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THE USE OF THE CONSTITUTIONAL RIGHT TO HUMAN DIGNITY IN THE SOUTH AFRICAN LEGAL SYSTEM IN COMPARISON TO THE APPLICATION IN THE EUROPEAN UNION

Timur Mete Öztunali

The South African Bill of Rights confers the right to human dignity upon the people living in South Africa. However, the interpretation of that right is not always clear. Therefore, the courts have been faced with questions concerning the extent and application of certain human dignity-related rights. This paper will compare the application of the right to human dignity as contained in the South African Bill of Rights with the application of the corresponding right from the Charter of Fundamental Rights of the European Union and the German Basic Law. This comparative approach will allow for a better insight in regard to the application and interpretation of human dignity within South Africa, which can help to provide more clarity and better understanding.

KEYWORDS

Bill of Rights, Human Rights, Charter of Fundamental Human Rights, Constitutional Law, European Union Law, Comparative Law, Legal Interpretation

CONTENT

1 Introduction to the comparative study

1.1 Problem Statement

Human rights have become an important element in the legal systems of many countries around the world. The countries are often committed not only to the protection of human rights but also to the promotion and enforcement.[1] 'Dignity' is perhaps some of the most universally agreed on and important rights that the recent surge of the interest in human rights has produced. Despite that, there are a lot of competing ideas and theories as to what dignity entails and means.

The Constitution of the Republic of South Africa, 1996 (Constitution) lays the legal foundation on which the modern day South Africa has been constructed.[2] In conferring certain rights upon its citizens, the state also has the duty to take action to ensure the realisation of these rights. This includes calling upon the judiciary to enact laws to protect and give effect to the rights provided for in the Constitution. Since the establishment of the Constitutional Court of South Africa (Constitutional Court) in 1993, it has played a significant role in developing the law to be in line with the constitutional values such as dignity, equality and the achievement of human rights.[3] The historical noteworthiness of the Constitution itself and the constitutional commitment to human rights has been a momentous step in South Africa's history. Especially in light of the fact that prior to the commencement of the Constitution, the safeguarding of human rights by the judiciary was not always guaranteed.[4]

The European Union, which can be described as an supranational organisation, has endorsed its commitment to human rights with the

[1] Burlacu F, European Union and Human Rights (2012) 4 COGITO: Multidisciplinary Res. J. 59
[2] The Constitution of the Republic of South Africa, Act 200 (1993)
[3] The Constitution of the Republic of South Africa Act 200 (1993)
[4] Currie I, et al The Bill of Rights Handbook (2013) 2-3

adoption of the Charter of Fundamental Rights of the European Union.[5] The comparison with South Africa and its Constitution, which has been praised as being very progressive, lends itself for that purpose as it permits viewing these rights in the national and international context, as well as in different legal landscapes.[6] Germany will also be analysed in that context, because not only is it a member state of the European Union, but it also has some parallels with South Africa in terms of its historical legacy also with respect to transitional constitutionalism.

This paper will analyse and compare how the European Union, the Republic of South Africa and Germany approach the right to dignity. The aim is to provide greater insight into what dignity entails, how it can be applied and thereby contribute towards the protection of it. The research will set out to establish what the rights to 'dignity' encompasses in the respective legal systems. Case law will be assessed to address the scope of the rights and the practical application, most notably in the field of constitutional law.

1.2 Significance of the problem

The right to 'dignity' is so significant that Germany's Basic Law, the Charter of Fundamental Rights of the European Union and the South African Constitution included it.[7] The term in itself is not self-explanatory in regard to the extent and scope. For the judiciary to be able to promote and protect dignity, it is beneficial to have a clear understanding of what dignity entails and how functions within the legal system.

The Charter of Fundamental Human Rights of the European Union has only been in force since 2009. According to the '2018 Report on the Application of the EU Charter of Fundamental Rights' there has been an increase over the last couple of years of the national courts using the Charter in their

[5] The Charter of Fundamental Rights of the European Union (2012)
[6] https://businessmediamags.co.za/xtrending/a-progressive-constitution/
[7] The Charter of Fundamental Rights of the European Union (2012)

judgements.[8] In South Africa, the courts and the legal profession has a great appreciation for the Constitution. All fields of the law have a constitutional dimension and the courts have been presented with a variety of legal issues in relation to the constitutional rights.[9]

The interpretation of the right to human dignity is interesting and significant as a connection is made between the law, rationality and morality. Human dignity as a pre-legal notion and the law are founded on different premises. While the law operates on principles, rules, maxims and doctrines, human dignity is much more open to interpretation and has a multiplicity of implications.[10] Therefore, having the right to human dignity entrenched in the law creates the legal task of finding a way to incorporate such a complex concept into the legal system.

1.3 Research question

To what degree and how is the constitutional right to human dignity used in the South African legal system and how does the application differ to the approach of the European Union and Germany as a member state of the European Union?

1.4 Aims of the research

The aim is to establish how the dignity plays a role in the legal system, in particular as a basis for human rights. The research will assess the structure of the legal system and what role the aforementioned right plays. In order to leave the realm of the strictly theoretical the research will also assess landmark cases from all three legal systems and critically discuss how the law has been applied, what importance has been given to 'dignity' and also

[8] 2018 Report on the Application of the EU Charter of Fundamental Rights (2018)
[9] Woodman Set al, Constitutional Law of South Africa (2013) ch. 3.2
[10] Stephen R, Human dignity and law: Legal philosophical investigations (2018) 14

what possible shortcomings or issues can be record

2 An introduction to 'dignity' in the South Africa and the European Union context

2.1 Introduction

'Dignity' – as enshrined in national constitutions and the Union treaties – is considered to be a human right. Human rights is a broad and multifaceted concept, which is relevant not only in the legal context, but also grants discussion in other academic fields. [11] This paper will analyse the aforementioned rights in the legal field. Rather than focusing on the theoretical or philosophical aspects or implications, this paper will take a more practical approach that is rooted in court decisions and the law.

This chapter will nonetheless briefly outline what human rights are in order to provide a more complete insight. The legal landscape and legal framework important for 'dignity' will thereafter be discussed for South Africa, the European Union and Germany. The focus will lie on the South African and the constitutional law, as the constitution is the piece of legislation which in many instances justifies and gives rise to human rights.[12]

2.2 Human rights

Human rights is a term that is often mentioned and used in relation to rights such as 'human dignity'. The meaning of human rights can be approached from different angles. The definition of the term will be based on the law and

[11] Leher SP, Dignity and Human Rights: Language Philosophy and Social Realizations (2018)

[12] Curry I et al, The Bill of Rights Handbook (2018), ch. 1

the philosophical understanding thereof.[13]

Legal positivism generally refers to a school of thought that assumes that law is based on a fortuitous sociological link.[14] The law does not reflect morality and is not dependent on or connected to it. Legal positivist thinking conceives the law as the rules put in place and enforced by a competent person or administration. The law is man-made and not rooted in justice, therefore a moral sphere is not required.[15] An argument that has been advanced in favour of this conception of the law is that the term 'justice' and the definition thereof are based on the subjective interpretation of individuals. Consequently, an answer to the question will be equivocal.[16] Legal certainty is another consideration that has been brought up by proponents of legal positivism.[17] Legal certainty could be compromised where the population of a country would ignore the law in specific instances to follow moral considerations.[18]

Legal positivist's notion of what constitutes law is based on the observance and obedience of the rules in place.[19] The law must be accepted and internalised by the addressee in order to be considered law. These requirements have been expressed by John Austin, according to whom the law is based on three things.[20] A person or authority that is competent to create law, the observance of the law can be enforced by that person or authority and the issued law is perceived as part on an order that society is obliged to observe, it is not simply seen as a recommendation.[21]

Natural law theory, on the other hand, sees morality and justice as an expression of that, as an integral part of the law.[22] The argument that is made

[13] Gilabert P, Human Dignity & Human Rights (2013), ch. 5
[14] Spaak T et al, The Cambridge Companion to Legal Positivism (2021)
[15] Spaak T et al, The Cambridge Companion to Legal Positivism (2021)207
[16] Mertens T, A philosophical introduction to Human Rights (2020)10-12
[17] Mertens T, A philosophical introduction to Human Rights (2020)10-12
[18] Mertens T, A philosophical introduction to Human Rights (2020)10-12
[19] Letwin, SR, On the History of the idea of Law (2005)113
[20] Austin J, Province of jurisprudence determined (1832)
[21] Cahn SM et al, The Blackwell guide to the philosophy of law and legal theory (2005)20
[22] Finnis J, Natural Law & Natural Rights (2011)25-28

against positive law is that, in the judicial process, the judges need to consider different interpretations of the law.[23] In the view of natural law theorists, these considerations are informed by moral standards. These moral standards that play an important role in the interpretation cannot be fully captured in legal principles, consequently the law cannot be set apart from morality.[24] Another shortcoming of the positivist school of thought that has been pointed out, is that where two rights are in conflict with one another, a value judgment needs to be made as to how these rights need to be balanced. Such a balancing cannot be done based on legal principles alone.[25]

Another argument in favour of natural law is that unjust laws cannot be laws.[26] This is encapsulated in the latin principle lex iniusta non est lex.[27] Natural law theorist propose that laws that do not abide by basic morality are not law at all but merely give the appearance of such. This[28] is based on the preposition that law by itself does not permit unjustness. In the past, religion has been consulted to provide the moral campus to decide whether a law is actual law or 'false' law in terms of the natural law theory. Nowadays, human rights, the intrinsic unalienable rights of every person, are used to do the same. Human rights are, by virtue of the aforementioned, the minimum requirements of morality, which is often entrenched in the law nowadays.[29] Some philosophers, such as Leszek Kolakowski, have proposed that human rights are the natural law of modern times.[30]

Human rights protect the innate moral interests that all human beings have in common.[31] A person does not need to do anything in order to gain these rights, they are conferred to a person by virtue of them being a human. For

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[23] Cahn SM et al, The Blackwell guide to the philosophy of law and legal theory (2005)22-24

[24] Mertens T, A philosophical introduction to Human Rights (2020)10-12

[25] Bix B, H.L.A. Hart and the ''open texture'' of language (1999)

[26] Association of American Law Schools, The legal philosophies of Lask, Radbruch and Dabin (1950)84-87

[27] Saint Thomas A,The "Summa theologica" of St. Thomas Aquinas (1912)

[28] Mertens T, A philosophical introduction to Human Rights (2020)10-12

[29] Clapham A, Human Rights: A very short introduction (2007)24-27

[30] Kolakowski L, Modernity on endless trial (1990) ch. 17

[31] Alford C, Narrative, nature and the natural law: From Aquinas to international human rights (2010) 128

reason of protecting the innate moral interest, human rights are considered more significant than other competing rights. The applicability should be universal, which means that regardless of nationality, they shall be upheld.[32]

2.3 South African legal landscape

The history of the South African legal system is rich and closely related to the political developments of the country. This has resulted in a hybrid legal system (also referred to as legal pluralism), which reflects the varied influences and developments.[33]

The Dutch East India Company settled at the Cape of Good Hope in 1652.[34] That is why many features of the South African law are linked to the civil law traditions of the Dutch and the use of the Roman-Dutch law. The Roman-Dutch law was initially employed by the Dutch East India Company and a variety of courts were established. However, the control of the population through the law proved to be difficult for various reasons. The system of law and the administration at the time can be described as weak. One of the reasons for the difficulties in controlling the population was due to the Dutch East India Company's close link to the legal institutions. The colonial settlers perceived that the institutions mostly served the interest of the wealthy for that reason.[35]

An attempt was made to transform the legal landscape, however in 1806 Britain gained control of the Cape.[36] The law of capitulation as practised by the British provided that the laws of the conquered were to remain intact unless amended by the Sovereign. The concept of lower courts headed by the magistrates was introduced in 1828 (which still exists today) as the

[32] Mertens T, A philosophical introduction to Human Rights (2020)12-15
[33] Rautenbach C et al, Introduction to legal pluralism (2010)
[34] Hamilton C et al, The Cambridge history of South Africa Volume 1: From Early times to 1885 (2010)174
[35] Du Bois F, Introduction to the law of South Africa (2004) 8-12
[36] Hamilton C et al, The Cambridge history of South Africa Volume 1: From Early times to 1885 (2010)253

anglicisation of the law took place.[37]

Through legislation that was introduced during that period and the influence of British judges that were in charge of the courts, the common law was introduced in South Africa. Most notably the doctrine of precedent[38], trials in the manner of oral, adversarial court procedures and full and individual judgements that would be issued. Thereby, the Roman-Dutch law traditions were developed in accordance with the English law.[39] As the Cape grew and became more established, legislation was passed to give effect and govern these areas. The English commercial law being adopted at the Cape was a result of that. Another sphere of the law that was largely governed by the principles introduced by the English law was the public law, where the Roman-Dutch law influence slowly dissipated.[40] In the 1830s, some of the Dutch settlers (Afrikaners) set out on the 'Great trek' to found their own republics. [41] Namely the Orange Free State and the Transvaal. [42] It is interesting to note that even though they intended to live according to their own laws, their laws, to a certain degree, became aligned with the laws of the Cape and British legal traditions were adopted.[43]

In 1910, the Union of South Africa was founded after Britain had emerged victorious from the 'Second Boer War', which lasted from 1899 to 1902.[44], conquering the Transvaal and the Orange Free State. The conquered areas were annexed and legal traditions consequently merged.[45] The constitution that was drafted as a consequence of the founding of the Union of South Africa played in important role and provided the backdrop for the developments that took place in the 20th Century. The constitution that was adopted was based on British constitutional theory, and the Union of South

[37] Du Bois F, Introduction to the law of South Africa (2004) 8-12
[38] Whyte v Anderson (1909) EDC 28 32
[39] Du Bois F, Introduction to the law of South Africa (2004) 8-12
[40] Du Bois F, Introduction to the law of South Africa (2004) 8-12
[41] Ross R, A concise history of South Africa (1999) 39
[42] Thompson L, A history of South Africa (2014) 87-89
[43] Du Bois F, Introduction to the law of South Africa (2004) 8-12
[44] Thompson L, A history of South Africa (2014) 114-115, 140-145
[45] Du Bois F, Introduction to the law of South Africa (2004) 8-12

Africa followed the parliamentary sovereignty model.[46]

The movement of Afrikaner nationalism saw resistance towards the English legal traditions. The Afrikaans Universities in particular curated arguments against the English law and in favour of the Roman-Dutch law. The National Party won the 1948 election, which would further encourage this process, whereby the South African common law gained its own character through the application of Roman-Dutch, English law and the development of it in the courts.[47]

Concurrent to the Roman-Dutch and British legal traditions, the system of 'indirect rule' was practised in relation to the Zulu population. Indigenous laws were retained, while indigenous leaders were able to practice their legal powers under the superintendence of the colonial administration.[48] This culminated in the Native Administration Act of 1927, which furthered the segregation of society and set the stage for the Apartheid laws.[49] Despite that, it prevent the total legal assimilation and secured the survival of some indigenous law, despite the changed character due to the influence of the colonial administration and the fact that it was mostly used in certain branches of the law, such as family law.

Similarly, the liberal character of the Roman-Dutch law and the English law have been modified in the South African context. The enforcement of discriminatory laws and the repressive system, that was designed to only serve some but applied and had a bearing on the lives of the entirety of the population, cannot be said to be in line with the original legal philosophy behind it.[50] Johannes Voet, a legal scholar whose writings have an important influence on the understanding of Roman-Dutch law, wrote that:

'The aim of Jurisprudence is justice, the most perfect of all the virtues, and

[46] Thompson L, A history of South Africa (2014) 150
[47] Du Bois F, Introduction to the law of South Africa (2004) 13
[48] Ross R et al, The Cambridge history of South Africa Volume 2: 1885-1994 (2011)237-238
[49] Du Bois F, Introduction to the law of South Africa (2004) 14
[50] Du Bois F, Introduction to the law of South Africa (2004) 15-16

as it were their joiner together: it is rightly defined as "the constant and perpetual desire to render unto everyone his own."[51] '

That demonstrates that the legal philosophy behind the Roman-Dutch law, is anchored in justice and not reconcilable with some of the law that emerged in South Africa.

2.3.1 Adoption of the South African Constitution

In April 1993, South Africa adopted the interim Constitution. The interim Constitution states in the preamble that there is the 'need to create a new order'.[52] This points towards the fact that unjust laws of the Republic of South Africa, prior to the adoption of the interim Constitution, segregated society by race and conferred certain rights only upon the white population.[53] The preamble also connotes the principle of transformative constitutionalism. Transformative constitutionalism refers to the social transformation that the Constitution is supposed to facilitate in response to the injustices of the past. The ongoing transformation process recognises the ability of the judiciary to shape and create a society that is founded on the democratic principles, equality and social-justice.[54]

Based on the interim Constitution, the final and current Constitution was enacted in 1996. The Constitutions brought about important changes.[55] For the first time, all citizens were granted political and civil rights.[56] The system of parliamentary sovereignty was replaced by constitutional supremacy and the division of power was reorganised with the effect of moving away from a

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[51] Voet J, Johannes Voet, his Commentary on the pandects : wherein, besides the principles and the more celebrated controversies, of the Roman law, the modern law is also discussed, and the chief points of practice / translated by James Buchanan (1880) 12

[52] The Constitution of the Republic of South Africa (1993)

[53] Dubow S, Apartheid 1948 - 1994 (2014) ch. 2

[54] Davis DM et al, Transformative Constitutionalism and the Common and Customary Law (2010) South African Journal on Human Rights, 26:3, 403-509

[55] Fowkes J, Building the Constitution: The practice of constitutional interpretation in Post-Apartheid South Africa (2016)

[56] Powell D, The role of Constitution making and institution building in furthering peace, justice and development: South Africa's democratic transition (2010) Int. J. Transitional Justice Vol 4. 2010, 230-250

system which favoured a powerful central government.[57] The process of transforming the

From a legal perspective, the change from a system of parliamentary sovereignty to constitutional supremacy was significant, as it afforded the courts of South Africa with the power to effectively protect human rights.[58] Previously, the courts were bound by the power of the Parliament, who essentially yielded all the power.[59] The system of parliamentary sovereignty stems from the British colonisers, who by the year 1806 were in control of the Cape and governed it in accordance with the British law at the time. The doctrine of parliamentary sovereignty was a defining feature of Westminster Constitutionalism and prescribed that the Parliament could make any laws it wished to make, while no one had the necessary powers to challenge it. This included the courts, who did not have the necessary power vested in them to challenge unjust laws. The only avenue for the courts during the Apartheid era to challenge laws, was by declaring a law invalid, based on the fact that it had not been enacted in accordance with the correct procedure as envisioned in the Constitution.[60] No challenge was possible on substantive grounds. It is also notable that the Constitution could be amended through the normal legislative procedures.[61]

The common law afforded some protection to individual rights. However, the Parliament was able to enact legislation to change the common law in accordance with what they would deem fit. The government also utilised the state of emergency to suspend civil rights, as pressure against Apartheid was mounting.[62]

The shortcoming of the doctrine of parliamentary sovereignty is essentially that it was not developed in the South African context. In Britain the

[57] Curry I et al, The Bill of Rights Handbook (2013), ch. 1
[58] Curry I et al, The Bill of Rights Handbook (2013), ch. 1
[59] Curry I et al, The Bill of Rights Handbook (2013), ch. 1
[60] Curry I et al, The Bill of Rights Handbook (2013), ch. 1
[61] Thompson L, A history of South Africa (2014) 150
[62] Curry I et al, The Bill of Rights Handbook (2013), ch. 1

Parliament is elected by the citizens.[63] This means that where the Parliament does not act in the best interest or against the wishes of the citizens, they will lose the support and will not be elected again. However, in South Africa, the 1909 Union Constitution created a state that was racially divided.[64] The white minority elected the Parliament and the large majority without voting rights, was unable to restrain the Parliament from enacting legislation, which was against its best interest.[65]

The process of changing the nation and enacting a new constitution can be said to have started in the 1980s. The government recognised the need for change and started negotiations with the African National Congress (ANC).[66] Many challenges had to be overcome during the negotiations, such as releasing political prisoners, unbanning organisations, allowing political activities and containing the violence within the country between the security forces and the liberation movements.[67]

After those obstacles had been removed, the actual negotiations on what shape the actual transformation process should take could commence. In 1991, the first meeting of the Convention for a Democratic South Africa (CODESA) was held.[68] It emerged that there were two competing sentiments. The one side argued that democracy is inevitable and that it has to come about, but that handing over creates the fear of being denied basic rights.[69] The other side contended that, bearing in mind the country's history, it is important to give legitimacy to the newly drafted constitution by invoking the right of self-determination through an election. The elected body should then draft a constitution.[70] The compromise took into consideration that

[63] Curry I et al, The Bill of Rights Handbook (2013), ch. 1
[64] Ross R et al, The Cambridge history of South Africa Volume 2: 1885-1994 (2011) ch. 5
[65] Curry I et al, The Bill of Rights Handbook (2013), ch. 1
[66] Murray C, A Constitutional Beginning: Making South Africa's Final Constitution (2001) UALR Law Review 809
[67] Murray C, A Constitutional Beginning: Making South Africa's Final Constitution (2001) UALR Law Review 809
[68] Fowkes J, Building the Constitution: The practice of constitutional interpretation in Post-Apartheid South Africa (2016)100
[69] Sachs A, The Creation of South Africa's Constitution (1996) N. Y. L. Sch. L. Rev. 669
[70] Sachs A, The Creation of South Africa's Constitution (1996) N. Y. L. Sch. L. Rev. 669

minorities will and have to be part of South Africa and that they should be accommodated. Nonetheless, minority groups would also have to appreciate the fact that constitutional legitimacy was a significant step towards building trust in the new government and transforming the country. Furthermore, a constitution can be undone if simply made at the negotiating table, a historical event would not only add legitimacy but would also ultimately let the nation identify with the ideals.[71] It was agreed that general elections were necessary prior to drafting the constitution, but that the constitution would be drafted in line with thirty-four predetermined principles.

The interim Constitution of 1993 had several functions, it was to facilitate the drafting of a new constitution. The Bill of Rights was introduced, in order to give effect to human rights.[72] The interim Constitution also gave powers to the several state institutions, such as the Parliament. The Parliament had the prerogative of choosing the President. The choice of not directly electing the president was a conscious one, it was made to avoid a scenario where two sources of power are simultaneously elected, which could destabilise the new government due to a power deadlock.[73] The Parliament consisted of two bodies, the National Assembly and the senate. These two institutions together formed the Constitutional Assembly, who was responsible for drafting the new constitution.[74]

The Constitutional Assembly had two years to complete the drafting process. The public involvement was noteworthy and issues were debated in television programs on a weekly basis. During the two years two to three million petitions and public opinions were received, which demonstrates the interest the public took and how the process was aimed at making it a constitution of the people.[75] The Constitutional Assembly used slogans such

[71] Sachs A, The Creation of South Africa's Constitution (1996) N. Y. L. Sch. L. Rev. 669
[72] O'Malley K, The 1993 Constitution of the Republic of South Africa - The Constitutional Court (1996) Journal of Theoretical Politics 8(2) 177-191
[73] Sachs A, The Creation of South Africa's Constitution (1996) N. Y. L. Sch. L. Rev. 669
[74] Sachs A, The Creation of South Africa's Constitution (1996) N. Y. L. Sch. L. Rev. 669
[75] Sachs A, The Creation of South Africa's Constitution (1996) N. Y. L. Sch. L. Rev. 669

as 'The constitution is being written by the most important person: You!', to[76] further encourage the involvement of the public.[77] To guarantee that the public was able to understand the content of the document that the assembly came up with, cartoons were published to facilitate the comprehension.

The final text was then forwarded to the Constitutional Court. The Constitutional Court analysed the document and did an assessment as to whether it was compliant with the thirty-four principles mentioned earlier.[78] To provide some insights and satisfy the nation as to the legitimacy, these discussions in the court were recorded and broadcasted in a summarised version. After two months of deliberations, the Constitutional Court made the decision that some of the principles were not adequately complied with in nine specific areas. However, the Constitutional Assembly had all in all managed to write a constitution, which aside from those specified areas, was democratic and respected the spirit of the principles as a whole.[79] The Constitution was adopted on 10 December 1996, coming into effect on the 4 February 1997.[80]

2.3.2 The Basic Principles of the Constitution

The basic principles are significant in that they are the framework of the Constitution.[81] The interpretation of the Constitution (and thereby also the Bill of Rights) is guided by these principles and any law that is not in accordance with them is essentially unconstitutional.[82] The Constitution itself informs the way in which the legal Acts are written and how the court

[76] Murray C, A Constitutional Beginning: Making South Africa's Final Constitution (2001) 822 UALR Law Review 809
[77] Murray C, A Constitutional Beginning: Making South Africa's Final Constitution (2001) 822 UALR Law Review 809
[78] Sachs A, The Creation of South Africa's Constitution (1996) N. Y. L. Sch. L. Rev. 669
[79] Sachs A, The Creation of South Africa's Constitution (1996) N. Y. L. Sch. L. Rev. 669
[80] Curry I et al, The Bill of Rights Handbook (2013), ch. 1
[81] Woolman S et al, Constitutional Law of South Africa (2013) ch. 13
[82] Curry I et al, The Bill of Rights Handbook (2013), ch. 1

develops the common law.[83] It is therefore important to understand the basic principles, also for the discussions on the South African law in the following chapters. It should be born in mind that the principles are abstract and that the courts only directly rely on these principles in specific circumstances. It is preferable to use a specific piece of legislation to resolve a question of law.[84]

The basic principles are namely:

- constitutionalism;

- the rule of law;

- democracy and accountability;

- the separation of powers and checks and balances;

- cooperative government and devolution of power.[85]

Constitutionalism refers to the constitutional theory and the presumptions that the constitution operates on. In the South African context, that means that the Constitution is supreme and limits the state power. This has to be done in a way which provides the actors with enough power to effectively govern, while limiting the state's power in order to safeguard the rights of the people.[86]

An important aspect under constitutionalism is the supremacy of the Constitution.[87] Section 2 of the Constitution specifies that the Constitution is the supreme law and that it has precedence over all other laws, also any 'act

[83] Cornell D, Law and revolution in South Africa: Ubuntu, dignity, and the struggle for constitutional transformation (2014)131

[84] Curry I et al, The Bill of Rights Handbook (2013), ch. 1

[85] The Constitution of the Republic of South Africa (1996) s 1 · some principles are implicit

[86] Curry I et al, The Bill of Rights Handbook (2013), ch. 1

[87] Roux T, The politics of principle: The first South African Constitutional Court, 1995-2005 (2013)203

or conduct'[88] that does not comply with it is invalid. This is strengthened by section 173(1), which obliges the court to declare any act or conduct that violates or contravenes the Constitution to be invalid.[89]

The rule of law as a principle is significant, as it dictates that the state institutions are required to obey the law. They may not deviate from the law or act outside of the scope that the law has conferred upon them.[90] The Constitutional Court famously applied the rule of law principle in the Pharmaceutical Manufacturers Association of South Africa case[91] in relation to the President's exercise of public power.[92] It was held that

'Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution, and therefore unlawful.'[93]

Therefore, it can be said that the rule of law principle goes beyond merely looking at legality. It seeks to prevent the arbitrary exercise of power and even contains an element of fairness.[94]

Democracy and accountability also belong to the basic principles of the Constitution. Section 1 of the Constitution contains the specific rights, which are:

'universal adult suffrage, a national common voters role, regular elections and a multi-party system of democratic government, to ensure

[88] The Constitution of the Republic of South Africa (1996) s 2
[89] Woolman S et al, Constitutional Law of South Africa (2013) ch. 11.4
[90] Curry I et al, The Bill of Rights Handbook (2013), ch. 1
[91] Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000)
[92] Curry I et al, The Bill of Rights Handbook (2013), ch. 1
[93] Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000) 90
[94] Curry I et al, The Bill of Rights Handbook (2013), ch. 1

accountability, responsiveness and openness'.[95]

How noteworthy the right of universal suffrage is for South Africa, especially in light of its history, can be noted when looking at the August and Another v Electoral Commission and Others case.[96] The court was faced with the question of whether prisoners should be barred from participating in elections, due to logistical constraints. The Constitutional Court ruled in the favour of the prisoners and the Electoral Commission was ordered to set up voting facilities for prisoners.[97]

In Matatiele Municipality & Others v President of the Republic of South Africa & Others[98], the presiding officer held that accountability, responsiveness and openness strengthen one another. Openness advances rationality and accountability, which is important as legitimacy of laws is achieved through openness.[99] This allows for the suggestion that the Parliament only has the power to make laws as long as the aims are rationally explained.

Lastly, separation of powers and checks and balances need to be mentioned. Separation of powers goes back to Montesquieu, who referred to this as a theory whereby the government is divided into different branches in order to prevent tyranny.[100] Checks and balances, on the other hand, refers to the interdependence and control the different branches have over one another in order to prevent a power grab.

It is notable that the Constitution itself omits the expression 'separation of

[95] The Constitution of the Republic of South Africa (1996) s 1

[96] August and Another v Electoral Commission and Others (CCT8/99) [1999] ZACC 3; 1999 (3) SA 1; 1999 (4) BCLR 363 (1 April 1999)

[97] August and Another v Electoral Commission and Others (CCT8/99) [1999] ZACC 3; 1999 (3) SA 1; 1999 (4) BCLR 363 (1 April 1999)

[98] Matatiele Municipality & Others v President of the Republic of South Africa & Others CCT73/05 2006 (5) BCLR 622 (CC)

[99] Woolman S et al, Constitutional Law of South Africa (2013) ch. 10.4

[100] Möllers C, The three branches: A comparative model of separation of powers (2013)40-42

powers' and 'checks and balances'. In the De Lange v Smuts NO & Others[101] case, the court recognised that over time a distinctly South African model of separation of powers would emerge, that suits the South African context.[102] In another judgement, the conclusion was reached that the separation of powers, even though it can only be inferred from the text of the Constitution, is justiciable. Hence, it can be invoked and a matter can, on the basis of a violation of the principle, be brought before the courts.

2.3.3 Applicability of the Bill of Rights

The Bill of Rights is enshrined in the Constitution. In the context of South Africa's history, it plays a significant role in the transition towards a democratic order that upholds human rights. It contains political and civil rights, in addition to socio-economic, cultural and environmental rights.[103] The ambit of the Bill of Rights is significant and it is not limited to protecting the individuals' rights but also strengthens the rights of groups, such as cultural and linguistic communities.[104] The Bill of Rights specifically protects the right to dignity and equality.

The reason a Bill of Rights is necessary is to balance out the power difference between the individual and the state. The state is the more powerful actor and the individual is at risk in this unequal relationship. The Bill of Rights binds the state in a way that the individual can enforce his rights to prevent abuse.[105] That means that the Bill of Rights is vertically directly applicable between the individual and the state. According to section 8 (1) of the Constitution the legislature, judiciary, executive and all organs of state need to comply and uphold the Bill of Rights, it follows that an act or omissions that violate any of the rights contained in the Bill of Rights by the previously

[101] De Lange v Smuts NO and Others (CCT 26 of 1997) [1998] ZACC 6 (28 May 1998)
[102] Woolman S et al, Constitutional Law of South Africa (2013) ch. 12.3
[103] Klug H, The Constitution of South Africa: A contextual analysis (2010) 114-115
[104] Klug H, The Constitution of South Africa: A contextual analysis (2010) 114-115
[105] Curry I et al, The Bill of Rights Handbook (2013), ch. 3

mentioned can be challenged.[106]

Horizontal applicability relates to the enforcement of the Bill of Rights between individuals.[107] Section 8 (2) of the Constitution governs that aspect and describes the circumstances in which the Bill of Rights is directly horizontally applicable. In addition to that the Bill of Rights is also indirectly horizontally applicable, the relevant provisions can be found in section 39(2). The indirect horizontal application refers to the development of the common law.[108] In the past, the relationship between indirect horizontal applicability and direct horizontal applicability has been noted to be complex. While the interim Constitution was still in effect, the courts preferred to make use of the indirect horizontal applicability. Part of the reason why direct horizontal applicability was perceived cumbersome has been pointed out by Kentridge AJ in the Du Plessis[109] case. It was held that the indirect horizontal application seems appropriate in a legal system such as the German one, where constitutional jurisdiction and ordinary jurisdiction are separate.[110] In terms of the interim Constitution the judiciary was not obliged to uphold the constitutional rights. In addition to that, disputes between private parties were governed by the common law. The direct application of the Bill of Rights under the interim Constitution would have had the potential to place an excessive burden on the Constitutional Court. The court decided that bringing the common law in line with the Constitution was not a constitutional matter and could be dealt with by the other courts. Hence, the solution was the indirect application of the Bill of Rights.[111] The 1996 Constitution altered the stance substantially, to the effect that the legal

[106] Curry I et al, The Bill of Rights Handbook (2013), ch. 3
[107] Khumalo and Others v Holomisa 2002 (5) SA 401 (CC)
[108] Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening) 2001 (4) SA 938 (CC)
[109] Du Plessis and Others v De Klerk and Another (CCT 8 of 1995) [1996] ZACC 10 (15 May 1996)
[110] Curry I et al, The Bill of Rights Handbook (2013), ch. 3
[111] Curry I et al, The Bill of Rights Handbook (2013), ch. 3

arguments in Du Plessis are essentially invalid.[112]

The Khumalo and Others v Holomisa[113] case brought about change to the way the courts applied the law. In the case a newspaper wrote about Holomisa, who was not pleased with the representations made. Hence, a case for defamation was instituted. The defence was based on the direct application of the constitutional right to freedom of expression (section 16 of the Constitution). The presiding officer then started an enquiry into whether the common law of defamation was in line with section 16 of the Constitution.[114] The presiding officer held that the Bill of Rights should be directly applied where possible. Despite the remarks in the case, the indirect application has remained the manner of application more commonly utilised.[115]

Another important case is the Napier v Barkhuizen[116] case from 2007. The case deals with a short-term insurance contract, which had a time-limitation clause. The applicant had instituted his claim after the expiration of the prescribed time period. The time-limitation clause of the contract was challenged by the applicant through direct application of the Constitution, more specifically section 34, which states that everyone has the right to have a dispute settled in court.[117] The High Court found that the clause was indeed unconstitutional after direct application of the Constitutional right found in section 34. The Constitutional Court, however, decided that the indirect application was more suitable. The correct approach is based on public policy. Public policy is informed by the values enshrined in the Constitution, whereby it enables the courts to declare contracts to be inoperable.[118] That way a balance could be achieved between upholding the Constitution (through public policy) and the pacta sunt servanda. Pacta sunt servanda

[112] van der Walt J, Progressive indirect horizontal application of the Bill of Rights: Towards a co-operative relation between common-law and constitutional jurisprudence (2001) South African Journal on Human Rights, 17:3, 350-351
[113] Khumalo and Others v Holomisa 2002 (5) SA 401 (CC)
[114] Khumalo and Others v Holomisa 2002 (5) SA 401 (CC)
[115] Curry I et al, The Bill of Rights Handbook (2013), ch. 3
[116] Barkhuizen v Napier (CCT72/05) [2007] ZACC 5; 2007 (5) SA 323 (CC)
[117] Barkhuizen v Napier (CCT72/05) [2007] ZACC 5; 2007 (5) SA 323 (CC)
[118] Du Plessis et al, The Law of Contract in South Africa (2012) 36-37

means that agreements must be kept and it thereby creates legal certainty and certainty on the part of contracting parties.[119] Undermining that principle can have negative effects on the law of contract. Legal writers have noted that the decision in Napier v Barkhuizen essentially made the direct horizontal application of section 8(2) redundant.[120]

The indirect application of the Bill of Rights means that in contrast to directly holding a specific actor accountable, the common law and other laws are influenced by the Bill of Rights and thereby promote the spirit it envisions.[121] In general, where there is a specific rule in place, that specific rule should be consulted, or read in such a way to confirm with the Bill of Rights.[122] Where the common law is concerned, it should be developed to be in line with the Bill of Rights, rather than to start an enquiry into whether it stands in breach of the Bill of Rights. Section 39(2) of the Constitution reads that,

'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'[123]

That creates a general duty on the courts to be mindful of the Bill of Rights and when several interpretations are possible, they are required to use the one that promotes the Bill of Rights in the best possible manner.[124] The interpretation of the Bill of Rights itself has to be done in such fashion that it,

'promote (s) the values that underlie an open and democratic society based on human dignity, equality and freedom'[125].

Nonetheless, despite the obligation to interpret law in a manner that it complies with the Constitution, the power of the courts in that regard is not

[119] Lesaffer R et al, The Cambridge companion to Hugo Grotius (2021)132
[120] Curry I et al, The Bill of Rights Handbook (2013), ch. 3
[121] van der Walt J, Progressive indirect horizontal application of the Bill of Rights: Towards a co-operative relation between common-law and constitutional jurisprudence (2001) South African Journal on Human Rights, 17:3, 350-351
[122] Curry I et al, The Bill of Rights Handbook (2013), ch. 3
[123] The Constitution of the Republic of South Africa (1996) s 39(2)(2)
[124] Curry I et al, The Bill of Rights Handbook (2013), ch. 3
[125] The Constitution of the Republic of South Africa (1996) s 39(1)(a)

limitless. The consequence of such power would be that all laws could be in line with the Constitution and no piece of legislation would have to be declared unconstitutional. In Mateis v Ngwathe Plaaslike Munisipaliteit[126], the court determined that there is no discretion to interpret where the interpretation of the law leaves no room for doubt.[127]

In the Govender v Minister of Safety and Security[128], the court determined the formula for dealing with constitutional arguments in regard to legislation. The formula consists of a five fold enquiry that the relevant presiding officer must undertake. This starting point is the object and purport of the Act in questions, then the protected right of the Constitution has to be considered in light of its scope and meaning. Then it needs to be established whether the section can be interpreted in a way that the rights of the Constitution are safeguarded. Where it has been established that it is possible, the court has to follow that interpretation. Should no such interpretation be possible in terms of the enquiry, then the necessary steps need to be taken to declare the section unconstitutional.[129]

2.4 European Union

The European Union can be described as a sui generis political and economic union. [130] The catalyst for the renewed interest in economic cooperation amongst European countries was the Second World War, as a means of ensuring peace and propensity in the region. Nowadays, the European Union consists of 27 countries and it has moved away from being a mere economic community. The European Union governs several policy areas and has created a single market for its citizens.[131]

The European Union is based on treaties that the member states have

[126] Mateis v Ngwathe Plaaslike Munisipaliteit 2003 (4) SA 361 (SCA)
[127] Mateis v Ngwathe Plaaslike Munisipaliteit 2003 (4) SA 361 (SCA) 10
[128] Govender v Minister of Safety and Security (342 of 1999) (2001)
[129] Curry I et al, The Bill of Rights Handbook (2013), ch. 3
[130] European Commission, The European Union: What it is and what it does (2020)
[131] Pinder J, The European Union: A very short introduction (2007) ch. 4

acceded to. The treaties are the basis for the creation and powers that the several institutions yield. The most important institutions are the European Commission, The European Parliament, the Council of Ministers, the European Council and the Court of Justice.[132]

Due to the nature of the European Union and especially in hindsight of how it was founded, the absence of human or fundamental rights in the treaties can be observed and elucidated. The organisation was not intended to have ambitious outside of its declared goal of regulating the coal and steel industry to ensure peace[133]. The states that were part of the early contractual arrangements created the European Convention on Human Rights. The European Convention on Human Rights is monitored and operates with an independent body and its own court. Unlike many of its member states, the European Union itself has not acceded to the convention yet and therefore falls outside of the jurisdiction of the courts. The unexpressed competition between the courts might be the reason why the European Union has not acceded to it yet. Thereby, the courts continue to exists with an overlap in the jurisdiction, while being institutionally separate entities.[134]

That created the issue that even though the member states might have fundamental rights entrenched in their constitutions, that due to the supremacy of European Union law, these might not be enforceable. The issue of supremacy of the European Union law will be discussed later, but for now it suffices to state that where the European Union law applies, the law of the member states does not apply. The member states were not satisfied with such a state of affairs. The European Union reacted by declaring that fundamental rights can be found in the 'general principles of community law'.[135]

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[132] Barnard C, European Union Law (2020) ch. 3
[133] Barnard C, European Union Law (2020) ch. 2
[134] Dzehtsiarou K et al, Human Rights Law in Europe: The influence, overlaps and contradictions of the EU and the ECHR (2014)9-12
[135] Barnard C, European Union Law (2020) ch. 9

This has been further developed through case law. In the Stauder[136] case the court held acts from the institutions of the European Communities (the European Union's predecessor) are subject to unwritten fundamental rights and that any act by the Communities would be declared void, if in breach of the fundamental rights. They also stated that the interpretation of a law, which would not breach a fundamental right should be chosen.[137] The fundamental rights are most prominently applicable to the institutions of the European Union, the legislation but also to the member states.[138]

The expansion of policy fields that the European Union is responsible for has created the need to codify and safeguard fundamental rights. This resulted in the Charter of Fundamental Rights of the European Union. The Lisbon Treaty of 2007 added significance to the Charter by giving it the same weight as treaties and formally recognising it in article 6 (2).[139] The Treaty also states that the general principles of the European Union's law consists amongst other things of the constitutional traditions of the member states. That means that the legislature of the European Union can effectively extend the law in line with the fundamental rights of the member states.[140]

It is important to remember that the European Union only has the competence to deal with matters within its jurisdiction. A matter will only be within the European Union's jurisdiction, where the states have conferred the necessary competency to the European Union.[141] That bears the implication that the European Union cannot and may not impose its human right standards outside of those areas that have been conferred.[142] For the express purpose of having a procedure to deal with member states, who do not respect the fundamental rights article 7 of the Treaty on the European Union (TEU) was introduced as ultima ratio. As an alternative the

[136] Case 29/69 Erich Stauder v City of Ulm Sozialamt (1969)
[137] Barnard C, European Union Law (2020) ch. 9
[138] Thorson B, Individual rights in the EU law (2016)200-201
[139] Treaty of Lisbon (2007) article 6
[140] Barnard C, European Union Law (2020) ch. 9
[141] Kuijper PJ et al, The law of EU external relations: Cases, materials and commentary on the EU as an international legal actor (2015)24
[142] The Charter of Fundamental Rights of the European Union (2000) article 51(1)

infringement procedure can be invoked.[143] The European Union may, where there is a 'clear risk' of a breach of a value that's enshrined in article 2 TEU, react to it. This can be done after a proposal has been submitted by a member state, by the European Parliament or the Commission. If the Council votes that such a breach or impending breach is present, then a recommendation can be issued. Article 7 TEU also allows for sanctions if a 'serious and persistent' breach is present. However, these sections have rarely been invoked or had the intended effect, as the voting threshold is unreasonably high.[144]

The most significant piece of legislation in regard to the protection of human rights within the European Union is the Charter of Fundamental Rights (Charter). [145]The Charter consists of several provisions and so called titles. The titles represent the fundamental values and contain rights that fit under that term. The fundamental values are dignity, freedom, equality, solidarity, citizens' rights and justice.[146] Upon its inception in the year 2000, the Charter was not binding on the states. The Treaty of Lisbon clarified the legal position in regard to the Charter. The amendment to the Treaty of the European Union, which the Treaty of Lisbon brought about, gave legitimacy to the Charter and afforded it the status as an essential part of European Union law.[147]

2.4.1 Applicability of the Charter of Fundamental Rights of the European Union

The relevant article of the Charter in regard to the applicability is article 51(1).

[143] Treaty on the Functioning of the European Union (1958) article 258
[144] Barnard C, European Union Law (2020) ch. 9
[145] Craig P et al, EU law: text, cases, and materials (2011)394-406
[146] Barnard C, European Union Law (2020) ch. 9
[147] Fairhurst J, Law of the European Union (2016) pg. 71

The article states the following:

'The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.'[148]

The Charter is applicable to all institutions of the European Union. The institutions are bound by it and all conduct needs to be in accordance with the fundamental rights. The extent has been established in the Ledra Advertising[149] case. The court held that,

'the Charter is addressed to the EU institutions, including, as the Advocate General has noted in point 85 of his Opinion, when they act outside the EU legal framework'[150].

Therefore, it can be stated that the European Union institutions are strictly bound by the provisions of the Charter, even where the institutions act outside of the legal framework of the European Union.[151]

The Charter is only applicable to the member states when they are acting within the scope of European Union law. That includes the implementation of directives, regulations. The case law has provided some indication as to how broad the scope is in relation to member states. In the Aklagaren v Akerberg Fransson[152] case, the court dealt with the question of whether tax offences would fall within the ambit of European Union law. The argument was raised that tax matters are mostly within the realm of the national states.

[148] The Charter of Fundamental Rights of the European Union (2000) article 51(1)
[149] Case 10/15 and Case 8/15 Ledra Advertising Ltd and Others v European Commission and European Central Bank (ECB) C (2016) 67
[150] Case 10/15 and Case 8/15 Ledra Advertising Ltd and Others v European Commission and European Central Bank (ECB) C (2016) 67
[151] Barnard C, European Union Law (2020) ch. 9
[152] Case 617/10 Åklagaren v Hans Åkerberg Fransson C (2013)

However, due to the fact that the European Union collects a part of the value added tax and thereby their financial interests were compromised, the matter was found to be within the realm of European Union law.[153] This case demonstrates how broad the scope can be and what level of relationship to the European Union law can be sufficient to fall within the ambit of article 51 of the Charter. It should be noted that the court went against the Advocate Generals counsel, who proposed that there was the connection between the Swedish laws and article 51 was not sufficient.[154] The general rule is that the courts will be more amenable to declaring that something falls within the scope where the matter at hand relates to the internal market and harmonising the rules of the member states.[155]

The McB[156] case dealt with a challenge of a family law provision of the Irish national law. The challenge was based on the Charter, more specifically on the right to private and family life. Regulation 2201/2003 of the European Union, seeks to coordinate national rules in relation to the family law, it was therefore assumed that such a case would fall within the scope of the European Union. When faced with the question of whether the provision of the Irish family law was in breach of the rights protected under the Charter, the court held that it would fall outside of their jurisdiction to assess the Irish national law. Despite that, the court assessed the national law indirectly through an assessment of the regulation itself.[157] The court thereby balanced the importance of the Charter and the importance of the principle of conferral, which is also envisioned in article 51(2) of the Charter and reads as follows:

'The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or

[153] Barnard C, European Union Law (2020) ch. 9
[154] Craig P et al, EU law: text, cases, and materials (2020)446-447
[155] Barnard C, European Union Law (2020) ch. 9
[156] Case 400/10 J. McB. V L.E C (2010)
[157] Barnard C, European Union Law (2020) ch. 9

modify powers and tasks as defined in the Treaties.'[158]

Article 51 of the Charter does not make any provisions about the horizontal application.[159] The Charter can be said to have indirect horizontal application, as the courts, as a public body under article 51 of the Charter, have the duty to safeguard and uphold the fundamental rights.[160] In order to decide whether Charter provisions have direct horizontal application, it is critical to decide where the law originates from. Directives are generally not horizontally applicable, while treaties and regulations are. The courts have, however, horizontally applied the Charter for directives in some instances. The reasoning of the court in those instances was dependent on the fact that the Charter essentially contained the same right as the directive.[161]

2.5 German Constitution

Germany's constitution drafting process started after the end of the Second World War as a new order had to be established. Unlike in South Africa, where public discourse characterised the period when the drafting of the final Constitution took place, the process in Germany was marked by technical considerations and diminutive public discourse.[162] The Constitution[163] was drafted as a 'provisional' document, as it was assumed that a new one would be drafted for a united Germany at a later stage.[164] The enactment of the Constitution has also been described as an 'imposed' act by the allied forces, but was broadly accepted by the German population.[165]

In 1948, the occupying forces decided that the West German state should be

[158] The Charter of Fundamental Rights of the European Union (2000) article 51(2)
[159] Craig P et al, EU law: text, cases, and materials (2011)386-387
[160] Kellerbauer M et al, A commentary on the EU Treaties and the Charter of Fundamental Rights (2019) 2246
[161] Barnard C, European Union Law (2020) ch. 9
[162] Möllers C, Das Grundgesetz: Geschichte und Inhalt (2009) ch. 1
[163] Also referred to as Basic Law
[164] Bumke C et al German Constitutional Law: Introduction, Cases and Principles (2018) 1
[165] Bumke C et al German Constitutional Law: Introduction, Cases and Principles (2018) 21-22

formed. The basis for the formation of such a state were the Frankfurt documents. They also detailed that constitutional assembly should be put in place by the Prime Ministers in order to draft the Constitution for the newly formed German state. The conditions were that the constitution should establish a democratic order that protects individuals' rights and freedoms.[166] This was a response to the previous authoritarian regime and to ensure that the injustices committed would not be repeated.[167]

The general consensus on the drafting of such a constitution was dissentient. In the mind of those in power, it would cement the separation of into two German nations. The proposal in the Frankfurt documents was therefore rejected. The compromise that came about was that a provisional constitution would be drafted by a parliamentary council.[168] The process was onerous and the allied forced rejected the draft versions several times. However, after many deliberations, the constitution was put into effect on the 23 May 1949.[169]

The establishment of the Constitutional Court, which is separate from the federal courts and acts as a protector and interpreter of the Constitution, was a significant step towards the active implementation of the rights enshrined in the Constitution.[170] The work of the Constitutional Court has been described as very successful and added to the success that the Constitution and the relatively young democracy has experienced.[171] The simply and concise nature of the document itself has been credited as well as the focus on the safeguarding of individual freedoms. The jurisdiction of the Constitutional court includes the protection of individuals where their fundamental rights have been violated, competence issues and the cases in

[166] Bumke C et al German Constitutional Law: Introduction, Cases and Principles (2018) 1

[167] Grimm D et al, European Constitutionalism and the German Basic Law (2009) 409

[168] Möllers C, Das Grundgesetz: Geschichte und Inhalt (2009) ch. 1

[169] Bumke C et al German Constitutional Law: Introduction, Cases and Principles (2018) 2-6

[170] Bumke C et al German Constitutional Law: Introduction, Cases and Principles (2018) 9-10

[171] Bumke C et al German Constitutional Law: Introduction, Cases and Principles (2018) 22

regard to the institutions.[172]

2.5.1 Applicability of the German Constitution

The fundamental rights are the very core of the German Constitution, as a response to the injustices of the past. They are enshrined in article 1(2) of the Constitution. The scope of the constitutional rights to dignity, freedom of action and equal treatment extends to all natural persons, as well as legal persons. Certain rights, such as voting rights, which are reserved for German citizens only.[173]

The Constitution is directly applicable to all state institutions, as set out in article 1(3). All acts of the state are therefore subject to the fundamental rights. This extends to state-owned organisations that normally operate in the realm of the private law. The questions of applicability becomes more precarious and difficult to answer where these organisations are only partly owned by the state. The application is also not limited to state functions that occur within the bounds of the state. State functions exercised in foreign countries still remain subject to the fundamental rights. However, it might not always be possible to safeguard the fundamental rights to the degree that it is possible in the territory of Germany.[174]

The vertical application is expressed through the right against state interference. The individual enjoys protection against any interference that is not justifiable and falls within the scope of protection. The scope of protection is determined by behaviours, characteristics, situations, legal positions or legal interests. The enquiry looks at whether the cessation of the state's action would protect the individual's rights.[175]

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[172] Grimm D et al, European Constitutionalism and the German Basic Law (2019) 409
[173] Bumke C et al German Constitutional Law: Introduction, Cases and Principles (2018) 22
[174] Bumke C et al German Constitutional Law: Introduction, Cases and Principles (2018) 43
[175] Bumke C et al German Constitutional Law: Introduction, Cases and Principles (2018) 45-48

In terms of horizontal applicability in private law, private and third parties are not directly bound by the fundamental rights. The underlying legal argument is that if private parties were directly bound, the right to freedom of action would be compromised, as they would have to provide justifications for their actions.[176] The fundamental rights are given indirect effect in several ways. Firstly, the fundamental rights need to be considered in the interpretation and application of the law. Civil courts are also bound by the fundamental rights in relation to their conduct during the proceedings. Furthermore, the legislature itself can only enact laws that are in line with the fundamental rights, that also applies in relation to the legislative process. Lastly, the defensive right against state interference, as explained above, and the duty to protect are applicable and protect the individual's rights.[177]

2.6 Conclusion

The South African Constitution, the German Constitution and the European Union law has been introduced in this chapter. The applicability and thereby extent of the protection provided by the relevant sources of law offer has also been discussed.

The discussion of how the final South African Constitution was enacted, made it apparent that there has been a phase of transformative Constitutionalism. In Germany, the enactment of its Constitution took place after the end of the Second World War and was insisted upon by the occupying forces. The European Union on the other hand, evolved over a period of time into what it is today, which made it imperative to offer a protection of the human rights.

The next chapter will explore the right to dignity in the South African context

[176] Bumke C et al German Constitutional Law: Introduction, Cases and Principles (2018) 45-48

[177] Bumke C et al German Constitutional Law: Introduction, Cases and Principles (2018) 45-48

more in depth. Drawing upon the relevant case law and legislation to accurately describe the application and notions of dignity.

3 'Equality' and 'dignity' in South Africa

3.1 Introduction

This chapter will discuss the right to dignity in South Africa. For that purpose, the interpretation of the Bill of Rights will be explained, in order to provide a better understanding before discussing the relevant case law. Case law of various branches of the law will be analysed to offer a better insight into the diverse nature in which the Constitution and the right to dignity have had a bearing on the legal system. That will establish a better grasp of how the concept and right to dignity has been interpreted and used in the South African context.

3.2 The interpretation of the Bill of Rights

The interpretation of the Bill of Rights falls within the realm of constitutional interpretation. On that account, the interpretation of rights and provisions is more complex and goes beyond the scope of normal statutory interpretation. The interpretation of the Constitution has a bearing on the development and view of the democratic order in South Africa.[178] The interpretation is so significant as it gives effect to the constitutional rights, protects the supremacy of the Constitution and develops the law where required.[179]

The way in which the interpretation should be approached has been

[178] du Plessis L, Re-interpretation of statutes (2002)133-147
[179] Woolman S et al, Constitutional Law of South Africa (2013) ch. 32

described by decisions of the Constitutional Court. In Department of Land Affairs v Goedgelegen[180] the court stated that:

"'[W]e are obliged to scrutinise its purpose. As we do so, we must seek to promote the spirit, purport and objects of the Bill of Rights. We must prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest possible protection of their constitutional guarantees. In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied.In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the provision within the context of the grid, if any, of related provisions and of the statute as a whole, including its underlying values. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous."[181]

It is apparent that the court favours a broader approach that takes many factors into consideration to go beyond the mere meaning of the words. Over the years, it has been established that approach to interpretation should take into consideration the role of the text, the purposive interpretation, generous interpretation and the context.[182]

The role of the text pertains to the relevant provision of the Bill of Rights and the way in which it has been worded. In S v Zuma,[183] the court cautioned against using an interpretation deviating that is too far removed from the wording of the provision. Even though the values of the Constitution need to be taken into considerations, that does not give the court the prerogative to

[180] Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd [2007]
[181] Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd [2007]
[182] Curry I et al, The Bill of Rights Handbook (2013), ch. 6
[183] S v Zuma and Others (CCT5/94) [1995] ZACC 1

read anything into the provision in question.[184] Still, the text must be read in conjunction with the Constitution and in the context of its existence. The literal meaning of a provision seldom allows for the resolution of discussions, especially in light of the complex and equivocal nature of rights and words.[185]

The generous interpretation of rights refers to the broad application of the rights. Rather than construing the rights restrictively, an interpretation should promote the rights. This has been expressed in S v Mhlungu[186], where the court held that where the wording allows for an interpretation that is 'most beneficial in the widest amplitude',[187] such an interpretation should be given effect. The reason has been advanced that the wide interpretation of rights can in part be attributed to the fact that before the end of Apartheid, the majority of the population did not enjoy these rights.[188]

The purposive interpretation looks at the values that a specific right is giving effect to. The interpretation is then chosen that safeguards and promotes these values in the best way possible.[189] In order to conduct an analysis into what values a right gives effect to requires an analysis of purpose and context.[190] The enquiry by necessity requires the court to make a value judgment in regard to which values a right protects. The exact process whereby the court must make such a value judgment is not clear.[191]

Contextual interpretation can be done in the narrow or broad sense. The narrow contextual interpretation refers to the context of the Constitution itself, while in the broad sense focuses on the history as well as the political circumstances.[192] The political history is an important factor when

[184] Curry I et al, The Bill of Rights Handbook (2013), ch. 6
[185] Curry I et al, The Bill of Rights Handbook (2013), ch. 6
[186] S v Mhlungu and Others (CCT25/94) [1995] ZACC 4
[187] S v Mhlungu and Others (CCT25/94) [1995] ZACC 4
[188] Klug H, The Constitution of South Africa: A contextual analysis (2010) 121
[189] du Plessis L, Re-interpretation of statutes (2002)118-119
[190] Klug H, The Constitution of South Africa: A contextual analysis (2010) 122
[191] Curry I et al, The Bill of Rights Handbook (2013), ch. 6
[192] Curry I et al, The Bill of Rights Handbook (2013), ch. 6

interpreting, in the S v Mhlungu case[193], the court stated that:

'What must be avoided, if this is a constitutionally permissible course, is a result which permits human rights guaranteed by the Constitution to be enjoyed by some people and denied arbitrarily to others. Such a consequence would effectively allow substantive parts of a disgraced and acceptable culture from the past to continue into the future, protected by the Constitution.'[194]

It demonstrates the stark break with the past, which the interpretation of the Constitution shall facilitate.

The drafting history is less decisive than the aforementioned, but the Constitutional Court has shown its willingness to consider it, nonetheless. For instance, the preparatory work of committees in the drafting of the Constitution or other pieces of legislation can give context and important insights into why a specific formulation was chosen (over another).[195]

The last part of contextual interpretation is the textual context. It refers to the harmonisation of the provisions contained in the Constitution. The provisions should not be viewed in a vacuum, but rather as a whole. An example of how this approach works was demonstrated in the Soobramoney v Minister of Health[196] case. The court had to decide whether the right to life created a positive obligation on the state. Such a positive obligation would translate to the state being obligated to provide life-saving medical care where the patient is in a critical condition. The court approached the case by taking into consideration that section 27 of the Constitution, which contains the right to 'health care, food, water and social security'[197]. In the courts' view, the right to life could not create further responsibilities of the state, as in the context of the Constitution as a whole, section 27 already expressly provided

[193] S v Mhlungu and Others (CCT25/94) [1995] ZACC 4
[194] S v Mhlungu and Others (CCT25/94) [1995] ZACC 4 8
[195] Curry I et al, The Bill of Rights Handbook (2013), ch. 6
[196] Soobramoney v Minister of Health (Kwazulu-Natal) (CCT32/97) [1997] ZACC 17
[197] The Constitution of the Republic of South Africa (1996) s 27

for the rights.[198]

In addition to that, the Constitution itself contains a provision, which concerns the interpretation of the Bill of Rights. Section 39 specifies that an interpretation must 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom'[199]. In addition to that, a court interpreting the Bill of Rights must consider international law and has the discretion to take into account foreign law. The international law considered under section 39 does not need to be binding on South Africa, as the objective is merely to assist in the interpretation. Despite the wording of section 39, which makes the consideration of international law obligatory, while allowing for the consideration of the Constitutional Court has shown a preference for foreign law, particularly of countries that are well known for their democracy, freedom and equality. On that account it has been observed that the decisions of the Constitutional Court 'read like works of comparative constitutional law'.[200]

3.3 The right to dignity

Dignity is deeply enshrined in the South African Constitution. Dignity is recognised in several provisions of the Constitution, which highlights the special standing. Section 1 of the Constitution contains the founding values, the very first value mentioned is human dignity. [201] Chapter 2 of the Constitution, which contains the Bill of Rights, labels dignity the 'cornerstone' of the South African democracy and mentions it as one of three democratic values that the Bill of Rights seeks to affirm.[202] Other sections making reference to dignity are section 35, which contains the rights of detained persons and specifies that the conditions of detention need to be in

[198] Curry I et al, The Bill of Rights Handbook (2013), ch. 6
[199] The Constitution of the Republic of South Africa (1996) s 27
[200] Curry I et al, The Bill of Rights Handbook (2013) 148
[201] The Constitution of the Republic of South Africa (1996) s 1
[202] The Constitution of the Republic of South Africa (1996) s 7

accordance with human dignity. The limitation clause in section 36 dictates that a limitation of rights is only possible where,

'The limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.[203]

As previously discussed, the interpretation provision in section 39 also makes specific reference to dignity. Human dignity is also recognised as a specific right in section 10 of the Constitution, which reads,

'Everyone has inherent dignity and the right to have their dignity respected and protected'.[204]

It is apparent how significant and important dignity has become for South Africa. The constant emphasis highlights the commitment and can be seen as a reaction to the human right violations of the past.[205] The right to dignity can be said to stand on equal footing with equality and freedom, thereby the model of post-war European constitutionalism was clearly influential for the South African constitutionalism.[206]

Within the context of the legal system, dignity can be used in different ways. It can be used as a first order rule, a second order rule, a correlative right or a grundnorm.[207] A first order rule refers to a rule being decisive in a case. Due to the rule in South African law that the specific right should always be consulted and utilised first, dignity is rarely used as a first order rule. In cases where the court could not find a more specific rule protecting a person's dignity, section 10 of the Constitution has been used, despite its general nature.[208]

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[203] The Constitution of the Republic of South Africa (1996) s 36
[204] The Constitution of the Republic of South Africa (1996) s 10
[205] Cornell C et al, The Dignity jurisprudence of the Constitutional Court of South Africa: Volumes I and II (2013) 67
[206] Cornell C et al, The Dignity jurisprudence of the Constitutional Court of South Africa: Volumes I and II (2013) 44-45
[207] Woolman S et al, Constitutional Law of South Africa (2013) ch. 36.3
[208] Cornell C et al, The Dignity jurisprudence of the Constitutional Court of South Africa: Volumes I and II (2013) 83-84

The use of dignity as a second order rule is more prevalent. A second order rule informs a certain right, which is decisive in a matter or it helps in the understanding of another second order rule. Dignity is often used in cases that deal with the infringement of the right to equality (section 9 of the Constitution). The enquiry considers human dignity to decide whether a differentiation took place or an act of discrimination took place. Then the degree of the violation of human dignity gets considered to establish whether a discrimination is unfair. Other sections of the Bill of Rights, where dignity acts as a second order rule are amongst others the freedom of expression (section 16), the freedom of trade, occupation and expression (section 22) in relation to contracts and the right freedom of security of persons (section 12) in order to establish the proportionality of punishments.[209]

Dignity can also be utilised as a correlative right. That describes the interdependence of rights. In S v Jordan,[210] the court held that even though the constitutional challenge was based on several rights, that overlap, each of these rights had to be considered individually. The rights that the challenge was based on could not be consolidated.[211] However, the court has also stated that some rights are so closely linked that they can be considered together. An example is the right of dignity and the right to equality. The Constitutional Court has stated that the rights dignity is the basis for democracy in South Africa and that equality acquires its meaning only in the context of dignity.[212]

Lastly, dignity can be viewed as a grundnorm or value. Dignity is most often considered in that function. The reason being that the court generally prefers to develop the law rather than to create it. Chaskalson CJ held that values as they appear in section 1 are separate from rights.[213] Rights are enforceable,

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[209] Cornell C et al, The Dignity jurisprudence of the Constitutional Court of South Africa: Volumes I and II (2013) 83-84

[210] S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae (CCT31/01) [2002] ZACC 22

[211] Woolman S et al, Constitutional Law of Africa (2013) ch. 36

[212] Woolman S et al, Constitutional Law of Africa (2013) ch. 36

[213] Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others (CCT 03/04) [2004] ZACC 10

while values inform and flesh out other provisions of the Constitution.[214] Therefore, section 10 establishes an enforceable right, whereas various other sections refer to dignity as a value. Section 39 is an example of that. The section dictates that an interpretation must be chosen that is in line with dignity. The section refers to dignity as a value rather than a right, therefore wherever the interpretation is concerned and the courts apply section 39, dignity will be used as a value to inform rather than to give rise to a right.[215] Dignity as a value has been used by the court in essentially three different instances. Firstly, where the extent and scale of a specific right is determined in reference to dignity and the interpretation is hinging on it. For instance, where the court declares an act unconstitutional, because it violates the freedom of speech, and dignity reinforces that verdict. Dignity as a value can also be used in relation to the limitation of rights clause.[216] Dignity guides the decision of whether an infringement of a right should persist and be legal or not. Lastly, where legislation or the common law needs to be interpreted or developed, dignity is used to guide in the process. Dignity is not directly applied or enforced, but rather turned to for guidance.[217]

3.4 Relevant Case Law

The cases that will be discussed under this heading all have in common that the right to dignity is relevant in one way or another. This will provide a better understanding of how dignity can have an influence and how it is to be understood.

The first case to be discussed is a landmark case in South African constitutional law. The reason for its significance is that it was one of the first cases brought before the Constitutional Court. It thereby addressed several important issues. The Interim Constitution was applicable when S v

[214] Woolman S et al, Constitutional Law of Africa (2013) ch. 36
[215] Woolman S et al, Constitutional Law of Africa (2013) ch. 36
[216] Du Bois F, Introduction to the law of South Africa (2004) 94
[217] Woolman S et al, Constitutional Law of Africa (2013) ch. 36

Makwanyane[218] was heard by the newly established Constitutional Court. Section 277(1) of the Criminal Procedure Act 51 of 1977 specified that a superior court may, for certain crimes such as murder or rape, impose the death sentence.[219] That provision was challenged based on several rights contained in the Constitution.

The provision of the Criminal Procedure Act was challenged by the two accused, who committed four counts of murder in addition to other crimes. For their crimes, they were sentenced to death by the Appellate Division. In response to the appeals of the accused, the matter was referred to the Constitutional Court to make a finding on whether the death sentence was in line with the Bill of Rights.[220]

The Interim Constitution specifically states that 'cruel, inhuman and degrading punishment'[221] is prohibited. The Court was of the view that the right has to be interpreted in the light of other rights, such as the right to life and the right to dignity. International law and the law of foreign countries, like the United States of America, was also consulted.[222] The judgment leaned on the fact that the death penalty is irrevocable. It also points out that the imposition of the death sentence carries a degree of capriciousness. Only a small percentage of murderers actually received the death sentence in the past. Someone who could not afford legal council would be represented under the pro deo system. For those reasons the court acknowledged how race, poverty and chance were factors involved in the decision, which would ultimately render the sentencing to death arbitrary[223]. The court came to the conclusion that the death sentence was against the right prohibiting 'cruel, inhuman and degrading punishment'. The limitation clause consequently needed to be looked in order to consider whether the breach of the right could be justified. Through the process of balancing the rights, the Court

[218] S v Makwanyane and Another 1995 (3) SA 391 (CC)
[219] Criminal Procedure Act (1977) s 277
[220] S v Makwanyane and Another 1995 (3) SA 391 (CC) 5
[221] The Constitution of the Republic of South Africa (1993)
[222] S v Makwanyane and Another 1995 (3) SA 391 (CC) 40
[223] S v Makwanyane and Another 1995 (3) SA 391 (CC) 50-55

arrived at the conclusion that the deterring nature of capital punishment was not enough to outweigh the right to life and to dignity:

'The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter Three. By committing ourselves to a society founded on the recognition of human rights, we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does, including the way it punishes criminals. This is not achieved by objectifying murderers and putting them to death to serve as an example to others in the expectation that they might possibly be deterred thereby'[224]

The judges reasoning not only reveals the importance and weight of dignity in post-Apartheid South Africa, but also reveals how dignity can be applied as a value or grundnorm.

The case also shows how dignity is innate. The court held that:

'Central to this commitment is the need to revive the value of human dignity in South Africa, and in turn re-define and recognise the right to and protection of human dignity as a right concomitant to life itself and inherent in all human beings...'[225]

It may seem obvious that everyone enjoys the right to dignity, but at the time when this judgement was delivered, it highlighted how a new South African democratic order had come into existence, where the judiciary has the power to safeguard rights. Nonetheless, the court indicated that the right has the possibility of being limited.[226]

In the Pretoria City Council[227] case, Mr. Walker took the Pretoria City Council to court. To understand the case, it is important to understand that Mr.

[224] S v Makwanyane and Another 1995 (3) SA 391 (CC) 144
[225] S v Makwanyane and Another 1995 (3) SA 391 (CC) 310
[226] Cornell C et al, The Dignity jurisprudence of the Constitutional Court of South Africa: Volumes I and II (2013) 175
[227] Pretoria City Council v Walker 1998 (2) SA 363 (CC)

Walker lived in old Pretoria, which was mostly white and together with two black townships (Atteridgeville and Mamelodi) fell into the administrative district of the Pretoria City Council. For water and electricity, the City Council charged the residents of old Pretoria on the basis of a consumption-based tariff, while the residents of Atteridgeville and Mamelodi had to pay a flat rate that was significantly less. Furthermore, the City Council only would only seek legal remedies for the non-payment against residents of old Pretoria. Mr. Walker contended this approach and for that reason withheld payment of the amount he was charged. He indicated that he would only pay the amount due in terms of the flat rate that applied to the residents of Atteridgeville and Mamelodi.[228]

The legal argument advanced by Mr. Walker was that the different rates that the Pretoria City Council imposed, as well as the different approach concerning unpaid rates, amounted to a violation of the right against unfair discrimination. The Constitutional Court concluded that indirect discrimination based on race was present. However, in regard to the different rates, the court found that the discrimination was not unfair and therefore not in breach of the constitutional right in contention. The discrimination relating to the recovery of unpaid rates was found to be unfair and thereby unconstitutional. The reasoning that the court brought forward was that:

'No members of a racial group should be made to feel that they are not deserving of equal "concern, respect and consideration" and that the law is likely to be used against them more harshly than others who belong to other race groups.'[229]

The court further stated that:

'The impact of such a policy on the respondent and other persons similarly placed, viewed objectively in the light of the evidence on record, would in my

[228] Pretoria City Council v Walker 1998 (2) SA 363 (CC)
[229] Pretoria City Council v Walker 1998 (2) SA 363 (CC) 81

view have affected them in a manner which is at least comparably serious to an invasion of their dignity[230].'

The case, even though on the face of it mostly concerned with unfair discrimination, made the connection to dignity. Dignity provided the backdrop against which the effect of the discrimination was evaluated.[231] A person who is treated without 'equal concern, respect and consideration', cannot be said to have been treated with the court's notion of equality. It is apparent from the above that the court's notion of equality has been informed by dignity.[232]

The relationship between dignity and socio-economic rights was discussed in the Government v Grootboom[233] case. Prior to instituting proceedings the respondents had erected their informal homes on private land and after being evicted from there on the sports field of an informal settlement (Wallacedene). The area lacked basic amenities such as water and sewerage. The respondent instituted proceedings based on the right to housing in accordance with section 26 of the Constitution and the rights of children, which are protected in terms of section 28. The right of children was relevant, due to the fact that half of the population living in Wallacedene was made up of children.

The case is appropriate for the notion of dignity, as it exhibits how dignity can be understood in relation to socio-economic rights. The Court recognised that the situation, where a large number of South Africans are denied their socio-economic rights, that those people are essentially not having their rights to dignity and equality realised[234]. The presiding officer held that:

'There can be no doubt that human dignity, freedom and equality, the

[230] Pretoria City Council v Walker 1998 (2) SA 363 (CC) 81
[231] Ngcukaitobi T et al, The constitutional law casebook (2012) 172-187
[232] Cornell C et al, The Dignity jurisprudence of the Constitutional Court of South Africa: Volumes I and II (2013) 301
[233] Government of the Republic of South Africa and Others v. Grootboom and Others 2001 (1) SA 46 (CC)
[234] Government of the Republic of South Africa and Others v. Grootboom and Others 2001 (1) SA 46 (CC) 2

foundational values of our society, are denied to those who have no food, clothing or shelter'.[235]

This provides a better insight into the meaning of dignity. According to the arguments of the court, dignity relates to a physical condition, it goes beyond 'respect, concern and consideration' as contemplated in the Pretoria City council case. It also shows that there is a social dimension to dignity.[236]

The decision that the court reached was that the state has the obligation to realise the implementation of the rights in a progressive manner. The approach of the state must fulfil the standard of being reasonable. The current program of the state was found to not comply with the requirement of reasonably being able to progressively attain the fulfilment of the socio-economic rights. The respondents did not get relief to their request for housing, however the Constitutional Court conferred the obligation on the state to make amendments in order to fulfil the requirements mentioned above.[237] The social nature of the South African understanding of dignity has been highlighted in the Dikoko v. Mokhatla[238] case. The case linked the principle of ubuntu or botho closely to dignity. The social nature of that was explained by the court, that stated:

'...ubuntu or botho, an idea based on deep respect for the humanity of another. Traditional law and culture have long considered one of the principal objectives of the law to be the restoration of harmonious human and social relationships where they have been ruptured by an infraction of community norms.'[239]

The balancing of rights is at the core of many Constitutional Court

[235] Government of the Republic of South Africa and Others v. Grootboom and Others 2001 (1) SA 46 (CC) 23
[236] Cornell C et al, The Dignity jurisprudence of the Constitutional Court of South Africa: Volumes I and II (2013) 417
[237] Government of the Republic of South Africa and Others v. Grootboom and Others 2001 (1) SA 46 (CC) 23
[238] Dikoko v. Mokhatla 2006 (6) SA 235 (CC)
[239] Dikoko v. Mokhatla 2006 (6) SA 235 (CC) 68

judgements. The considerations that a court needs to make can be very intricate. Even though the importance of dignity has been recognised, it is not always clear which decision caters for the protection of dignity in the best way possible. In Volks v. Robinson[240] Mrs. Robinson made an application to the High Court on the basis of being excluded from claiming maintenance from under the Maintenance of Surviving Spouses Act[241], as she was not married to her partner but only in a life partnership. The Maintenance of Surviving Spouses Act only applies to married couples. Mrs. Robinson alleged that the act was in breach of her rights to equality and dignity and should be extended to include life partners.

The High Court found that the constitutional challenge was justified, because the term 'spouse' excluded life time partners. The matter was then referred to the Constitutional Court for their corroboration. The Constitutional Court came to the conclusion that the discrimination of life partners was fair and thereby constitutional. The weighing of rights that essentially took place took into consideration whether dignity was best protected by safeguarding the vulnerable position of women in relationships or whether dignity would dictate that the autonomy of the parties and the freedom to contract served dignity and equality better.[242]

The Justice Sachs elaborated in his dissenting judgement how elderly or poor women find themselves in a position, where they are left without any meaning assets or prospects of finding employment. This is on one hand unfair, because despite their lifelong commitment to the person and the relationship, they do not enjoy the benefits of the act. It also connotes that a life partnership is not as worthy of protection under the law as a marriage.[243] In addition to that, it indirectly promotes the idea that aside from marriage, essentially no relationship can exist that is based on love, concern and

[240] Volks NO v. Robinson and Others 2005 (5) BCLR 446 (CC)
[241] Maintenance of Surviving Spouses Act (1990)
[242] Volks NO v. Robinson and Others 2005 (5) BCLR 446 (CC)
[243] Volks NO v. Robinson and Others 2005 (5) BCLR 446 (CC) 226

mutual support. The majority judgement by Justice Skweyiya held that marriage gives rise to rights and obligations equally. It would be prejudicial to only impose these rights and obligations after one party to the relationship has died.[244] It was further held that the mere differentiation that is given effect to through the marriage concerning maintenance does not stand on breach of dignity. The majority judgement did however, recognise the vulnerable position of women in relationships, where one partner does not commit to marriage. Justice Skweyiya acknowledges that laws should be enacted in order to remedy the situation and protect these women in life partnerships.[245]

This case demonstrates that the promotion and protection of the constitutional right to dignity is not always straightforward. On the contrary, the legal principles that are competing can create a situation where the judiciary is in the precarious situation of having to make a judgement. Nonetheless, what is apparent in the discussion is that regardless of the decision, the court's intentions are clear in that they recognise and attempt to make the decision most in line with dignity. Even though it is debatable, as the dissenting judgements show, whether the judgment was the right one, it is apparent that the Constitutional Court, as well as the High Court, were acting based on the foundational values.

The liability of the state was discussed in the Carmichele [246] case. The applicant, Alix Carmichele, sought damages against the Minister of Safety and the Minister of Justice and Constitutional Development. She was assaulted by Fracois Coetzee, who despite having a criminal record for indecent assault and housebreaking, was granted bail on the recent charge of rape committed against her.[247] After being released on bail, he was spotted

[244] Volks NO v. Robinson and Others 2005 (5) BCLR 446 (CC) 58
[245] Volks NO v. Robinson and Others 2005 (5) BCLR 446 (CC) 65
[246] Carmichele v. Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening) 2001 (4) SA 938 (CC)
[247] Carmichele v. Minister of Safety and Security and Another (Centre for Applied Legal

around the house where Carmichele was residing at the time. Coetzee tried to open a window, but upon being spotted left the premises. The prosecutor was contacted and asked to detain Coetzee, however his response was that nothing could be done.[248] Approximately one month after that incident, Coetzee broke into the house and stabbed Carmichele. She eventually managed to flee from the house and alerted the police. He was consequently apprehended and later sentenced.[249]

Carmichele's application was based on the law of delict. In the Constitutional Court she raised the argument that the court, in accordance with section 39(2) of the Constitution, had to develop the common law to promote the rights contained in the Bill of Rights. The Court drew attention to the fact that:

'In addressing these obligations in relation to dignity and the freedom and security of the person, few things can be more important to women than the freedom from the threat of sexual violence.'[250]

Therefore, the Constitutional Court held that the positive obligation of the state to safeguard the right to dignity existed.[251] The case was referred back to the High Court, where Carmichele was awarded damages by the state.[252] The case has interesting implications. The protection of dignity is once again reaffirmed by the judgment and permeates the common law in accordance with section 39(2) (in this case the law of delict), at the cost of possibly overburdening the state. A snowball effect of similar cases being brought could be detrimental to the financial health of the state, and it might create a lack of funds for other important issues such as socio-economic rights.

Studies Intervening) 2001 (4) SA 938 (CC) 20

[248] Carmichele v. Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening) 2001 (4) SA 938 (CC) 21-23

[249] Carmichele v. Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening) 2001 (4) SA 938 (CC) 25-27

[250] Carmichele v. Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening) 2001 (4) SA 938 (CC) 62

[251] Van der Walt J, Horizontal application of fundamental rights and the threshold of the law in view of the Carmichele Saga (2003) South African Journal on Human Rights, 19:4

[252] Cornell C et al, The Dignity jurisprudence of the Constitutional Court of South Africa: Volumes I and II (2013) 483-485

A case where the court looked at a violation of the right to dignity is the Du Toit v Minister[253] case. A lesbian couple in a life partnership wanted to adopt two children jointly, but was prevented from doing so, as the relevant legislation only applied to heterosexual couples. On that basis, the applicants alleged that the Guardianship Act[254] is in breach of the rights to dignity and equality of homosexual life partnerships and further breaches the child's best interest.[255] In terms of the right to equality, the court applied the Harksen test and arrived at the conclusion that the differentiation between homosexual life partners and heterosexual married couples was unfair. This was in light of the fact that the applicants for the adoption otherwise satisfied all requirements and were legally unable to get married.[256]

The arguments brought by the applicants were that the non-recognition of one of the parents, despite living together, contributing equally and raising the children together, violated their dignity. The view of a family as consisting of one mother and a father was described by the applicant as ignorant of the reality in the country.[257] The court agreed with the view and added that the applicants can be considered a good family and not recognising one partner's worth, by not affording them the status of a parent would be demeaning.[258] On the afore-mentioned grounds, the court declared that homosexual life partners should be allowed to jointly adopt.

The connection between right to freedom of religion and dignity is shown in the Mec for Education[259] case. The dress code of the Durban Girls High

[253] Du Toit and Another v. Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae) 2003 (2) SA 198 (CC)
[254] Guardianship Act (1993)
[255] Du Toit and Another v. Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae) 2003 (2) SA 198 (CC) 20
[256] Du Toit and Another v. Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae) 2003 (2) SA 198 (CC) 25-26
[257] Du Toit and Another v. Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae) 2003 (2) SA 198 (CC) 28
[258] Du Toit and Another v. Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae) 2003 (2) SA 198 (CC) 29
[259] Mec for Education: Kwa Zulu-Natal, Thulani Cele: School Liaison Officer, Anne Martin: Principal of Durban Girls' High School, Fiona Knight: Chairperson of the Governing Body of

School prohibited the learners from wearing jewellery. A learner contravened that dress code by wearing a nose stud. The school threatened with consequences if the learner was unwilling to remove the nose stud. On account of that, the mother of the learner took the school to court on the basis of her daughter's right to culture and religion being infringed.

The matter went to the Constitutional Court, who held that:

'A necessary element of freedom and of dignity of any individual is an "entitlement to respect for the unique set of ends that the individual pursues." One of those ends is the voluntary religious and cultural practices in which we participate.'[260]

The court also highlighted that to make a distinction between cultural and religious practices, which are voluntary and those that are mandatory, does not promote diversity in terms of the Constitution. The Constitution seeks to promote and celebrate diversity, making a distinction would however mean that cultural differences are merely allowed. Further, it was stated that especially culture was dependent on many customs, which are rarely mandatory. For that reason, voluntary practices need to be protected to uphold a person's dignity. In the proceedings, it was explained as follows:

'The notion that "we are not islands unto ourselves" is central to the understanding of the individual in African thought. It is often expressed in the phrase umuntu ngumuntu ngabantu which emphasises "communality and the inter-dependence of the members of a community" and that every individual is an extension of others. According to Gyekye, "an individual human person cannot develop and achieve the fullness of his/her potential without the concrete act of relating to other individual persons". This

Durban Girls' High School v. Navaneethum Pillay, Governing Body Foundation, Natal Tamil Vedic Society Trust, Freedom of Expression Institute 2008 (2) BCLR 99 (CC)

[260] Mec for Education: Kwa Zulu-Natal, Thulani Cele: School Liaison Officer, Anne Martin: Principal of Durban Girls' High School, Fiona Knight: Chairperson of the Governing Body of Durban Girls' High School v. Navaneethum Pillay, Governing Body Foundation, Natal Tamil Vedic Society Trust, Freedom of Expression Institute 2008 (2) BCLR 99 (CC) 64

thinking emphasises the importance of community to individual identity and hence to human dignity. Dignity and identity are inseparably linked as one's sense of self-worth is defined by one's identity.'[261]

This case demonstrates the connection between freedom (of religion), identity and how important those values are to uphold a person's dignity.[262] It is also notable how those practices of a voluntary nature are closer linked to our identity and thereby dignity.[263]

A case that dealt with the extradition of an individual is the Mohamed[264] case. This case went on trial after Mr. Mohamed had already been deported to the United States of America. He was involved in the bombings of an United States embassy in Tanzania in 1998. He applied for asylum in South Africa under using a false identity, before being found out.[265]

The case was based on the violation of Mr. Mohamed's constitutional rights to life and dignity. It was alleged that the handing over, the detention, the interrogation and consequent extradition to the United States was unlawful, especially in light of the death sentence he might face. Assurances should have been procured, that he would not be sentenced to death.[266] The court found that his right to life and dignity had been violated and that the handing over was unlawful. The judgment was sent to the relevant court in the United States.[267] The judgement clarifies that the Constitution is rigorously applied, even where political matters are at stake and where individuals are

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[261] Mec for Education: Kwa Zulu-Natal, Thulani Cele: School Liaison Officer, Anne Martin: Principal of Durban Girls' High School, Fiona Knight: Chairperson of the Governing Body of Durban Girls' High School v. Navaneethum Pillay, Governing Body Foundation, Natal Tamil Vedic Society Trust, Freedom of Expression Institute 2008 (2) BCLR 99 (CC) 53

[262] Coetzee P. H. et al, Philosophy from Africa: A text with readings (2000) 321

[263] National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) 26

[264] Mohamed and Another v. President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening) 2001 (3) SA 893 (CC)

[265] Cornell C et al, The Dignity jurisprudence of the Constitutional Court of South Africa: Volumes I and II (2013) 467

[266] Mohamed and Another v. President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening) 2001 (3) SA 893 (CC) 3, 4

[267] Mohamed and Another v. President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening) 2001 (3) SA 893 (CC) 70-72

concerned who are illegally in the country.

It is apparent that the courts, in certain situation are willing to apply the right to dignity as a right and not merely as a value. In this case, dignity was one of the three rights breached by the legislation and the interpretation of what amounts to a violation of that right is very beneficial in the South African context, in that it gives effect to the purpose and object of the Constitution.[268]

3.5 Limitation of rights

Generally, the rights in the South African Constitution and Bill of Rights are not absolute. They can be limited. As mentioned before, section 36 is the general limitation clause. This has resulted in a two-stage approach, where the violation of rights is concerned. The court will enquiry into whether a right has been infringed upon, followed by the enquiry as to whether such a violation can be justified in terms of section 36.[269]

The limitation can be justified if a law of general application is concerned and:

'The limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.[270]

The term 'a law of general application', refers to any law, piece of legislation or executive act that possesses the qualities of being clear, accessible and precise, so that the rights and obligations can be grasped by those addressed. In addition to that, the law must not single out a specific addressee or person affected.[271]

The enquiry into the limitation and whether it is reasonable in a society based

[268] Cornell D, Law and revolution in South Africa: Ubuntu, dignity, and the struggle for constitutional transformation (2014)
[269] Curry I et al, The Bill of Rights Handbook (2013) 155
[270] The Constitution of the Republic of South Africa (1996) s 36
[271] Curry I et al, The Bill of Rights Handbook (2013) 159

on the dignity looks at several factors. The S v Makwanyane[272] case set out the relevant criteria that the proportionality test comprises of.[273] Firstly, the nature of the right needs to be considered. This can give important insights as to harm done by the infringement of the fundamental right. This criterion recognises that not all rights are equal. An important right such as dignity would therefore weigh heavier and the law in breach of it would need to have a sufficiently strong reason or purpose.[274]

The importance of the purpose of the limitation should be considered in light of the purpose of the law. The purpose needs to have a nexus to the constitutional values. Consequently, a law (limiting a right) which does not promote something which all reasonable citizens deem important cannot justified. An example which qualifies in terms of the purpose would be the protection of rights of others, a measure reducing the number of unemployed people in the country or the prevention of crime.[275]

The nature and extent of the limitation also needs to be looked at. The court has to evaluate to what degree and in what manner the infringed right is impacted. Hereby, the most important consideration is whether the goal the limitation of the right seeks to attain is warranted in light to limitation itself. Proportionality lies at the heart of this enquiry.[276] There also needs to be a specific relation between the limitation and the purpose, which needs to be identifiable. The court will examine whether the law actually achieves what it was prescribed to do. The limitation cannot be warranted, where the law does not attain the specific thing it was designed to do.[277]

The court also needs to evaluate whether there are less restrictive means to reach the goal of the law. Should there be another way to reach the same outcome, but in a manner which upholds the constitutional rights, such a

[272] S v Makwanyane and Another 1995 (3) SA 391 (CC)
[273] Woolman S et al, Constitutional Law of Africa (2013) ch. 34
[274] Curry I et al, The Bill of Rights Handbook (2013) 163-166
[275] Curry I et al, The Bill of Rights Handbook (2013) 166-167
[276] Rautenbach IM, Proportionality and the limitation classes of the South African Bill of Rights (2014) Potchefstroom Electronic Law Journal 2014(17)6
[277] Curry I et al, The Bill of Rights Handbook (2013) 166-171

way would be preferable, also taking into consideration the proportionality principle. In S v Makwanyane the court found that the death penalty was not the only way to deter crime. Life imprisonment could deter crime, without the same implications in terms of the limitation of other rights[278].

The factors discussed above should ordinarily be considered together, nonetheless in practice, it appears that the evaluation of less restrictive means is often decisive.[279] The overwhelming reliance on less restrictive means has been criticised as has its place in the enquiry itself. Legal scholars have argued that the rational connection test makes the less restrictive means test superfluous, as the outcome of both enquiries is essentially the same. The law must be 'narrowly tailored' to the solution, which means that an irrational solution or law will not satisfy the proportionality test.[280] Where a measure is irrational, it is logical that an enquiry into less restrictive means will conceive a more suitable measure. The less restrictive means enquiry also takes the judiciary into the realm of the legislature, which even though lawful in terms of the Constitution, could be subject of debate in terms of the appropriateness.[281]

3.6 Conclusion

This chapter has discussed the right to dignity in the South African legal context. The interpretation of the Bill of Rights, of which the right to dignity belongs, has been examined. The interpretation of the rights often occurs in the context of South Africa's history and the broader context. Nonetheless, a departure from the words that is too far off, does not appear to be compatible

[278] Curry I et al, The Bill of Rights Handbook (2013) 170-171
[279] Curry I et al, The Bill of Rights Handbook (2013) 170-171
[280] Iles K, A fresh look at limitations: Unpacking section 36 (2007) South African Journal on Human Rights, 23:1
[281] Iles K, A fresh look at limitations: Unpacking section 36 (2007) South African Journal on Human Rights, 23:1

with the rule of law.

Dignity has been applied both as a substantive right as well as a value that informs other considerations and rights. The right to dignity not only occurs in section 10 of the Constitution, but is also mentioned in several other sections of the Constitution. Most notably perhaps as a founding value.[282] The right to dignity has a bearing on several fields of the South African law, such as family law, the law of contract, criminal law and administrative long amongst others. The courts have generally shown a propensity for allowing dignity to have a bearing on the legal arguments, whether that is to inform the rights or to stand by itself. It is notable that the right to dignity has a connection to various rights in the Bill of Rights. The concept of ubuntu is closely related and offers a social dimension to dignity. Equality is very closely linked and the two rights are often mentioned together. Furthermore, the courts have expressed that socio-economic rights are essentially giving effect to a dignified existence. The importance and influence of dignity can be understood when looking at the cases discussed. A case in point is the decision in Du Toit, which gave rise to an amendment of the law in order to recognise the rights of same-sex partners. The Grootboom case illustrates how socio-economic rights can be protected through the application of the right to human dignity. The declaratory order for the state to develop and implement a program to secure the attainment of an existence in line with dignity, not only emphasises dignity.[283] It also reaffirms the democratic values South Africa is founded on by granting the state the opportunity to set in motion an effective program to provide for housing.

The next chapter will focus on the right to dignity in the European Union as well as in Germany, which is a member state. Chapter four will examine the

[282] Cornell C et al, The Dignity jurisprudence of the Constitutional Court of South Africa: Volumes I and II (2013) 47

[283] Roux T, Constitutional Courts as democratic consolidators: Insights from South Africa after 20 years (2016) 14-17

laws and some important decisions made by the courts.

4 'Dignity' in the European Union and Germany

4.1 Introduction

This chapter will examine how the right to dignity is used and utilised in the European Union and in Germany as a member state of the European Union. The relationship between the law of the European Union and the member states will be discussed. Thereafter, the examination of the the right to dignity in relation to the European Union and Germany will follow. The examination will not be done jointly, as the European Union and Germany have separate judiciary institutions and their own legislation.

4.2 The relationship between European Union Law and the law of the countries

The point of departure for the relationship between European Union law and the national law of the member states, is the supremacy of the European Union law. The principle was not mentioned initially in any of the treaties that were concluded. However, the Lisbon Treaty contains a declaration, which affirms the principle. Most importantly perhaps, the principle has been applied and enforced for many years by the European Court of Justice (ECJ).[284]

In the Costa v. ENEL[285] case the Court held that:

[284] Craig P et al, EU Law Text, Cases and Materials (2011) 256-258
[285] Case 6/64 Flamino Costa v ENEL (1964) ECR 585, 593

'...real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves'.[286]

The legal argument underlying such a supremacy was detailed as follows:

'The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardising the attainment of the objectives of the Treaty set out in Article 5(2) and giving rise to the discrimination prohibited by Article 7'.[287]

The court referred to:

'Article 189, whereby a regulation 'shall be binding' and 'directly applicable in all Member States'. This provision, which is subject to no reservation, would be quite meaningless if a State would unilaterally nullify its effects by means of a legislative measure which could prevail over Community law.'[288]

The arguments raised by the court highlight the functioning of the European Union, which is reliant on the supremacy of the European Union law. The conferral of competencies from the member states to the European Union gives the European Union law primacy in those fields of the law. Without the supremacy principle the effectiveness of the European Union would be greatly reduced and the court has indicated that it would make the European Union superfluous.[289]

In some aspects, the supremacy has been controversial as the Internationale Handesgesellschaft [290] case demonstrates. The applicant's reasoning for instituting proceedings was that a European Union regulation was violating the constitutional rights guaranteed under the German Constitution. The ECJ

[286] Case 6/64 Flamino Costa v ENEL (1964) ECR 593
[287] Case 6/64 Flamino Costa v ENEL (1964) ECR 594
[288] Case 6/64 Flamino Costa v ENEL (1964) ECR 594
[289] Craig P et al, EU Law Text, Cases and Materials (2011) 257-258
[290] Case 11/70 Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel (1970) ECR

came to the conclusion that the national law should not be consulted in matters that fall within the ambit of European Union law.[291] The principle of efficiency would be undermined by such an approach, and community law cannot be challenged by national constitutional law and the rights conferred by such a document.

In the Simmenthal[292] case, several important issues were brought up with regard to the principle of supremacy. One of the legal issues was whether the court could just apply European Union law that was in conflict with the national law, without having the national law been declared unconstitutional. The ECJ held that in light of the effectiveness of the European Union law it is only viable to that the European Union law prevails, even without setting the conflicting national law aside.[293] The community law has to be applied with immediate bearing. The judgement also clarifies that the supremacy of the community law is not concerned with whether national laws post or pre-date European Union law.[294] The obligation on national courts to safeguard community law by setting aside conflicting national legislation was also affirmed. This has been confirmed by preceding judgments by the ECJ. Case law has even established the application of the principle where certain administrative agencies are concerned.[295] That once more highlights the weight that the judiciary of the European Union places on the supremacy. It should be noted that due to the sensitive nature of handing over sovereignty, this principle has been controversial at times.

4.3 Dignity in the European Union

As mentioned in chapter 2, the European Union (previously known as the

[291] Case 11/70 Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel (1970) ECR 3

[292] Case 106/77 Amministrazione delle Finanze dello Stato v Simmental SpA (1978) ECR

[293] Case 106/77 Amministrazione delle Finanze dello Stato v Simmental SpA (1978) ECR

[294] Craig P et al, EU Law Text, Cases and Materials (2011) 261

[295] Craig P et al, EU Law Text, Cases and Materials (2011) 264

European Economic Community) was founded without the intention of being an institution with a comprehensive set of legal rules, but rather as an organisation that aims to preserve the peace and promote economic interests. Therefore, for a long time the European Union did not have a system of human rights. The member states yielded considerable political power within the European Union and thereby enforced the human rights of the national law.[296]

In 1970, the ECJ recognised the concept of uncodified human rights. The rationale behind the decision was to give effect to the Constitution of the member states, also bearing in mind that all member states had ratified the European Convention on Human Rights. It is also notable that an extended body of human rights was not in place, partly due to the fact that the competencies of the European Union were mostly limited to the economic freedom and the protection of property. Areas of the law, which are more likely to require the application had not yet been conferred.[297]

The Charter of Fundamental Rights was drafted in and later proclaimed in the year 2001. Human dignity formed an important right in the document, however the Charter's legal effect was limited, as it had not yet been adopted and the status of European Union law. The Lisbon Treaty conferred more competencies from the member states to the European Union and elevated the Charter to primary law.[298]

In regard to primary law of the European Union, the right to dignity is contained in article 1 of the Charter refers to human dignity and acknowledges that it needs to be protected and respected.[299] The Charter is divided into several titles, of which 'dignity' is the first one, encompassing five specific rights. Dignity also finds mention in the preamble of the Charter as well as several other provisions[300], in relation to elderly people and social

[296] Becchi P et al, Handbook of Human Dignity in Europe (2019) 945
[297] Becchi P et al, Handbook of Human Dignity in Europe (2019) 945
[298] Becchi P et al, Handbook of Human Dignity in Europe (2019) 946
[299] Charter of Fundamental Rights of the European Union (2000) article 1
[300] Becchi P et al, Handbook of Human Dignity in Europe (2019) 946

rights. Another important piece of legislation is the Treaty of the European Union (TEU), which cements dignity in the legal framework of the European Union.[301]

In terms of dignity as a right under secondary law, the freedom of movement of workers recognises that a standard in regard to dignity needs to be adhered to. Another area where dignity is mentioned is the law of asylum and migration.[302] The standard of living of those who seek asylum requires to be in line with dignity.[303] Secondary legislation exists, which sets out dignity as a minimum standard in relation to all matters that are not catered for by other legislation.[304]

Article 2 of the TEU states that:

'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights'[305]

Dignity is thereby one of the most important values of the European Union and an objective legal principle. It holds the European Union and its institutions accountable and equally requires the member states to act in accordance with it. In conjunction with article 7 TEU it becomes apparent that a violation of dignity by the member states is justiciable and can result in a suspension of voting rights.[306]

The Omega[307] case is notable in that the ECJ acknowledged that human dignity is a general principle of law and thereby affirmed the objective dimension referred to in the previous paragraph. It could henceforth form part of public policy.[308] The case centred around the issue of a laser game,

[301] Becchi P et al, Handbook of Human Dignity in Europe (2019) 950
[302] Cherubini F, Asylum Law in the European Union (2015) 172-178
[303] Becchi P et al, Handbook of Human Dignity in Europe (2019) 947
[304] Becchi P et al, Handbook of Human Dignity in Europe (2019) 947
[305] Treaty on the European Union (2012) article 2
[306] Becchi P et al, Handbook of Human Dignity in Europe (2019) 953
[307] Case 36/02 Omega Spielhallen und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn (2204)
[308] Dupré C,. "Human Dignity." The EU Charter of Fundamental Rights: A Commentary

which saw participants in the simulated game, shoot and kill other people playing the game. Germany argued that the marketing should be restricted due to the affront to human dignity that such games pose. The ECJ ruled that the prohibition was in line with their conception of human dignity and that it outweighed the right to the freedom to provide services.[309] In context of the Second World War, Germany's perception of a game centred around shooting and killing was perhaps more sensitive than that of other countries. The decision in favour of the perception of the game by Germany demonstrates the ECJ's willingness to respect and place importance on the history and sentiments of a specific country.[310]

Article 1 of the Charter dictates that 'human dignity is inviolable. It must be respected and protected'[311]. The Charter thereby extends the understanding of human dignity from a mere principle to an absolute right. The wording implies that the right to human dignity is absolute and a violation cannot be justified, not even under article 52 of the Charter.[312] It would be interesting to see how a court would decide on a similar matter to the Omega case, now that human dignity is entrenched in the Charter, which forms part of the primary European Union law.

The wording of the provision itself indicates a negative obligation and as well as a positive obligation to uphold the right.[313] The case law has not yet been very extensive on what falls within the ambit of article 1 of the Charter or how the section finds application. Having said that, as other rights together with human dignity are mentioned under title 1 of the Charter, the context dictates that it should be interpreted in a narrow manner.[314] Legal scholars appear to agree that even though the definition remains unclear, an opinion

(2014) 19

[309] Case 36/02 Omega Spielhallen und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn (2004) 40-41

[310] Craig P et al, EU Law Text, Cases and Materials (2011) 371

[311] Charter of Fundamental Rights of the European Union (2000)

[312] Becchi P et al, Handbook of Human Dignity in Europe (2019) 960

[313] Kellerbauer M et al, A commentary on the EU Treaties and the Charter of Fundamental Rights (2019) 2100

[314] Kellerbauer M et al, A commentary on the EU Treaties and the Charter of Fundamental Rights (2019) 2100

in the Coleman[315] case expresses that human dignity is linked closely to self-autonomy and the right to make decisions about one 's own's life.[316]

There is a special connection in regard to human rights between the European Convention on Human Rights and the European Union. The European Union has not yet joined the European Convention on Human Rights, but has recognised that the rights in article 4 of the Charter and the rights in the European Convention on Human Rights are uniform, hence the jurisprudence underlying the rights has been applied in a similar manner.[317] While the countries of the European Union are obliged to observe and have acceded to the Convention on Human Rights, the European Union itself is not. This bears the implication that the competences that have been transferred from the member states to the European Union are outside the jurisdiction of the European Convention on Human Rights. The double system has certain drawbacks, such as the potential for contradictory judgments on similar human rights matters, caused by the lack of coordination.[318]

Secondary legislation needs to be interpreted to be in line with the rights conferred by the Charter. The ECJ held that:

'Such a sanction infringes Article 8 ECHR, to which Article 7 of the Charter corresponds, and constitutes punishment which is disproportionate or discriminatory within the meaning of Article 9(2)(c) of the Directive.'[319]

Thereby indicating the need to consider the rights contained in the Charter as well as the corresponding rights.[320]

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[315] Case 303/06 Coleman v Attridge Law and Steve Law (2008)
[316] Kellerbeauer M et al, A commentary on the EU Treaties and the Charter of Fundamental Rights (2019) 2100
[317] Becchi P et al, Handbook of Human Dignity in Europe (2019) 962
[318] Ravasi E, Human rights protection by the ECtHR and the ECJ (2016) ch. 1
[319] Case 199/12 to Case C201/12 X., Y. and Z. v Minister voor Immigratie en Asiel (2013) 57
[320] Becchi P et al, Handbook of Human Dignity in Europe (2019) 963

In the Staatssecretaris van Veiligheid en Justitie[321] case, the court decided that dignity could inform public policy in the determination of whether a person would be able to practise his right to the freedom of movement. The court held that:

‘ That overall assessment must also take account of the time that has elapsed since the date when the crimes or acts were allegedly committed and the subsequent conduct of that individual, particularly in relation to whether that conduct reveals the persistence in him of a disposition hostile to the fundamental values enshrined in Articles 2 and 3 TEU, capable of disturbing the peace of mind and physical security of the population. The mere fact that the past conduct of that individual took place in a specific historical and social context in his country of origin, which is not liable to recur in the host Member State, does not preclude such a finding.’[322]

The reference to article 2 of the TEU refers to the right to dignity, which was an important consideration in limiting the rights. The case demonstrates how the right to dignity can be utilised to limit certain rights.[323]

In the F v Bevándorlási és Állampolgársági Hivatal[324] case the Court of Justice of the European Union (CJEU) dealt with the question, whether psychological tests were allowed in regard to asylum seekers based on their sexual orientation. The CJEU held that such a test did not violate human dignity, as it was essential and the prerogative of the state to ascertain the truthfulness of the facts presented by the asylum seeker. The CJEU made the qualification however, that such expert tests need to be conducted in accordance with the right to dignity and cannot be the only reason for a judgement by the

[321] Case 331/16 to Case C366/16 Staatssecretaris van Veiligheid en Justitie and H.F Belgische Staat (2016)
[322] Case 331/16 to Case C366/16 Staatssecretaris van Veiligheid en Justitie and H.F Belgische Staat (2016) 66
[323] Becchi P et al, Handbook of Human Dignity in Europe (2019) 964
[324] Case 473/16 F v Bevándorlási és Állampolgársági Hivatal (2016)

Hungarian court.[325]

In the N. S.[326] case, the United Kingdom wanted to deport asylum seekers in terms of the Regulation 343/2003. The asylum seekers were supposed to be deported to the country, where they first entered Europe, which in this case would be Greece. The court found that the discretion in terms of the regulation would still fall within the ambit of European Union law and would thereby be subject to the Charter of Fundamental Rights of the European Union. In terms of the Charter and also the right to dignity, it was not permissible to deport the people in question due to systemic deficiencies in the Greek asylum procedure, which would bear the risk of exposing the asylum seekers to degrading or inhumane treatment.[327]

4.4 Dignity in Germany

Human dignity in Germany appears in article 1, paragraph 1 of the German Federal Constitution and states that human dignity is 'inviolable' and shall be 'respected and protected' by the state.[328] Placing human dignity at the very beginning of the Constitution was intentional by the drafters, as a reaction to the lack of due regard that the national socialists had for the dignity of humans.[329]

Among scholars, there has been some debate whether the acknowledgement of human dignity in the German Constitution is merely a principle or a

[325] Case 473/16 F v Bevándorlási és Állampolgársági Hivatal (2016) 46

[326] Case 411/10 N. S. v Secretary of State for the Home Department and M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform

[327] N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform

[328] German Federal Constitution (1949) 1(1) *(also referred to as Basic Law)

[329] Bumke C et al German Constitutional Law: Introduction, Cases and Principles (2018) 91

fundamental right.[330] The opponents of acknowledging human dignity as a right, refer to the rights of freedom and equality, which according to them protect the individual sufficiently. An interpretation based on the text itself has been used by proponents of both theories. Scholars arguing against human dignity as a right refer to article 1, paragraph 3, which states 'the following rights shall bind...as directly applicable law'.[331]. The fact that human dignity appears in article 1, paragraph 1, so before that sentence, indicates to them that human dignity should not be considered a right. Proponents of human dignity as a right however, refer to the fact that the heading of the section that article falls under is 'fundamental rights', which would point to the contrary.[332]

The Constitutional Court has on numerous occasions called human dignity the 'supreme value' of the Constitution, such as in the BvR[333] case where the court held that:

'Above all, the laws must for that reason not violate human dignity, which is the supreme value of the Constitutional Law, but also must not restrict human intellectual, political and economic freedom in such a way that it would be affected in its essential content.'[334]

Human dignity under German law is considered in light of every person's right to have their freedom and equality recognised. The state's action or omission in relation to such a denial needs to be evaluated to determine whether human dignity has been breached.[335]

In the Aviation Security Law (Luftsicherheitsgetsetz [336]) case the

[330] Enders C, Die Menschenwürde in der Verfassungsordnung: Zur Dogmatik des Art. 1 GG (1997)

[331] German Federal Constitution (1949) 1(3)

[332] Bumke C et al German Constitutional Law: Introduction, Cases and Principles (2018) 92

[333] BvR 253/56 = BVerfGE (1957) 6, 32

[334] BvR 253/56 = BVerfGE 32 (Vor allem dürfen die Gesetze daher die Würde des Menschen nicht verletzen, die im Grundgesetz der oberste Wert ist, aber auch die geistige, politische und wirtschaftliche Freiheit des Menschen nicht so einschränken, daß sie in ihrem Wesensgehalt angetastet würde.)

[335] Bumke C et al German Constitutional Law: Introduction, Cases and Principles (2018) 94

[336] BVerfGE 357/05 (2006) 115, 118

Constitutional Court presided over the question whether paragraph 14.3 of the Aviation Security Law was constitutional. Paragraph 14.3 granted the military the authorisation to shoot down airplanes that have been highjacked and are intended to be used as a means to destroy lives. The authorisation included shooting down planes that were transporting passengers.[337] The constitutional complaint was based on the paragraph being in breach of the right to life and right to human dignity. The court came to the conclusion that the complaint was valid and the Act violated the aforementioned rights.

The court argued that dignity had been violated as:

'Such a treatment ignores the status of the persons affected as subjects endowed with dignity and inalienable rights. By their killing being used as a means to save others, they are treated as objects and at the same time deprived of their rights; with their lives being disposed of unilaterally by the state, the persons on board the aircraft, who, as victims, are themselves in need of protection, are denied the value which is due to a human being for his or her own sake.'[338]

It was further held that:

'Human life and human dignity enjoy the same constitutional protection regardless of the duration of the physical existence of the individual human being (see above under C I, II 2 b aa). Whoever denies this or calls this into question denies those who, such as the victims of a hijacking, are in a desperate situation that offers no alternative to them, precisely the respect which is due to them for the sake of their human dignity (see above under C II 2 b aa, bb aaa).'[339]

Despite the perhaps controversial nature of the judgement of the Constitutional Court, this case demonstrates the understanding and perception of human dignity in Germany. The extent to which the right goes

[337] BvR 357/05 (2006)
[338] BvR 357/05 (2006) 124
[339] BvR 357/05 (2006) 124

and the one sided consideration are a bit surprising, especially in light of the premise of a legal system. A legal system and the way that society is structured, there will always be those who reap a greater benefit, while others get left behind and become victims of the system. Therefore, it could be argued that states run on the premise of protecting and benefiting the majority, while sacrificing a small minority, while the greater good is still guaranteed. Also, the right to life of the potential victims that are targeted by the attack should also be considered. The commission of the state places their right to life in jeopardy.

In the headscarves[340] case, the Constitutional Court had to decide whether the law in place prohibiting teachers from outwardly showing their religious affiliation was constitutional. At the heart of the matter were two Muslim teachers who refused to adhere to the ban headscarves and were therefore sanctioned at the labour law courts. The challenge to these sanctions was based on a violation of the teachers' right to faith.[341]

The provision that the labour court relied on specified that:

'...teachers may not publicly express views of a political, religious, ideological or similar nature which are likely to endanger, or interfere with, the neutrality of the Land with regard to pupils and parents, or to endanger or disturb the political, religious and ideological peace at school.'[342]

The second part in particular refers to human dignity as one of the central elements of the German value system, which must not be infringed by the outer appearance of the teaching staff. The court highlighted that Germany, as a secular state, does not seek to prohibit the population from living in accordance with their religious beliefs, but still strives towards being an inclusive society. In relation to dignity, it was held that self-perception forms

[340] 1 BvR 471/10, 1 BvR 1181/10 (2015)
[341] 1 BvR 471/10, 1 BvR 1181/10 (2015)
[342] 1 BvR 471/10, 1 BvR 1181/10 (2015)

part of the right to dignity. By viewing themselves as part of a certain religion, the believers must be able to observe religious imperatives.[343] It could further impact on the right to dignity, where those who wish to cover themselves as part of their observance of their religion are unable to take up employment. The court could not find that a teacher wearing a headscarf as part of their religion would pose a sufficiently specific danger to the neutrality or peace at school.[344]

The court came to the conclusion that the wearing of a headscarf did not have a causal nexus to jeopardising the neutrality or adherence to the values of the land. Furthermore, the:

'The mere visual perceptibility of an Islamic headscarf at school has to be accepted as the result of the exercise of fundamental rights, as there is, as usual, in general, no constitutional right to be spared of exposure to the exercise of other religious or ideological beliefs by other people.'[345]

The boundaries of the right to freedom of faith were laid down in another case. In 2 BvR 1500/97[346] the Constitutional Court evaluated how a religious community could acquire the recognition as a corporate body in terms of the public law. The court held:

'Article 79.3 of the Basic Law removes the principles set out in Article 1.1 and Article 20 of the Basic Law from any amendment. The Basic Law is hence in addition to the principle of human dignity entrenched in Article 1.1 of the Basic Law and the core of the following fundamental rights encompassed within it (see BVerfGE 84, 90 (120-121); 94, 12 (34)) also declares other guarantees to be inalienable, which are determined in Article 20 of the Basic Law'[347]

[343] 1 BvR 471/10, 1 BvR 1181/10 1(b) (2015)
[344] 1 BvR 471/10, 1 BvR 1181/10 3 (2015)
[345] 1 BvR 471/10, 1 BvR 1181/10 3(b) (2015)
[346] 2 BvR 1500/97 (2000)
[347] 2 BvR 1500/97 (2000) 84

Therefore, even where a religion or faith acquires the status of a corporate body and thereby gains greater freedom and sovereignty, human dignity cannot be waived and needs to be upheld by such a religious grouping.[348]

In the life imprisonment[349] case, the constitutionality of the life sentence was evaluated. The court stated that the proportionality between the crime and the sentence is paramount. Any sentence passed needs to comply with the right to human dignity, thereby cruel, inhumane and humiliating punishments are unconstitutional.[350]

It was determined that the right to human dignity in conjunction with the principle of the social state, demands that the state guarantees the offender a minimum quality of life. The right to human dignity still applies to criminals and they cannot be treated as objects in an effort to manage crime. Hence, the retention of their value and respect must be guaranteed.[351]

The court also held that the right to dignity would be violated if a person convicted and sentenced to a prison sentence would not have the possibility of regaining his freedom.[352] The rationale for that is that a prison sentence needs to comply with human dignity and thereby focus on resocialisation and the possibility of being reintroduced into society. Nonetheless, where a prisoner remains dangerous and does not take the chance offered to become socialised, then such prisoner can be kept in prison.

In the 2 BvR 2259/04 case, the Constitutional Court dealt with the question whether the extradition to the United States of America was lawful, as the defendant might face life imprisonment without the possibility of parole if convicted. In terms of German law, a person must have the possibility of being released.[353] The Constitutional Court found that the extradition would

[348] 2 BvR 1500/97 (2000) 86
[349] BVerfGE 14/76 (1977) 45, 187
[350] BVerfGE 14/76 (1997) 45, 187
[351] Bumke C et al German Constitutional Law: Introduction, Cases and Principles (2018) 97
[352] Bumke C et al German Constitutional Law: Introduction, Cases and Principles (2018) 97
[353] 2 BvR 2259/04 (2005) 5

be admissible, as long as the death sentence would not be imposed, for which the United States gave assurance. Furthermore, the possibility of being released did exist even for a sentence of 'life imprisonment without the possibility of parole'. This can either be achieved by a pardon or commutation of the sentence. The Constitutional Court was satisfied with that these possibilities existed and that therefore the defendant's right to dignity would be upheld.[354]

The Court also referred to the fact that in order to uphold extradition between the two countries, the law of the other country has to be respected. It was stated that:

'even if in detail they do not comply with domestic German views'[355]

Essentially referring to the fact that a lower minimum standard of rights than the one applicable in Germany will be accepted in favour of honouring its commitments under the agreement. The process to be pardoned in the United States involves the discretion of the Governor to make the final decision. Even though the process is different and possibly makes it more difficult to be released, the Court held that it must respect different standard.[356] Only where the violation is sufficiently harsh will the court consider to intervene.

4.5 Conclusion

The right to dignity has only sparingly been utilised in the courts of the European Union. This is partly due to the nature of the Union, which only has limited competencies in the fields that have been conferred by the member states, but there is also a certain hesitancy by the courts to define or enforce dignity specifically.

[354] 2 BvR 2259/04 (2005) 5-8
[355] 2 BvR 2259/04 (2005) 24
[356] 2 BvR 2259/04 (2005) 35-38

In Germany, the right to human dignity has often been approached in a way, where violations are pointed out rather than defining what human dignity is, this is also referred to as the object formula.[357] It is apparent that from the case law that the legal theory underlining human dignity is the object theory, whereby human beings shall not be treated as objects of the state.[358] As is shown in the Aviation Security Law case, the right to human dignity is absolute and strictly enforceable. In my opinion, this ends up being somewhat problematic. The weighing of rights in relation to human dignity does not take place, as it is 'inviolable'. This creates situations that run the risk of illogical and unconvincing decisions, due to the unsystematic approach. The weighing of rights consists compares and analyses the competing rights, allowing for more calculated and measured outcomes. The Aviation Security Law case, shows that a weighing of rights is sometimes perhaps preferable over the strict enforcement of an absolute right. In the context of a society, decisions should be taken in the context of reasonableness, rather than dealing in absolutes.

The next chapter will compare and evaluate the approaches to dignity that have been discussed in this paper and will thereby bring the discussions to an end.

5 Comparison

5.1 Introduction

This chapter will conclude the discussion and compare how human dignity has been understood and applied in South Africa, the European Union and

[357] Ullrich D, Concurring visions: Human dignity in the Canadian charter of rights and freedoms and the Basic Law of the Federal Republic of Germany (2003) Global Jurist Frontiers, Volume 3;1 74

[358] Unger S, 'Human dignity shall be inviolable' · Dealing with a Constitutional Taboo (2013) 189-202

in Germany, respectively. The discussion will take into consideration the context of the specific legislation, human rights theory and the case law that has been discussed.

The discussion will evaluate some of the factors that make one approach preferable over the other in light of advantages and disadvantages. It will also evaluate which approach is most conducive to being in line with the philosophical underpinnings of dignity.

5.2 Comparison

South Africa, Germany and the European Union alike honour human rights and recognise the importance. The recognition of the importance of human rights and thereby human dignity has resulted in the entrenchment of human dignity in the constitutions of Germany and South Africa, while the European Union as an international organisation sui generis has a Charter, which fulfils a similar function.

The South African and German constitutions were both drafted in response to human right violations of the past. For that reason, human dignity plays a central role in both documents, with the South African Constitution mentioning it as one of the three democratic values that the Constitution will protect and promote. Human dignity is also contained in the Bill of Rights as a specific right in section 10.[359] The German Constitution lists human dignity as the very first right, thereby highlighting its status. The European Union on the other hand, was not created with the objective of being 'state-like', the conferral of competencies happened over decades. The European Union operates on the basis of treaties signed by the member states.[360] In regard to human dignity, the two most important pieces of legislation are the Treaty of the European Union[361] (TEU) and the Charter of Fundamental Rights of the

[359] The Constitution of the Republic of South Africa (1996) s 10
[360] European Commission, The European Union: What it is and what it does (2020)
[361] Treaty on the European Union (1958)

European Union[362]. The drafting of the Charter of Fundamental Rights of the European Union took into consideration the historical context of the European Union, its member states and the declared aim of securing peace and prosperity. The first article contains the right to human dignity and is worded in a similar manner to the right to human dignity in the German Constitution. The Universal Declaration of Human Rights is another public international law example, which is worded similarly and influenced the German Constitution.[363]

The scope that the term human dignity covers and the interpretation of how it is understood in the legal context differs between the countries and the Union. In South Africa, the concept extends to almost all branches of the law directly or indirectly. Indirectly through the limitation provision and the duty of the state to protect and promote dignity. The case law has clearly shown that the court is very conscious of that duty and the responsibility it has to play its part in the transformation of the country. S v Makwanyane[364] has made that very clear. As opposed to the European Union, where there is a great degree of hesitancy to invoke the right to human dignity directly, South Africa is allowing more cases to be decided in relation to human dignity, always bearing in mind past transgression and the obligation of the courts to protect the dignity. The European Union's stance can partly be explained by the judicial process that takes place and also the nature of its jurisdiction. The European Union only has the necessary jurisdiction, where the member states have conferred such competencies to the Union. For that reason, the main responsibilities of the courts takes place in relation to matters in the realm of business law and trade. Germany can also be said to be less generous than South Africa when it comes to invoking the substantive right to human dignity in court proceedings. In my view, the wording of the German Basic Law and the Charter of Fundamental Rights of the European

[362] Charter of Fundamental Rights of the European Union (2000)
[363] Universal Declaration of Human Rights (1948)
[364] S v Makwanyane and Another 1995 (3) SA 391 (CC) 5

Union concerning human dignity makes it more restrictive than the concept should be. The word 'inviolable' is used, which essentially makes human dignity an absolute right, whereas in South Africa, it can be limited.

As mentioned before, an absolute right in my opinion creates scenarios and situations that are not logically sound and as can be inferred from the case law previously discussed, might have the effect of resulting in the under-invocation of the right in question, as the legal implications of an absolute right are so serious. In the German Aviation Security Law Act[365] case, the court evaluated the right to dignity of those innocent passengers of an airplane, to be used as a weapon. They arrived at the conclusion that it would violate their human dignity to be shot down by the military in order to save lives.[366] The interpretation of human dignity that the court made use of specifies that a person may not be viewed as a mere object. However, on the other hand, this is problematic when evaluating the human dignity of the people who will die as a result of not shooting down the airplane. Their human dignity and right to life would also be at stake and they would ultimately be objectified as 'collateral damage'. Regardless of phrasing the right to human dignity as an absolute right, in reality situations arise where rights are competing and it might be beneficial to acknowledge that and weigh the competing interests. Theoretical considerations should still be effective in relation to the real world. Where those passengers on a highjacked plane will die with absolute certainty, would it not be in the best interest to shoot them down and uphold their human dignity by letting them die on their own terms and not on their captors, while thereby saving the life of fellow citizens?

In South Africa the case law expands, adjusts and defines human dignity, while in Germany and in the European Union courts it is more often used in

[365] BVerfGE 357/05 (2006)
[366] BVerfGE 357/05 (2006)

a negative sense, rather stating what human dignity is and entails, it is pointed out what it is not. I believe South Africa has benefited from their approach, even though it can occasionally result in the court extending the right to human dignity too far. The Carmichele case might be an example of that. Holding the state liable for damages might jeopardise the resources of a state. However, in comparison to the German court, there is a great degree of self-awareness and sense of upholding and furthering the Bill of Rights. This becomes apparent in the cases regarding religion at schools. The German courts stated in the headscarves case that the garment in question had to 'accepted', while simultaneously placing a lot of emphasis on the fact that it is mandatory in terms of a certain interpretation of Islam. The South African Constitutional Court held in the Mec for education [367] case that cultural and religious differences should be celebrated and not merely permitted. For that reason, even voluntary practices should be allowed at school, such as the wearing of a nose stud in terms of Hindu and Indian traditions. The link between being part of a community, self-identity and human dignity was elaborated on in a manner, which provides more insight into what human dignity means. The recognition that South Africa is a country with lots of cultures that celebrates and promotes diversity is a stark contrast to the wording of the German Constitutional Court that merely 'accepts' a religious practice. The courts in both countries are obliged to apply the law and implement the democratic and equalitarian principles that the countries were founded on. In South Africa the right to culture is entrenched in the Constitution, while Germany's Constitution recognises human rights as the 'basis of every community'. The following remark by the South African Constitutional Court shows greater propensity towards that commitment than the German counterpart:

"The acknowledgment and acceptance of difference is particularly

[367] Mec for Education: Kwa Zulu-Natal, Thulani Cele: School Liaison Officer, Anne Martin: Principal of Durban Girls' High School, Fiona Knight: Chairperson of the Governing Body of Durban Girls' High School v. Navaneethum Pillay, Governing Body Foundation, Natal Tamil Vedic Society Trust, Freedom of Expression Institute 2008 (2) BCLR 99 (CC)

important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation."

The life imprisonment[368] case and S v Makwanyane show a propensity to favour an approach to justice that is restorative rather than retributive and places emphasis on the perpetrator in relation to human dignity. The judiciary in both countries has decided that the right to human dignity of the perpetrator of a crime needs to be protected and that for those reasons 'cruel and inhumane treatment' is not permitted. The death penalty in South Africa has been declared to fall within the real of what is 'cruel and inhumane' , while in Germany the life imprisonment case established that everyone should be afforded to be released from their prison sentence. Some legal scholars have criticised this approach as being too focused on the rehabilitation of criminals in the South African context. The argument leans on the crime statistics. In the first ten years after the death sentence was temporarily suspended, more than a quarter of a million people have been murdered.[369] Despite the fact that the numbers of murders have reduced since then, the (intentional) murder rate for South Africa was 35.9 per 100 000 people[370]. While Germany and other European countries typically have a murder rate of 0.71 in Germany, France with 1.28 in France being close to the top of the list.[371] Although the decision in S v Makwanyane sought to protect the dignity and right to life, in hindsight, the value of life has dramatically diminished. The right to life and dignity of the innocent citizens should also

[368] BVerfGE 14/76 (1977) 45, 187
[369] Snyman CR, Criminal Law (2014) 22
[370] https://data.worldbank.org/indicator/VC.IHR.PSRC.P5?locations=ZA
[371] https://www.statista.com/statistics/1268504/homicide-rate-europe-country/

be taken into consideration.[372] By reason of the aforementioned, it has been contended that the death sentence might see murderers executed, but might uphold the right to life of those innocent, while in the least offering retributive justice in line with the community's sentiments.[373]

In light of socio-economic rights, I believe that South Africa found a good way to balance the right to dignity and effective government, as demonstrated in the Grootboom[374] case. The recognition that human dignity involves some aspects, which the state is unable to provide at the moment, also emphasises the benefit of rights that are not absolute. The state can admit of not catering upholding everyone's right to human dignity in light of access to food, shelter and clothing. However, the decision not only clarified what falls under human dignity, but also conferred the duty on the state to devise a reasonable plan to cater to those in need. Germany is a social state in any event, but in terms of human dignity has most probably a similar scope as the South African interpretation of the right. In the life imprisonment case, the court decided that even prisoners shall be guaranteed the minimum quality of life, therefore it is to be assumed that this also extends to other citizens.

In regard to deportation or extradition, it would appear that the European Union, Germany and South Africa take a similar approach. The human rights still apply to such proceedings and place the obligation on the state to honour dignity and other human rights.[375] A remark made by the German Federal Constitutional Court seems to limit the enforcement of human dignity. The court stated that they will accept a lower standard for human dignity in order to uphold extradition agreements and to honour the sovereignty of states. Even where the law is not in line with the German view on how a certain right

[372] Snyman CR, Criminal Law (2014) 28
[373] Snyman CR, Criminal Law (2014) 26
[374] Government of the Republic of South Africa and Others v. Grootboom and Others 2001 (1) SA 46 (CC)
[375] Mohamed and Another v. President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening) 2001 (3) SA 893 (CC) 70-72

should be applied, the law of the other state should be respected. On the one hand the courts are thereby enforcing their view on what constitutes human rights by making sure that the death penalty is not imposed, on the other hand however they are weighing their interpretation of what constitutes human dignity against the importance of extradition agreements and the sovereignty of other states. In the end they accept a lower standard for the right of human dignity. In my view, that is noteworthy as the inviolability of human dignity is part of the German law and a weighing is usually not part of the considerations. It might be a slight deviation from the uniform and at times rigid approach in terms of the inviolability of human dignity.

In the Barkhuizen[376] case, the South African courts even extended human dignity to contractual clauses in the shape of public policy considerations. A clause, which does not comply with public policy is unenforceable. This can be viewed as somewhat problematic in light of the principle of legal certainty. However, it also demonstrates the willingness to protect and promote human dignity, especially when bearing in mind that the power gap between two contracting parties is sometimes extremely wide.

Coming to a conclusion, it is notable that the concept of human dignity has a lack of clarity in the European Union and Germany, when compared to South Africa. In South Africa many cases have established significant links to other rights or maxims, which over time will create a more complete picture of what dignity entails. In my opinion, a clearer understanding guides and creates a more comprehensive protection of the rights of the individual. Human dignity in Germany and the European Union is mostly based on the prohibiting cruel treatment and objectification, while in South Africa it can be regarded as an instrument for transformation, bringing about the changes

[376] Barkhuizen v Napier (CCT72/05) [2007] ZACC 5; 2007 (5) SA 323 (CC)

envisioned in the Constitution.

It needs to be mentioned that the extensive use of the right to human dignity in South Africa does not necessarily equate to a better protection of the individual. Human rights violations can often be addressed in relation to other rights. In my opinion it does however show that regardless of whether the courts decisions are correct or incorrect, there is a willingness in South Africa to remedy the problems of the past and embrace the Constitution and the rights contained therein, perhaps more so and in a more open-minded manner than in Germany or in the European Union. When dignity is used as it is in South Africa, a consequence of that might be that legal certainty is diminished. This presents a question that is rooted in jurisprudence and that is whether dignity and the law are compatible in a manner where it is used extensively without going putting the principle of legal certainty at risk.

Firstly, one approach to the equivocal concept of human dignity could be to 'work it pure'. The idea of 'working something pure' relates to complex concepts that become more distinct through adjudication.[377] It could be said that this process in South Africa is already ongoing. However, the difficulty lies in the fact that there is a multiplicity of uses of dignity. It can be used as a substantive right, a value and in several branches of the law, so what exactly would a distinct meaning pertain to. The alternative would be to use existing principles and construe a meaning from that. This more conservative approach is similar to what can be observed in Germany and especially in the European Union, which results in a more narrow interpretation. In Germany and the European Union, human dignity is used mostly focused on atrocities and bodily integrity.[378] Instead of using the power to establish a system, which would need to take into consideration the multiplicity of applications and meanings, human dignity was demoted to a regulatory use. The purpose of regulatory use is that the right becomes less complex to apply

[377] Stephen R, Human dignity and law: Legal philosophical investigations (2018) 7
[378] Stephen R, Human dignity and law: Legal philosophical investigations (2018) 7-8

in the legal context.[379] In my view, that unnecessarily limits dignity in a way in which it lacks the intrinsic value of relating to a variety of situations.

[379] Stephen R, Human dignity and law: Legal philosophical investigations (2018) 8-9

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About the Author(s)

Timur Öztunali was a student in European Legal Studies at the Europa-Kolleg Hamburg. He received his Bachelor of Laws as well as his Master of Laws (in Comparative Labour Law) at the University of the Western Cape in South Africa.

Contact: timur.oeztunali@gmail.com

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Editors
Europa-Kolleg Hamburg
Institute for European Integration
Prof. Dr. Jörg Philipp Terhechte, Managing Director
Dr. Andreas Grimmel, Research Director
Windmühlenweg 27
22607 Hamburg, Germany
http://www.europa-kolleg-hamburg.de

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