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Dignity and Disgrace – Moral Citizenship and Constitutional Protection*

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INTRODUCTION AND SUMMARY – EXPLAINING THE ROLE OF DIGNITY

- [1] Why has dignity taken such a central place in South Africa’s constitutional jurisprudence? And what does it tell us about the fact that South Africa’s Constitution was the first anywhere that expressly outlawed discrimination based on sexual orientation, and one of the first to extend equal rights to marry to lesbian and gay couples? The puzzle is worth unravelling.
- [2] On a visit to the Constitutional Court of South Africa in February 2010, Professor Catharine MacKinnon, who described herself as the pioneer of the “substantive equality” approach to rights, forcefully expressed her bemusement that the Court’s equality jurisprudence centred on the right to dignity.¹ MacKinnon has recognised that “deprivation of dignity is often a powerful dimension of the substance of inequality and does some of its work.” But she has also asserted that ascribing dignity to humans, particularly when employed in the Kantian sense of their unconditional and incomparable worth,² is simply inadequate to address certain social practices or relationships that undermine it, or instances where individuals willingly relinquish it.³

¹ Professor MacKinnon declared, “As the pioneer of the substantive equality approach, I just don’t get it why anyone thinks dignity has to do the work.” (Personal communication.)

² Cite to Kant’s “unconditional and incomparable worth.”

³ Catherine MacKinnon, “Substantive Equality: A Perspective”, 96 *Minn. L. Rev.* 1, 10 (2011). Professor MacKinnon has written extensively about the failure of the United States Supreme Court to undertake a substantive equality analysis of the statute outlawed in the same-sex sodomy case, *Lawrence v. Texas*, 539 U.S. 558 (2003). Implicit in her critique seems to be a belief that dignity, while serving a powerful rhetorical purpose, cannot replace a substantive equality analysis of discriminatory laws or practices. See “The Road Not Taken: Sex Equality in *Lawrence v. Texas*”, 65 *Ohio St. L. J.* 1081-1095 (2004).

- [3] Yet there is sound reason why dignity, for all its indeterminacy, has taken so central a place in the formative jurisprudence of the Court. It is to be found in South Africa's past of racial indignity – where racial subordination was both premised on and enacted shamefulness and disgrace.
- [4] Apartheid laws deprived black South Africans of their citizenship, gave them education that was inferior to whites', segregated and confined them on land both urban and rural, and relegated them to poorer jobs and economic roles.
- [5] But those laws represented, and did, more. They derived from the view that black South Africans were subordinate and inferior humans, and treated them accordingly.⁴ They enunciated and practised the condition of “non-whiteness” as legally shameful.
- [6] I grew up in apartheid South Africa in a desperately poor and fractured white family. But I was glad not to be black. At home, at school and on the street, my daily consciousness was imbued with a sense and gratitude that, at least, I was white. The shame of being black, not only with the legal impediments and subordinations that marked it, but with the stigmatised condition those impediments implied, was not mine. My humanness was superior: unshamefully white.⁵
- [7] In this way, apartheid laws damaged both white and black, by stigmatising black people, placing a mark of shame on their race, and by injuring white people with an award of a false conception of superiority. This legacy re-emerges vividly in persisting, acrid controversy about race in South African society.⁶

⁴ Thus the National Party's 1947 Manifesto, on which the white electorate voted it into power in 1948, proclaimed that “Bantu education” should be “adapted” to the “development level” of “the vast majority of Bantu people”, and that “the Bantu in urban areas should be regarded as migratory citizens [of their rural “homelands”] not entitled to political or social rights equal to those of the Whites”. Available at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=298016&sn=Detail> (accessed 6 June 2012).

⁵ In a statement attributed to him in the *Boston Globe* of 25 October 1977, after his death, black consciousness activist Stephen Bantu Biko said, “We know that all interracial groups in South Africa are relationships in which whites are superior, blacks inferior. So as a prelude whites must be made to realize that they are only human, not superior. Same with blacks. They must be made to realize that they are also human, not inferior.” Sourced from http://en.wikiquote.org/wiki/Steve_Biko.

⁶ That this past still haunts us emerged in a vivid recent controversy. An artist, Brett Murray, painted a portrait of President Jacob Zuma, which was displayed for sale in a commercial art gallery in Johannesburg. The portrait was based on a famous image of Vladimir Lenin. But, unlike the original, this portrait portrayed the figure represented with fully naked genitals.

This elicited an impassioned reaction. The portrait was seen as shameful. It was criticised degrading to the dignity of black people, and as rekindling the past where blacks were subordinated and shamed.

Two people defaced the painting, smearing black and red paint over it. Both the governing African National Congress and President Zuma sought an injunction (interdict) against the artist, the gallery and a Sunday newspaper, *City Press*, which carried the image on its website, asserting that the image unlawfully infringed the

- [8] But, like other, less racist, societies, apartheid created also a further category of subordination and shame: that of deviant sexuality. There, too, the law stigmatised and persecuted a condition that was seen as undesirably shameful: homosexuality and same-sex sexual conduct.
- [9] Of that category I was shamefully part. I was gay in an otherwise heterosexual world, a world that would accommodate me only to the extent that I managed to pretend that I was straight.
- [10] When it came to determining the ambit of constitutional protection, those negotiating for gays and lesbians could plausibly contend that including sexual orientation as a protected condition was analogous to including race – both conditions had been harshly stigmatised under apartheid, and both had been subjected to severe indignity. By this path, the generous embrace of equality and non-discrimination was extended to sexual orientation.
- [11] That same spirit has been evident in the Constitutional Court’s jurisprudence.
- [12] In this paper I argue that the inclusion of sexual orientation as a protected ground in South Africa’s Constitution, and the Court’s vigorous assertion of sexual orientation equality, can be fully understood only by understanding the indignity apartheid’s racialised assault on black South Africans inflicted. That this protection has been based so centrally on asserting the inherent dignity of all, reflects the continuing palpability of a past of indignity and shame.

LEGAL STIGMA & MORAL CITIZENSHIP

- [13] In 1963, in a justly famous analysis, the sociologist Erving Goffman identified the “structural preconditions” of stigma as consisting in a trait or attribute that amounts to an “undesired differentness” – one that contravenes society’s expectations or the

dignity of the President. It also called for a boycott of the newspaper. Many cited this as political bullying and a threat to free expression; others considered that the image was a racial assault on the dignity not only of the President, but on black South Africans and their culture.

That a painting could cause such a furore; that so many could demand that the portrait be taken down and the newspaper boycotted signal the depth of passion, anger and hurt expressed. For many black South Africans, the depiction of an African leader with genitals displayed showed that whites still do not regard them as worthy of dignity or respect. Whether this is what the painting intended, or even whether it is what it objectively implied, is beside the point. As one commentator noted, “the anger runs far deeper than a reaction to an artwork: it is triggered when a public event gives people reason to believe they are victims of prejudice again.” (Steven Friedman, “Spear row can get us to face our real problem,” *Business Day* 30 May 2012, available online: <http://www.businessday.co.za/articles/Content.aspx?id=172924>.)

standards upon which collective identity is predicated.⁷ Stigma arises because society, through its social settings, laws, cultural practices, and policies, creates a structure and language for categorising people and hence for identifying qualities that are regarded ordinary or “natural”.⁸ These take on a normative meaning, which entails that those who cannot meet them are “discredited”.⁹

- [14] Discrediting confers an inferior social status, and concomitantly, less power and access to resources.¹⁰
- [15] This is the essence of social stigma, and it takes little imagination to see that apartheid legal institutions systematically “discredited” black people.
- [16] At its most brutal, the legal apparatus of apartheid denied black South Africans the vote, land, freedom of movement, jobs, public office, educational opportunity, the capacity to learn in their own languages and the liberty to choose their sexual partners and spouses. It deprived them even of their South African citizenship.
- [17] The process of degradation of civic status started with the European settlement of South Africa in the 17th century.¹¹ Over time, successive white governments made laws that regulated both the public and the most intimate aspects of people’s lives, and in particular, placed the onerous restrictions on the movements, relationships and economic choices of black people.¹²
- [18] Perhaps the most oppressive embodiment of this control was the pass laws,¹³ which required black people at all times to carry a document¹⁴ that denoted permission to be

⁷ Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* 5-6 (Simon and Schuster, 1986).

⁸ Goffman, *supra* note ** at 2.

⁹ Goffman, *supra* note ** at 2. See also Gregory Herek, et al., “Sexual stigma: Putting sexual minority health issues in context”, at 1, in I. Meyer & M. Northridge (eds.), *The health of sexual minorities: Public health perspectives on lesbian, gay, bisexual, and transgender populations* (2007).

¹⁰ Herek, *supra* note ** at 2.

¹¹ See Lawrie Schlemmer, “The Factors Underlying Apartheid”, in *Anatomy of Apartheid* 20-21 (Peter Randall ed. 1970) (noting that master-slave relationships beginning in Cape Colony of the seventeenth-century established blackness as a badge of inferiority that has persisted throughout the country’s history). See also Nigel Worden, *The Making of Modern South Africa: Conquest, Apartheid, and Democracy* (3 ed, 2000).

¹² “Black”, unless I mention otherwise (specifically where I quote Stephen Bantu Biko), refers to people characterised as “Bantu” or “African” by the apartheid-era government.

¹³ As early as the eighteenth century, slaves and Khoi peoples were required to carry “passes” from their employers to demonstrate that they were not runaways (Worden, *supra* note ** at 74-80). Passes were systematised in a series of laws promulgated over a thirty-year period. These included: The Native (Urban Areas) Consolidation Act, No. 25 of 1945 (which sought to carry out the state’s programme of ‘influx control’ to restrict not only the movements but also the residence of black people in predominantly white parts of the country); The Native Laws Amendment Act, No. 54 of 1952 (designating *all* urban areas of the country to be areas for which black people must produce a pass to validate their entry); The Natives (Abolition of Passes and Coordination of Documents) Act, No. 67 of 1952 (simplifying the passes to make police administration of passes

in a particular city or location for a specific purpose. The “pass” came to symbolise the viciousness and pettiness of apartheid.

- [19] To be caught without a pass was a crime. Many hundreds of thousands of black South Africans were arrested every year for violating these laws,¹⁵ and sentenced to jail terms, generally short, but often repeated. The very spectre of arrest dominated black urban life. In this way, apartheid made criminals of a large proportion of South Africa’s adult population.
- [20] The system of discrimination, constraint and denial required black people to collide, at every turn, with an omnipresent legal machinery that regulated their lives. The laws sought to erect and entrench “separateness”. Necessarily, they embodied a pervasive strategy of repression and domination.¹⁶
- [21] But they did more than this. They branded black South Africans as inferior.¹⁷

easier); The Native Laws Further Amendment Act, No. 79 of 1957 (requiring the issuance of a bound reference book to all black people, aged 16 or older); Bantu Laws Amendment Act, No. 19 of 1970 (requiring that a black person deemed guilty of being present in an urban area illegally might be sent by a court to a work colony, institution, or rehabilitation scheme and to perform manual labour there). For a comprehensive overview, see Muriel Horrell, *Laws Affecting Race Relations in South Africa (To the end of 1976)* 171-195 (1978).

¹⁴ A “pass” contained a run-down of personal information: fingerprints, birth date and location, residential address, employer information, history of tax payments, plus any exemptions from particular laws or regulations. It also reflected authorisation to be in a particular area for more than seventy-two hours. A government commission convened in 1946, the Fagan or Native Laws Commission, concluded that black people might consider a “pass” objectionable because it was carried only by members of a particular race; embodied restrictions on freedom of movement; and always had to be carried upon a person’s body, to be produced immediately upon the request of the police: Muriel Horrell, *Laws Affecting Race Relations in South Africa (To the end of 1976)* 171-172 (1978).

¹⁵ See John F. Burns, ‘Pass’ Laws, *Aspect of Apartheid Blacks Hate Most, Bring Despair and Pent-Up Fury*, N.Y. Times, 24 May 1978. Burns notes that in 1977, of the more than 400,000 black people arrested for violating the pass laws, more than 200,000 black people received a jail sentence. See also Worden, *supra* note ** at 81. A 1956 petition to the Prime Minister submitted on behalf of “the Women of South Africa”, seeking the withdrawal of the pass laws for women and the repeal of the pass laws, declared: “For hundreds of years the African people have suffered under the most bitter law of all—the pass law which has brought untold suffering to every African family. Raids, arrests, loss of pay, long hours at the pass office, weeks in the cells awaiting trial, forced farm labour—this is what the pass laws have brought to African men. Punishment and misery—not for a crime, but for the lack of a pass.” Thomas Karis and Gail Gerhart eds, *From Protest to Challenge: A Documentary History of African Politics in South Africa – Challenge and Violence (1953-1964)* 250-251 (1977).

¹⁶ See Max Coleman, ed., *A Crime Against Humanity: Analysing the Repression of the Apartheid State* 13-27 (Human Rights Committee, Johannesburg 1998) (discussing the repressiveness of the legal regime, including preventive detentions; the holding of tens of thousands of people without trial; restrictions on public political meetings and other political activities).

¹⁷ For a judicial reflection on the apartheid era’s systematic discrimination against black people, see *Brink v. Kitshoff* NO 2996 (4) SA 197 (CC), para 40.

- [22] The effect of apartheid's laws in "discrediting" black people in this way was fiercely contested: indeed, it was the cause of an externally based liberation struggle and a massive internal rebellion.
- [23] But the legal meaning of apartheid was to subordinate, discredit and stigmatise blackness. That meaning inflicted injury on all who lived under it, black and white.
- [24] The injury was also subsumed internally. The American W.E.B. Du Bois articulated how this may happen. He spoke of a world that yielded an African-American descendant of slaves "no true self-consciousness, but only lets him see himself through the revelation of the other world":¹⁸ thus creating a sense of "measuring one's soul by the tape of a world that looks on in amused contempt and pity".
- [25] But whose "tape" is to be used in this measurement? This question was taken up fiercely and eloquently by Stephen Bantu Biko, the young activist beaten to death in police detention in September 1977. He saw black¹⁹ people's struggle against racial categorisation, restriction and control as being against "forces that seek to use your blackness as a stamp that marks you out as a subservient being".²⁰
- [26] He asserted a counter-consciousness, an assertive black consciousness, that sought "to infuse the black community with a new-found pride in themselves, their efforts, their value systems, their culture, their religion, and their outlook to life."²¹ His vision recognised the psychic scarring of legal stigma, as well as the internal dimension

¹⁸ *The Souls of Black Folk* (1903), available at <http://www.bartleby.com/114/1.html>. He writes poetically of the psychic struggle with social stigma:

[T]he Negro is a sort of seventh son, born with a veil, and gifted with second sight in this American world,—a world which yields him no true self-consciousness, but only lets him see himself through the revelation of the other world. It is a peculiar sensation, this double-consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity. One ever feels his two-ness,—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.

The history of the American Negro is the history of this strife,—this longing to attain self-conscious manhood, to merge his double self into a better and truer self. In this merging he wishes neither of the older selves to be lost. He would not Africanize America, for America has too much to teach the world and Africa. He would not bleach his Negro soul in a flood of white Americanism, for he knows that Negro blood has a message for the world. He simply wishes to make it possible for a man to be both a Negro and an American, without being cursed and spit upon by his fellows, without having the doors of Opportunity closed roughly in his face.

¹⁹ Biko used the term "black" as encompassing all South Africans of colour, including "Africans," "Indians" and "Coloureds".

²⁰ Biko, *I Write What I Like*, 52.

²¹ Biko, *supra* note *** at 53.

necessary to true liberation: “The interrelationship between the consciousness of the self and the emancipatory programme is of paramount importance.”²²

- [27] Biko proclaimed that the fundamental tenet of black consciousness was “that the black man must reject all value systems that seek to make him a foreigner in the country of his birth and reduce his basic human dignity”.²³
- [28] Biko rightly saw that the primary impact of apartheid was as a systematised affront to racial dignity, and that its reclamation was a task both public and private, both external and internal.
- [29] This is so because the effect of systematic degradation persists even after legalised racial,²⁴ and other, stigmas are abolished.²⁵ They burden even without being internalised, merely because the perceptions might be applicable.²⁶
- [30] But the apartheid state assailed not only race. It also demeaned on the basis of sexual identity.
- [31] Sexual expression was severely policed. In 1927, the apartheid parliament passed the Immorality Act, forbidding extra-marital sexual relations between white and African people. This was amended after 1948 to prohibit sex between whites and any other

²² Biko, supra note *** 53. Biko also captured Du Bois’s idea of the “consciousness of the self”, which had for centuries enabled black people to find the courage to endure as well as to lead ordinary, even normal lives in a society that was extraordinarily abnormal: Steve Biko, “The Definition of Black Consciousness,” in *I Write What I Like* 52-57 (Picador, 2004). In *Native Nostalgia* 19 (2010) Jacob Dlamini challenges “facile accounts of black life under apartheid that paint the forty-six years in which the system existed as one vast moral desert, with no social orders, and as if blacks produced no art, literature or music, bore no morally upstanding children or, at the very least, children who knew the difference between right from wrong – even if those children did not grow up to make the ‘right’ moral choices in their lives”.

²³ Testimony in *S v Cooper and others* (the SASO/BCP trial) on 3 May 1976.

²⁴ In South Africa, research suggests that perceived discrimination, generally higher amongst historically stigmatised groups, results in higher psychological distress and other mental health effects: David R. Williams, et al., “Perceived Discrimination, Race and Health in South Africa”, 67(3) *Social Science Medicine* 441-452 (2008).

²⁵ In the United States, sociologist Claude Steele has described “stereotype threat,” in which the performance of African Americans and women in the academic realm is directly affected by their awareness of negative stereotypes about their intellectual abilities: Claude M. Steele, “A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance”, 52 *American Psychologist* 613, 616-618 (1997); Claude M. Steele, “Race and the Schooling of Black Americans”, *The Atlantic Monthly*, April 1992, available at <http://www.theatlantic.com/magazine/archive/1992/04/race-and-the-schooling-of-black-americans/6073/>. See also Glenn C. Loury, “Racial stigma and its consequences”, 24 *Focus Newsletter* No. 1 (University of Wisconsin-Madison Institute for Research on Poverty, Fall 2005) (identifying racial stigma as a “human development” problem and noting that an understanding of contemporary racial inequality requires an understanding of the extent to which “an inherited ‘racial stigma’ . . . inhibits the ability of African Americans to realize their full human potential”).

²⁶ Steele, supra note *** at 617.

race. And further in 1949 the Prohibition of Mixed Marriages Act was enacted. This not only prohibited marriage between white people and members of all other races, but also declared illegitimate any children born of a marriage later deemed invalid.²⁷

- [32] What was more, “Apartheid South Africa exhibited a well-developed tradition of legally-sanctioned discrimination against gays and lesbians. South Africa had gathered anti-homosexuality laws from each of its several legal traditions — all of which condemned homosexuality. The legal situation in pre-liberation South Africa was more harsh (de jure at least) than many of its neighbors. Whereas many sub-Saharan nations have no explicit provisions related to homosexuality, South Africa has had condemnatory laws since colonization.”²⁸
- [33] All sexual expression between men was proscribed. Laws against sodomy and “unnatural offences” were fiercely enforced. In 1969, the apartheid parliament expanded the common law and legislative prohibitions on sex between men.²⁹ Right until the lag-years of apartheid, the apartheid Parliament was considering further expansions of these crimes.³⁰
- [34] The symbolic effect of these laws was immense.³¹ As the Constitutional Court later noted, their meaning was “that in the eyes of our legal system all gay men are criminals.”³² The resonance with the way the pass laws made most black South Africans criminals is intense.

²⁷ Act 55 of 1949. This was followed by the Immorality Amendment Act 21 of 1950 (which prohibited extramarital sexual intercourse between white people and black people of all races); the Immorality Act 23 of 1957 (increasing the penalties for sexual intercourse between white people and members of other racial groups); and the Prohibition of Mixed Marriages Amendment Act 21 of 1968 (deeming void any marriage entered into by a South African citizen that could not be recognized by the Republic because it was a mixed marriage).

²⁸ Eric C Christiansen, “Ending the Apartheid of the Closet: Sexual Orientation in the South African Constitutional Process”, 32 *NYU Journal of International Law & Politics* 997 (2000) p 14.

²⁹ Section 20A was added to the Immorality Act 32 of 1957. It criminalised private conduct between “men at a party” –

“(1) A male person who commits with another male person at a party an act which is calculated to stimulate sexual passion or to give sexual gratification, shall be guilty of an offence.

(2) For the purposes of subsection (1) ‘a party’ means any occasion where more than two persons are present.

(3) The provisions of subsection (1) do not derogate from the common law, any other provision of this Act or a provision of any other law.”

³⁰ Reference Gevisser, Mark and Cameron, Edwin, *Defiant Desire: Gay and Lesbian Lives in South Africa* (1995) (New York: Routledge) pages 30–36 for President’s Council investigation to broaden laws against gays and lesbians.

³¹ In *Khumalo v Holomisa* 2002(5) SA 401(CC) O’Regan J stated the following at para [27]:

“The value of human dignity in our Constitution is not only concerned with an individual’s sense of self-worth, but constitutes an affirmation of the worth of human beings shared by all people as well as the individual reputation of each person built on his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public’s estimation of the worth or value of an individual.”

³² *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at para 28.

- [35] In my adolescent and early adult years I experienced the debilitating effect of this criminality. I felt shame at what I was: a gay man with intense yearning for same-sex companionship and expression. And I felt fear that its expression would lead to a life-ruining confrontation with the criminal law.
- [36] Sexual stigma stems from social discomfort or disregard for non-heterosexual behaviour, identity, relationships, or communities.³³ It is oppressive and pervasive, and, as with race laws, it is exacerbated when the law brands the condition as inferior: when the law discredits it.
- [37] As with the effects of racial subordination, the reparatory project is both private and public, both internal and external.
- [38] And here the law is of immense importance. The capacity to function fully within the legal sphere, and to be viewed as a fully legal citizen, helps diminish internalization of dignity and shame.
- [39] Biko's ideas were a premonitory articulation of what dignity has come to mean in South African constitutional jurisprudence: a rejection of any value system that reduces human worth. They also explain the central role of dignity in the South African constitutional order.
- [40] Dignity-based jurisprudence has helped to foster the notion of an inclusive moral citizenship in South Africa, unburdened by the humiliating exclusions and degradations of the past.
- [41] That the equal protection of the laws should have been extended so fulsomely to gays and lesbians, no less than to South Africans oppressed by apartheid's suffocating racial codes, is one of the truly remarkable aspects of our transition.
- [42] The explanation lies in the degrading experience of indignity under apartheid, which was in significant respects common to black South Africans and gays and lesbians. This argument could be advanced plausibly because gays and lesbians were deeply involved in fighting apartheid. These included Cecil Williams,³⁴ who was driving Mr Mandela when he was arrested in 1962, Simon Nkoli, the gay and AIDS activist who died tragically in 1998,³⁵ and Sheila Lapinsky, founder of the Cape Town-based Organisation of Lesbians

³³ Gregory M. Herek, et al., "Sexual Stigma: Putting Sexual Minority Health Issues in Context", in *The health of sexual minorities: Public health perspectives on lesbian, gay, bisexual, and transgender populations* (I. Meyer & M. Northridge eds. 2007).

³⁴ See <http://www.sahistory.org.za/people/cecil-williams> (accessed 25 July 2012).

³⁵ See http://en.wikipedia.org/wiki/Simon_Nkoli (accessed 25 July 2012).

and Gays (OLGA),³⁶ which initiated discussions with the ANC about sexual orientation as a constitutionally protected condition after 1990.³⁷

DIGNITY AS BOTH A FOUNDATIONAL VALUE AND A FUNDAMENTAL RIGHT

- [43] In the Constitution of South Africa, human dignity is both a founding value³⁸ and a discrete right in the Bill of Rights.³⁹ In fact, in the interim Constitution under which South Africa's transition to democracy took place, dignity was listed only as a fundamental right.⁴⁰ It was the Constitutional Court that declared, in its decision outlawing the death penalty, that dignity played a larger role than merely as a right: it was also the value on which the new democracy was founded.⁴¹ As a direct response to the *Makwanyane* decision,⁴² the Constitutional Assembly, drafting South Africa's final Constitution, adopted this. It listed dignity not only as a fundamental right, but also right at the start of the Constitution, as a founding value. It provided that dignity was one of only two rights – alongside the right to life – that is entirely non-derogable.⁴³
- [44] Dignity thus operates in the jurisprudence of the Court in two ways: as a foundational value that informs the interpretation of all other rights; and as a fully justiciable right.⁴⁴ Dignity is relatively rarely invoked as a right in itself.⁴⁵ More often it operates as a value infusing other rights, most particularly, perhaps, the right to equality.
- [45] Dignity has an important public dimension.⁴⁶ This is embodied in the status and protection that legal, social and political institutions confer. These enable us, without

³⁶ See Gevisser, M and Cameron, E *Defiant Desire: Gay and Lesbian Lives In South Africa* (1994) page 75.

³⁷ I am indebted to my colleague Justice Zak Yacoob for the observation that “one of the most important reasons for the inclusion of protection for gay and lesbian people is that they participated in the struggle for democracy”.

³⁸ Section 1 of the Constitution provides that the Republic of South Africa is one, sovereign, democratic state founded on the values that include “Human dignity, the achievement of equality and the advancement of human rights and freedoms”.

³⁹ Section 10 of the Constitution provides that “Everyone has inherent dignity and the right to have their dignity respected and protected.”

⁴⁰ Constitution of the Republic of South Africa, Act 200 of 1993, section 10.

⁴¹ *S v Makwanyane* [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1, para 58 (Chaskalson P), para 328 (O'Regan J).

⁴² I am indebted for this information to my colleague Justice Zak Yacoob, who was closely involved in drafting the final Constitution as a member of the Panel of Independent Experts advising the Constitutional Assembly.

⁴³ Constitution section 37. In states of emergency, other rights are partially derogable.

⁴⁴ O'Regan J, for the Court, in *Dawood*. See Currie & de Waal, 275.

⁴⁵ See Stu Woolman, “Dignity” in *Constitutional Law of South Africa* at 36-19.

⁴⁶ This public dimension of dignity has been given a unique flavour in South African jurisprudence by imbuing it with *ubuntu*. It has been defined as:

“In one sense ubuntu is a philosophical concept forming the basis of relationships, especially ethical behaviour. In another sense, it is a traditional politico-ideological concept referring to socio-political action. As a moral or ethical concept, it is a point of view according to which moral practices are founded

fear of abuse, discrimination or constraint, to engage *out in the world* in the commitments and activities that embody who we are and what we wish to become – to attain self-actualisation, despite the accidents of our birth and notwithstanding any incidents of lifestyle.

- [46] The Court has thus held that the anti-discrimination provisions of the Constitution provide “a bulwark against invasions which impair human dignity” and that the commitment to dignity underpins the commitment to avoid discrimination.⁴⁷ In this way, dignity is the basis of the Court’s anti-discrimination jurisprudence.
- [47] As is evident, this in many ways follows other societies that have vested dignity as a fundamental constitutional or jurisprudential value.⁴⁸ The German Constitution, in many ways a product of World War II, established the “inviolability” of human dignity and obliged state institutions to “respect and protect” it.⁴⁹
- [48] Although Canada’s Charter of Rights and Freedoms does not specifically mention dignity, the jurisprudence of its Supreme Court has invoked “respect for the inherent dignity of every human person” to ascribe meaning to those rights and freedoms.⁵⁰
- [49] The dignity and equality jurisprudence of the South African Constitutional Court has derived much of its formal and conceptual structure from that of the Supreme Court of Canada.⁵¹ But the evolution of dignity as a constitutional value in South Africa has

exclusively on consideration and enhancement of human well-being; a preoccupation with ‘human’. It enjoins that what is morally good is what brings dignity, respect, contentment, and prosperity to others, self and the community at large. uBuntu is a demand for respect for persons no matter what their circumstances may be.

In its politico-ideological sense it is a principle for all forms of social or political relationships. It enjoins and makes for peace and social harmony by encouraging the practice of sharing in all forms of communal existence.” (Mabogo More, “South Africa under and after Apartheid” in *A companion to African Philosophy*, ed. Kwasi Wiredu (Oxford, Blackwell Publishing, 2006), 149 and 156-157.)

In *S v Makwanyane* (above) at para 308, Mokgoro J explained that *ubuntu* generally “translates as humaneness”:

In its most fundamental sense, it translates as personhood and morality. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.”

⁴⁷ *Harksen v Lane* [1997] ZACC 12; 1998 (1) SA 300 (CC) para 49.

⁴⁸ See Arthur Chaskalson, “Human Dignity as a Foundational Value of Our Constitutional Order”, The Third Bram Fischer Lecture, 16 *S.Afr. J. on Hum. Rts.* 193, 196-198 (2000).

⁴⁹ *Deutscher Bundestag – Basic Law for the Federal Republic of Germany*, Art. I.

⁵⁰ See *R v Oakes* (1986) 19 CRR 308, 334-335.

⁵¹ See *The President of the Republic of South Africa v Hugo*, para 41, citing the judicial analysis of section 15 of the Canadian Charter, which the Canadian Supreme Court determined was given full effect in section 15, the equality provision of the Charter, as a result of the Court’s recognition of every individual’s inherent human dignity as crucial to their realisation in an open and democratic society. *Egan v Canada*, (1995) 29 CRR (2d) 79 at 104-5.

deeper roots. And it is wrong to think it was simply appropriated from elsewhere.⁵² It is best understood through the indignity that apartheid inflicted on most South Africans.⁵³

- [50] Dignity is intrinsic to each person (and may inhere in all beings). It comprises the deeply personal understandings we have of ourselves and our worth as individuals and in our material and social context.
- [51] No law or social practice can strip dignity, in this sense, away.⁵⁴ Apartheid was an assault on black South Africans' dignity, but its laws could not deprive them of their intrinsic human worth.
- [52] The systematic humiliation and degradation apartheid's legal structures inflicted on black people may not have detracted from their intrinsic human dignity. But it stemmed from an ideology of racial superiority that imputed to white skin colour and European culture a high value, while regarding black skin colour and African culture as inferior. This left a residue of indignity that was perceived and experienced as shameful. It is from this that the conception of apartheid's racism as "disgraceful" stems: that it sought to inflict a state of disgrace on people for no morally sound or rational reason.
- [53] In one of its earliest judgments, the Constitutional Court distinguished the South African constitution from others by noting that it marks a "decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive."⁵⁵
- [54] South African constitutional jurisprudence has thus sought to abolish the impediments of the past by ensuring that self-worth is recognized and protected by the formal institutions of the state and its law. Those who suffered from a disgraceful past would be restored to grace.

⁵² See Rowan Philp, *In Love with SA's Constitution*, Mail & Guardian, 24 February 2012 (noting one commentator's view that South Africa's reputation as a 'constitutional power' was "overblown", particularly as it cited the Canadian Supreme Court's decisions on 850 separate occasions), available at <http://mg.co.za/article/2012-02-24-in-love-with-sas-constitution> (last visited 28 Feb 2012).

⁵³ The South African writer, André Brink, once noted, "I believe that apartheid is a denial of everything that is basic to human dignity and to the concept of love[.]" See "Some Aspects of Culture and Apartheid", in *Anatomy of Apartheid* 31-32 (Peter Randall ed., 1970).

⁵⁴ See Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 Harv. L. Rev. 1596, 1612 (2011) ("Philosophically, we may say that dignity is inherent in the human person – and so it is. No law or social practice can take it away. But as a social and legal status, dignity has to be nourished and maintained by society and the law, and this . . . is a costly and difficult business and something in which we are all required to play a part. At the very least, we are required in our public dealings not to act in a way that undermines on another's dignity in this socio-legal sense [.]")

⁵⁵ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995), para 262.

- [55] We have neither forgotten nor fully healed from our oppressive past. But our Constitution has given full recognition to those previously shamed and disgraced by an oppressive system. It has created a legal framework to permit rights-assertions that have enabled people to express their anger, to demand recognition. And in doing so, it has provided the means for overcoming that past, and for asserting, at an individual and collective level, a sense of dignity.
- [56] The experience of the shameful effects of racial and gender subordination impelled those envisioning the new constitutional order to include protection for a wide array of conditions that under apartheid were disabling. Over the last decade and a half, South African law has invoked dignity to proscribe the criminal inhibitions on same-sex conduct, and to allow the recognition of same-sex partnerships, adoption, procreation and marriage.
- [57] Dignity has also enabled the Court’s jurisprudence to advance individual personhood and to erase the residues of shame by bringing differences in sexual functioning out of the hidden realm of the private sphere. The Court’s decisions have thus subverted the notion that, to avoid shameful disparagement, individuals’ activities and relationships must subscribe to uniformity.
- [58] The Court’s jurisprudence has sought not merely to abolish the impediments of the past by ensuring that self-worth is recognised and protected by the state and its institutions. It has sought to create a normative framework in which South Africans can assert their personhood without the shameful stigmata of past subordination.
- [59] In short, the function of dignity in South African constitutionalism has been to repair indignity, to renounce humiliation and degradation and to vest full moral citizenship in those who were denied it in the past.

ARRIVING AT SAME SEX MARRIAGE

- [60] The earliest judgments of the Constitutional Court saw an inextricable link between dignity and equality.⁵⁶ But the role of dignity is evidenced most strikingly in the jurisprudence on the equality of gays and lesbians.

⁵⁶ *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995), para 11. In finding that the death penalty was an unlawful violation of the Constitution, the Court found that the rights to life and dignity are the “most important of all human rights” as well as “the source of all other personal rights” set out in the Bill of Rights. As a result, the South African state’s commitment to these two fundamental rights had to be evidenced in all of its actions, including the punishments it imposes on wrongdoers (para 144). In a concurring opinion, that articulated the important historical basis for the emphasis on these fundamental rights, Ackermann J noted that the new constitutional order created a right to life that, unlike in other jurisdictions, is not a qualified one (para 154). To that end, he emphasised that South Africa’s past was characterised by the imposition of laws that were “arbitrary and unequal”. In a separate concurrence,

- [61] Over the last thirteen years, our law has invoked dignity to proscribe the criminalisation of sodomy as well as to allow for the recognition of same-sex partnerships, adoptions, and, most recently, marriages.
- [62] The pronouncements on same-sex relationships and marriage cannot be fully appreciated without understanding the impact of apartheid’s expansive racialized assault on the dignity of the majority of South Africa’s people.

Langa J noted that “The history of the past decades has been such that the value of life and human dignity have been demeaned. Political, social and other factors created a climate of violence resulting in a culture of retaliation and vengeance. In the process, respect for life and for the inherent dignity of every person became the main casualties.” (para 218).

In *President of the Republic of South Africa and Another v Hugo* (1997), President Mandela issued a proclamation allowing for the early release of certain prisoners, including mothers with minor children under the age of 12. An incarcerated father, who was the sole caretaker of a minor child, challenged his exclusion, asserting a violation of the equality clause of the Constitution. The Court by a majority rebuffed the challenge through a close dignity analysis. It found that the equality provision sought to create a new order that, in contrast to an inegalitarian past, aims to accord equal dignity to all citizens. Equal dignity and respect, the Court held, lies “at the heart of the prohibition of unfair discrimination.”

In *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), the Court invalidated a statutory provision that discriminated against married women by depriving them of life insurance benefits ceded to them or established on their behalf by their husbands. The Court recognized that constitutional principles must be interpreted mindful of the apartheid past and the systematic discrimination against black people. Although race was the most extreme and overt form of discrimination in South African society, other forms of discrimination also became deeply entrenched. To that end, the equality provisions were meant to combat not only the effects of a long pattern of racial oppression, but also the effects of other forms of discrimination.

Harksen v Lane [1997] ZACC 12; 1998 (1) SA 300 (CC) – in considering an application to declare statutory provisions that affected the estate of a solvent spouse on the sequestration of the estate of the insolvent spouse, constitutionally invalid, the Court outlined a multi-pronged test for unfair discrimination. Despite finding that there was a rational connection between the differentiation in the statute and the legitimate purpose at which it was aimed, and thus no unfair discrimination, the Court went on to explain the role of dignity in equality adjudication – which is primarily to determine whether discrimination is unfair. The Court declared that “[t]he prohibition of unfair discrimination in the Constitution provides a bulwark against invasions which impair human dignity” (para 49) and that “[u]nderpinning the desire to avoid such discrimination is the Constitution’s commitment to human dignity.”

In *Dawood v Minister of Home Affairs* 2000 (1) SA 997 (C), the Court found that the right to dignity was impaired by a statute that required the non-citizen spouse of South African residents to have a valid temporary residence permit in order to apply for an immigration permit. The Court found that the effect of this provision was to leave the non-resident spouse – and correspondingly, the family itself – at the mercy of the immigration authority. The Court also affirmed the marriage relationship, and the freedom to enter into that relationship as an essential aspect of an individual’s ability to “achieve personal fulfilment”. To that end, it said that legislation that imposes an onerous burden on the right of individuals to marry infringed directly upon the right to dignity. Such a burden might take the form not only upon a restriction on the right itself, but also upon the capacity to carry out fundamental aspects of their marital obligations, including the ability to live together.

[63] More tellingly, the same-sex rulings may not have been possible had courts relied exclusively upon the rights of privacy and equality.⁵⁷ Dignity, both as a right and as a foundational value, has enabled our jurisprudence to bring people's differences out of the hidden realm of the private sphere, by undercutting the notion that individuals' activities and relationships must correspond with uniform norms.

[64] In some ways, the cases that led to constitutional recognition of same-sex marriage were themselves the product of a past that treated most South Africans as outcasts in their own country. Instead, the jurisprudence sought to affirm each individual's intrinsic worth, regardless of social station or public disapproval.⁵⁸

⁵⁷ See *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Lawrence v Texas*, 539 U.S. 558 (2003). See also Jeffrey Toobin, "Comment: Learning from Gay Marriage", *The New Yorker*, 8 Feb 2012, available at <http://www.newyorker.com/online/blogs/comment/2012/02/ninth-circuit-overturns-prop-8.html> (last visited 14 Feb 2012); "Same-Sex Marriage, Civil Unions, and Domestic Partnerships", *New York Times*, 8 Feb. 2012, available at http://topics.nytimes.com/top/reference/timestopics/subjects/s/same_sex_marriage/index.html (last visited 8 Feb 2012); Gay Moon & Robin Allen, "Dignity discourse in discrimination law: a better route to equality?", 2006 *Eur. Hum. Rts. L. Rev.* 610.

⁵⁸ *National Coalition for Gay and Lesbian Equality v. Minister of Justice* [1998] ZACC 15; 1999 (1) SA 6 (CC): Under apartheid, the state regulated sexual conduct of gay men through enactments and the common law. The common law created the offence of sodomy, which applied only to sexual intercourse between men. In addition, the Sexual Offences Act of 1957 criminalised any act between two males at a party that was "calculated to stimulate sexual passion or to give sexual gratification". Other statutes also treated sodomy as an offence (the Criminal Procedure Act and the Sexual Offences Act). South African law, in effect, exclusively deemed criminal a specific kind of sexual act, anal sex between two men, irrespective of whether it was consensual. To that end, anal sex between a heterosexual couple or any sexual act between two women was not similarly criminalised. The Court in finding an equality infringement applied the established multipronged test, which first evaluated the nature of the differentiation; assessed whether the differentiation amounted to discrimination that was unfair; and then examined whether the discrimination could be justified under the limitations clause. Finding the discrimination unfair, Ackermann J emphasised that "Gay men are a permanent minority in society and have suffered in the past from patterns of disadvantage." He noted the severe psychological and psychic effects of such discrimination: "to reinforce the misapprehension and general prejudice of the public" and to "increase the anxiety and guilt feelings of homosexuals." While acknowledging the limitations of privacy, the Court affirmed the importance of the right, which the common law ban on sodomy infringes. It noted that the intimate and autonomous sphere of our private lives is imperative for establishing relationships without encroachment from the outside community. The Court concluded that these effects serve as a fundamental assault on the dignity of gay men. The constant threat of arrest, prosecution and conviction for sexual activity that is "part of their experience of being human" results in stigma that breeds "insecurity" and "vulnerability" that directly impinge upon their dignity. The common law offence of sodomy imposed a severe limitation on the rights of consenting men to equality, privacy, dignity and freedom. The laws infringed upon the right to dignity, in particular on the ability of gay men "to achieve self-identification and self-fulfilment." The Court noted that this harm "radiates out into society generally and gives rise to a wide variety of other discriminations, which collectively unfairly prevent a fair distribution of social goods and services and the award of social opportunities for gays."

Satchwell v President of Republic of South Africa and Another (CCT45/01) [2002] ZACC 18; 2002 (6) SA 1 (CC) – A judge in a longstanding same-sex relationship challenged the constitutionality of provisions of the Judges' Remuneration and Conditions of Employment Act 88 of 1989 that provided benefits for the surviving spouse of a deceased judge, but not for her partner. Emphasising the "duty of support" attached by the law to certain family relationships, such as a husband and wife or parent and child relationship, the Court found that such a duty may be inferred in certain kinds of same-sex relationships, namely permanent life partnerships. The equality clause was

*Minister of Home Affairs v Fourie*⁵⁹

- [65] Bringing to a seemingly logical end discrimination based on sexual orientation, the Constitutional Court has held that exclusion of same-sex couples from the right to marry contravened constitutional values and constituted unfair discrimination. In reaching its conclusion, the Court emphasised the evolution of its equality jurisprudence, emphasising the significant role played by the values of human dignity, equality and freedom.
- [66] Against the backdrop of preceding cases, the Court highlighted “four unambiguous features of the context in which the prohibition against unfair discrimination on grounds of sexual orientation must be analysed.” These are:
- i) the inappropriateness of entrenching a particular family form as the social and legal norm, given the constantly changing nature of familial formation;
 - ii) the need to recognise the past persecution of gays and lesbians;
 - iii) the fact that no comprehensive legal regulation of gay and lesbian family law rights existed; and
 - iv) the fact that our Constitution represents a “radical rupture” with a past based on intolerance and exclusion.

THE LIMITS OF DIGNITY

infringed precisely because of the nature of the partnership at issue, since it was longstanding and committed and resembled marriage.

Du Toit v Minister for Welfare and Population Development [2002] ZACC 20; 2002 (10) BCLR 1006 ; 2003 (2) SA 198 (CC): the Child Care Act and the Guardianship Act provided for joint adoption and guardianship of children only by married people. Although one statute allowed for adoption of children by a single person, it did not provide for parental recognition of a same-sex life partner. Neither statute contemplated that same-sex partners as joint guardians of children. Just as in *Satchwell*, the Court emphasised of the relationship between the two women applicants who had lived together for more than twenty-three years as life partners and who had formalised their relationship in a commitment ceremony. Emphasising that marriage and family are “important social pillars that provide for security, support and companionship among members of our society”, the Court also noted that conceptions of family and family practices must change – and that the Constitution accommodates this change. Moreover, this reality must be evaluated against a larger social reality concerning the vast number of South African children who do not have parents. The Court found that the provisions in both statutes contravened the equality as well as the dignity provisions of the Constitution. The unfair discrimination was rooted in the fact of their unmarried status, a status that resulted directly from their sexual orientation. Moreover, the Court found a restriction on their right to dignity, which demeaned the partner who acted as a primary caregiver to the adoptive children, but could not be recognised as their parent.

⁵⁹ *Minister of Home Affairs and Another v Fourie and Others* 2006 (1) SA 524 (CC).

- [67] There is substantial criticism of dignity as a basis on which to adjudicate rights. A main concern has been that dignity is fuzzy – often rife with ambiguity, and hence difficult to give a concrete meaning or effect as a realisable right.⁶⁰
- [68] One criticism is that using dignity can involve imposing a normative or ethical value onto individual behaviour or choice.⁶¹
- [69] This has happened in South Africa. In a case about sex work, *S v Jordan*,⁶² the majority upheld the criminal prohibition, rejecting all grounds of invalidity. But the minority would have overturned the criminal ban on narrow gender discrimination grounds. That judgment also rejected dignity as a basis. The minority said this was because it was not the criminalisation of sex work, but the commodification of a sex worker’s body – that is, the work itself – that undermines her dignity.⁶³ “The very character of the work they [sex workers] undertake devalues the respect that the Constitution regards as inherent in the human body.”
- [70] The judgment has been heavily criticised for making an unsustainable distinction between sexual activity that is subject to criminal sanction, and therefore subject to intervention by the state, and that which properly merits sanctuary in the private realm.⁶⁴
- [71] Indeed, dignity’s rhetorical and conceptual power may be inadequate to challenge narrow conceptions of naturalness or normalness. It has justly been said that *Fourie* idealises marriage as the most appropriate way for two people to garner public recognition and legitimation of their relationship.⁶⁵
- [72] And there may be a danger that institutionalising same-sex marriage may replace one set of dangerous repressive social norms for another – the legal sanction of sexual

⁶⁰ See Stephanie Henneke-Vaucher “A human dignitas? Remnants of the ancient legal concept in contemporary dignity jurisprudence”, I-CON (2011) Vol 9 No 1, 32-57. Justice Laurie Ackermann identified this problem by highlighting the difficulty of distinguishing between dignity as a “right” and as a “value”. “Equality and Non-Discrimination: Some Analytical Thoughts”, 22 *S. Afr. J. on Hum. Rts.* 597, 598-599 (2006). See too Tarunabh Khaitan, “Dignity as an Expressive Norm: Neither Vacuous Nor a Panacea”, 1-19 *Oxford Journal of Legal Studies*, (2011).

⁶¹ See Rory O’Connell, “The role of dignity in equality law: Lessons from Canada and South Africa”, 6 *Int. J. of Constitutional Law* 272 (2008).

⁶² 6 SA 642 (CC) (2002)

⁶³ *Jordan*, para 74 (“Our Constitution values human dignity which inheres in various aspects of what it means to be a human being. One of these aspects is the fundamental dignity of the human body which is not simply organic. Neither is it something to be commodified. Our Constitution requires that it be respected. We do not believe that section 20(1)(aA) can be said to be the cause of any limitation on the dignity of the prostitute. To the extent that the dignity of prostitutes is diminished, the diminution arises from the character of prostitution itself.”)

⁶⁴ Currie & de Waal, supra note **, at 444.

⁶⁵ Jaco Barnard-Naudé and Pierre de Vos, “Disturbing heteronormativity: The ‘queer’ jurisprudence of Albie Sachs”, 25 *SA Publiekreg/Public Law* 209, 222 (2010).

sameness or conformity. In Goffman’s language, it may “discredit” those who do not conform to the newly created social norm.

- [73] In *Le Roux v Dey*,⁶⁶ the Court certainly frowned upon sexual “otherness”. In that case, two schoolboys manipulated an image of two men involved in a “sexually suggestive”⁶⁷ pose, graphically superimposing the faces of their principal and vice-principal onto the bodies. Importantly, the court held that the mere portrayal of someone as gay was not sufficient to render it defamatory, despite the stigma that still surrounds being gay.⁶⁸ It is the constitutional framework that has enabled us to advance from criminalising homosexuality to holding that referring to someone as gay cannot on its own be defamatory.
- [74] However, the majority described the image as being of “two promiscuous men who allowed themselves to be photographed in what can only be described as a situation of sexual immorality, which would be embarrassing and disgraceful to the ordinary members of society.”⁶⁹ The boys were thus held liable for defamation.
- [75] A minority, of which I was part, found in favour of the plaintiff on the much narrower basis of affront to feelings, or *iniuria*, invoking infringement of dignity. We held that the plaintiff had suffered an affront to his subjectively-experienced, personal dignity, and that the children had acted both wrongfully and with intent.
- [76] Taken together, *Jordan* and *Le Roux* may be offered as evidence of judicial conservatism about how we express ourselves sexually. This may justly be contrasted with the assertions in the rest of the Court’s jurisprudence that no particular social norm for sexual expression should be entrenched.⁷⁰

THE POSSIBILITIES OF DIGNITY

- [77] Notwithstanding this, dignity has enabled the Court to secure a significant break from the past. As a value and as a right, dignity has affirmed and destigmatised those previously excluded. Crucially, it has also provided a framework and tools for future proscription of other forms of discrimination – for instance, against non-citizens – and for recognition of sexual expressiveness.
- [78] It is against this backdrop, characterised by the internalisation of stigma and disgrace for the majority of people in South Africa, that constitutionalism has sought to create a reparative legal framework – one in which injury to dignity can be repaired, and in which humanhood can be asserted.

⁶⁶ 2011 (3) SA 274 (CC).

⁶⁷ Id at para 1.

⁶⁸ Id at para 181.

⁶⁹ Id at para 98.

⁷⁰ Sachs J in *Fourie* at para ***.

- [79] To this end, the Constitution functions as a simple statement and thus an assertion of the dignity of all South Africans. In addition, its provisions provide symbolic affirmation, reinstatement and reparation to those previously excluded, recognising and affirming their diversity.
- [80] And it provides a practical framework for the more difficult task of attaining internal dignity, and asserting it externally, by disclaiming stigma and disgrace, and affirming moral citizenship and worth.⁷¹
- [81] The law cannot, on its own, create internal dignity or repair a history of degradation. Nor can the law by itself remove stigma or stop hatred. But it can reject branding people as subordinate and inferior and thus making them objects of shame.
- [82] The Court's jurisprudence on the equality of gays and lesbians has, therefore, both addressed social and legal equality, and sought to rectify the subordination of the past by enabling gays and lesbians to assert themselves as equal moral citizens who can fulfil their capacities as humans without shame.
- [83] Dignity thus enables not conformity, but rather the advancement of those aspects of our lives that have the potential to be distinct and extraordinary: traversing public spaces fearlessly, developing our minds and speaking freely, and perhaps finding love and generativity.

⁷¹ It is this explanation which with colleagues I sought to advance to assuage Professor MacKinnon's expressed bemusement when she visited the Court in February 2010 – see para 2 above.