

EXTREME ELECTIVE OR COSMETIC SURGERY AND CONTROVERSIAL PATIENT CHOICE: A CONSTITUTIONAL ANALYSIS

HANNEKE VERWEY* AND PIETER A CARSTENS**

ABSTRACT

The specific fundamental human rights protected in the Bill of Rights that come into play when patients make controversial requests for extreme forms of cosmetic surgery are discussed. The meaning of human dignity in South African constitutional law forms the focus of the first part of this article. By applying a constitutional conception of human dignity, the question is answered whether extreme forms of cosmetic surgery most likely promotes or impedes human dignity. In this regard, the relationship between autonomy and dignity and the question whether autonomous individuals should be prevented from participating in activities that might limit their dignity is addressed. The same enquiry is made concerning the other fundamental human rights that are applicable to extreme forms of cosmetic surgery. This includes the right to bodily integrity and the right to privacy. The limitation of these fundamental human rights in terms of s 36 of the Constitution is then addressed.

Key words: Constitution of the Republic of South Africa, 1996, medical law

I INTRODUCTION

The pursuit of beauty by means of cosmetic surgery is big business in modern societies and South Africa is catching up very fast in this particular area. With the rise of cosmetic surgery, the contemporary body, instead of being a dysfunctional object requiring medical interventions, has become a primary symbol of identity and a commodity, not unlike ‘a car, a refrigerator, a house, which can be continuously upgraded and modified in accordance with new interests and greater resources’.¹ Cosmetic surgery has in fact become a ‘modern body custom’.² Cosmetic surgery, whilst generally pursued to beautify, enhance and perfect, can do the exact opposite when used inappropriately.³ As Tony Bogdanoski rightly states: ‘[E]xcessive cosmetic surgery can transform acts which were undertaken to conform to societal images of beauty into “freakish” acts of body modification, divorced from their original intentions

* MacRobert Attorneys, Department of Professional Indemnity Law.

** Department of Public Law, University of Pretoria.

1 J Finkelstein *The Fashioned Self* (1991) 87; D Gimlin ‘Cosmetic Surgery: Beauty as a Commodity’ (2000) 23 *Qualitative Sociology* 77, 80; J Adams ‘Motivational Narratives and Assessments of the Body after Cosmetic Surgery’ (2010) 20 *Qualitative Health Research* 755, 757.

2 DA Sullivan *Cosmetic Surgery The Cutting Edge of Commercial Medicine in America* (2000) 10.

3 T Bogdanoski ‘Every Body is Different – Regulating the Use (and Non-use) of Cosmetic Surgery, Body Modification and Reproductive Genetic Testing’ (2009) 18 *Griffith LR* 503, 507.

of conforming to socially sanctioned ideals of beauty ...⁴ Consider the real-life, albeit extreme, example of Brian Zembic, the high-stakes gambler who became famous when he agreed to undergo a breast augmentation with silicone implants as part of a \$100, 000 wager, or Jocelyn Wildenstein, the famous New York socialite, who had undergone so many cosmetic procedures that she unintentionally transformed herself into the ‘cat woman’.⁵ Although rare, some patients suffering from body identity integrity disorder actually request the amputation of healthy limbs.⁶ Others want their anatomy shaped to replicate the appearance of reptiles.⁷ More commonplace examples might include an exotic dancer who asks her surgeon to give her extraordinarily large breast implants so that she can find a niche in the competitive market of exotic dancing, a young black woman asking her surgeon to lighten her skin and narrow her nose, or a woman asking her surgeon to perform a labiaplasty, a cosmetic procedure that some feminists compare to female circumcision.⁸

II SECTION 10 OF THE CONSTITUTION: RIGHT TO HUMAN DIGNITY

The Constitution of the Republic of South Africa, 1996 states the following: ‘Everyone has inherent dignity and the right to have their dignity respected and protected.’⁹ The Constitution repeatedly refers to human dignity as both a right and a value and all things considered, human dignity is arguably the most important right as well as the most important value contained in the Bill of Rights.¹⁰ Human dignity is central to the protection of all other rights and every other right has a component consisting of human dignity, as such human dignity can be described as a ‘pre-eminent value in the Constitution,

4 Ibid.

5 M Konik *The Man with the \$100 000 Breasts And Other Gambling Stories* (1999) 240; Bogdanoski (note 3 above) 507.

6 Body integrity identity disorder is an extremely rare phenomenon marked by extreme emotional distress due to the presence of one or more body parts, usually a limb, which the patient feels should not be there. People suffering from body integrity identity disorder typically believe that a particular limb does not belong to them or is not a part of their body and as such they feel ‘over complete’. This discomfort is so strong that it interferes with routine functioning. Patients are usually motivated to seek amputation of the healthy limb. Psychologists and neurologists explain this phenomenon in different ways, but a successful psychotherapeutic or pharmaceutical therapy is not known.

7 T Schramme ‘Should we Prevent Non-therapeutic Mutilation and Extreme Body Modification?’ (2008) 22 *Bioethics* 8, 8.

8 T Elliott ‘Body Dysmorphic Disorder, Radical Surgery and the Limits of Consent’ (2009) *Medical LR* 149, 163; L Benadiba ‘Labiaplasty: Plastic or Cosmetic Surgery? Indications, Techniques, Results and Complications’ (2010) 55 *Ann Chir Plast Esthet* 147, 147; S Aleem & EJ Adams ‘Labiaplasty’ (2012) 22 *OGRM* 50, 50.

9 Constitution s 10.

10 The Constitution s 1 states that South Africa is founded on the values of ‘human dignity, the achievement of equality, and the advancement of human rights and freedoms’; s 7 reads that the Bill of Rights is an instrument that ‘affirms the democratic values of human dignity, equality and freedom’; s 36 permits limitations provided that they are ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’. Furthermore, s 39 states that when interpreting the Bill of Rights ‘the values that underlie an open and democratic society based on human dignity, equality and freedom’ must be promoted.

even more so than the right to life'.¹¹ Furthermore, human dignity lies at the heart of the prohibition against unfair discrimination and the infringement of human dignity due to unequal treatment amounts to prima facie unfair discrimination.¹² Human dignity also differs from other fundamental rights in the sense that it has a residual function. This means that the right to human dignity finds application where more specific rights that give expression to human dignity do not.¹³ However, more often than not, dignity is applied as an objective normative value and not as an individual right. Courts ordinarily do not apply dignity as a first order right where the 'primary constitutional breach occasioned may be of a more specific right ...'.¹⁴ Susie Cowen explains this as follows:

Dignity as a right is 'elevated' in relation to other rights, but only in the sense that it is seen to embrace and inform other rights. Other rights may be seen as incidences of dignity itself or, put less strongly, the meaning of other rights can also be located in the idea of protecting human worth. The implication of this is that one would see the protection of bodily and psychological integrity, for example, as a component of protecting human worth – or dignity – and thus embraced also in the right to dignity. But a legal claim that fits the right to bodily and psychological integrity would more likely be dealt with under that right, even though it is also embraced by the broader right to dignity. Sometimes the choice of right will be determined by whether there are internal limitations on those rights. The dignity right then for practical purposes serves as a flexible and residual right.¹⁵

(a) Constitutional conceptions of human dignity

There is a very close connection between human dignity and health care, as health is essential to life and human dignity.¹⁶ Furthermore, decisions regarding one's body and the effect that those decisions have on your relationship with your own body is deeply personal. As such, the decisions affect one's dignity. Appeals to human dignity and claims that some feature of current medical practice violates human dignity are ubiquitous in contemporary bioethical discourse. The same can be said for extreme forms of cosmetic surgery. Depending on the definition of human dignity, extreme forms of cosmetic surgery might either promote or impede human dignity. It is therefore very important to have a correct understanding of the term. Despite the pervasive reference to human dignity in biomedical literature, it is rarely defined. This

- 11 *S v Makwanyane* 1995 (5) BCLR 666 (CC); D Davis, H Cheadle & N Haysom *Fundamental Rights in the Constitution Commentary and Cases* (1997) 70; A Chaskalson 'Human Dignity as a Foundational Value in our Constitutional Order' (2000) *SAJHR* 193, 196; I Currie & J De Waal *The Bill of Rights Handbook* 5 ed (2005) 272.
- 12 *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC) para 31.
- 13 I Currie, J De Waal, C Hoexter & R Lyster *The New Constitutional and Administrative Law* (2001) 362; Currie & De Waal (note 11 above) 275; H Botha 'Human Dignity in Comparative Perspective' (2009) 20 *Stellenbosch LR* 171, 198.
- 14 *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 35; S Woolman 'The Widening Gyre of Dignity' in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 193, 207; Botha *ibid* 198.
- 15 S Cowen 'Can "Dignity" Guide South Africa's Equality Jurisprudence?' (2001) 17 *SAJHR* 34, 47; Botha (note 13 above) 198.
- 16 P Carstens & D Pearmain *Foundational Principles of South African Medical Law* (2007) 29.

had led some to conclude that human dignity is indefinable and therefore a useless concept for the ethical analysis of medical technologies.¹⁷ It has been said of dignity, that its meaning is so unclear, and its use so vast, that it is not much more than a vague rhetorical device.¹⁸ Some constitutional lawyers are of the opinion that dignity can only be defined on a case-by-case basis or that it can only be defined negatively.¹⁹ There is no denying the fact that the concept of human dignity is indeed 'complex, ambiguous and multivalent'.²⁰ Proof of this is the fact that appeals to dignity are often used to support diametrically opposed positions. For example, death with dignity organisations often appeal to a loss of dignity during end of life suffering to support their arguments, whereas anti-euthanasia organisations appeal to respect for the dignity of human life to oppose euthanasia. It has also been said that dignity-based jurisprudence is not conducive to principled decision-making, as it allows judges to resort to subjective values rather than objective rules.²¹ Even our Constitutional Court has acknowledged that human dignity is 'a difficult concept to capture in precise terms'.²² However, the concept of human dignity is certainly not a mere empty slogan. Such a stance would be completely unacceptable in an open and democratic society based on human dignity, equality and freedom. The Constitutional Court identified human dignity as the hallmark of the new constitutional order very early on in *S v Makwanyane*.²³ The Constitutional Court has since referred to human dignity repeatedly, particularly in the case of controversial issues such as the death penalty,²⁴ termination of pregnancy,²⁵ marriage between homosexual individuals,²⁶ religious freedom²⁷ and prostitution,²⁸ just to name a few.²⁹ The importance of human dignity is clearly beyond dispute, but its meaning is very far from clear. Despite the prominence and importance of human dignity, the Constitutional Court has not yet adopted any definitive or comprehensive definition thereof and has acknowledged that human dignity is difficult to define.³⁰ The manner

17 HR Moody 'Why Dignity in Old Age Matters' (1998) 29 *JGSW* 13, 32; R Macklin 'Dignity is a Useless Concept' (2003) 327 *BMJ* 11419, 1419; N Jacobson 'Dignity and Health: A Review' (2007) 64 *Soc Sci Med* 292, 292; D Schroeder 'Dignity: Two Riddles and Four Concepts' (2008) 17 *Camb Q Healthc Ethics* 230, 231; S Pinker 'The Stupidity of Dignity' *The New Republic* (2008).

18 Macklin *ibid* 1419; Moody *ibid* 32; N Jacobson 'Dignity and Health: A Review' (2007) 64 *Soc Sci Med* 292, 292; Schroeder *ibid* 231; Pinker *ibid*.

19 Botha (note 13 above) 182.

20 Moody (note 17 above) 14.

21 See literature referred to by Botha (note 13 above) 172.

22 *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 28; Currie & De Waal (note 11 above) 273.

23 *Makwanyane* (note 11 above).

24 *Ibid*.

25 *Christian Lawyers Association of South Africa v Minister of Health* 1998 (11) BCLR 1434 (T).

26 *Minister of Home Affairs v Fourie* 2006 3 BCLR 355 (CC).

27 *Christian Lawyers Association* (note 25 above).

28 *S v Jordan* 2001 (10) BCLR 1055 (T) para 642.

29 DW Jordaan 'Autonomy as an Element of Human Dignity in South African Case Law' (2009) 9 *J of Philosophy, Science and Law* (2009).

30 *National Coalition for Gay & Lesbian Equality* (note 22 above) para 28; Currie & De Waal (note 11 above) 273; Jordaan *ibid*.

in which the Constitutional Court has addressed the inviolability of dignity has also been somewhat ambiguous. At times, the Constitutional Court has seemingly taken the stance that dignity cannot be destroyed. Presumably, undignified behaviour must at the very least then represent some sort of an insult to dignity, as it cannot be violated or diminished. At other times, the Constitutional Court has explicitly condemned certain behaviours in so far as it diminishes or destroys human dignity.³¹

In its broadest sense, the Constitutional Court has defined human dignity as the intrinsic worth of all human beings and the source of a person's innate rights to freedom and physical integrity from which several other rights emanate.³² The Constitutional Court has explained the concept of human dignity by stating that simply by virtue of being human, 'human beings are entitled to be treated as worthy of respect and concern'.³³ Human beings are therefore not 'commodities to which a price can be attached', but rather 'creatures with inherent and infinite worth' who deserve to be treated as ends in themselves as opposed to mere means to an end.³⁴ Human dignity has been recognised by the Constitutional Court as a right 'concomitant to life itself and inherent in all human beings'.³⁵ The Constitutional Court therefore does not regard human dignity as something that is linked to virtue. It can neither be earned nor deserved. This understanding of human dignity is also what Ronald Dworkin is referring to when he speaks of 'the principle of intrinsic value' as the first dimension of human dignity.³⁶ In terms of the principle of intrinsic value each and every human life is objectively valuable.³⁷ Potentially relevant to the question of extreme forms of cosmetic surgery and its impact on human dignity, is the fact that the Constitutional Court has stated that human dignity inheres in various aspects of what it means to be human, including, but not limited to the fundamental dignity of the human body.³⁸ In this regard, the Constitutional Court in *S v Jordan* stated that the Constitution regards there to be an inherent respect in the human body and that the 'constitutional commitment to human dignity invests a significant value in the inviolability and worth of the human body'.³⁹

31 In this regard, one might compare the Constitutional Court's treatment of dignity in *Makwanyane* (note 11 above) to that in *Jordan* (note 28 above). In *Makwanyane* it was averred that the dignity of even the most vile of criminals remains intact. In *Jordan* however, the Constitutional Court upheld the ban on prostitution based on the fact that commercial sex diminished the dignity of the prostitute.

32 *S v Dodo* 2001 (3) SA 382 (CC) para 38; *Bernstein v Bester* 1996 (2) SA 751 (CC) para 148; *Makwanyane* (note 11 above) para 327; *National Coalition for Gay & Lesbian Equality* (note 22 above) para 29; Currie & De Waal (note 11 above) 273.

33 *Makwanyane* *ibid* para 328.

34 *Dodo* (note 32 above) para 38; S Liebenberg 'The Value of Human Dignity in Interpreting Socio-economic Rights' (2005) *SAJHR* 1, 6.

35 *Makwanyane* (note 11 above) para 311.

36 R Dworkin *Is Democracy Possible Here? Principles for a New Political Debate* (2006) 10.

37 *Ibid*.

38 *Jordan* (note 28 above) para 74.

39 *Ibid* paras 74 & 81.

The Constitutional Court has adopted both a classic liberal conception of human dignity as well as a conception of human dignity rooted in ubuntu respectively. In *Ferreira v Levin*, Ackerman J held that human dignity refers to the need to respect the uniqueness of the individual and the need to permit personal development. In this regard, Ackerman J stated that:

Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their ‘humanness’ to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual’s human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity. Although freedom is indispensable for the protection of dignity, it has an intrinsic constitutional value of its own.⁴⁰

Autonomy is certainly a *conditio sine qua non* for personal development and as such, in terms of the definition of human dignity put forward by Ackerman J, autonomy is also an element of human dignity.⁴¹ Nicholas Haysom connects autonomy with self-actualisation or self-realisation when he states that in order to respect an individual’s autonomy, the individual’s ‘worth as self-actualising must be protected’.⁴² This understanding is also what Dworkin is referring to when he speaks of ‘the principle of personal responsibility’ as the second dimension of human dignity.⁴³ Dworkin explains the principle of personal responsibility as follows:

The second principle – the principle of personal responsibility – holds that each person has a special responsibility for realizing the success of his own life, a responsibility that includes exercising his judgment about what kind of life would be successful for him. He must not accept that anyone else has the right to dictate those personal values to him or impose them on him without his endorsement. He may defer to the judgments codified in a particular religious tradition or to those of religious leaders or texts or, indeed, of secular moral or ethical instructors. But that deference must be his own decision; it must reflect his own deeper judgment about how to acquit his sovereign responsibility for his own life.⁴⁴

The Constitutional Court has also recognised the connection between autonomy and self-actualisation on several other occasions.⁴⁵ The notion that

40 *Ferreira v Levin* 1996 1 SA 984 (CC) para 49.

41 N Haysom ‘Dignity’ in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: the Bill of Rights* 2 ed (2002) 123, 131; Jordaan (note 29 above).

42 *Ibid.*

43 Dworkin (note 36 above) 10.

44 *Ibid.*

45 In *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC) para 57 the court defines autonomy as: ‘[T]he ability to regulate one’s own affairs, even to one’s own detriment.’ In *NM v Smith* 2007 (7) BCLR 751 (CC) para 131 the court describes autonomy as the ability to choose how you want to live your life, albeit within the overall framework of a broader community. In *Ferreira* (note 40 above) para 50 the court stated that: ‘An “open society” most certainly enhances the argument that individual freedom must be generously defined. It is a society in which persons are free to develop their personalities and skills, to seek out their own ultimate fulfilment, to fulfil their own humanness and to question all received wisdom without limitations placed on them by the State. The “open society” suggests that individuals are free, individually and in association

autonomy forms an important part of dignity was put forward by O'Regan J in *NM v Smith* when she stated the following in regard to human dignity, privacy and freedom: 'Underlying all these constitutional rights is the constitutional celebration of the possibility of morally autonomous human beings independently able to form opinions and act on them.'⁴⁶ O'Regan J acknowledged that the Constitution 'seeks to assert and promote the autonomy of individuals'.⁴⁷ This conception of human dignity was also adopted by the Constitutional Court in *Barkhuizen v Napier*, when Ngcobo J stated that autonomy, or the 'ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity'.⁴⁸ The ability to live an autonomous life, that is, a life of one's choice in accordance with your own conception of the good, was once again confirmed to form an important part of dignity by the Constitutional Court in *MEC for Education: KwaZulu-Natal v Pillay* when Langa CJ stated that an 'entitlement to respect for the unique set of ends that the individual pursues' is a 'necessary element of freedom and of dignity of any individual'.⁴⁹ Also, in *President of the Republic of South Africa v Hugo*, it was confirmed that dignity is 'at the heart of individual rights in a free and democratic society'.⁵⁰ This particular understanding of human dignity 'secures the space for self-actualisation'.⁵¹

This is not to say that autonomy is an independent right, as this stance has already been rejected by the Constitutional Court in *S v Jordan*.⁵² Furthermore, it is not being averred that dignity is completely synonymous with or limited to the concept of autonomy, after all one can exercise one's autonomy in ways that might limit or represent an insult to one's own dignity. All that is being averred is that autonomy, unless exercised for the explicit purpose of degrading or humiliating oneself, generally complements human dignity. Dignity therefore presupposes a sphere of personal autonomy, even though it is not exclusively synonymous with individual freedom and self-fulfilment.⁵³ This contention has its roots not only in constitutional jurisprudence and contemporary human rights literature, but also in Kantian philosophy in terms of which autonomy promotes dignity in the sense that it allows an individual

with others, to pursue broadly their own personal development and fulfilment and their own conception of the "good life".

46 *Smith* *ibid* paras 145–6.

47 *Ibid*.

48 *Barkhuizen* (note 45 above) para 57.

49 *MEC for Education KwaZulu-Natal v Pillay* 2008 (2) BCLR 99 (CC) para 64.

50 *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 41.

51 Woolman (note 14 above) 202.

52 See *Jordan* (note 28 above) para 53 where the court stated that: 'While we accept that there is manifest overlap between the rights to dignity, freedom and privacy, and each reinforces the other, we do not believe that it is useful for the purposes of constitutional analysis to posit an independent right to autonomy. There can be no doubt that the ambit of each of the protected rights is to be determined in part by the underlying purport and values of the Bill of Rights as a whole and that the rights intersect and overlap one another. It does not follow from this however that it is appropriate to base our constitutional analysis on a right not expressly included within the Constitution.'

53 Botha (note 13 above) 204.

to lay down the rules of their own morality.⁵⁴ The fact that human dignity is closely related to the notion that human beings are moral agents who are capable of shaping their own identity is often expressed by philosopher and legal scholar, Martha Nussbaum. Nussbaum expresses this notion as follows:

The core idea is that of the human being as a dignified free being who shapes his or her own life in cooperation reciprocity with others, rather than being passively shaped or pushed around by the world in the manner of a ‘flock’ or ‘herd’ animal. A life that is really human is one that is shaped throughout by these human powers of practical reason and sociability.⁵⁵

Autonomy is valuable for the pursuit of dignity if it is exercised in the pursuit of the good without prescribing any particular conception of the good.⁵⁶ Some individuals have values that differ from the dominant social values and their controversial choices could make for better, more autonomous lives.⁵⁷ These values lead them to choices that appear irrational to most, but that are acceptable within their particular worldview, as it truly contributes to their conception of a worthwhile life.⁵⁸ A good or worthwhile life might include the pursuit of some physical ideal through the performance of extreme surgery. Some people regard their bodies as ‘a collection of raw materials through which one can construct one’s own true self’.⁵⁹ Such a view actually legitimises extreme surgery as a source of self-determination and autonomy.⁶⁰ Controversial choices, where competent and rational, should therefore even be encouraged as they ‘increase the richness of the tapestry of human living’.⁶¹ In this regard, the British philosopher, John Stuart Mill, stated the following:

I have said that it is important to give the freest scope possible to uncustomary things, in order that it may in time appear which of these are fit to be converted into customs. But independence of action, and disregard of custom, are not solely deserving of encouragement for the chance they afford that better modes of action, and customs more worthy of general adoption, may be struck out; nor is it only persons of decided mental superiority who have a just claim to carry on their lives in their own way. There is no reason that all human existence should be constructed on some one or small number of patterns. If a person possesses any tolerable amount of common sense and experience, his own mode of laying out his existence is the best, not because it is the best in itself, but because it is his own mode.⁶²

54 R Post ‘Dignity, Autonomy and Democracy’ *Working Papers*, Institute of Governmental Studies, UC Berkeley (2000). See also *Ferreira* (note 40 above) para 52 where Ackerman J refers to a Kantian conception of dignity and its relation to freedom/autonomy.

55 M Nussbaum *Women and Human Development The Capabilities Approach* (2000) 72.

56 JAM De Roubaix ‘Beneficence, Non-maleficence, Distributive Justice and Respect for Patient Autonomy: Reconcilable Ends in Aesthetic Surgery?’ (2011) 64 *JPRAS* 11, 12.

57 J Savulescu ‘Autonomy, the Good Life and Controversial Choices’ in R Rhodes, LP Francis & A Silvers (eds) *The Blackwell Guide to Medical Ethics* (2007) 17, 17.

58 De Roubaix (note 56 above) 12.

59 W Hua *Buying Beauty Cosmetic Surgery in China* (2013) 6.

60 For example Hua *ibid* 71 describes the way in which some Chinese women consider cosmetic surgery to be a source of liberation and ‘a way to emancipate the natural human desire for beauty from the shackles of the earlier political oppression in China’. These women, who are free to do whatever they want with their bodies, therefore attempt to draw a comparison between their own generation and a previous generation of women who had to sacrifice everything, including their bodies, for the needs of the state.

61 Savulescu (note 57 above) 17.

62 JS Mill ‘On Liberty’ in ML Morgan (ed) *Classics of Moral and Political Theory* 4 ed (2005) 995, 969.

In contrast with this classic liberal conception of dignity, Mokgoro J, in *Ferreira v Levin*, opined that although the individual is not completely irrelevant when it comes to dignity, the individual should not be regarded as an isolated entity. People are interdependent and bound to a community and as such human dignity is a relational value.⁶³ In terms of this definition, dignity therefore ‘encompasses both the autonomy of the individual and her membership of and boundedness to the community’.⁶⁴ Mokgoro J then put forward an understanding of human dignity as part of ubuntu or humaneness, in which the community or group plays an essential role. In this regard, Langa J, in *S v Makwanyane*, stated that:

An outstanding feature of *ubuntu* in a community sense is the value it puts on life and human dignity. The dominant theme of the culture is that the life of another person is at least as valuable as one’s own. Respect for the dignity of every person is integral to this concept.⁶⁵

The court in *Port Elizabeth Municipality v Various Occupiers* was also recognising such a collective conception of dignity when it stated the following:

It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies rather than mitigates their marginalisation.⁶⁶

A communitarian conception of human dignity can be described as social justice with an emphasis on compassion for vulnerable individuals in the community. This conception of human dignity is rooted in the communal nature of traditional African societies.⁶⁷ In contrast, the classic liberal conception of human dignity is rooted in individual rights and any derogation from individual liberty for the sake of the collective good must be properly justified in terms of the limitation clause.⁶⁸

It is important to avoid both a ‘radical individualist conception of a self that is unencumbered by social ties and relations’ on the one hand as well as a ‘thick, essentialist view of a self that is incapable of escaping the strictures imposed by attributes like culture and religion’ on the other.⁶⁹ A communitarian conception of human dignity seems more appropriate in cases concerning socio-economic rights as opposed to cases concerning highly personal rights such as the extreme elective surgery patient’s right to bodily integrity and privacy. Dignity is a wide and all-encompassing concept; as such no single conception of dignity is correct or incorrect.⁷⁰ Furthermore, dignity as autonomy or self-determination can also be adapted to operate at a group

63 Liebenberg (note 34 above) 11; Botha (note 13 above) 187.

64 Botha (note 13 above) 187.

65 *Makwanyane* (note 11 above) para 225.

66 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 18.

67 C McCrudden ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19 *EJIL* 655, 688.

68 *Ibid.*

69 Botha (note 13 above) 206.

70 J Waldron ‘The Dignity of Groups’ (2008) *Acta Juridica* 66, 73.

or communitarian level, as is made clear in s 235 of the Constitution which recognises the right of communities and the South African people as a whole to self-determination.⁷¹ When we talk about the dignity of a patient seeking extreme cosmetic surgery, it is submitted that it would be more appropriate to refer to the classic liberal conception of dignity, with an emphasis on autonomy, as opposed to a communitarian sense of dignity rooted in ubuntu. This is because autonomy is so important in personal decisions regarding health care.

(b) The importance of autonomy in health-care decisions

In *Castell v De Greef*, the court emphasised the importance that the Constitution places on a patient's fundamental right to self-determination and rights of bodily integrity and autonomous moral agency.⁷² It has been said that health is an 'essential prerequisite to the exercise of personal autonomy and an irreducible condition of human flourishing'.⁷³ Control over physical and mental health is an essential facet of personal autonomy and the pursuit of health through the exercise of personal choices is an expression thereof.⁷⁴ Similarly, individuals must be autonomous in order to make informed choices regarding the pursuit of health.⁷⁵ A right to health therefore also includes a right to gain control over one's sense of physical and psychological well-being.⁷⁶ In this regard, it is important to remember the enormous impact that individual behaviour, attitudes and choices have on health status.⁷⁷ It has been argued that the importance of autonomy in health care should not be overestimated, as the holders of rights are not isolated and socially disconnected entities.⁷⁸ In *Soobramoney v Minister of Health, KwaZulu-Natal*, Sachs J stated that rights related to health care must not just be considered in terms of the usual legal context structured around the ideas of human autonomy. Sachs J opined that such rights must also be evaluated in terms of a new 'analytical framework based on the notion of human interdependence', as a healthy life depends upon social interdependence.⁷⁹ This is very true, but it is submitted that in the context of privately paid for elective procedures such as cosmetic surgery, the broader social and material dimensions of the pursuit of health becomes less relevant. The close relationship between dignity and autonomy in the context

71 Ibid 75.

72 *Castell v De Greef* 1994 (4) SA 63 (C) paras 420J & 421C-D; M Pieterse 'The Interdependence of the Right to Health and Autonomy in South Africa' (2008) 125 *SALJ* 553, 559.

73 D Giesen 'A Right to Health Care? A Comparative Perspective' (1994) 4 *Health Matrix* 277, 280.

74 Pieterse (note 72 above) 555.

75 Ibid.

76 AE Yamin 'Defining Questions: Situating Issues of Power in the Formulation of a Right to Health Care Under International Law' (1996) 18 *Human Rights Quarterly* 398, 415; Pieterse (note 72 above) 555.

77 C Barker *The Health Care Policy Process* (1996) 118; Pieterse (note 72 above) 556.

78 Pieterse (note 72 above) 568–72; *National Coalition for Gay and Lesbian Equality* (note 22 above) para 117.

79 *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) para 54.

of health care must also be kept in mind. As such, an emphasis on autonomy is warranted.

III SECTION 12(2) OF THE CONSTITUTION: RIGHT TO BODILY AND PSYCHOLOGICAL INTEGRITY

Section 12 of the Constitution protects health-related autonomy interests.⁸⁰ Sections 12(2)(a) and 12(2)(b) protect the right to bodily and psychological integrity, which includes, but is not limited to, the right to make decisions about reproductive health and the right to security in and control over your body. '[T]he essence of the right to freedom and security of the person' is negative, that is, the 'right to be left alone'.⁸¹ There is a difference between a right to 'security in' your body as opposed to a right to 'control over' your body. A right to security in your body refers to the protection of your bodily integrity against intrusion by the state and your right to be left alone, whereas a right to control over your body refers to physical autonomy, self-determination and the right to live the life of your choice.⁸²

In the health-care context, the right to bodily and psychological integrity usually implies a right not to receive medical treatment against your will and a right to informed consent.⁸³ In terms of a wide interpretation of the right to bodily and psychological integrity, it also includes a right to make autonomous decisions regarding your own body. Such a reading is consistent with the fact that the right to bodily and psychological integrity explicitly includes the right to make decisions regarding reproductive health. According to Marius Pieterse, the right to bodily integrity includes the autonomous pursuit of health through lifestyle-related choices.⁸⁴ Reproductive autonomy is just one of the manifestations of this freedom.⁸⁵ According to Pieterse, it is therefore conceivable that 'the failure to respect autonomy-related elements of the right to health may, in several contexts, amount to an infringement of the constitutional right to bodily and psychological integrity'.⁸⁶ In this regard, it is important to keep in mind that 'health' is a very broad concept and includes well-being. The right to bodily and psychological integrity becomes relevant in the context of extreme forms of elective or cosmetic surgery, as some individuals may undergo such procedures in the pursuit of well-being.

80 Pieterse (note 72 above) 557.

81 M Swanepoel 'Embryonic Stem Cell Research and Cloning: A Proposed Legislative Framework in Context of Legal Status and Personhood' LLM dissertation, UP (2006) 110; Currie & De Waal (note 11 above) 308.

82 Swanepoel *ibid* 110–1; Currie & De Waal (note 11 above) 308.

83 Swanepoel *ibid* 110; Currie & De Waal *ibid* 308; D Pearmain 'A Critical Analysis of the Law on Health Services Delivery in South Africa' LLD dissertation, UP (2004) 121–2; Pieterse (note 72 above) 558; Carstens & Pearmain (note 16 above) 30.

84 Pieterse *ibid* 558.

85 See *Christian Lawyers v Minister of Health* 2004 (10) BCLR 1086 (T) paras 10931–1094C where the court stated that the ability to make decisions regarding termination of pregnancy furthers the enjoyment to the constitutional right to bodily and psychological integrity, dignity and privacy. Also see discussion in Pieterse *ibid* 563.

86 Pieterse *ibid* 560.

A patient who therefore makes the autonomous decision to undergo extreme or strange elective surgery in pursuit of their conception of well-being, might have their right to bodily and psychological integrity violated should they be refused.

IV SECTION 14 OF THE CONSTITUTION: RIGHT TO PRIVACY

Section 14 of the Constitution protects the right to privacy, which includes the right not to have one's person, home or property searched, one's possessions seized or the privacy of one's communications breached. South Africa is one of the few countries in the world with an express right to privacy contained in its Bill of Rights. The Constitutional Court has stated that there is a 'manifest overlap' between the right to privacy and the right to human dignity and freedom and that each reinforces the other.⁸⁷ Furthermore, it has been acknowledged that the right to privacy 'serves to protect and foster' human dignity.⁸⁸ The right to privacy is relevant to extreme elective medical practices, as decisions concerning health care and what one chooses to do with one's body is extremely intimate and personal. The autonomy to make such intimate decisions in relation to intensely significant aspects of one's personal life could reasonably be argued to be protected by the right to privacy.⁸⁹ In this regard, it has been said that the right to privacy is protected for instrumental reasons, namely the 'realisation of a value-autonomous identity', and as such privacy is a valuable aspect of personhood, human dignity in particular.⁹⁰

(a) Constitutional conception of privacy

The concept of privacy is notoriously difficult to define in both philosophy and law.⁹¹ In *Bernstein v Bester*, Ackerman J referred to scholars Dionisopoulos and Ducat and their suggestion that the concept of privacy consists of three core elements.⁹² The first core element constitutes the 'place-oriented conceptions of privacy', which defines the right to privacy in spatial terms. The second core element refers to the 'person-oriented conceptions of privacy', where the emphasis is shifted from place or property to the actual person involved. Lastly, the third concept refers to how the 'right inheres in certain relationships', such as the relationship between spouses.⁹³ In this regard, it is worth mentioning that the Constitutional Court in *S v Jordan* clarified any confusion surrounding the spatial metaphors used in *Bernstein v Bester*. Such metaphors are somewhat misleading to the extent that they suggest that privacy is confined to or relates

87 *Jordan* (note 28 above) para 53.

88 *Ibid* para 81.

89 *Ibid* para 76.

90 I Currie 'The Concept of Privacy in the South African Constitution' (2008) 3 *JSAL* 549, 552–3; Currie & De Waal (note 11 above) 322.

91 Currie *ibid* 549; *Bernstein* (note 32 above) para 65; *Smith* (note 45 above) para 32.

92 *Bernstein* *ibid* para 65.

93 See PA Dionisopoulos & CR Ducat *The Right to Privacy* (1976) as referred to in LJ Barker & TW Barker *Civil Liberties and the Constitution* (1990) 577.

to a space or a place. This is incorrect. The fact that conduct takes place in or outside of the inner sanctum is not crucial in determining whether or not the conduct merits protection.⁹⁴ What matters is whether the conduct is dignity-affirming, and whether it therefore conforms to the primary purpose of the right to privacy.⁹⁵ In *Bernstein v Bester*, it was also stated that the right to privacy extends to all those areas of one's life that one can legitimately expect to be kept private.⁹⁶ A legitimate expectation of privacy has both a subjective as well as an objective component.⁹⁷ The subjective component refers to the individual's subjective expectation of privacy, whereas the objective component refers to the objective reasonableness of that expectation in the eyes of society.⁹⁸ Concerning the subjective component of privacy, it has been said that privacy is what feels private.⁹⁹ Privacy is therefore what can reasonably be considered to be private.

Concerning the scope of the right to privacy, the court in *Bernstein v Bester* stated that the concept of privacy is an amorphous and elusive one which has been the subject of much academic debate.¹⁰⁰ The court then confirmed that the scope of privacy is closely related to the concept of identity and that the right to privacy is 'not based on a notion of the unencumbered self, but on the notion of what is necessary to have one's own autonomous identity'.¹⁰¹ However, as Pierre de Vos rightly states: '[O]ne's identity is multi-levelled and depending on who one is and what activity one is engaged in the level of privacy protection will differ.'¹⁰² De Vos therefore likens the right to privacy to an onion and states that the right to privacy 'has many layers and the closer one gets to the skin the less protected it is'.¹⁰³ This is also what Ackerman J means when, referring to privacy, he states that the Constitution calls for a 'multi-levelled recognition of identity'.¹⁰⁴ Ackermann J held that the right to privacy must be understood as recognising a continuum of privacy rights that starts with a wholly inviolable inner self, moving to a relatively impermeable sanctum of the home and personal life, and ending in a public realm where privacy does not enjoy much protection. In this regard, the court in *Bernstein v Bester*, per Ackerman J, stated the following:

The relevance of such an integrated approach to the interpretation of the right to privacy is that this process of creating context cannot be confined to any one sphere, and specifically not to an abstract individualistic approach. The truism that no right is to be considered absolute, implies that from the outset of interpretation each right is always already limited by every

94 Currie & De Waal (note 11 above) 322–3; *Jordan* (note 28 above) para 81. See also Sachs J concurring with the fact that the right to privacy protects persons and not places in *National for Gay and Lesbian Equality* (note 22 above) para 116.

95 Currie & De Waal *ibid* 322–3; *Jordan* *ibid* para 81.

96 Currie & De Waal *ibid* 318; *Bernstein* (note 32 above) para 75; Currie (note 90 above) 551.

97 *Ibid*.

98 Currie & De Waal (note 11 above) 318; *Bernstein* (note 32 above) para 75.

99 Currie & De Waal *ibid* 318.

100 *Bernstein* (note 32 above) para 65.

101 *Ibid*.

102 P de Vos 'Why the Right to Privacy is Like an Onion' *Constitutionally Speaking* (October 2010).

103 *Ibid*.

104 *Bernstein* (note 32 above) para 66.

other right accruing to another citizen. In the context of privacy this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by conflicting rights of the community. This implies that community rights and the rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly.¹⁰⁵

In a truly personal realm, such as what you choose to do to your body, an expectation of privacy is therefore far more likely to be considered reasonable.¹⁰⁶ According to McGregor and Moore, the Constitution recognises an ‘inviolable sphere of privacy beyond the reach of public authority’.¹⁰⁷ This means ‘that certain matters that arise in this private sphere of autonomy cannot be judged upon or regulated by the state’.¹⁰⁸ In *S v Jordan*, the court stated that ‘[t]here can be no doubt that autonomy to make decisions in relation to intensely significant aspects of one’s personal life’ is included in the right to privacy.¹⁰⁹ Similarly, in *National Coalition for Gay and Lesbian Equality v The Minister of Justice* the court, per Ackerman J, stated that the right to privacy ‘recognises that we all have a right to a sphere of private intimacy and autonomy’.¹¹⁰ Privacy therefore does not only pertain to one’s home, body and property, but also to certain types of very personal and intimate decisions.¹¹¹ In this regard, the right to privacy includes the right ‘to be left alone’ and the right of an individual ‘to live his or her life as he or she pleases’.¹¹² The right to privacy is therefore relevant to extreme forms of elective or cosmetic surgery, as the decision to alter your body is an extremely personal and intimate one.

V APPLICATION OF THE CONSTITUTIONAL FRAMEWORK PERTAINING TO EXTREME FORMS OF COSMETIC SURGERY

It is difficult to determine whether certain forms of extreme cosmetic surgery violate human dignity. Due to the fact that human dignity is regarded as the basis of human rights and as it is so often used in combination with more specific rights, dignity sometimes features on both sides of a dispute.¹¹³ Two or more aspects of dignity are therefore placed in opposition to one another. In cases where dignity conflicts with dignity, a court has no choice but to engage in a balancing act.¹¹⁴ When autonomous and competent patients willingly

105 Ibid para 67.

106 Currie & De Waal (note 11 above) 318.

107 M McGregor & R Moore ‘The Constitutionality of Abortion on Request in South Africa’ *E Law* (December 1995).

108 Swanepoel (note 81 above) 115.

109 *Jordan* (note 28 above) para 76.

110 *National Coalition for Gay and Lesbian Equality* (note 22 above) para 32.

111 Currie (note 90 above) 552.

112 *Smith* (note 45 above) paras 32 & 33.

113 Botha (note 13 above) 216; SJ Fick ‘Consenting to Objectifying Treatment? Human Dignity and Individual Freedom’ LLM dissertation, University of Stellenbosch (2012) 66.

114 Botha (note 13 above) 194; Fick *ibid* 66.

consent and choose to have things done to their bodies that violate their human dignity, the state's duty to protect dignity, even against self-degradation, stands in opposition to the individual's autonomy and right to self-determination.¹¹⁵ In the case of extreme surgery, the self-worth and inherent dignity of human body component of dignity stands in opposition to the autonomy component of human dignity.

Assuming for the moment that some forms of extreme surgery do violate human dignity, the question arises whether one is allowed to consent to the limitation of one's own dignity and whether the state has an interest in preventing autonomous individuals from engaging in activities that represent some sort of an insult to or potential violation of dignity. Can the protection of dignity override free and autonomous consent? It might be assumed that if one has the right to be protected from the violation of the right to human dignity, then one should also be free from the paternalistic imposition of its unwanted benefits.¹¹⁶ In terms of a classic liberal autonomy-based approach to dignity, it seems perfectly rational that individuals should be allowed to limit their own dignity. Conversely, individuals will probably not be allowed to limit their own dignity in terms of a communitarian-based approach.¹¹⁷ There are numerous examples of ways in which the paternalistic protection of human dignity limits freedom. In some jurisdictions people are actually prohibited from exercising their freedom in order to protect their own dignity or the dignity of others. Examples include the prohibition of prostitution, dwarf-tossing¹¹⁸ and peepshows.

The South African position in this regard is somewhat vague and usually depends on the particular context. Whilst the Constitutional Court generally adopts a very anti-paternalistic approach, particularly in the case of gay rights, a distinctly paternalistic approach was adopted in the case of prostitution.¹¹⁹ In *S v Jordan*, the Constitutional Court upheld the criminalisation of prostitution based on the fact that it violates the prostitute's human dignity. It is very telling that the court was of the opinion that the harm to the prostitute's dignity was mainly ascribable to her own free choice to enter into the profession. The court's finding that the violation of the prostitute's dignity arises not from the law which criminalises the conduct of the prostitute instead of the patron, but from her own autonomous conduct is quite controversial.¹²⁰ In justification of upholding the criminalisation of prostitution, the court in *S v Jordan* stated the following:

115 Botha *ibid* 5; Fick *ibid* 66.

116 O De Schutter 'Waiver of Rights and State Paternalism under the European Convention of Human Rights' (2000) 51 *NILQ* 481, 494; Fick *ibid* 102.

117 McCrudden (note 67 above) 705.

118 Dwarf-tossing is a controversial bar activity during which individuals with dwarfism are thrown onto mattresses or at Velcro-covered walls. Participants compete to see who can throw these individuals the farthest. The practice has been banned in several countries.

119 McCrudden (note 67 above) 706; Botha (note 13 above) 203.

120 *Ibid*.

The very nature of prostitution is the commodification of one's body. Even though we accept that prostitutes may have few alternatives to prostitution, the dignity of prostitutes is diminished not by section 20(1)(a) but by their engaging in commercial sex work. The very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body.¹²¹

The reference to the inherent dignity of the human body as well as the fact that the court was of the opinion that the nature of a prostitute's work, despite the presence of consent, devalues human dignity, reminds one of German jurisprudence. In Germany, as in South Africa, dignity's paradoxical relationship to freedom has been discussed in cases in which individuals willingly participate in certain acts, usually sexual, that others regard as degrading, undignified or unnatural. In terms of German constitutional law, human dignity does not only refer to the individual dignity of the person, but also to the dignity of man as a species.¹²² Dignity is therefore not at the disposal of the individual. As such, the state may limit the rights of autonomous individuals seeking to limit their own dignity.¹²³ As it can be difficult to identify a violation of the dignity of a particular individual, it is often argued that certain practices violate the dignity of humanity as a whole.¹²⁴ For example, the German Federal Administrative Court ruled that peepshows should be banned as the women's dignity, by exposing themselves for payment, was being violated. The fact that competent women were willingly consenting to being objectified did not, in the eyes of the court, change the fact that their dignity was being violated.¹²⁵ In the peepshow case, as in *S v Jordan*, the right to human dignity did not function as the foundation of human rights, but instead allowed for otherwise well-established rights to be limited and for the liberal principle according to which 'all that is not prohibited is permitted' to be overturned.¹²⁶ According to Stéphanie Hennette-Vauchez's interpretation of the case, it was therefore not the dignity of prostitutes or peepshow performers that the judges were trying to protect. It was an 'abstract and completely objectivised' concept of human dignity that they were seeking to protect.¹²⁷ Another interesting example of the apparent irrelevance of the individual's consent to undignified treatment is the dwarf-throwing case. In the famous dwarf-throwing case, the French Supreme Administrative Court held that the prohibition of dwarf-throwing games were valid insofar as the prohibition was grounded in the principle of human dignity. The fact that the dwarves were all competent consenting adults looking to earn a living

121 *Jordan* (note 28 above) para 74.

122 McCrudden (note 67 above) 705; S Hennette-Vauchez 'A Human "Dignitas"? Remnants of the Ancient Legal Concept in Contemporary Dignity Jurisprudence' (2011) 9 *IJCL* 32, 52.

123 McCrudden (note 67 above) 705.

124 Botha (note 13 above) 192; McCrudden (note 67 above) 203.

125 BVerwGE 64, 274 (1981); McCrudden *ibid* 705; Botha *ibid* 182–4; Fick (note 113 above) 103; Hennette-Vauchez (note 122 above) 37.

126 Hennette-Vauchez *ibid* 37–8.

127 Botha (note 13 above) 192; Hennette-Vauchez *ibid* 38.

was irrelevant in the eyes of the court.¹²⁸ In this case, the court held that ‘the respect for human dignity, an absolute concept if any, cannot accommodate any kind of concession dependent on subjective appreciations’.¹²⁹

Consent is essential to many dimensions of the private law, as well as the constitutional order itself. However, it is submitted that, despite the importance of consent in law, the giving and withholding of consent, even with full freedom and knowledge, should not be the only determining factor in the demarcation of legal rights and duties.¹³⁰ R George Wright argues that in order to arrive at the correct legal outcome, one must go further than merely determining the presence or absence of free and knowledgeable consent.¹³¹ He argues that consent is not an ultimate value, but only a substitute for something else. Making legal rights and duties dependent on consent usually serves human dignity. Dignity and consent are commonly linked, however they are not indistinguishable or interchangeable concepts and they may therefore come into conflict with one another. The law should not just blindly and uncritically serve an individual’s subjective whims, wishes and desires. Human dignity is a more fundamental value, as it is central to humanity and it is what makes us human.¹³² A patient’s consent can therefore not be a defence against a charge of assault in the case of extreme elective surgery if it degrades human dignity to a serious degree.¹³³ As important as personal autonomy is to the law and our constitutional order, human dignity is equally or more important and as such certain forms of harmful conduct should be prohibited even if it is consensual.¹³⁴ Wright argues that we can de-emphasise the all-importance of consent for the sake of human dignity without coercively imposing, through legal or social means, intolerant majoritarian norms on

128 Conseil d’Etat, Assemblée du 27 octobre 1995 136727 publié au recueil Lebon; McCrudden (note 67 above) 706; Botha *ibid* 194; Hennette-Vaucher *ibid* 47; Fick (note 113 above) 35.

129 Hennette-Vaucher *ibid* 47.

130 RG Wright ‘Consenting Adults: The Problem of Enhancing Human Dignity Non-coercively’ (1995) 75 *Boston University LR* 1397, 1398; M Dan-Cohen ‘Basic Values and the Victim’s State of Mind’ (2000) 88 *California LR* 759, 765; DJ Baker ‘The Moral Limits of Consent as a Defense in the Criminal Law’ (2009) 12 *Criminal LR* 93, 98.

131 Wright *ibid* 1398.

132 *Ibid* 1398–9; Dan-Cohen (note 130 above) 777–8; LE Chiesa ‘Consent is Not a Defense to Battery: a Reply to Professor Bergelson’ (2011) 9 *OSJCL* 195, 202.

133 For example, the amputation of a patient suffering from body integrity identity disorder’s healthy limb *might* fall into this category.

134 Wright (note 130 above) 1398–9; Dan-Cohen (note 130 above) 777–8. Also see Chiesa (note 132 above) 203 where he provides the following alternative explanation from prohibiting certain forms of harmful consensual conduct: ‘Consent is not a defense to certain batteries because, in addition to promoting personal autonomy, the criminal law also cares about encouraging certain types of socially acceptable conduct and discouraging certain socially unacceptable acts. Thus, our current criminal laws allow parents to pierce the ears of their baby girls, but do not authorize them to tattoo their children. They allow boxers and mixed martial arts fighters to beat each other to a pulp in the ring or cage, but do not authorize the general citizenry to engage in street fights or barroom brawls. Our current criminal law authorizes the severing of body parts for the purposes of a sex change operation, but not for the purposes of satisfying the desires of those who suffer from body dysmorphic disorder. What these laws have in common is that they criminalize conduct that for some reason or another is deemed to be socially unacceptable.’

minorities.¹³⁵ Wright argues, further, that individual dignity can therefore be safeguarded and encouraged without undermining autonomy, as no true form of dignity could ever be repressive or intolerant.¹³⁶ The right to self-determination and autonomy gives a patient the right to make informed decisions and even to refuse treatments, but it does not normally give a patient the right to demand a particular form of treatment.¹³⁷ Despite the high value placed on personal autonomy, it is therefore submitted that consent cannot be a valid defence in cases where the harm crosses the threshold of degrading the human dignity to a serious degree or where overriding someone's consent will most likely promote that person's overall long-term autonomy, freedom and dignity.¹³⁸ However, this threshold would have to be very high if we are to protect personal autonomy.¹³⁹ This threshold must be particularly high in the case of cosmetic surgery, due to a factor that might be called 'heightened electiveness'.¹⁴⁰ The term denotes cases where the special role of personal values or preferences causes, or should cause, a greater than ordinary concern about and more aggressive and independent protection of patient choice.¹⁴¹

In the above scenario it is assumed that some extreme cosmetic practices might violate human dignity in terms of a communitarian conception of human dignity. Freedom is therefore limited for the sake of dignity. On the other side of the coin, it can be said that extreme surgeries might also be dignity-enhancing in terms of a liberal autonomy-based understanding of dignity. If so, refusal to perform the surgery would violate the patient's dignity, privacy and bodily integrity. The rights enshrined in the Constitution may be limited or restricted and are not absolute. The Constitution does not prohibit the limitation of human dignity and is silent as far as the inviolability of dignity is concerned.¹⁴² Dignity is therefore subject to limitation in terms of s 36, and like the rest of the Constitution, s 10 can be amended with a two-thirds majority of the members of the National Assembly and Senate sitting jointly.¹⁴³ In this regard, s 36(1), the limitation clause, states the following:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;

135 Wright *ibid* 1399.

136 *Ibid*.

137 R Thomas 'Where to from *Castell v De Greef*? Lessons from Recent Developments in South Africa and Abroad Regarding Consent to Treatment and the Standard of Disclosure' (2007) 124 *SALJ* 188, 204; Bogdanoski (note 3 above) 512.

138 Wright (note 130 above) 1398 & 1433; Dan-Cohen (note 130 above) 772; V Bergelson 'Autonomy, Dignity and Consent to Harm' (2008) 60 *Rugters LR* 723, 730; Baker (note 130 above) 99.

139 Baker *ibid* 99.

140 MM Schultz 'From Informed Consent to Patient Choice: A New Protected Interest' (1985) 95 *Yale LJ* 219, 264.

141 *Ibid*.

142 Botha (note 13 above) 196.

143 Constitution s 62(1).

- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

In *S v Makwanyane*, the Constitutional Court adopted the following approach to the application of the general limitation clause in terms of the interim Constitution:¹⁴⁴

The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of s 33(1)[IC]. The fact that different rights have different implications for democracy, and in the case of our Constitution, for ‘an open and democratic society based on freedom and equality’, means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of s 33(1)[IC], and the underlying values of the Constitution, bearing in mind that, as a Canadian Judge has said, ‘the role of the Court is not to second-guess the wisdom of policy choices made by legislators’.¹⁴⁵

Human dignity may therefore be limited, but it would be very difficult to justify the limitation of human dignity in an open and democratic society based on human dignity, equality and freedom.¹⁴⁶ The right to human dignity is of fundamental importance to the Constitution’s ambition to create an open and democratic society based on human dignity, freedom and equality and will therefore carry a great deal of weight when balancing the competing rights in terms of the s 36 enquiry.¹⁴⁷ Section 36 will be applied very strictly in the case of a limitation of human dignity, even more so if the violation of human dignity is accompanied by the violation of other rights such as the patient’s right to privacy and bodily integrity in the case of extreme forms of elective or cosmetic surgery. As was explained above, in addition the patient’s right to human dignity, his or her constitutionally enshrined right to privacy and bodily and psychological integrity also comes into play in the case of extreme elective or cosmetic surgery. The simultaneous limitation of a patient’s dignity, bodily integrity and privacy would require an extremely

144 Constitution of the Republic of South Africa, Act 200 of 1993 (interim Constitution).

145 *Makwanyane* (note 11 above) para104.

146 In this regard, it must be remembered that the Bill of Rights, the right to human dignity included, applies vertically (between the state and citizens) as well as horizontally (between private individuals). The Constitution s 8(1) states: ‘The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.’ In terms of s 8(2): ‘A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.’

147 Currie & De Waal (note 11 above) 178.

convincing justification. The rights to human dignity, privacy and bodily integrity are individually essential and collectively foundational to the value system prescribed by the Constitution. If we compromise these rights, the society to which we aspire becomes illusionary. Any significant limitation of any of these rights would therefore require a very compelling countervailing public interest in justification therefore.¹⁴⁸

The proportionality enquiry in terms of s 36 requires weighing up the harm caused by the limitation of a fundamental right against the purpose, in other words the benefits, of the particular limitation.¹⁴⁹ The limitation of the patient's right to dignity, privacy and bodily and psychological integrity might be justified if the purpose of the limitation is to protect the human dignity of others or another interest which enjoys a similar status in terms of the Constitution. Even then, the relation or causal connection between the limitation and its purpose will be closely scrutinised and no discretion will be afforded in regard to finding alternative and less restrictive ways of limiting the right.

The way in which the limitation affects the rights concerned must also be taken into consideration. It would be difficult to justify the limitation of the right if the limitation impedes the right to a significant extent or if the limitation relates to the core or heart of the specific right. According to Henk Botha, dignity has emerged as the major mechanism by means of which the Constitutional Court has attempted to mediate value conflicts.¹⁵⁰ The closer a limitation of a person's right to privacy, autonomy or bodily integrity comes to the core of a person's fundamental human dignity, the more persuasive the justification of the limitation will have to be.¹⁵¹ Conversely, more leeway will be given to the legislature to limit privacy, autonomy and bodily integrity in areas that are further removed from the core of dignity.¹⁵² According to Botha, a limitation of autonomy or privacy would probably also constitute a serious violation of human dignity if 'the restrictive measure objectifies or degrades the human person' and 'inhibits the capacity of the individual to forge an autonomous identity and to form intimate relationships' to a significant extent.¹⁵³ Here, spatial and layer metaphors are used to describe the core of personal autonomy. Any limitation of this core or essence will be a limitation of the very heart of autonomy and in effect also of an intimate part of human dignity. On the other hand, areas of individual freedom and self-fulfilment that are further removed from the core of individual autonomy, identity and self-worth, or closer to the skin of the proverbial onion as De Vos describes it, would be more susceptible to legitimate limitations.¹⁵⁴ In distinguishing between the core of human dignity and peripheral or further removed areas,

148 *Ex Parte Minister of Safety and Security In Re S v Walters* 2002 (4) SA 613 (CC) para 28.

149 Currie & De Waal (note 11 above) 178.

150 Botha (note 13 above) 215.

151 Botha *ibid*; *Bernstein* (note 32 above) paras 65–7; *Smith* (note 45 above) para 136.

152 *Ibid*.

153 Botha (note 13 above) 204.

154 Botha *ibid*; De Vos (note 102 above).

Botha suggests that such definitions must necessarily remain vague and will largely depend on the court's characterisation of the interest at stake.¹⁵⁵ Rather than placing an unconditional ban on the violation of dignity, this approach remains sensitive to differences of degree.¹⁵⁶ Limitations that therefore go to the heart or essence of the individual's inherent human dignity and worth would probably not pass constitutional scrutiny, whereas marginal limitations further removed from the core of the individual's dignity will be allowed more easily.¹⁵⁷

In the area of extreme forms of cosmetic surgery, it could be argued that any limitation of a patient's privacy, autonomy and bodily and psychological integrity would in fact constitute a serious violation of human dignity. Prohibiting individuals from doing to their bodies what they truly desire and long for will in effect rob such individuals of the ability to live their lives in accordance with their own conception of the good. Furthermore, such individuals will be prevented from presenting themselves to the world and subsequently relating to others in the manner they feel most comfortable with. Such a limitation, apart from being very paternalistic, would constitute a gross violation of human dignity. This is not to say that no violation of human dignity could ever possibly be justifiable. A very pressing social need for the said violation would however need to exist as justification. Such a compelling countervailing public interest would be difficult to identify in the case of the personal realm of extreme elective or cosmetic surgery. It is difficult to imagine how an idiosyncratic decision made by an individual in his or her private sphere could disadvantage the interests of society to such an extent that it needs to be prohibited. At most it can be argued that a more restrictive and paternalistic regulatory approach to extreme surgery should be taken, as the possibility exists that such autonomous decisions may perpetuate certain negative socio-cultural messages.¹⁵⁸ In this regard, Bogdanoski believes that some surgeries are authorised by the state, because they promote 'socio-culturally acceptable forms of embodiment'.¹⁵⁹ On the other hand, some surgeries should be prohibited, because they give rise to 'transgressive embodiment'.¹⁶⁰

VI CONCLUSION

It is clear that a patient's choice to undergo extreme elective or cosmetic surgery involves several fundamental constitutional rights. It has been shown that should an autonomous patient seeking to alter his or her body be prevented from doing so, his or her constitutional rights to dignity, privacy and bodily integrity will be affected. It has also been shown that some harmful

155 Botha *ibid* 216.

156 *Ibid* 215.

157 *Ibid*.

158 Bogdanoski (note 3 above) 503.

159 *Ibid*.

160 *Ibid*.

and transgressive forms of cosmetic surgery might actually impede human dignity. Whether cosmetic surgery impedes or promotes human dignity depends on what conception of human dignity one adopts as well as the nature of the particular cosmetic procedure. Cosmetic surgery generally promotes human dignity if one adopts a liberal, autonomy-based conception of human dignity. However, even if one adopts an autonomy-based conception of human dignity, it can be argued that certain forms of extreme and transgressive cosmetic surgery nevertheless impede human dignity. It is these forms of cosmetic surgery that should be prohibited, even in the presence of an autonomous patient's informed consent. However, these transgressive forms of cosmetic surgery are quite rare and the average patient will generally not be interested in undergoing such procedures. It has been shown that most forms of cosmetic surgery are quite acceptable and may even be dignity enhancing. The prohibition of any particular form of cosmetic surgery and the subsequent limitation of the patient's constitutional right to human dignity, autonomy, privacy and bodily integrity would therefore necessitate a very convincing justification grounded in public interests. Such compelling countervailing public interests are difficult to identify in the personal realm of extreme elective or cosmetic surgery.