Tess Watson's 'Delores Down The Rabbit-Hole' argues that popular culture offers a lense through which we can understand and examine how law functions in practice. The dystopian sci-fantasy *Westworld* is set in a world without the rule of law; rather it is governed by click-wrap contracts and a shadowy corporate culture where android hosts offer a sublime vacation in exchange for the complete commodification of the human "guests", mirroring the rise of surveillance capitalism in the real-world. The article examines how *Westworld* might work in practice, demonstrating that the concepts underpinning it are not so very far removed from our present-day common experience of law in Australia.

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HUMAN DIGNITY AND THE AUSTRALIAN CONSTITUTION – A CRITIQUE

Bede Harris*

Today dignity is referred to as the foundational value of human rights documents and of the constitutions of several jurisdictions, in particular those of Germany and South Africa, where it is expressly recognised not only as a substantive right but also as an interpretative principle governing the entire constitution. In contrast to these values-based constitutions, the Commonwealth Constitution is 'value-less' in that it was drafted as a pragmatic response to competing claims of the colonies that would form the Australian federation, rather than in accordance with any over-arching theory of the relationship between the individual and the state. This anti-theoreticism continues to be reflected in the way in which the Constitution has been interpreted by the courts. Respect for human dignity is a universal entitlement, and the failure of the Constitution to provide protection for it imposes a moral duty on legal academics to encourage their students to think about the ways in which the Constitution should be reformed.

I INTRODUCTION

This article examines the concept of human dignity as a fundamental legal value and then discusses the extent to which the Constitution is consistent with that value.

Part II examines the concept of dignity in Ancient Rome, both in its broadest jurisprudential sense as a value underlying all law, and in the sense of a private right that could be vindicated by means of a civil action. This Part also discusses the way in which dignity jurisprudence was developed in the Roman-Dutch legal system of South Africa. Part III discusses how Renaissance and Enlightenment concepts of human dignity provided a foundation for natural rights, which in turn led to dignity becoming the value upon which international human rights documents were based. Part IV discusses 20th century jurisprudential writings on human dignity, with a focus on the McDougal-Lasswell school. Part V illustrates the role of dignity in the constitutional law of Germany and South Africa and the effect it has had on constitutional interpretation. Part VI argues that constitutional debate in Australia has been marked by a profound anti-theoreticism, reflected in the absence at the Constitutional Conventions of the 1890s of debate on the question of what values the Commonwealth Constitution should be founded on, a phenomenon which is still evident today. Part VII critiques the Commonwealth Constitution in light of human dignity, with a particular focus on protection of human rights. The article ends with Part VIII which calls for

transformative action by the legal community in order to press for reform which will make our constitutional order consistent with human dignity.

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II DIGNITY IN ROMAN AND ROMAN-DUTCH LAW

A *Roman law*

The earliest references[1] to dignity are found in Ancient Rome,[2] where dignity had two distinct meanings. The first was the philosophical concept articulated by Cicero that all human beings were entitled to dignity by virtue of their capacity to use reason,[3] and were therefore bound by an obligation of mutual respect:[4]

> ... nature prescribes that a human being should be concerned for a human being, whoever he may be, for the very reason that he is a human being.

This concept influenced Roman thinking on the nature of law. Roman jurisprudence distinguished between *ius naturale* (rules of conduct prescribed by natural reason) *ius gentium* (law agreed upon by mankind as a whole, from which individual societies varied to a greater or lesser extent) and ius civile (the law of Rome itself).[5] Thus Roman jurists recognised that slavery, for example, was not permitted by *ius naturale* even though it was permitted under *ius civile* and *ius gentium*.[6] However, despite these philosophical insights, it would be anachronistic to equate the Romans' conception of *ius naturale* with natural rights recognised in later centuries. Nor did the idea that the universal set of values contained in *ius naturale* have any practical impact on Roman law – there was nothing in Roman law akin to human rights in the sense of interests that restrained the power of the state over the individual.

The second meaning of *dignitas* was a personal interest recognised by the law of delict (or civil wongs) which could be vindicated by means of a civil action, the *actio injuriarum*.[7] The *actio injuriarum* protected three interests: *corpus* (bodily integrity), *fama* (reputation) and *dignitas* (dignity).[8] While the action to remedy infringements of *corpus* has its obvious equivalent in the English common law actions for assault and battery, and the action to remedy *fama* parallels the common law action for defamation, the action to remedy *dignitas* has no equivalent in English common law. What then was meant by *dignitas*? Key to answering this question is an understanding that, as is stated by Neethling, Potgieter and Visser:

> although one may identify . . . corpus and the fama as independent personality rights with a more or less fixed meaning, the same cannot be said of dignitas

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[1] For an overview of the history of dignity as a philosophical concept see Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 *European Journal of International Law* 655 and Scott Shershow, 'Human Dignity from Cicero to Kant' in Scott Shershow, *Deconstructing Dignity: A Critique of the Right to Die Debate* (University of Chicago Press, 2014) 54.

[2] For a discussion of dignity in Stoic philosophy, see Miriam Griffin, 'Dignity in Roman and Stoic Thought' in Remy Debes (ed), *Dignity – A History* (Oxford University Press, 2017) 47.

[3] Cicero *De Officiis* 1. 105-107 (Walter Miller trans, William Heinemann, 1913). For a detailed discussion of Cicero's references to dignity see Scott Shershow, *Deconstructing Dignity* (Chicago, University of Chicago Press, 2014) 58-60.

[4] Cicero *De Officiis* 3. 27. See also *De Officiis* 3.21, where Cicero stated

> For one person to take something from another, and to increase one's own advantage at the cost of another's advantage, is more contrary to nature than death....

[5] Justinian *Institutes* 1.2.pr.-2. *The Institutes of Justinian* [John Moyle trans (Clarendon Press, 1913)].

[6] Ibid 1.3.2. See also William Buckland, *A Text-Book of Roman Law* (Cambridge University Press, 3rd ed, 1963) 53, Robert Lee, *Elements of Roman Law* (Sweet & Maxwell, 4th ed, 1956) 35-9 and Herbert Jolowicz, and Barry Nicholas, *Historical Introduction to the Study of Roman Law* (Cambridge, University Press, 3rd ed, 1972) 106-7.

[7] Authority for the *actio* is found in the Digest of Justinian at D 47.10.1.2. *Digest of Justinian* [Theodore Mommsen, Paul Kreuger and Alan Watson trans (University of Pennsylvania Press, 1985)].

[8] Reinhard Zimmerman, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Clarendon Press, 1996) 1064.

> . . ..[D]ignitas was . . . a collective term for all personality interests, excluding corpus and fama, which in Roman law had not yet been clearly distinguished and independently delimited.[9]

The inherent flexibility of the action for impairment of *dignitas* thus enabled it to be used to provide a remedy for a wide range of harmful conduct. For example, the Justinian's *Digest* stated that impairment of *dignitas* could be occasioned by invasion of privacy taking the form of following a person[10] or by interfering with freedom of movement by obstructing a person in a public place.[11]

B *Roman-Dutch law*

The *actio injuriarum* survived into the modern era in jurisdictions whose legal systems were founded on Roman law, in particular in South Africa, where the *actio* was available in that country's Roman-Dutch legal system. The circumstances in which *dignitas* was found to have been impaired were expanded through case law,[12] to include conduct such as stalking,[13] indecent exposure,[14] sexual harassment,[15] breach of privacy[16] as well as sexist[17] and racist[18] verbal insult.

As already noted, in Ancient Rome the concept of *dignitas* as vindicated by the *actio injuriarum* was a purely private law interest, and Roman law lacked any concept of fundamental rights. However commentators in South Africa came to recognise the potential of *dignitas* to be developed as a foundation for public law rights. The leading exponent of this view was Burchell, who pointed to the fact that the *actio injuriarum* had been used to remedy impairments of *dignitas* taking the form of unlawful arrest,[19] unlawful detention[20] and malicious prosecution.[21] Liability under the *actio injuriarum* was also found in cases where a defendant removed property belonging to a plaintiff and destroyed huts belonging to him[22] and restricted a plaintiff's freedom of movement.[23] Impairment of *dignitas* held to have arisen from a failure to adhere to procedural rights, taking the form of unlawful expulsion from an educational institution,[24] summary ejectment from a meeting of a local government body contrary to that body's by-laws,[25] failure by a subordinate legislature to adhere to correct procedure,[26] denial of the right to consult an attorney after arrest[27] and the subjection

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[9] Johann Neethling, Johannes Potgieter and P.J. Visser, *Deliktereg* (Butterworths, 1991) 14.
[10] D 47.10.15.19 and D 47.10.15.22.
[11] D 47.10.13.7.
[12] Note some examples of *injuriae* come from criminal cases. This is because in South Africa impairment of dignity can also be prosecuted as a criminal offence (*crimen injuria*), the only difference being the criminal standard of proof applies.
[13] *Epstein v Epstein* 1906 TH 87.
[14] *R v Kobi* 1912 TPD 1106.
[15] *R v Kaye* 1928 TPD 463, *R v Robinson* 1911 CPD 319 and *Piliso v Old Mutual Life Assurance Company (SA) Ltd* [2006] ZALC 107.
[16] *R v Holliday* 1927 CPD 395.
[17] *Whittington v Bowles* 1934 EDL 142
[18] *S v Bugwandeen* 1987 (1) SA 787 (N) and *S v Tantel*ii 1975 (2) SA 772 (T).
[19] *Smit v Meyerton Outfitters* 1971 (1) SA (T) and *Areff v Minister van Polisie* 1977 (2) SA 900 (A).
[20] *Manase v Minister of Safety and Security and Another* 2003 (1) SA 567 (Ck).
[21] *Moaki v Reckitt and Coleman (Africa) Ltd* 1968 (3) SA 98 (A) and *Prinsloo v Newman* 1975 (1) SA 481 (A).
[22] *Smith, N.O. and Lardner-Burke, N.O. v Wonesayi* 1972 (3) SA 289 (RAD).
[23] *Sievers v Bonthuys* 1911 EDL 525
[24] *Tiffin v Cilliers* 1925 OPD 23, *Schoeman v Fourie* 1941 AD 125. See also McKerron, supra n. 917 at 53.
[25] *Course v Household* (1909) 30 NLR 188.
[26] *Engelbrecht v Voorsitter, Wetgewende Vergadering van Suidwes-Afrika* 1973 (1) SA 52 (SWA).
[27] *Whittaker v Roos and Bateman* 1912 AD 92.

of a detainee to severe and prolonged interrogation,[28] Most significantly in the context of South Africa, racial discrimination was held to constitute impairment of *dignitas*,[29] and thus the incompatibility between racial discrimination and Roman-Dutch common law necessitated legislative over-ride of the common law when apartheid was implemented.[30]

What the cases in the preceding paragraph have in common is that they indicated that *dignitas* protects interests which are also classifiable as human rights. On this basis Burchell argued that[31]

> The role of the law of delict in the protection of human rights and fundamental freedoms is usually regarded as peripheral. However, there is a vast, as yet virtually unexploited, potential within the law of delict for the protection of these rights and freedoms.

Later in the same work he stated that[32]

> I hope I have succeeded in demonstrating the immense potential for the furthering of human rights and fundamental freedoms that lies hidden within the actio injuriarum. A liberal interpretation of dignity, analogous to the meaning given to the concept in the Universal Declaration of Human Rights and the European Convention on Human Rights, and reflected in many aspects of the Freedom Charter, would provide a key to these hidden riches. As Joseph Raz says '...respecting people's dignity includes respecting their autonomy, their right to control their future'. An insult, according to Raz, offends a person's dignity when it 'consists of or implies a denial that he is an autonomous person or that he deserves to be treated as one'.

The conclusion one can draw then is that the principle underlying the Roman action for impairment of *dignitas* – respect for the autonomy and personhood of the individual in all its dimensions – were the same as those which underlie dignity as it has come to be understood in the modern era.[33] Familiarity with dignity as an actionable interest under Roman-Dutch common law proved an advantage to the courts when they came to interpret South Africa's post-apartheid constitution, in which dignity was made a founding principle.[34] This is discussed in Part V.

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[28] *Van Heerden v Cronwright* 1985 (2) SA 342 (T).
[29] *Purshotam Dagee v Durban Corporation* 1908 NLR 391.
[30] Anne Hughes, *Human Dignity and Fundamental Rights in South Africa and Ireland* (Pretoria University Law Press, 2014) 108-9.
[31] Jonathan Burchell, 'Beyond the Glass Bead Game: Human Dignity in the Law of Delict' 4 (1988) *South African Journal on Human Rights* 1, 2.
[32] Ibid 18.
[33] The connection between the Roman concept of *dignitas* and dignity in modern jurisprudence has also been made by scholars outside South Africa – see Stéphanie Hennette-Vuachez, 'A human *dignitas*? Remnants of the ancient legal concept in contemporary dignity jurisprudence' 2011 (9) *International Journal of Constitutional Law* 32.
[34] *Republic of South Africa Constitution Act* No 108 of 1996, s 1(a).

III THEORIES OF DIGNITY DURING THE RENAISSANCE AND THE ENLIGHTENMENT

The modern view of dignity originated during the Renaissance and was given its classic exposition in Pico della Mirandola's *Oration on the Dignity of Man*.[35] This work was significant for its departure from the medieval view in terms of which human dignity was seen in theistic terms, justified by reference to the Biblical statement that man was created in the image and likeness of God.[36] According to that earlier view, there was nothing inherently worthwhile in the human being as such - human worth derived from, and was measured against, a standard set by the Creator. Such unique qualities as were exhibited by human beings and separated them from the rest of creation proceeded from the fact that human beings were created by God and shared certain divine qualities.

By contrast, della Mirandola adopted a humanistic approach, which grounded human worth in rational free will which, although ultimately derived from the creator, served to place human beings in a *parallel* position with God in that, enjoying the autonomy of choice that free will gives, human beings can choose to do either good or evil without reference to the will of God - and indeed, in *contravention* of the will of God.[37] Autonomy based on free will also separated humans from the rest of creation, which lacked the faculty of reason. It is this inherent specialness that constituted the dignity of humankind. In terms of this analysis[38] it follows that interference with human potential to exercise and act in accordance with free will constitutes an offence against dignity.

The Renaissance concept of free will and autonomy as the foundation of human dignity formed an important part of Enlightenment philosophy and, most importantly, led to the development of the theory of natural rights because, having accepted that free will is the essence of human dignity, it was a logical step to argue that it was necessary to guarantee rights in order to secure for individuals the autonomy to act in accordance with that will.

Key to the development of the idea of dignity as autonomy forming the basis of individual rights was the contribution of Immanuel Kant, who wrote that 'Autonomy is the ground of the dignity of human nature and of every rational creature,'[39] from which he derived rationalist theory of rights, emphasising the person as an end as opposed to a means - in other words, that the inherent dignity of each person makes it impermissible for one person to be subordinated to another or to be prevented by that other from exercising their free will.[40] Kant also identified equality as a crucial link in the chain from the 'is' (the individual has a quality - dignity - which derives from his uniqueness as an autonomous being endowed with free will) to the 'ought' (the individual should be guaranteed rights to prevent interference with that autonomy),[41]

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[35] Pico Della Mirandola, *On the Dignity of Man* (GlennWallis trans, Bobbs-Merrill,1965) [trans of: *Oratio de hominis dignitate* (first published 1486)].

[36] Genesis 1: 26-27

[37] Above n 35, 4-5. See also Nathan Rotenstreich, *Man and his* Dignity (Magnes Press, 1983) 49-54.

[38] In general see Rotenstreich, Ibid, 141.

[39] Immanuel Kant, *Groundwork of the Metaphysic of Morals* (Herbert Paton, trans, Routledge Classics, 2005) [trans of *Grundlegung zur Metaphysik der Sitten* (first published 1785)] 114-5.

[40] Ibid. 161-2.

[41] Thus, as Rotenstreich, above n 37, 133 states

> Suppose that we adopt the view that the desire for destruction is an expression of creativity and, to that extent, accords with the notion of human dignity. That desire implies the annihilation or disregard of one's fellow man both in the singular and in the plural. However, man's awareness of his dignity is joined by his awareness that dignity is not a quality of his, or of Paul or Peter, only, but is an attribute of man *qua* man. In this sense the awareness of human dignity presupposes a step beyond one's personal

arguing that once one asserts that inherent dignity as a human being entitles one to freedom of action, one is logically bound to recognise that freedom in all other human beings as well, and from the 'is' of one's own dignity proceeds the 'ought' of respecting the dignity of others.[42] The onus of justification thus no longer rests on the person who asks why the dignity of others should be respected, but rather on the person who, having laid claim to their own dignity, seeks to trench upon the dignity of others. The concept of equality thus provides the link between dignity and natural rights - since dignity is inherent in being human, all human beings must be entitled to it, and thus each human being has the right to have his or her dignity respected by all other human beings.[43] Thus as Rotenstreich points out,[44] Kant held that although man has unique dignity *qua* man, no individual is 'more unique' than any other, that each human being's dignity must be accorded equal respect. This led Kant to his famous injunction at one should[45]

> Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never as a means but always at the same times as an end.

Useful as these theoretical developments were, it was only in the wake of the human rights abuses that occurred during World War II that dignity came to be recognised as a legal, and not only philosophical, concept.

IV DIGNITY IN THE MODERN ERA

A *Dignity in international rights documents*

The increasing recognition given to rights in the twentieth century spurred in the wake of the crimes against humanity committed during World War II by a determination not to permit state sovereignty to over-ride individual rights, led to dignity being recognised as a foundational value in international and domestic human rights documents.[46] The United Nations Charter states that human dignity is an ideal that the members of the United Nations are determined to achieve,[47] and this is reflected in the 1948 *Universal Declaration of Human Rights*[48] which in its preamble states:

> *Whereas* recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...

Furthermore, Article 1 of the Declaration provides that

> scope; it further presupposes the acknowledgment of their [sic] respective dignity of human beings in their plurality. Here the very acknowledgment of the plurality of human beings implies a norm of behaviour. ...From this point of view, we can see the relationship between human dignity and human equality. The demand for or right to equality is ultimately based on the notion that the human essence is present in every human individual.

[42] For a general discussion of autonomy, including Kant's contribution, see Joel Feinberg, *Harm to Self* (Oxford University Press, 1986) 27-51.

[43] The same rationale of shared humanity formed the basis of Locke's theory of rights – see Crawford Macpherson, 'Natural Rights in Hobbes and Locke' in David Raphael, *Political Theory and the Rights of Man* (Indiana University Press, 1967) 1, 7-8.

[44] Rotenstreich, above n 37, 149.

[45] Kant, above n 39, 106-7.

[46] For an overview of the foundational role of dignity see Mary Neal 'Respect for human dignity as 'substantive basic norm' (2014) 10 *International Journal of Law in Context* 26.

[47] The *Charter of the United Nations* of 26 June 1945 (UNCIO xv 335) states in its preamble that signatories are "determined...to reaffirm faith in fundamental human rights" and "in the dignity and worth of the human person".

[48] GA Res. 217 A (III) of 10 December 1948.

> All humans are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Both these provisions clearly owe much of their intellectual heritage to the Enlightenment view of the inherent dignity of human beings, of the equal freedom that that dignity implies, and of the consequent entitlement of each human individual to fundamental rights. Dignity is also protected by the *International Covenant on Civil and Political Rights*,[49] and Article 13 of the *International Covenant on Economic, Social and Cultural Rights*.[50]

B *Dignity in modern legal theory*

Several legal philosophers have pointed to dignity as the foundational value of law, including Fuller,[51] Raz[52] and Waldron.[53] Of particular note, because of its specific focus on dignity, was the development by McDougal and Lasswell of a school of thought at the cornerstone of which was the ideal of 'deference for the dignity and worth of the individual.'[54] In developing their jurisprudence, McDougal and Lasswell stated[55] that the

> ...supreme value of democracy is the dignity and worth of the individual; hence a democratic society is a commonwealth of mutual deference...

and in their search for 'the primary postulate[] of public order, infusing and transcending all particular communities',[56] they identified[57]

> ...The comprehensive set of goals which, because of many heritages, we recommend for clarification and implementation are, as already suggested, those which are today commonly characterised as the basic values of human dignity, or of a free society. These are the values bequeathed to us by all the great democratic movements of mankind and being very more insistently expressed in the rising common demands and expectations of peoples everywhere.

Thus according to this view, dignity was the ultimate value which human rights were to serve.[58] As Paust expressed it, the McDougal-Laswell school identified dignity as the 'high level abstraction' which would be given concrete expression through the satisfaction of people's expectations that rights would be protected.[59] In subsequent

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[49] GA Res 2200A (XXI) of 16 December 1966. The Preamble states that "rights derive from the inherent dignity of the human person", while Article 10 provides:

> ..[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

Article 10 of the Covenant is also reproduced as Article 5 of the American Convention on Human Rights.

[50] GA RES 2200A (XXI) of 16 December 1966. This article states in part that

> ...education shall be directed towards the full development of the human personality and the sense of its dignity

[51] Lon Fuller, *The Morality of Law* (Yale University Press, 1964), 162.

[52] Joseph Raz, 'The Rule of Law and its Virtue' in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979), 221.

[53] Jeremy Waldron 'How Law protects Dignity' (2012) 71 *Cambridge Law Journal* 200.

[54] Harold Lasswell and Myers McDougal, 'Legal Education and Public Policy: Professional Training in the Public Interest 52 (1943) *Yale Law Journal* 203, 207.

[55] Ibid 212.

[56] Harold Lasswell and Myers McDougal, 'Criteria for a Theory About Law' 44 (1971) *Southern California Law Review* 362, 393.

[57] Ibid.

[58] Jerome Shestack, 'The Jurisprudence of Human Rights' in Theodore Meron (ed), *Human Rights in International Law* (Clarendon Press, 1984) 69, 96.

[59] Jordan Paust, 'Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry

writings, McDougal, Lasswell and Chen identified specific rights that respect for human dignity would guarantee.[60]

Also worthy of mention in this context is Rawls, because although his theory of justice was not explicitly based on human dignity, a legal system which was based on the principles he developed would manifest the same features as one based on dignity. In seeking to answer the question of whether there were any values that were truly universal in their application Rawls conceived the idea of what he called the 'original position' - a hypothetical exercise in which a random group of people would be invited into a room and asked to agree on a set of fundamental rules for a society that they would then live in once they left the room.[61] The key constraint under which they worked, however, was that they were behind what he called a 'veil of ignorance'.[62] In other words, they were not told what their condition would be in the new society - whether they would be man or woman, black or white, rich or poor, Muslim or Christian, heterosexual or homosexual, fully-abled or disabled *et cetera* – until after they had devised the fundamental rules.

Rawls concluded that in a situation where 'no one knows his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like',[63] rational participants would agree on what he called the 'liberty principle', namely that each person should have the fullest degree of liberty as is consistent with everyone-else's equal liberty[64] and that social and economic opportunities should be arranged so as to be of greatest benefit to the least advantaged and so that there is equality of opportunity (the 'equality principle').[65] The liberty principle echoes Kant's idea of autonomy, while the equality principle reflects the 20th century idea that respect for human dignity requires not only that the state refrain from arbitrary limitations on individual autonomy but also that it provides protection for the socio-economic wellbeing of its citizens, a theme that is discussed in the context of South African constitutionalism in Part V.

C *Implications for constitutional law*

Human dignity obviously has particular implications for constitutional law, given that it is the constitution which determines the balance of power between the individual and the state. This is emphasised by McCrudden, who states that dignity contains three essential elements: the intrinsic worth of all human beings; the recognition and respect of that intrinsic worth by others; and the state's duty to protect human rights.[66] It is the third element that is important here – without it, dignity remains merely a theoretical concept, devoid of practical meaning.

I argue that two constitutional principles flow from this: First, since dignity is inherent in people and is not the gift of the state, it follows that it cannot be taken away by the state.[67] Second, since dignity requires respect for human autonomy, human dignity gives rise to a positive obligation to provide textual protection in the constitution for autonomy. In its broadest sense, autonomy encompasses the full range of human activities – being at liberty, moving from place to place, expressing an opinion, seeking

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Into Criteria And Content' 27 (1984) *Howard Law Journal* 145, 200-201.

[60] See, in general, Myers McDougal, Harold Lasswell and Lung-chu Chen, *Human Rights and World Public Order* (Yale University Press, 1980).

[61] John Rawls, *A Theory of Justice* (Clarendon Press, 1972) 17–22.

[62] Ibid 136–42.

[63] Ibid 137.

[64] Ibid 60.

[65] Ibid 60 and 303.

[66] Christopher McCruden, 'Human Dignity and Judicial Interpretation of Human Rights' 19 (2008) *European Journal of International Law* 655, 679.

[67] Rinie Steinmann 'The Core Meaning of Human Dignity' (2016) 19 *Potchefstroom Electronic Law Journal* 1, 17.

privacy *et cetera* – and from this flows an obligation to protect the right to do these various things. It is therefore incorrect to think of rights as individual entitlements. All rights are ultimately traceable back to human dignity, and each right is just a specific manifestation of the autonomy that dignity implies.[68] So if one poses the question as to why one should protect freedom of expression, for example, the answer is that exercising freedom of expression is an aspect of individual autonomy and that if the state was to abrogate that freedom, that would amount to an impairment of the that person's entitlement to dignity. The answer would be the same if one posed that question in relation to any other right. As Barroso states,[69]

> As a fundamental value and a constitutional principle, human dignity serves both as a moral justification for and a normative foundation of fundamental rights.

The protection of any and all rights thus ultimately serves to uphold human dignity, and human dignity requires that all rights be given equal protection. There is no logically defensible justification for protecting some rights and not others. This is what is meant by the 'indivisibility' of rights – that because all rights are based on human dignity, one cannot pick and choose which rights to protect. No right is to be preferred above any other, and all rights are entitled to protection.

V DIGNITY IN MODERN CONSTITUTIONAL SYSTEMS – GERMANY AND SOUTH AFRICA

The constitutions of many countries refer to dignity either as a founding principle or as a discrete justiciable right. Here there is space to focus on two, those of Germany and South Africa, which are particularly significant in that both were written in the wake of the demise of regimes which were notorious for their denial of human dignity. This historical experience led to a determination in both countries to ensure that their constitutions be founded on dignity.

A *Germany*

The German constitution [70] was consciously designed with human dignity at its foundation. As Eberle, states[71] the constitution

> is a value-oriented constitution that obligates the state to realize a set of objectively ordered principles, rooted in justice and equality that are designed to restore the centrality of humanity to the social order, and thereby secure a stable democratic society on this basis. These values are not to be sacrificed for the exigencies of the day, as had been the case during the Nazi time.

The centrality of dignity in the German constitutional order is signalled by the fact that the opening provision (Article 1(1)) states that

> Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

Article 1(2) then states that

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[68] For a comprehensive analysis of the relationship between human dignity and individual rights see *K. S. Puttaswamy v. Union of India* Writ Petition (Civil) No. 494 of 2012 (Sup. Ct. India Aug. 24, 2017) [40-6] and [96 – 107].

[69] Luís Barroso, 'Here, There and Everywhere: Human Dignity in Contemporary Law and the Transnational Discourse' (2012) 35 *Boston College International & Comparative Law Review* 331, 354-5.

[70] *The Basic Law of the Federal Republic of Germany 1949*.

[71] Edward Eberle, 'Observations on the Development of Human Dignity and Personality in German Constitutional Law: An Overview' (2012) 33 *Liverpool Law Review* 201, 203.

> The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

The use of the word 'therefore' is important, because it shows that, in the mind of the drafters, dignity could not be upheld unless fundamental rights were protected. Rights are thus the 'tangible manifestations'[72] of human dignity. The Basic Law goes on to protect a range of fundamental freedoms in Articles 2 – 19. Most of these freedoms echo those protected by the Universal Declaration of Human Rights, but one is unique and reflects the particular approach to constitutional law in Germany: Article 2(1) states that

> Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.

What this provision does is to give protection to the broad right of individual autonomy – what could be described as the freedom to be free - which, as discussed earlier in this article, is, along with equality, the key justification for human dignity in the Kantian sense.[73] Thus in the *Lüth* case,[74] the German constitutional court[75] stated that

> This system of values, centring on the freedom of the human being to develop in society, must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration, and judicial decision.

Kantian philosophy was also echoed in the *Life Imprisonment Case*,[76] where the constitutional court stated

> It is contrary to human dignity to make the individual the mere tool of the state. The principle that "each person must always be an end in himself" applies unreservedly to all areas of the law; the intrinsic dignity of the person consists in acknowledging him as an independent personality

However, dignity has a role that goes beyond the protection of basic rights. It operates as the most important interpretative rule applied by the courts. As Eberle states,[77] 'it infuses throughout the whole constitutional order, obligating the state both to protect and realize it.' For this reason then, it would be true to say that the Basic Law should not be seen as its own justification – rather it was designed as a vehicle to give effect to the value of human dignity, standing above and outside the law.

B *South Africa*

The South African constitution, like that in Germany, is based on human dignity, as has been explicitly noted by South Africa's Constitutional Court.[78] The dignitarian basis of the constitution[79] is evident in s 1, which states[80]

> The Republic of South Africa is one, sovereign, democratic state founded on the following values:

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[72] Ibid 206.
[73] Ibid 204.
[74] 7 BVerfGE 198, 205 (1958).
[75] See also the *Elfes Case* 6 BVerfGE 32, 36-41 (1957) in which the constitutional court held that the right to development of personality empowers a person to do as they desire, provided that they do not interfere with the same right of others.
[76] 45 BVerfGE 187, 228 (1977).
[77] Eberle above n 71, 206.
[78] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) [54].
[79] *Republic of South Africa Constitution Act 108 of 1996*.
[80] Ibid s 1(a).

> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

Chapter 2 of the constitution protects a wide range of political, social and economic rights, within which dignity is accorded protection as a free-standing right in s 10, which states that

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

In the decades since the post-apartheid constitution came into force, the courts have used dignity as a touchstone value in interpreting the constitution as a whole. Thus in *Carmichele v Minister of Safety and Security*,[81] the Constitutional Court held that

> [o]ur constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective normative values system.

Experience in developing the Roman-Dutch law interest of *dignitas* has given the courts an advantage in elucidating the meaning of dignity in the constitutional sense – bearing out the argument discussed in Part II that the theory underlying private law concept of *dignitas* overlapped with the public law concept of human rights.

The concept of human dignity has been used to interpret a wide range of rights protected by South Africa's bill of rights. Among the first of these were those in which capital punishment[82] and corporal punishment[83] were declared incompatible with the right not to be subject to cruel, inhuman or degrading punishment. Human dignity was also used in interpreting provisions protecting individual freedom (in the sense of liberty of the person),[84] the right to a fair trial[85] and freedom of expression.[86] It was referred to as an interpretative principle when the Constitutional Court held that criminalisation of same-sex intercourse breached constitutional rights to equality and privacy, [87] that prisoners retained the right to vote as a 'badge of dignity and personhood,'[88] and that the prohibition of same-sex marriage infringed the right to equality.[89]

One of the most progressive features of the South African constitution is its protection of socio-economic rights, which indicates that its transformative purpose was the achievement of equal worth not only in the sense of freedom but also in the sense of substantive equality.[90] In other words, the constitution embodies the view that a person cannot be said to live in dignity if their most basic needs are not met.[91] The relationship between human dignity and socio-economic equality has been explored in

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[81] 2001 (4) SA 938 (CC) [54].
[82] *S v Makwanyane* 1995 (3) SA 391 (CC).
[83] *S v Williams* 1995 (3) SA 632 (CC).
[84] See *Ferreira v Levin* 1996 (1) SA 984 (CC) and *Bernstein v Bester* 1996 (2) SA 751 (CC).
[85] *S v Basson* i2005 (1) SA 171 (CC).
[86] See *Khumalo v Holomisa* 2002 (5) SA 401 (CC) and *Laugh It Off Promotions CC v South African Breweries international (Finance) BV t/a Sabmark International* 2006 (1) SA 144 (CC).
[87] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).
[88] *August v Electoral Commission* 1999 (3) SA 1 (CC) [17] (Sachs J).
[89] *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC).
[90] Hughes, above n 30, 125. For an overview of dignity as a theoretical basis for equality, and an analysis of relevant South African case law, see Evadné Grant, 'Dignity and Equality' (2007) 7 *Human Rights Law Review* 299.
[91] Steinmann, above n 67, 6-7.

several cases, most notably in the early case of *Republic of South Africa v Grootboom*,[92] a case involving the constitutional right to housing, in which Yacoob J held that[93]

> [t]here can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter.

The fact that dignity was used to give meaning to so wide a range of rights illustrates the point made at the end of Part IV that each right is, ultimately, a dimension of human autonomy and thus of human dignity. Dignity is, therefore, the parent value from which every human right descends.

VI VALUES AND THE ORIGINS OF THE AUSTRALIAN CONSTITUTION

Both the German and South African constitutions explicitly embody dignity as a normative value and are interpreted in accordance with that value. This stands in striking contrast to the Commonwealth constitution. Indeed, a characteristic of debate on constitutional matters in Australia is the absence of discussion of what fundamental value does, or should, underlie the Constitution. This represents a failure in Australian constitutionalism which has negative consequences for constitutional development. Unless decisions about the direction in which the Constitution will be developed (or indeed whether it will be developed at all) are founded upon values, those decisions will be determined by the powerful and, because they are not developed in accordance with an underlying theory, will also suffer from the defect of inconsistency. In other words, unless we take the conscious first step of debating and agreeing upon the meta-framework that should govern law, the law we produce (or maintain) will either be ethically deficient (if it is based on the wrong values) or contradictory (if partly based on good values and partly not).

The aversion to discussing values is deeply rooted in Australian constitutionalism. Its origins lie in the constitution-making process that took place during the constitutional Conventions of the 1890s, from which philosophical debate was largely absent. The focus of the delegates to the Conventions was ruthlessly pragmatic - indeed one could say anti-theoretical – and was concentrated on practical issues of trade and commerce, inter-State relations and Commonwealth-State relations, rather than on questions such as what values should underlie the Constitution and what balance should be struck between the power of the state and the autonomy of the individual.

Yet it would be a mistake to think that, because debate on values was conspicuously meagre at the Conventions, that the Commonwealth Constitution is not founded on values. All law embodies values. Even if those values are not expressed, they subsist nonetheless, because in the absence of the formulation of a new set of values, the position which is impliedly accepted – what might be called the unarticulated premise - is that the prevailing values of society, and the power relationships they embody, will continue to operate. In other words, in the absence of any enunciation of new values, existing values apply by default.

The values upon which the new constitution was based were those of 19th century British constitutionalism which had been inherited from the United Kingdom and which convention delegates unquestioningly assumed should underpin the Commonwealth constitution. The key elements of British constitutionalism were an hereditary monarchy, with executive power wielded by a government responsible to a

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[92] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46, [23].
[93] Ibid [83]. See also *Soobramoney v Minister of Health (Kwa-Zulu Natal)* 1998 (1) SA 765 (CC).

parliament elected on a restricted franchise. Parliament was not subject to any restrictions on how it might legislate. The concept of the 'rule of law' offered a degree of protection for individual liberty, in that courts operated independently of the executive and in accordance with a degree of procedural fairness. However that protection was inherently susceptible to variation – parliament could, and did, legislate in such a way as to take away such freedoms as the rule of law was said to imply. The received constitutionalism had developed out of an interplay between forces of the crown and parliament in the 17th century, and was the result of a pragmatic political compromise reached at the end of a tumultuous period of civil war, not as the result of the implementation of any overarching theory. One can therefore describe the system as one of democratic positivism – it was democratic, but only because society had developed in a democratic manner, and there was no principle which could prevent anti-democratic measures being adopted nor any mechanism which restrained the power of parliament to legislate in an unjust manner.

The absence of any questioning of the theory underlying to their inherited British institutions meant that when the Australian colonists debated their constitutional arrangements, they thought there to be nothing wrong in providing that the States should be allowed to keep in force laws which restricted the franchise based on gender, race and property-ownership. Nor did they consider there to be anything wrong in rejecting a proposal that the constitution should contain a right to due process, it being argued that since such a right could be read as requiring equality before the law, it would prevent the Commonwealth from discriminating against Asian and Indigenous people.[94]

Despite piecemeal changes to the Constitution, it has never undergone wholesale reform in its 120 year history. The most recent public inquiry into reform was initiated in 1985 and led to the publication in 1988 of the *Final Report of the Constitutional Commission*. [95] This document was excellent for its breadth of coverage of constitutional issues, yet none of its recommendations were implemented. Furthermore, as is illustrated in Part VII, such debate as there is on constitutional reform is conducted largely without reference to values

[94] *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1898, 687 (Isaac Isaacs) and 690-91 (Patrick Glynn). See Geoffrey Robertson, *The Statute of Liberty: How Australians Can Take Back Their Rights* (Random House Australia, 2009) 59 and Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (University of New South Wales Press, 2009) 24-6.

[95] Constitutional Commission, *Final Report of the Constitutional Commission* (Commonwealth of Australia, 1988).

VII A CRITIQUE OF THE COMMONWEALTH CONSTITUTION FROM THE STANDPOINT OF HUMAN DIGNITY

What observations can one make if one analyses the Commonwealth Constitution for its consistency with human dignity?

A *Absence of an underlying value*

The first and most obvious point to make is that because the Constitution lacks any reference to dignity – indeed to any value – the courts have no criteria, other than conformity with the text of the Constitution, against which to measure the validity of legislation and the wielding of executive power. The Constitution is what might be referred to as a 'values-free zone.' Constitutional interpretation is therefore purely mechanical – essentially statutory interpretation writ large – in which normative restraints have no role. This was most starkly demonstrated by the High Court's decisions in *Al-Kateb v Godwin*[96] in which it held that the Constitution did not prevent the government from holding a person in so-called 'non-punitive' immigration detention *ad infinitum*, and *Behrooz v Secretary, Department of Immigration, Multicultural and Indigenous Affairs*,[97] in which it held that even if the conditions in which a person was being held were inhumane, that fact did not alter the supposed non-punitive nature of the detention.

Although reference is commonly made to 'democratic values' both in academic writing and in case law as a value underpinning the Constitution, this serves to obscure rather than advance constitutional analysis. This is because it confuses a process (democracy) with a *justification* for that process (which must be some value other than democracy itself). In dispelling this confusion it is critical to recognise that democracy itself is not a value – it is just one among several possible mechanisms for law-making, such as autocracy and oligarchy or any other process of rule-formulation one might think of. The idea that democracy can serve as a fundamental value suffers from a fatal flaw: The proposition that all questions be determined by majorities of voters (as represented in the legislature) is itself sustainable only if one accepts the proposition that voting and all the other rights required for democracy to function 'ought' to be protected. But why is that? Why *should* law-making be determined by democratic processes? Other systems of government such as enlightened despotism are arguably more efficient. The answer of course is that people are entitled to participate in law-making because respect for their autonomy and equality requires it. In other words, the qualitative difference between democracy and other systems is that it allocates equal political power to each person, thereby respecting their equal worth – which is the principle which lies at the core of human dignity. Thus, democracy is preferable not because of any practical benefit inherent in it because it serves a value *external to itself*, namely human dignity. The term 'democratic values' should therefore be avoided, because it suggests that democracy itself is a value, whereas democracy can be justified only by something (the value of human dignity) which lies above democracy.

Since democracy is a product of, and is subordinate to, human dignity, it becomes apparent why crude majoritarianism cannot serve as the foundation for the constitutional order. An example illustrates this: During the apartheid era, the South African parliament, for which only the white population (which amounted to 20% of the total) could vote, enacted racially-discriminatory legislation which determined where the remaining 80% of the population could live, work, go to school and even whom they could marry or have sexual relations with. This racist legislation was supported by a range of other Acts which infringed civil liberties and suppressed dissent. South Africa was rightly condemned on the ground that this legislation infringed numerous fundamental rights. But was apartheid objectively wrong or wrong

[96] (2004) 219 CLR 562.
[97] (2004) 219 CLR 486.

only because it was implemented by a minority against a majority? What if whites had amounted to 51% of the population? Would those same racist laws have then been unobjectionable because they were supported by a majority? In other words, were the laws inherently wrong, or were they wrong only because they did not enjoy the support of a majority of South Africans? Obviously, the answer is such laws were inherently wrong because of the unjust effect they had on those subject to them – an effect on its victims which would have been equally unjust, irrespective of whether they constituted 80% or 49% of the population. In other words, it is the content of the law, not how many people support it, that determines whether it is just or unjust. Although a law made in a democracy may be less likely to infringe human rights than one made by an absolute monarch - if only because democratic law-making involves debate during which human rights considerations can be ventilated - it is entirely possible for an absolute monarch to make a just law and for a democratic majority to make a profoundly unjust one. Thus it is the content of the law, not the manner by which it is mad, that ultimately determines whether it is consistent with human dignity.

This is why it is important for a constitution not only to expressly state that it is founded upon human dignity and that it should be interpreted in accordance with that value, but also that it should subordinate all power – including democratic power manifested through parliamentary law-making – to a restraint which enables effect to be given to the supremacy of human dignity which, as has been discussed earlier, can be achieved only through the inclusion in the constitution of a bill of rights

B *Insufficient express protection for human rights*

This leads us to the second shortcoming in the Commonwealth Constitution - its failure to provide comprehensive protection for the broad range of human rights that are recognised in international human rights documents. This is despite the fact that Australia has ratified a range of such documents, including the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.

Such rights as the Constitution does protect were included as a pragmatic response to political controversies which needed to be settled in order to gain the consent of the colonies to federation, rather than out of recognition of inherent human dignity. Thus s 51(xxxi) (requiring just terms compensation for the acquisition of property), s 117 (requiring equal treatment of residents of different States) and s 92 (protecting freedom of inter-State trade, commerce and intercourse) all addressed apprehended abuses of Commonwealth powers by the States or by the States vis-à-vis each other. The prohibition of religious discrimination in s 116 reflected a concern that in an era of sectarian tensions between Catholics and Protestants, no religious group be able to dominate the institutions of government.[98] Only the s 80 requirement of jury trials for indictable Commonwealth offences is conceivably identifiable as a provision protecting fundamental rights, yet it can easily be circumvented simply by the way in which the Commonwealth Parliament classifies offences as either summary or indictable.

Beyond that, the Constitution offers no express protection to rights. Despite the fact that Australian Attorney-General and Foreign Minister H. V. Evatt had played a key part in the drafting of the Universal Declaration of Human Rights in his role as President of the General Assembly, the Menzies government elected in 1949 rejected the idea of a domestic bill of rights, among other reasons because it might lead to litigation by Indigenous Australians contesting the discrimination to which they were subject – notably the same ground upon which the idea of a right to due process had been rejected at the constitutional Conventions. Subsequent Australian governments have maintained opposition to the inclusion of a bill of rights into the constitution, and

[98] Richard Ely, *Unto God and Caesar: Religious Issues in the Emerging Commonwealth* (Melbourne University Press, 1976) 19–20, 130.

have been openly hostile to the United Nations when it has criticised human rights breaches. Some ministerial statements have, unfortunately, echoed what used to be said of the United Nations by South African politicians during the apartheid era.

Several unsuccessful attempts have been made to insert new rights into the Constitution. In 1944 a proposal to make the s 116 protection for freedom of religion applicable to the states and to incorporate freedom of expression in the Constitution failed. In 1988, following on the recommendation by the Constitutional Commission that a new chapter be inserted into the Constitution protecting a wide range of rights,[99] the government responded with a proposal limited to expanding the s 116 right to religious freedom and the s 51(xxxi) requirement for just terms compensation when property is acquired so as to make them applicable to the states, and incorporating in the Constitution an express right to vote and a requirement that all electorates have an equal number of voters. Both proposals were defeated.

In 2008 the Rudd government established the National Human Rights Consultation (NHRC) to hold public consultations on the question of whether Australia should have a Bill of Rights.[100] The terms of reference included a restriction that options canvassed by the committee 'should preserve the sovereignty of the Parliament' – in other words, should not suggest the inclusion in the Constitution of new rights which would restrict the legislative power of parliament.

Unfortunately, even legal academics – who, among all social groups, one would think would be most keen to critique the current order – have demonstrated a disappointing attitude towards the protection of human rights. Although some have recommended enhanced protection for rights (albeit as an ordinary statute),[101] some are openly hostile to rights protection[102] while astoundingly yet others have justified the breach of human rights through torture.[103]

There is clearly a need for an attitudinal change. The former Commonwealth Human Rights Commissioner, Gillian Triggs, commented upon the outlook of exceptionalism displayed by Australian governments to the protection of fundamental human rights.[104] It is time for Australia to abandon this stance and accept the obligations imposed both by legal theory and the international human rights documents it has ratified by including a comprehensive and justiciable bill of rights in the Constitution.

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[99] Constitutional Commission, above n 95, Vol 1, 476.

[100] National Human Rights Consultation Committee, Parliament of Australia, *National Human Rights Consultation Report* (2009) http://apo.org.au/node/19288

[101] George Williams, *Human Rights under the Australian Constitution* (Oxford University Press, 2002).

[102] See Gabriel Moens, 'The Wrongs of a Constitutionally Entrenched Bill of Rights' in Margaret Stephenson and Clive Turner (eds), *Australia, Republic or Monarchy?: Legal and Constitutional Issues* (University of Queensland Press, 1994), Frank Brennan, *Legislating Liberty? A Bill of Rights for Australia* (University of Queensland Press, 1998), Greg Craven, *Conversations with the Constitution: Not Just a Piece of Paper* (University of New South Wales Press, 2004) 181–8 and Frank Brennan, *No Small Change: The Road to Recognition for Indigenous Australia* (University of Queensland Press, 2015) 6–7.

[103] Mirko Bagaric and Julie Clarke, 'Not Enough Official Torture in the World? The Circumstances in which Torture is Morally Justifiable' (2005) 39 *University of San Francisco Law Review* 581. It was gratifying to see this view firmly rebuffed by Desmond Manderson, 'Another Modest Proposal: In Defence of the Prohibition against Torture' in Miriam Gani and Penelope Mathew (eds), *Fresh Perspectives on the 'War on Terror'* (ANU Press, 2008) 27, and by Rodney Allen, 'Torture, Criminality and the War on Terror' (2005) 30 *Alternative Law Journal* 214, 216.

[104] Gillian Triggs, 'Australian Exceptionalism: International Human Rights and Australian Law' (Human Rights Lecture, University of Melbourne, 4 August 2016) https://events.unimelb.edu.au/recordings/1628-human-rights-lecture-australian-exceptionalism-international-human-rights-and .

C *Narrow judicial reasoning on implied rights*

Mention should also be made of the three implied constitutional interests that have been recognised by the High Court. The broad term 'interests' is used advisedly, as the language used by the court has been inconsistent. Furthermore, the scope of constitutional protection has fallen short of what respect for human dignity demands.

In *Australian Capital Television v Commonwealth (No 2),*[105] the High Court held that because sections 7 and 24 of the Constitution, which relate to elections for the Senate and House of Representatives respectively, embody representative government, and because representative government requires freedom to exchange political views to function, the Constitution impliedly protects the right to engage in political communication. The approach adopted by the court was curious: The court was at pains to emphasise that the freedom of political communication was not a 'right' but rather an 'immunity.' Although this language is redolent of Hohfeld's analysis of jural relationships,[106] the judgment contains no Hohfeldian analysis, nor did the court explain why it chose not to categorise the new constitutional interest as a right. This approach has had significant consequences: The way in which the court framed the interest reduced its scope to far less than what is encompassed by the right to freedom of expression that usually appears in bills of rights. The fact that it applies only to communication about political matters means that it does not cover the broad range of communications usually included within the ambit of freedom of expression as that concept is commonly understood. Furthermore, the fact that the interest is an 'immunity' means that it can be relied upon only to challenge the validity of legislation restricting the freedom – it cannot be used as the basis for a person to claim to have a positive right to communicate anything. Indeed the High Court has held that someone who claims that the freedom has been infringed bears the onus of proving that they had a pre-existing right to communicate derived from the 'general' (*sc* common) law.[107]

In *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*,[108] the High Court held that the doctrine of separation of powers in Chapter III of the constitution prohibits parliament from vesting in the executive a power to deprive a citizen of liberty without ultimate oversight by a court.[109] However, this due process right is limited in that the court held that its protections do not apply to categories of so-called 'non-punitive' detention - that is, detention which occurs outside the realms of criminal law, examples of which include detention for public health purposes and immigration detention.[110] Importantly, the court subsequently also held that the list of circumstances in which non-punitive detention may be authorised is not closed.[111] Because non-punitive detention stands outside the protection afforded to people suspected of having committed a crime, a person can be detained by the executive without bringing them before the courts. Moreover, as previously noted, the court has held that the duration of detention is not subject to the constraint of reasonableness – indeed it can be indefinite[112] - and has also held that detention does

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[105] (1992) 177 CLR 106.
[106] Wesley Hohfeld, 'Some Fundamental Legal Conceptions as Applied to Judicial Reasoning' (1913) 23 *Yale Law Journal* 16 and Wesley Hohfeld, 'Fundamental Legal Conceptions as Applied to Judicial Reasoning' (1917) 26 *Yale Law Journal* 710.
[107] See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560; *Levy v Victoria* (1997) 189 CLR 579, 622-6 (McHugh J) and *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 245-7 (Gummow and Hayne JJ).
[108] (1992) 176 CLR 1.
[109] Ibid 27-9 (Brennan, Deane and Dawson JJ).
[110] Ibid 55 (Gaudron J), 71 (McHugh J).
[111] *Kruger v Commonwealth* (1997) 190 CLR 1, 162 (Gummow J).
[112] *Al-Kateb v Godwin* (2004) 219 CLR 562, 651 (Hayne J) and *Re Wooley; Ex parte Applicants M276/2003* (2004) 225 CLR 1, 77 (Hayne J).

not become punitive even if its conditions are inhumane.[113] The bizarre consequence of this is that a person who is detained because they are suspected of having committed a crime is in an infinitely better positon than a person who is detained for non-criminal reasons. The effect of this have been felt only in the case of non-citizens and of people in off-shore detention, but in Australia as well, where a 2007 report by the Commonwealth Ombudsman found that 247 citizens and lawful residents had been unlawfully detained under the *Migration Act 1958* (Cth).[114]

In *Roach v Electoral Commissioner*[115] the High Court held that because ss 7 and 24 of the Constitution require that members of the House of Representatives and Senators be 'directly elected,' the Constitution protected an implied right to universal adult suffrage and that it would be unconstitutional for Parliament to disenfranchise people in a manner which disproportionately limited that right.[116] Yet, although these cases established an implied right to vote, they did not stipulate what is required for that vote to be truly effective. This is a critical omission. The 'right to vote' and 'representative government' must mean more than an opportunity to put a ballot in a box, otherwise regimes which are one-party states would be classified as democratic. Whether an electoral system can be described as democratic is a question of degree, and depends on the extent to which that system gives effect to the right of citizens to equal influence over the law-making process. Thus even in a system where candidates reflecting a variety of views are free to stand for election, where election processes are fair and where there is free access to the media, if the electoral system does not, as far a practical, give each voter equal power, that system falls short of what is required by human dignity which, as we have seen, mandates *equal* rights for each person. Thus the extent to which an electoral system satisfies that criterion must be determined by how accurately it reflects the political sentiments of the voters and, conversely, how successful it is in eliminating the effect of arbitrary factors which distort that reflection.

Analysed in that light, the electoral system contained in the *Commonwealth Electoral Act 1918* (Cth) falls far short of the requirements of human dignity. This is because in a system based on geographical electorates, it is the wholly arbitrary factor of where electoral boundaries are drawn (no matter how equal their populations may be) which determines whether an individual's vote has any impact on the composition of the legislature. This effect is accentuated the fewer the number of members who are elected in each electorate, and so the single-member electoral system we have has the most distorting effect possible. The system also has the consequence that parties receive a different percentage of seats to the nationwide percentage of votes cast for them, frequently allows a party to win government without obtaining a majority of votes, and sometimes even leads to a government winning a majority of seats with fewer votes than the major opposition party, as has happened in five federal elections since World War II.[117] On the macro scale, the electoral system has the effect of leading to political domination by two blocs because of the inescapable mathematical truth that an election in a single member electorate will always be reduced to a choice between two - and only two - candidates, which in turn means that parliament as a whole will be dominated by two blocs. In Australia this has led to the establishment of a Coalition – Labor duopoly and to the shutting out of minor parties from government. From the perspective of the individual voter, the way the system operates means that it is only swing voters in marginal seats who really determine the outcome of an election: Voters

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[113] *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486, 499 (Gleeson CJ).

[114] Commonwealth Ombudsman, *Lessons for public administration – Ombudsman investigation of referred immigration cases* (2007) https://www.ombudsman.gov.au/__data/assets/pdf_file/0018/26244/investigation_2007_11.pdf

[115] (2007) 233 CLR 162.

[116] *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

[117] In 1954, 1961, 1969, 1990 and 1998.

for any of the losing parties in an electorate have no impact on the composition of parliament – and the number of wasted votes will amount to 49.9% of the total in closely fought electorates. Also wasted are votes for the winning party in an electorate which were surplus to what it needed to win.

Despite this, in the two cases where distortions in the electoral system were challenged (*Attorney-General (Cth); Ex rel McKinlay v Commonwealth*[118] and *McGinty v Western Australia*[119]) the High Court held that the phrase 'directly chosen' by the people did not mandate equality of voting power as between voters and leaves Parliament free to determine what electoral system should be adopted. Nor did the High Court take the step, when recognising an implied right to vote in *Roach v Electoral Commissioner,*[120] of laying down a rule to the effect that for the right to vote to be truly effective, the electoral system must give equal effect to each vote as far as possible, an approach which would have been consistent with human dignity.

In none of these instances where the High Court drew implications from the Constitution did it justify its findings on the basis that it is an incident of human dignity that people should have a right to freedom of political communication, a right to personal liberty or a right to vote. In the case of the implied freedom of political communication and the right to vote, the court's reasoning was based on purely practical requirements relating to the operation of representative government. Similarly, the decision on personal liberty was justified with reference to a structural feature of the Constitution, not an individual right. While it could be argued in the court's defence that it felt that rights could be implied only to the extent that they could be said to arise from the text of the Constitution, there was much more that the court could have done to increase the scope of these implied interests, even within the confines of that constraint: The court need not have created an unnecessary (and unexplained) distinction between a 'right' and an 'immunity' when it recognised the implied freedom of political communication. There was also no reason to limit constitutional protection to political communication. The court could instead have recognised a comprehensive right to freedom of expression on the ground that it is invidious to distinguish between different types of communication, particularly given that the boundaries between them – think for example of the overlap political and artistic expression – are artificial and fluid. So far as the implication of a right to personal liberty from Chapter III was concerned, there was no reason for the court to create a distinction between punitive and so-called 'non-punitive' detention, which had the effect of significantly limiting the circumstances in which the right is available, denying its protection to some of the most vulnerable categories of people. Finally, in recognising the right to vote, the court could have laid down criteria for determining what the requirements for an effective franchise are, and thus whether an electoral system is truly consistent with representative government. Overall, the court adopted a narrow and grudging approach, rather than one which was broad and generous, which is the preferred - and more usual[121] - approach when courts define the scope of constitutional rights.

VIII CONCLUSION – WHAT IS TO BE DONE?

In the South African case *Minister of Home Affairs v Watchenuka*,[122] Nugent JA held that

> [h]uman dignity has no nationality. It is inherent in all people, citizens and non-citizens alike - simply because they are human.

[118] (1975) 135 CLR 1.
[119] (1996) 186 CLR 140.
[120] (2007) 233 CLR 162.
[121] See *Minister of Home Affairs v Fisher* [1980] AC 319 and *Attorney-General of Trinidad and Tobago v. Whiteman* [1991] 2 AC 240, 247.
[122] 2004 (4) SA 326 (SCA) [24].

The contrast between values-based constitutions,[123] such as those of Germany and South Africa, which give effect to that principle, and the values-free Commonwealth Constitution is striking. Only thoroughgoing constitutional reform can effect the changes necessary to make our Constitution conform to the requirements of human dignity. However, as is notorious, there are considerable impediments to reform. Undoubtedly the most significant of these is the interest that politicians have in maintaining a system which enables them to govern without the constraint of a bill of rights and – in the case of politicians from the two major blocs - under an electoral system that ensures them perpetual alternation in power as partners a comfortable duopoly. Then there is the widespread lack of knowledge of the Constitution on the part of voters, which naturally makes them fearful of changing that which they do not understand – a fear which is skilfully exploited by the same politicians who wish to maintain the current system. Reform is therefore likely to take decades.

It is here that legal academics have a singularly important role to play. Today's students are tomorrow's lawyers, judges and politicians, and so teachers of constitutional law are bear a particular moral responsibility to foster change. In 1985, South African legal academic and veteran anti-apartheid activist Tony Mathews wrote[124]

> Until quite recently in most law schools, and even today in some of them, law was taught as an arid body of rules divorced from social context and seldom evaluated, especially in the field of public law, in terms of non-legal standards of judgment.

Unfortunately, and assuming that the research legal academics do mirrors how they teach, Mathew's comment are as applicable in Australia today as they were in South Africa 35 years ago, because the research produced by legal academics in this country reveals the darkest of black-letter law approaches, and a striking absence of work critiquing the many flaws of the current Constitution.[125]

What is therefore required is a transformative approach to teaching, one in which students are not just taught about 'the Constitution' as though inscribed on Mosaic tablets, complete, unchanging and, what is worse still, as not requiring change, but rather one in which they are encouraged to think about the far more fundamental question of what *values* should underpin a constitution, and how to bring about such change as is necessary to give effect to those values. In short, we need to inspire our students to think not only about what the law is, but what it might become.[126]

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[123] For statement which is both eloquent and succinct in its explanation of what values-based constitutionalism means, and one which is all the more remarkable in that it was written during the apartheid era and yet with an eye to the demise of that system, see Dion Basson and Henning Viljoen, *South African Constitutional Law* (Juta & Co, 1998) 1-4.

[124] Anthony Mathews 'The South African judiciary and the security system' (1985) 1 *South African Journal on Human Rights* 199, 208.

[125] As an example of this, there was only one paper which discussed proportional representation in an entire issue of the *Federal Law Review* devoted to electoral law (Volume 32(3) 2004) – and its focus was the law in New Zealand. The disparities produced by the system in Australia went without comment.

[126] An examination of the issues requiring attention and a proposed new constitution which remedies them can be found in Bede Harris, *Constitutional Reform as a Remedy for Political Disenchantment in Australia – The discussion we need* (Springer Nature, 2020).