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Dignity and the Purpose of Labour Law

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Abstract

The article advances the notion in the context of South African labour law that the purpose of labour law is to protect the human dignity of employees. In doing so, it deviates from the accepted idea that the purpose of labour law in South Africa is to restrict the power of employers to impose their will in the employment relationship so that employees are treated fairly. Dignity is furthermore integrated and conceptualised in a manner that enhances its substantive use in labour law. This is achieved by adjusting the test for fairness of labour practices and by presenting a dignity framework. The framework consists of two dignity models: the 'same-kind dignity model' and the 'self-fulfilment dignity model'. The framework furthermore harnesses the social justice rules that are applied in South African labour law to resolve the perceived tension between individualistic and communitarian facets of dignity.

Keywords: purpose of labour law — dignity framework — constitutional rights — fair labour practices — unfair discrimination — same-kind dignity model — self-fulfilment dignity model — social justice rules — individualistic dignity — communitarian dignity.

1 Introduction

The claim that human rights was introduced to South Africa by the international human rights movement is rightly contested by some.[1] What seems to be less contested though is that the centrality of human dignity in most constitutional frameworks that were established after the Second World War, including South Africa's, derives from the core United Nations (UN) human rights instruments.[2]

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[1] F Dube 'Neither adopted nor borrowed: A critique of the conception of the South African Bill of Rights' (2020) 3 *PELJ* 1-26.

[2] These instruments consist of the Charter of the United Nations of 1945 (UN Charter) and the International Bill of Rights (IBR). The IBR comprises the Universal Declaration of Human Rights of 1948 (UDHR); the International Covenant on Civil and Political Rights of 1966 (ICCPR); and the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR). See Dube ibid 2 and IBR https://www.ohchr.org/en/what-are-humanrights/international-bill-human-rights, accessed 18 January 2024. The concept of dignity, with a variety of meanings and from a variety of sources, precedes the establishment of the UN. It was also not the UN that introduced the concept of dignity to constitutionalism. Ireland, Weimar

The centrality of dignity in constitutionalism entails that it performs multiple key functions, including as the source of all human rights.[3] In this article this function shall be referred to as the 'dignity premise'. When human rights are deemed to be sourced from dignity, it means that they are created by society in response to the need to protect dignity in particular contexts.[4] Consequently, in jurisdictions that accede to the dignity premise, the purpose of human rights is to protect dignity.

This line of reasoning will be expanded upon to argue in this article that where labour law consists of a collection of human rights, or gives effect to human rights, the overriding purpose of labour law is to protect the dignity of employees. Once this point is made, it is necessary to integrate and conceptualise dignity in a manner that enhances its substantive use in labour law so that labour law can fulfil its role as a guardian of dignity. This article endeavours to achieve this in predominantly two ways. First, by proposing that dignity should be incorporated in the test for fairness pertaining to the right to fair labour practices in the Constitution;[5] and, second, by presenting a dignity framework. The framework consists of two dignity models, and it harnesses the prevailing labour law conception of social justice to resolve the perceived tension between individualistic and communitarian dignity claims.

Germany, Portugal, Finland, Mexico and Cuba already referred to dignity in their constitutions prior to the adoption of the UDHR. However, the concept of dignity, as it finds application in constitutionalism after the Second World War, is sourced from the UN Charter and the IBR. See R Steinmann 'The core meaning of human dignity' (2016) 19 *Potchefstroom Electronic Law J* 2; C McCrudden 'Human dignity and judicial interpretation of human rights' (2008) 19 *European J of International Law* 664-673; and A Chaskalson 'Human dignity as a foundational value of our constitutional order' (2000) 16 *South African J on Human Rights* 196.

[3] D Beyleveld and R Brownsword explained that '[d]ignity appears in various guises, sometimes as the source of human rights, at other times as itself a species of human right …; sometimes defining the subjects of human rights, at other times defining the objects to be protected; and sometimes reinforcing, at other times limiting, rights of individual autonomy and self-determination'. Quoted from Steinmann ibid 2.

[4] There is consequently not always consensus between countries about exactly what type of human rights is required to protect dignity in different scenarios. For instance, South Africa, Germany, and Canada all accede to the dignity premise as shown below, but it is only South Africa that firmly recognises an independent human right to dignity. The South African constitutional framework recognises a stand-alone right to dignity to cater for situations where the other rights do not adequately protect dignity in all contexts. See s 10 of the Constitution of the Republic of South Africa 1996; and I Currie and J De Waal *The Bill of Rights Handbook* (Juta 2022) 253. The German Federal Constitutional Court has on occasion referred to dignity as a right, but as explained by C Enders ('A right to have rights — the German constitutional concept of human dignity' (2010) *National University of Judicial Sciences Law Review* 256), these decisions can for various reasons not serve as authority that a separate human right to dignity is fully recognised in Germany. Canada certainly does not recognise a separate right to dignity. See *Blencoe v British Columbia (Human Rights Commission)* [2000] 2 SCR 307 para 77. Canada and Germany therefore seem satisfied that they do not require a broad human right to dignity because the human rights that they do definitively recognise protect dignity in every conceivable scenario. Enders (above 256) makes this point in relation to Germany.

[5] Constitution s 23(1). The Labour Relations Act 66 of 1995 (LRA) gives effect to this right. See n 36 below.

2 The Dignity Premise and Labour Law

The UN Charter[6] and the International Bill of Rights[7] (IBR) unequivocally accede to the dignity premise.[8] This premise had become so deeply entrenched in the UN's approach to human rights, that the UN General Assembly determined in 1986 that all new human rights instruments must 'derive from the inherent dignity and worth of the human person'.[9]

In pursuance of the UN's stance, the dignity premise was adopted in a variety of regional human rights instruments[10] and national constitutional frameworks, including in South Africa.[11]

The Bill of Rights in the Constitution[12] commences with a confirmation that all persons in South Africa own two sets of normative possessions: all the human rights catalogued therein; and the values of dignity, equality

[6] n 2 above.

[7] ibid.

[8] ibid. In particular, the preamble in the UN Charter; the preamble and art 1 of the UDHR; the preamble of the ICCPR; and the preamble of the ICESCR. Interestingly, the South African delegate in the drafting committee of the UDHR was one of the delegates who objected to the inclusion of the concept of dignity in the UDHR. These protestations were overridden, among other reasons, precisely to ensure that the dignity premise was reflected in the UDHR. See McCrudden n 2 above 677.

[9] K Dicke 'The founding function of human dignity' in D Kretzmer and E Kleyn (eds) *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002) 119.

[10] The preamble and articles 4 and 5 of the African Charter on Human and People's Rights of 1981; the preamble of Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador) of 1988; the preamble and art 1 of the Arab Charter of Human Rights of 2004; Association of South East Asian Nations Human Rights Declaration of 2012, and the preamble and art 1 of the Charter of Fundamental Rights of the European Union of 2009 (EU Charter) read with art 1 of the Explanations Relating to the Charter of Fundamental Rights 2007/C 303/02. Unlike the EU Charter, the European Convention for the Protection of Human Rights and Fundamental Freedoms of 2010 (European Convention) does not contain an express acceptance of the dignity premise. The European Court of Human Rights, that oversees the European Convention, has made it clear though that the dignity premise underpins the European Convention. See *Pretty v United Kingdom* 24 EHRR (1997) 423 para 65. The Court of Justice of the European Union, which has a broader mandate to oversee EU law, has gone so far as to find that the dignity premise underpins the entire EU legal order in *Omega Spielhallen-und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-09609 para 34.

[11] Two other examples are Germany and Canada. Article 1(1)-(3) of the Basic Law of the Federal Republic of Germany of 1949 and the German Federal Constitutional Court make it clear that government's obligation to protect the dignity of each person is the basis for the allocation of human rights to citizens. See Enders n 4 above 254-256. The preamble of the Canadian Bill of Rights of 1960 states that the Canadian nation is, amongst other things, founded on the principle of dignity. The Canadian Bill of Rights was later supplemented by the Constitution Act of 1982 that contains the Canadian Charter of Fundamental Rights and Freedoms. The Supreme Court of Canada in *R v Kapp* 2008 SCC 41 para 21 has definitively isolated the 'promotion of … dignity' as the 'lodestar' of all the rights guaranteed by the Canadian Charter. Also see *R v Oakes* [1986] 1 SCR 30 para 64. For a broader discussion of the transnational adoption of the dignity premise see McCrudden n 2 above 672-673.

[12] n 2 above.

and freedom.[13] In so far as the Constitution emphasises that South Africa is founded on these values[14] and instructs that these values must inform the content of all human rights when it is interpreted,[15] they are the most superior set of normative standards in the Constitution.

Dignity has been described as the core value in the Constitution, with the values of equality and freedom fulfilling a supporting role to dignity.[16] Dignity's superior rank is confirmed by the fact that the Constitutional Court accepts the dignity premise in relation to all human rights, even the right to life.[17] The elevated status of dignity also seems to be reflected in the fact that it appears before the values of equality and freedom where they are listed together in the Constitution.[18]

The International Labour Organisation (ILO) has referred to dignity in some of its conventions and recommendations in the past.[19] However, the dignity premise does not clearly come to the fore in these instruments. As McCrudden has stated, the references to dignity in these instruments are done 'without any apparent pattern of explanation being perceptible'.[20]

Perhaps this has something to do with the fact that the ILO has for many years exerted its influence by setting an avalanche of standards without linking them to human rights.[21] If an institution is not overtly occupied with human rights, then there is no need for it to commit overtly to a theory that explains the origins of human rights. In the last couple of decades though, the ILO has increasingly relied on human rights to legitimise its standards. This was bound to occur seeing that

[13] s 7(1) of the Constitution states: 'This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.'

[14] Constitution s 1.

[15] ibid s 39(1)*(a)*.

[16] F Venter quoted in H Nishihara 'The significance of constitutional values' (2001) 4 *Potchefstroom Electronic Law J* 1.

[17] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) paras 58, 144 and 328. The Constitutional Court held that the right to life in s 11 of Constitution protects human life, being a life lived with dignity, and not merely physical existence. It also held that it is 'this concept of human life [that] is at the centre of [South Africa's] constitutional values'. See *Makwanyane* paras 326-327 and *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) para 31.

[18] N Goolam 'Human dignity — our supreme constitutional value' (2001) 4 *Potchefstroom Electronic Law J* 43-44.

[19] See for instance part II(a) Declaration Concerning the Aims and Purposes of the International Labour Organisation of 1944 (Declaration of Philadelphia); the preamble of the Workers with Family Responsibilities Convention of 1981; Employment Policy Convention of 1964; the preamble of the Discrimination (Employment and Occupation) Convention of 1958 and the preamble of the Indigenous and Tribal Populations Convention of 1957.

[20] McCrudden n 2 above 669.

[21] V Mantouvalou ('Are labour rights human rights' (2012) 3 *European Labour Law J* 154) observed that the ILO had for many decades not presented its instruments as 'human rights documents'.

the ILO is an agency of the UN,[22] an organisation that views the world largely through a human rights lens.

In 1998 the ILO adopted the Declaration of Fundamental Principles and Rights at Work that presents five core labour rights as human rights.[23] It has also insisted that it 'pioneered human rights through standard setting' and that it is these standards that provided the 'aspirations, values and rights' that were incorporated in the UN Charter and the Universal Declaration of Human Rights (UDHR).[24] It has furthermore asserted that the human rights set out in international human rights instruments are implemented through international labour standards.[25] In addition, the ILO has involved itself in the (UN) secretary general's call to action for human rights, which was launched in 2020,[26] with the aim of promoting its international standards as a 'part of' human rights.[27] The human rights in question are those that underpin the UN's 2030 agenda.[28]

The ILO's efforts to establish an inextricable connection between its standards and the UN's conceptualisation of human rights proposedly comes with an implied acceptance of the dignity premise which is entrenched in the UN instruments. There are, however, also more overt statements that support the view that the ILO accepts the dignity premise in relation to human rights that apply in the employment sphere. One of these statements can be found in the jobs pact,[29] an ILO policy instrument that serves as 'an internationally agreed basis for policymaking'.[30] It states that 'it is especially important to recognize that … [r]espect for fundamental … rights at work is critical for … dignity'.[31]

As the ILO increasingly accepted the dignity premise in relation to human rights, and blurred the distinction between standards and human rights, it was inevitable that it would begin to accept the dignity premise in relation to its standards as well. In commenting on the 2030 agenda, the ILO stated that 'international labour standards are there to ensure

[22] The ILO was established in 1919 but became the first specialised agency of the UN in 1948. See E Fourie 'Finding Innovative Solutions to Extend Labour Law and Social Protection to Vulnerable Workers in the Informal Economy' (unpublished LLD thesis North-West University 2018) 96 and 98.

[23] art 2.

[24] ILO *International Labour Standards and Human Rights https://www.ilo.org/global/standards/WCMS_839267*/lang--en/index.htm, accessed 22 February 2024.

[25] ILO's submission to the open-ended intergovernmental working group on transnational corporations and other business enterprises for the 2nd session (11 July 2016) 1.

[26] It is an action plan to increase society's reliance on human rights to address societal challenges. See 'UN Secretary General's call to action for human rights' https://www.un.org/en/content/action-for-human-rights/ind ex.shtml, accessed 18 January 2024.

[27] n 24 above.

[28] ibid. Transforming our World: the 2030 Agenda for Sustainable Development (2030 agenda) is an aspirational UN resolution adopted in 2015 that sets out 17 sustainable development goals. Goal 8 deals with labour relations.

[29] Global Jobs Pact (2009) (jobs pact), revised in 2022.

[30] Preface to the jobs pact.

[31] Clause 14(1) of the jobs pact.

that [economic development] remains focused on improving the life and dignity of men and women'.[32] For reasons articulated below, the enhancement of human life and dignity are synonymous, as human life is life lived with dignity.[33]

By portraying labour law as a collection of human rights and standards that function as practical manifestations of human rights, and by accepting the dignity premise in relation to such rights and standards, it is maintained that the ILO by implication accepts that the purpose of labour law is to protect dignity.

Whatever the purpose of labour law was before it became the domain of human rights,[34] it is contended that the purpose of labour law must now by default be to protect dignity.[35] This is the unavoidable consequence of accepting the dignity premise in relation to human rights and simultaneously accepting that labour rights are human rights.

To the extent that South African labour law has not fully come to terms with this legal reality, it should do so, not only because the South African constitutional regime fully accedes to the dignity premise, but also because South Africa chose to constitutionalise its labour law.[36]

[32] ILO *A Path to Full Productive Employment and Decent Work for All: The 2020 Goals https://www.ilo.org/global/standards/*introduction-to-international-labour-standards/the-benefits-of-international-labour-standards/lang-en/index.htm, accessed 20 January 2024.

[33] See part 5.3 below.

[34] Various authors argue that international labour law rights and standards are human rights; or that some or all of labour rights are human rights; or that one of the aims of labour law is to protect the human rights of employees. See, for instance, P Collins *Putting Human Rights to Work: Labour Law, the ECHR, and the Employment Relation* (Oxford Labour Law 2022) 4 and 21-50; H Collins 'Justice at work' (2020) 1 *Revista Forumul Judecatorilor* 67; H Collins 'Is there a human right to work?' in V Mantouvalou (ed) in *The Right to Work: Legal and Philosophical Perspectives* (Hart Publishing 2015) 35; B Langille 'Labour law's back pages' in G Davidoff and B Langille (eds) *Boundaries and Frontiers in Labour Law* (2006) 25; and B Creighton 'The future of labour law: Is there a role for international labour standards?' in C Barnard, S Deakin and G Morris (eds) *The Future of Labour Law* (2004) 253.

[35] Many authors increasingly assert, for a variety of reasons, that the purpose of labour law is to protect the dignity of employees, or that the protection of the dignity of employees is one of the predominant purposes of labour law. See for instance P Collins ibid 4; H Collins ibid 67; P Gilabert 'Dignity at work' (2018) in H Collins, G Lester and V Mantouvalou (eds) *Philosophical Foundations of Labour Law* (Oxford University Press 2018) 68-86; M Rigaux 'Labour law or social competition law? The right to dignity of working people questioned (once again)'; and K Reyniers 'Human dignity and decent work as ultimate objectives of labour law — towards "basic social law" with a labour law component?' in M Rigaux, J Buelens and A Latinne (eds) *From Labour Law to Social Competition Law* (Oxford University Press 2014) 1-12 and 161-174 respectively.

[36] Labour relations in South Africa is largely regulated by statutes like the LRA (n 5 above) and the Employment Equity Act 55 of 1998 (EEA). These statutes give effect to constitutional rights, such as the right to equality (s 9) that incorporates the prohibition of unfair discrimination, and the labour relations rights provision (s 23) that includes the right to fair labour practices. See *National Education Health & Allied Workers Union v University of Cape Town & others* (2003) 24 *ILJ* 95 (CC) para 4 (*NEHAWU*) and *Naidoo & others v Parliament of the Republic of South Africa* (2020) 41 *ILJ* 1931 (LAC) para 25. Furthermore, because labour law is viewed by the Constitutional Court as an extension of constitutional rights, all labour disputes are regarded as constitutional matters over which the Constitutional Court has jurisdiction. See *NEHAWU* para 14.

3 Dignity and the Right to Fair Labour Practices

A large part of labour relations in South Africa is governed by the constitutional rights which prohibit unfair discrimination and promote fair labour practices.[37]

Dignity already forms part of the substantive test formulated by the Constitutional Court for unfair discrimination in the equality right in s 9 of the Bill of Rights in that the test for the determination of the discrimination element and the fairness element both involve an assessment of the potential and/or actual impairments of dignity.[38]

Fairness, in terms of the constitutional prohibition of unfair discrimination in the equality right, is a value judgment that is arrived at pursuant to a balancing exercise.[39] For all practical purposes, this exercise involves balancing the impact of the discrimination on the victim and competing interests, with due regard to relevant social justice norms and the same proportionality considerations that are set out in the limitation provisions in terms of s 36(1) of the Constitution.[40] The impact of the discrimination on the victim is essentially determined by establishing the degree of contemporaneous impairment of the victim's dignity, and of the historical impairment of the dignity of the group to which the victim belongs, based on a prohibited ground of discrimination.[41] The balancing exercise tilts towards the victim of discrimination in so far as the impact of the discrimination on the dignity of the victim will always be the determining factor amid competing considerations.[42]

The victim-centred test for fairness that was developed in relation to the constitutional equality right's prohibition of unfair discrimination also applies to unfair discrimination disputes in terms of the Employment Equity Act (EEA).[43] Furthermore, where the rights prohibiting unfair discrimination and protecting fair labour practices fuse, which is what occurs in the context of automatic unfair dismissals based on unfair discrimination in terms of the Labour Relations Act (LRA),[44]

[37] ibid.

[38] *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) para 53.

[39] *SA Airways (Pty) Ltd v Jansen van Vuuren & another* (2014) 35 *ILJ* 2774 (LAC) para 44.

[40] *Harksen* n 38 above para 51; Currie and De Waal n 4 above 152 n 5 and 218; and *SA Airways* ibid paras 39–40. As Currie and De Waal (152) explain, because the same proportionality considerations set out in s 36(1) are taken into account to determine whether equality rights are impaired, once it is found that equality rights are impaired, consideration of s 36(1) is practically a redundant exercise. Predictably, therefore, as the authors explain further, in all the matters where the Constitutional Court found that equality rights had been impaired, and where the court then endeavoured to conduct a separate inquiry to determine whether the impairment was justified in terms of s 36(1), this supposed separate inquiry never rendered the contested provisions constitutional.

[41] *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) para 4; *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) para 43 (*Hugo*); and *Harksen* n 38 above paras 49–51.

[42] *Harksen* ibid para 50 and *Hugo* ibid para 43.

[43] n 36 above. See *SA Airways* n 39 above para 44.

[44] n 5 above.

the same test relating to dignity applies.[45] In other words, whenever the impairment of these rights is simultaneously assessed, the above mentioned victim-centred test, which revolves around dignity, must be applied to determine whether discrimination and labour practices are fair.

In terms of prevailing jurisprudence, the Constitutional Court has held that the concept of fairness involved in determining a fair labour practice under the constitutional right is incapable of being precisely defined.[46] It described it as a value judgement produced by balancing the competing interests of employers and the employees.[47] It has also emphasised that the balancing exercise must be conducted with due regard to the social justice norms that underpin modern labour law.[48] Within this balancing exercise, the employers' and employees' competing interests are notionally equal contenders in determining whether a labour practice is fair.[49] In other words, unlike with the test for fairness conducted in relation to the equality right's protection of unfair discrimination, the dignity of the employee is not the determining factor, and the labour practice does not have to survive the same proportionality considerations as those set out in s 36(1) of the Constitution as part of the fairness inquiry.

If it is accepted that the purpose of human rights and of labour law is to protect dignity, it is maintained that the assessment of the impairment of the right to fair labour practices must consistently accommodate this purpose, irrespective of whether it is considered in conjunction with the equality right's prohibition of unfair discrimination. To this end, it is asserted that the test for fairness of labour practices should resemble the test for fairness of discrimination. In practical terms this means that the balancing exercise that must be conducted to determine the fairness of a labour practice will involve balancing the impact of the labour practice on the dignity of the employee on the one hand with the impact on the employer's interests or any other competing interests on the other; the balancing exercise must be calibrated in relation to applicable social justice norms; and competing interests cannot prevail unless they survive the proportionality considerations that are set out in the limitation provisions in s 36(1) of the Constitution.

Based on this approach, the right to fair labour practices fulfils the function of protecting employees against dignity impairments caused by any unfair labour practice, while the equality right's prohibition of unfair discrimination focuses on protecting persons in all spheres of life

[45] *Department of Correctional Services & another v Police & Prisons Civil Rights Union & others* (2011) 32 *ILJ* 2629 (LAC) para 37 (*Correctional Services*).

[46] *NEHAWU* n 36 above paras 33 and 42.

[47] ibid.

[48] *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 *ILJ* 2405 (CC) paras 72 and 74; and *SA Chemical Workers Union v Sasol Industries (Pty) Ltd* (1989) 10 *ILJ* 1017 (IC) 1025.

[49] *NEHAWU* n 36 above paras 33 and 40.

against dignity impairments caused by unfair discrimination. As such, a discriminatory labour practice that is unfair will simultaneously impair both rights, but an unfair labour practice that is not discriminatory will impair the right to fair labour practices but not the equality right's prohibition of unfair discrimination.

It is contended that the proposed test to determine the fairness of labour practices is the best mechanism to make sense of the right to fair labour practices in the constitutional era. It gives effect to the dignity premise and allows for seamless conceptual cohesion when the impairment of the right to labour practices is considered in conjunction with the equality right's prohibition of unfair discrimination. In addition, it also aligns more closely with the ILO's insistence that the sole purpose of economic development is to improve human lives and to uphold the value of dignity.[50]

Some might argue that because the Constitutional Court determined that an employer also enjoys a fundamental right to fair labour practices[51] that one cannot adopt a formulation of the right to fair labour practices in terms of which employees' interests, even in the form of dignity, are determinative. The difficulty with this line of reasoning, it is contended, starts with the fact that the court's conclusion that an employer enjoys a right to fair labour practices is based on a conceptualisation of the right to unfair labour practices in terms of which employers' and employees' interests are equally placed that was conceived in the Industrial Court era.[52] In other words, the Constitutional Court's conceptualisation of the right originates from a legal regime that was not subordinate to a constitution that entrenches human rights and that accedes to the dignity premise.[53] The Constitutional Court may not have kept a steady eye on this reality when it determined that an employer also has a right to fair labour practices or that the interests of employers and employees are notionally equal in the context of the right to fair labour practices.

4 Difficult to Define

There is notable resistance in certain international quarters to a substantive reliance on dignity in law due to its abstract nature. Bagaric

[50] ILO n 32 above.

[51] *NEHAWU* n 36 above paras 36-37 and *National Entitled Workers Union v CCMA & others* (2003) 24 *ILJ* 2335 (LC) 2339-2340.

[52] For an overview of the development and adoption of the unfair labour practice concept during this time see M MacGregor 'A legal historical perspective on affirmative action in South Africa (part I)' (2006) 12 *Fundamina* 93-96.

[53] There does not appear to be any reported cases where employees' dignity played a role in the Industrial Court's assessment of what constituted pejorative discrimination or an unfair labour practice generally. However, as mentioned above, whereas labour courts and the Constitutional Court accept that dignity is the determining factor in the assessment of fairness of discrimination in the constitutional era, the Constitutional Court did not elevate dignity to the same status within the fairness inquiry that must be conducted in relation to the constitutional right to fair labour practices.

and Allan insist that dignity is a 'vacuous concept … without bounds', too malleable to have a lucid meaning, and having 'little function beyond the polemical'.[54] In one judgment issued by the European Court of Human Rights, two dissenting judges opined that dignity is a 'dangerous concept'.[55] After the Supreme Court of Canada incorporated dignity in the substantive test for discrimination in *Law v Canada (Minister of Employment and Immigration*),[56] in *Kapp* it later questioned the wisdom of having done so.[57] Although the court in *Kapp* was at pains to endorse the dignity premise, it concluded that the abstract nature of dignity makes it 'confusing and difficult to apply' as a substantive discrimination test.[58]

There also exists a nerve in South African human rights discourse that is sensitive to the dangers of the flexibility of dignity. Davis J, writing extra-judicially, accused the Constitutional Court in *Harksen*[59] of 'collapsing the equality test' into dignity, and giving dignity 'both a content and scope that makes for a piece for jurisprudential Legoland — to be used in whatever form and shape … required by the demands of the judicial designer'.[60]

The criticism of dignity seems to be the product of selective anxiety about the usefulness of abstract concepts in law. Constitutionalism is flooded with abstractions that judges have to grapple with to give it enough objective meaning to shield it from excessive judicial discretion and ideological manipulation.[61] This exercise rarely, if ever, results in such abstractions being given fixed definitions with meanings that have an infinite lifespan.[62]

Irrespective of any definitional complexities, South African judges cannot reduce dignity to a peripheral concept in human rights litigation. It is contended that judges are more compelled to provide dignity with objective meaning than any other abstract concept due to its centrality

[54] Quoted in A Chaskalson 'Dignity as a constitutional value: A South African perspective' (2011) 26 (5) *American University International Law Review* 1381.

[55] *Vereinigung Bildender Künstler v Austria* 68354/01 ECHR 2007-II quoted in P Carozza 'Human dignity in constitutional adjudication' in T Ginsburg and R Dixon *Comparative Constitutional Law* (Edgar Elgar Cheltenham 2011) 459.

[56] [1999] SCC 497 paras 62-75.

[57] n 11 above.

[58] ibid paras 21-22.

[59] n 38 above.

[60] Quoted in H Botha 'Human dignity in comparative perspective' (2009) 2 *Stell LR* 172 n 5. For a more comprehensive compendium of literature that laments the inclusion of dignity in the test for unfair discrimination in South Africa see R Kruger 'Equality and unfair discrimination: Refining the *Harksen* test' (2011) 128 *SALJ* 479.

[61] To this point, R O'Connell ('The role of dignity in equality law: Lessons from Canada and South Africa' (2008) 6 *ICON* 284) says: 'Constitutional texts and jurisprudence are replete with concepts as vague as they are inspiring. Judges may be tempted to rely on vague concepts as shorthand for what they perceive to be socially acceptable distinctions; nonetheless, they have a responsibility to impart more detailed content to these concepts.'

[62] Currie and De Waal n 4 above 251.

in the South African constitutional regime.[63] It is a sentiment of which Chaskalson J[64] was at pains to remind an international audience at one point.[65] After taking note of the debate regarding usefulness of dignity based on its plasticity he said:

'This is not a debate for South African lawyers and judges. Respect for human dignity is entrenched in specific terms in our Constitution, and lawyers and judges cannot dismiss that as a vacuous concept; they have to give effect to the Constitutional mandate, and give meaning to its language.'[66]

The criticism levelled against the Constitutional Court in *Harksen* for building the equality test around dignity therefore seems to be misplaced. The court accepted that dignity was a 'notoriously difficult concept' that required 'precision and elaboration',[67] but it rightly did not shirk from its responsibility to adhere to its constitutional mandate to recognise the substantive centrality of dignity and to participate in the judicial process of giving objective meaning to it.

It would be wrong to infer from the preceding discussion that judges are generally sceptical about the value of dignity in legal reasoning. The fact that the United States Constitution does not refer to dignity at all did not dissuade Brennan J[68] from his efforts to establish dignity as a crucial constituent in the formulation of human rights in the United States.[69] Chaskalson J insisted that '[the] affirmation of dignity as a foundational value of the South African constitutional order was not a romantic extravagance'.[70] When MacKinnon[71] expressed her astonishment to Cameron J[72] about the fact that dignity has been incorporated in the substantive test for equality in South African jurisprudence, it spurred him to deliver an ardent defence of this jurisprudential development at an international colloquium.[73] Even MacKinnon felt compelled to

[63] In a comparative analysis of the right to equality in South Africa and Canada, O'Connell (n 61 above 284) makes a similar point: 'Given that dignity often seems redundant or controversial, should we then jettison the concept? It may be too late. The concept may already be so embedded in case law and legislation that it must be addressed. If so, we will have to acknowledge its plasticity and find suitable ways to approach it.'

[64] Late chief justice of the Constitutional Court.

[65] At a lecture titled 'Dignity as a Constitutional Value: A South African Perspective' given at the Washington College of Law on 4 October 2010, later published in the *American University International Law Review*. See Chaskalson n 54 above 1377.

[66] Chaskalson ibid 1381-1382.

[67] *Harksen* n 38 above para 50, quoting the Canadian Supreme Court in *Egan v Canada* 1995 29 CRR (2d) 79 106.

[68] Late judge of the United States Supreme Court.

[69] Chaskalson n 54 above 1382.

[70] ibid.

[71] E Cameron 'Dignity and Disgrace — Moral Citizenship and Constitutional Protection' paper presented to the University of Oxford colloquium on understanding human dignity (2012) 1.

[72] Retired justice of the Constitutional Court.

[73] n 71 above 1-19.

concede at one point that 'deprivation of dignity is often a powerful dimension of the substance of inequality and does some of its work'.[74]

It may very well not be possible to formulate a fixed definition of dignity. Having said that, when one trawls through the copious scholarly analyses of the modern use of dignity in human rights jurisprudence, the predominant impression is not that it is an ethereal concept that is incapable of being formulated in objective terms. Objective meanings have been given to dignity. These meanings may at times be in conflict with each other, but conflict in thought can surely not be conflated with subjective meaninglessness.

The meanings attributed to dignity broadly fall into one of two categories, which shall respectively be referred to as individualistic dignity and communitarian dignity.[75] In literature, whereas individualistic dignity is a form of dignity that takes account of a particular individual's interests only, the meaning of communitarian dignity is determined based on broader societal interests.[76]

Although the structure of the analysis in the remainder of this article is broadly divided into two sections, namely individualistic dignity and communitarian dignity, it is ultimately argued, for reasons set out below,[77] that individualistic interests and communitarian interests ought to be interpreted in such a manner that they are in alignment to produce a single conception of dignity, rather than two competing conceptions. The two-section structure of the ensuing analysis therefore does not imply that the distinction between individualistic and communitarian dignity is viewed by this article as being conceptually sound, and the fact that notions are introduced in either of these sections must accordingly also not be understood to mean that this article views such notions as being either purely individualistic or communitarian in nature. For reasons that will become evident, the dignity models that are presented under the individualistic dignity section bestride both individualistic and communitarian interests.

5 Individualistic Dignity

5.1 *According to Kant*

Many of the modern meanings of dignity are attributed to Immanuel Kant's[78] deontological philosophy that fuses equality, dignity and

[74] ibid 1.

[75] These are the labels that McCrudden (n 2 above 699) utilises.

[76] For other contributions that examine inward and outward looking conceptions of dignity, see for instance O'Connell n 61 above 271-276; Chaskalson n 54 above 1396-1401; Botha n 60 above 182-188; Steinmann n 2 above 5-24; and McCrudden n 2 above 699-724.

[77] See part 5.2 read with part 6.2 below.

[78] See A Jemberie 'A critical analysis of Immanuel Kant's groundwork of metaphysics of morals' (2017) 4 *International J of Research and Review* 54.

autonomy.[79] Kant reasoned that human beings' ability to act morally and rationally is what confers on them an inherent value (or worth) that is 'unconditioned and incomparable', priceless and inviolable.[80] This inherent value is dignity, or inherent dignity to be precise.[81] Because human beings all possess dignity they must be treated as an end in themselves and not as a means to an end like objects.[82] In other words, to treat people with dignity is to treat them as autonomous beings with the capacity to exercise their own free will.[83]

Significantly, the ILO has more recently disclosed its allegiance to aspects of Kant's ideas on dignity. It linked its well-known statement that 'labour is not a commodity',[84] to work and dignity in very familiar Kantian language when it stated:

> 'In the Declaration of Philadelphia … the international community recognized that "labour is not a commodity". Labour is not an inanimate product, like an apple or a television set, that can be negotiated for the highest profit or the lowest price. Work is … crucial to a person's dignity ….'[85]

As influential as Kant's above stated ideas are, they do not represent a monopoly of thought on dignity. His ideas exist in a sea of other ideas regarding dignity and the purpose of labour law that preceded and succeeded him. In fact, as some authors point out, a full consideration of Kant's thoughts on dignity reveals that they extend far beyond his ideas mentioned above and cater for distributive justice as well.[86] Nonetheless, because of the prominence afforded to Kant's conceptualisation of dignity, it will be used as a foundation to explore different dimensions or meanings of dignity.

5.2 *Same-kind dignity and self-fulfilment dignity models*

Réaume offered the following perspective on the meaning of dignity:

> 'To ascribe human dignity to human beings … is to treat human beings as creatures of intrinsic, incomparable, and indelible worth, simply as human beings; no further qualifications are necessary. In this basic sense, dignity is ascribed to human beings independently of their particular accomplishments or merits of praiseworthiness.

[79] R Dean 'The value of humanity in Kant's moral theory' (2020) 23 *Medicine Health Care and Philosophy* 1; McCrudden n 2 above 659-660; and O'Connell n 61 above 273. Also see *S v Dodo* 2001 (3) SA 382 (CC) para 38 where the Constitutional Court relied on Kant's core thoughts to explain the concept of dignity.

[80] O'Connell ibid 273; J Waldron 'The dignity of groups' (2008) 66 *Acta Juridica* 4; and McCrudden n 2 above 659-660.

[81] O'Connell ibid 273; *National Coalition for Gay and Lesbian Equality v Minister of Justice and Another* 1999 (1) SA 6 (CC) para 29 (*National Coalition*); and *Nyathi v Member of the Executive Council for the Department of Health (Gauteng) and Another* 2008 (5) 94 (CC) para 45.

[82] McCrudden n 2 above 659-660 and O'Connell n 61 above 273.

[83] ibid.

[84] Principle I(a) of the Declaration of Philadelphia n 19 above.

[85] ILO n 32 above.

[86] See part 6.2 below.

It refers to a kind of worth that is not contingent on being useful, or attractive, or pleasant or otherwise serving the ends of others.'[87]

What Réaume in essence describes here is a conceptualisation of dignity that is entirely unrelated to each person's unique attributes and capacities, or to the relational use of such attributes and capacities when people interact with others. This conceptualisation of dignity shall be referred to as the 'same-kind dignity model', as it disregards differences between human beings, and it gives meaning to dignity based on an intuitive conception of humanness which is shared by all humans. Any reference to 'same-kind dignity' in this article must be understood as a reference to dignity as it is conceptualised by the same-kind dignity model.

The same-kind dignity model is useful to understand the impairment of dignity in situations where persons are disadvantaged based on a clearly discernible psychosocial belief that they are not as human as other people.[88] However, where such a psychosocial motivation is not clearly discernible, utilising the same-kind model without more can be problematic. It arguably gives judges too much freedom to rely on their subjective sensibilities to decide arbitrarily what constitutes humanness.[89]

The scientific reality is that the human condition entails that each person possesses a distinctive combination of biological, psychological, and social attributes and capacities that shapes each persons' personal identity.[90] Thus viewed, the unique combination of biological, psychological, and social attributes and capacities that each person possesses are as inherent to that person as her or his inherent dignity.

According to the interpretation of certain authors, Kant viewed each person's unique combination of attributes and capacities as dignity itself.[91] Because of the perpetual co-existence of dignity and unique human attributes and capacities, the irresistibility of equating dignity to unique human attributes and capacities is understandable. But equating them in this way is arguably a step too far because it amounts to a conflation

[87] DG Réaume 'Discrimination and dignity' (2003) 63 *Louisiana Law Review* 31.

[88] For example, psychosocial beliefs that certain groups are not human, or are less human, are often expressly relied on as a justification for genocide. The Germans justified the extermination of Jews, Roma and Slavs on the basis that these groups of people were untermenschen (subhuman). See J Gumkowski and K Leszczynski *Poland under Nazi Occupation* (Polonia Publishing House 1961) 219.

[89] See part 6.1 below.

[90] The American Psychiatric Association defines personal identity partly as 'an individual's sense of self defined by … a set of physical, psychological, and interpersonal characteristics that is not wholly shared with any other person …'. See 'identity' in the *APA Dictionary of Psychology* https://dictionary.apa.org/identity, accessed 22 February 2023.

[91] In quoting Henkin's analysis of Kant's work, L Ackerman ('The legal nature of the South African constitutional revolution' (2004) 4 *New Zealand Law Review* 649) says: 'On the highest level, dignity is a quality of worth or excellence, and when used in the compound term "human dignity", it suggests all that for Kant is inherent in the human "personhood" of every human being.' Also see *S v Lawrence* 1997 (4) SA 1176 (CC) para 168 where the late Sachs J effectively likened dignity to the 'human personality'. Based on these ideas, Steinmann n 2 above 10 asserted that '[i]nherent dignity comprises the totality of the uniqueness of a human being's nature; his intelligence and his sensibilities'.

of moral philosophy and science. Dignity is a philosophical assumption, and the possession of a unique combination of human attributes and capacities is a scientific fact.

It is not only the condition of possessing unique human attributes and capacities that is part of humanness, but also a person's ability to use these unique attributes and capacities to engage with society in an equally unique way. The Constitutional Court expresses this relational aspect, specifically in dignity-based jurisprudence, through the concept of self-fulfilment and related notions.[92]

The meaning of self-fulfilment that is favoured in this article involves the condition of realising, maintaining, and developing each person's unique physical, psychological, and social identity, health, capacities, and desires.[93] To be clear, self-fulfilment in this sense is not only conceptualised as the absolute fulfilment of an upper-most state of self-fulfilment.[94] It also entails the condition of being able to develop and strive towards the achievement of such a state.[95]

Self-fulfilment does not have a universal and timeless meaning. There must always be space for 'individual, social and historical contingencies' when self-fulfilment is assessed.[96] This means that self-fulfilment must

[92] See for instance *National Coalition* n 81 above para 36 and *Minister of Home Affairs and Others v Watchenuka* 2004 (4) 326 (SCA) para 32 (*Watchenuka*).

[93] The concepts of self-actualisation, human flourishing, and human development are often used synonymously with this conceptualisation of self-fulfilment. See generally Mirriam Webster Dictionary 'self-fulfilment' https://www.merriam-webster.com/dictionary/self-fulfilment, accessed 22 February 2024; A Gewirth *Self-fulfilment* (Princeton University Press 2009) 1-248; J Kleinig and N Evans 'Human flourishing, human dignity and human rights' (2013) 32 *Law and Philosophy* 539-548; and J Fontrodona and D Melé 'Thinking about the future of work: Promoting dignity and human flourishing' (2022) 7 *Humanistic Management J* 181-188. Maslow, who proposed one of the most influential needs-based motivation models in 1943, identified self-fulfilment as the highest ranked human need. See M Singh *Introduction to Social Psychology* (KK Publications 2021) 158-159. More recently, studies conducted by D Kenrick, V Griskevivius, S Neuberg and M Schaller ('Renovating the pyramid of needs: Contemporary extensions built on ancient foundations' (2010) 5 *Perspectives on Psychological Science* 1-35) led them to conclude that self-fulfilment, although of great psychological import, is not an independent human need. They subsumed the concept within the human need that they have identified as status/esteem. L Tay and E Diener ('Needs and subjective well-being around the world' (2011) 101 *J Pers Soc Psychol* 354-365), whose research involved a variety of cultures in various countries, however, found that self-fulfilment remains one of the primary needs that motivates human behaviour.

[94] Maslow held the view that certain people attain such a state. He said: 'It may be loosely described as the full use and exploitation of talents, capabilities, potentialities, etc. Such people seem to be fulfilling themselves and to be doing the best that they are capable of doing' — Verywellmind *Maslow's 'Hierarchy of Needs'* , accessed 26 February 2024. Maslow estimated that less than 1% of the adult population actually achieve self-fulfilment in the sense of reaching their full individual potential and observed that most people 'most of the time function on a level lower than that of [self-fulfilment]'. See Singh ibid 158-159.

[95] Although Maslow envisaged an upper-most self-fulfilment state, he also associated self-fulfilment with the desire to achieve self-fulfilment or growing towards it. He defined self-fulfilment at different times as both 'the desire for self-fulfilment, namely the tendency of [people] to become actualised in what [they] are potentially' and 'intrinsic growth of what is already in the organism, or more accurately what is the organism itself'. See Singh n 93 above 158-159.

[96] Kleinig and Evans n 93 above 544.

be discerned relative to a specific person's unique attributes;[97] that a person's concept of self-fulfilment may also change with time;[98] and that technological advancements may furthermore develop in such a way that people's boundaries for self-fulfilment will expand.[99] It also means that the boundaries of each person's concept of self-fulfilment will often be defined in relation to her or his co-existence with other persons.[100]

Based on a synthesis of the ideas set out above, which will variously be amplified in the remainder of this article, an alternative dignity model is presented through which the impairment of dignity can be assessed. It shall be referred to as the 'self-fulfilment dignity model'.[101] Any reference to 'self-fulfilment dignity' in this article must be understood as dignity as it is conceptualised within the self-fulfilment dignity model.

The self-fulfilment dignity model essentially entails the following. It proceeds from the basis, as we are constitutionally compelled to, that every human being possesses dignity because the person is human. When humanness is suppressed, persons are not treated as beings that possess dignity, and their dignity is consequently impaired.[102] As the capacity for self-fulfilment is part of humanness, when self-fulfilment is suppressed, humanness is suppressed. As stated, when humanness is suppressed, self-fulfilment dignity is simultaneously impaired. It needs to be emphasised though that self-fulfilment is defined in relation to a person's actual attributes and capacities at any given point in time and in relation to worthy competing interests, including other persons' claims to self-fulfilment dignity. It is the suppression of self-fulfilment that has been

[97] ibid 543. A professional sportsperson and an academic will harness different physical, psychological, and social attributes to achieve self-fulfilment in their careers.

[98] ibid. When a sportsperson's physical abilities deteriorate to the point that the person has to retire, her or his concept of self-fulfilment has to be adjusted to her or his capacities after retirement.

[99] ibid. South Africans did not have electricity in their homes two centuries ago, but electricity interruptions are now deemed to be unconstitutional. See Eskom *Electricity in South Africa — The Early Years https://www.eskom.co.za/heritage/theearlyyears*, accessed 24 February 2024; and *United Democratic Movement and Others v Eskom Holdings SOC Ltd and Others* [2023] ZAGPPHC 1949 para 39.

[100] See part 6.2 below.

[101] A problem that often troubles philosophers regarding the use of human attributes to give meaning to dignity, which the self-fulfilment dignity model does, is that animals may also possess 'human' attributes. The same problem presents itself with Kant's approach that links the existence of dignity to the capacity of humans to act rationally and therefore morally. Not all humans have the capacity to act rationally and morally, and it cannot be said with certainty that this capacity is absent in all animals. It seems unlikely though, without excluding it as a scientific possibility, that the capacity to possess unique attributes and the concept of self-fulfilment generally manifests in the same way in animals as it does in humans. It is however maintained that it is not necessary to compare humans and animals when dignity is in question. One can simply focus on the human condition and, as L Zagzebski does, be open 'to the possibility that we have overlooked an important class of beings with dignity'. For a discussion of this philosophical question see Zagzebski 'The Dignity of Persons and the Value of Uniqueness', presidential address delivered at the 113th central division meeting of the American Philosophical Association (2016) 71.

[102] *Prinsloo* n 41 above para 31.

defined in relation to these and/or any other qualifying considerations, that impairs self-fulfilment dignity. This point will be fully developed below.[103] With this in mind, the conduct that could potentially impair self-fulfilment dignity includes any positive action taken by the state or any person that has the effect of suppressing self-fulfilment, including the denial of available entitlements, rights, statuses, resources, benefits and privileges.[104]

The benefit of linking dignity with self-fulfilment, it is advanced, is that it gives an objective vantage point from which to determine impairments to dignity. A large part of the determination of what constitutes self-fulfilment, in relation to a particular person, must be resolved by relying on empirical reasoning to determine what a particular person's capacities are, at any given point in time, based on their unique attributes.

It is because decision makers may harbour preconceived ideas about what constitutes a particular group's attributes and potential that their empirical faculties are often overridden. As a result, they end up misrecognising the actual attributes and potential of a particular person.[105] But when this is misrecognition occurs, litigants and interest groups now have the opportunity in the constitutional era to correct it through litigation, lobbying, or education.[106]

5.3 *Subsistence and self-fulfilment functions of work*

As demonstrated below, it is widely accepted that work fulfils two functions. It provides the means through which a person fulfils her or his minimum socio-economic needs to survive, and it enables a person to experience self-fulfilment. In what follows these two functions of work are respectively referred to as the subsistence and self-fulfilment functions of work.

More is required than the fulfilment of the subsistence function for persons to live their lives with dignity because survival does not equate to a life lived with dignity. The Constitutional Court in *Makwanyane*[107] expressed itself as follows in this regard:

'It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community,

[103] Part 6.2 below.

[104] See for instance *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* (2005) JDR 1405 (CC) paras 63-74 where the denial of rights, status, entitlements, resources, benefits, and privileges played a key role in the court's reasoning when it declared provisions prohibiting same-sex marriages unconstitutional.

[105] *Hoffmann v SA Airways* (2000) 21 *ILJ* 2357 (CC) para 37 where the Constitutional Court discusses the manner in which attributes and capacities were misrecognised by decision makers, including judges, in the pre-Constitutional era.

[106] Since the adoption of the interim Constitution strategic constitutional litigation has been pursued with great success to bring about monumental social changes. For a seminal exploration of this subject matter, see R Brickhill 'Strategic Litigation in South Africa: Understanding and Evaluating Impact' unpublished DPhil thesis (University of Oxford 2021) 1-402.

[107] 1995 (3) SA 391.

to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured … The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished.'[108]

By applying the self-fulfilment dignity model, the court's reasoning can be translated in the following way. The organic being (human) is the vessel that houses dignity. When a person is not allowed to live a 'human life', ie a life characterised by self-fulfilment, dignity is impaired. A life is not lived with dignity if a person is merely allowed to survive because mere existence cannot be equated to a life characterised by self-fulfilment.[109]

The inextricable link between aspects of self-fulfilment, dignity and work is recognised transnationally in, for instance, the jurisprudence of the German Federal Constitutional Court,[110] the Supreme Court of Canada,[111] and South African courts. With reference to German jurisprudence, the Constitutional Court in *Affordable Medicines Trust and Others v Minister of Health and Others (Affordable Medicines)*[112] found as follows:

'What is at stake is more than one's right to earn a living, important though that is. Freedom to choose a vocation is intrinsic to the nature of a society based on human dignity as contemplated by the Constitution. One's work is part of one's identity and is constitutive of one's dignity. Every individual has a right to take up any activity which he or she believes himself or herself prepared to undertake as a profession and to make that activity the very basis of his or her life. And there is a relationship between work and the human personality as a whole. "It is

[108] ibid paras 326-327.

[109] The point can be illustrated with reference to the apartheid doctrine and the treatment of women in society. Although the apartheid doctrine did not overtly deny black persons' entitlement to exist (survive), it did not respect their entitlement to live as human beings by allowing them to experience self-fulfilment in the same way as a white person was allowed to experience it. In the same way, women's entitlement to survive was never in question, but for many centuries they were not allowed to experience self-fulfilment in the same way as men were allowed to experience it. See *Hoffmann* n 105 above para 37.

[110] In the so-called *Pharmacy* case, BVerfGE 377 (1958) 397, the German Federal Constitutional Court said the following of the occupational freedom right: 'To be sure, the basic right aims at the protection of economically meaningful work, but it views work as a "vocation". Work in this sense is seen in terms of its relationship to the human personality as a whole. It is a relationship that shapes and completes the individual over a lifetime of devoted activity; it is the foundation of a person's existence through which the person simultaneously contributes to the total social product.'

[111] The Supreme Court of Canada in *Reference Re Public Service Employee Relations Act (Alta)* [1987] 1 SCR 368 found as follows: 'Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being'.

[112] 2006 (3) SA 247 (CC).

a relationship that shapes and completes the individual over a lifetime of devoted activity; it is the foundation of a person's existence".'[113]

The relationship between different aspects of self-fulfilment, dignity and work was also emphasised, in the context of the right to dignity,[114] by the Supreme Court of Appeal (SCA) in *Watchenuka*.[115] It held as follows:

'The freedom to engage in productive work — even where that is not required in order to survive — is indeed an important component of human dignity … for mankind is pre-eminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth — the fulfilment of what it is to be human — is most often bound up with being accepted as socially useful.'[116]

In *Watchenuka* the court essentially concluded that when a person cannot experience the above psychological and socio-psychological dimensions of work, it amounts to a 'restriction upon the capacity of self-fulfilment', and consequently an impairment of dignity.[117]

The Constitutional Court and SCA therefore see work not only as the foundation of a person's existence because of its subsistence function, but also because it activates self-fulfilment. As such, it views the self-fulfilment function of work as important as the subsistence function in order protect the dignity of persons.[118]

The importance of the self-fulfilment function of work, to enable persons to live a life with dignity, is also recognised in international law. In international law, the self-fulfilment function of work has been expressed not only in relation to the identity formation quality of work, but also for instance in relation to work's role in contributing to the

[113] ibid para 59. For the application of this formulation by the Labour Court see also *National Bargaining Council for the Clothing Manufacturing Industry (KZN) v Glamour Fashions Worker Primary Co-operative Ltd & others* (2017) 38 *ILJ* 1849 (LC) para 30. It is peculiarly difficult to find authority where dignity, self-fulfilment and work are connected in this manner when courts deal with the right to fair labour practices. One instance can be found in *Botha v Du Toit Vrey & Partners CC* (2005) 26 *ILJ* 2362 (LC) para 17 where the employer relied on s 187(2)*(b)* of the LRA as a defence to an automatic unfair dismissal claim based on unfair age discrimination. The court held as follows: 'In most cases a career is that which is the driving force in a life. It determines a person's self-worth and worth in society.'

[114] Constitution s 10.

[115] n 92 above.

[116] *Watchenuka* n 92 above para 27.

[117] ibid paras 27-28 and para 32.

[118] It is however necessary to clarify certain aspects of the reasoning of the court in *Watchenuka* ibid paras 28-32. The court upheld an asylum seeker's right to work in South Africa. In doing so, the court distinguished between a restriction on her 'capacity for self-fulfilment' (self-fulfilment function) and her ability to live 'without positive humiliation and degradation' because of her inability to earn an income (subsistence function). The court essentially reasoned that the impairment of her right to work would have been justifiable if it were only the self-fulfilment function of work that was not fulfilled, but not if the subsistence function was not fulfilled. A holistic reading of the judgment reveals though that the court was of the view that the self-fulfilment and subsistence functions are of equal importance when the right to work of South African citizens is in issue. The point the court made is that South Africa cannot allow everyone that enters its borders to have a right to work for the sake of self-fulfilment, but that once an asylum seeker is in the country, the person must at least be allowed to work so that she or he can survive.

development of a worker's abilities, socialisation, self-esteem, and self-respect, and to experience a sense of material contribution to the well-being of society.[119]

Various authors have also connected aspects of self-fulfilment, work, and dignity, in various degrees and in different ways.[120]

The final observation in the context of the discussion about the relationship between self-fulfilment, dignity and work is that the self-fulfilment dignity model also accommodates the longstanding labour law notion that labour is not a commodity. To this end, German and South African courts have found that dignity is impaired when people's actual attributes are misrecognised because it means that they are being treated like non-human objects that do not possess dignity.[121] Any treatment of a person that is based on a misrecognition of their actual attributes constitutes a suppression of self-fulfilment, and therefore an impairment of self-fulfilment dignity, because persons cannot utilise their unique attributes to achieve self-fulfilment.

5.4 *Self-fulfilment and discrimination*

Impairment of dignity within the context of discrimination is often expressed with concepts that fit in the self-fulfilment dignity model. For instance, in *Prinsloo*,[122] where the Constitutional Court discussed unfair race discrimination during apartheid, the court spoke of persons who were treated 'as objects whose identities could be arbitrarily defined by those in power …'.[123] Another example is *National Coalition*[124] where the Constitutional Court described the severe historical and

[119] The UN Committee on Economic, Social and Cultural Rights, General Comment 6 of 1995: The Right to Work para 1: 'The right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity. Every individual has the right to be able to work, allowing him/her to live in dignity. The right to work contributes at the same time to the survival of the individual and to that of his/her family, and insofar as work is freely chosen or accepted, to his/her development and recognition within the community.' Art II(a) of the Declaration of Philadelphia (n 19 above) states that: 'all human beings … have the right to pursue both their material well-being and their spiritual development in condition of … dignity'. More recently the ILO (n 32 above) has for instance stated that '[w]ork ... is crucial to a person's dignity, well-being and development as a human being'. The ILO (Improving Health in the Workplace: The ILO's Plan of Action (2014) 1) has also stated that '*work* should offer real possibilities for personal achievement, *self-fulfilment,* and service for society'.

[120] See for instance P Collins n 34 above 4; Gilabert n 35 above 68-86, Kleinig and Evans n 93 above 539-564, and B Hepple 'European rules on dismissal law?' (1997) 18 *Comparative Labour Law J* 204.

[121] *Prinsloo* n 41 above para 31 and BVerfGE 45 187 (1977) 227-228 quoted in Steinmann n 2 above 12.

[122] ibid.

[123] ibid paras 31-33.

[124] n 81 above.

contemporaneous disadvantages inflicted by discrimination on gay men's 'self-esteem' and their 'dignity, personhood and identity'.[125]

Recall that the substantive test to determine whether discrimination is unfair involves an assessment of contemporaneous and historical impairments of dignity. The self-fulfilment model can be applied to both of these. Contemporaneous impairments occur when the victim's self-fulfilment is being or has been suppressed by a particular discriminatory act based on a prohibited ground. The assessment of historical impairments involves establishing whether the victim forms part of a group that has suffered past patterns of suppression of self-fulfilment based on a prohibited ground. The self-fulfilment suppression occurs because the treatment of the persons and/or group is based on an incorrect assignment of attributes and capacities due to stereotyping. In this sense, the prohibition of pejorative discrimination aims to protect the dignity of persons by providing them 'with a remedy for aggression against [them] on the grounds of [their] intimate attributes, whether inherent or adopted', as the Labour Appeal Court (LAC) put it in Naidoo.[126]

6 Communitarian Dignity

6.1 *Social morality and waiver of dignity*

The carnival practice of dwarf tossing, in terms of which dwarfs were thrown for short distances for remuneration while wearing protective gear, was prohibited in France and Germany in 1992.[127] A German court banned peep shows in terms of which women performed striptease dances in front of peep holes for anonymous men who could look through the hole after putting a coin into a machine.[128] In a judgment that attracted

[125] ibid paras 24 and 26. There is long line of precedents where the Supreme Court of Canada similarly expressed the impairment of dignity in the context of discrimination within the mould of the self-fulfilment dignity model. A good example, that touches on a variety of aspects of self-fulfilment, is *Law* (n 56 above para 53) where the court held as follows: 'Human dignity means that an individual or group feels self-respect and self-worth … [i]t is concerned with physical and psychological integrity and empowerment … [and] is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits.' Another instance is *Vriend v Alberta* [1998] 1 SCR 493 para 69 where the court connected the impairment of dignity with 'psychological harm' which occurs because of the 'fear of discrimination … which will lead to concealment of true identity' which is 'harmful to personal confidence and self-esteem'.

[126] *Naidoo* n 36 above para 25.

[127] By the German Administrative Courts. See Steinmann n 2 above 15. The relevant French law was approved by the United Nations Human Rights Committee in *Wackenheim v France, Communication* 854/1999, UN Doc CCPR/C/75/D/854/1999 (2002). Also see O'Connell n 61 above 272 n 44.

[128] BVerfGE 64 (1981) 277-280 referred to in Steinmann n 2 above 15.

a fair amount of criticism in South Africa,[129] the Constitutional Court in *S v Jordan*[130] upheld the criminalisation of prostitution.

What these cases have in common is that the jobs in question constituted consensual gainful employment, but were found to be unlawful based on the view that the persons who performed the work were treated like objects without dignity.[131] As dignity is inviolable, so the reasoning goes, it cannot be waived.[132]

McCrudden pointed out that the German approach in this regard is typified by a definitive subordination of individual consent to societal morality when the meaning of the individual's dignity is determined.[133] To support this point, he quoted the German Federal Constitutional Court when it said that 'dignity means not only the individual dignity of the person but the dignity of man as a species' and that 'dignity is therefore not at the disposal of the individual'.[134]

McCrudden compared the German approach with what he referred to as the 'ambiguous' approach followed in Canada as reflected in *R v Butler*.[135] Here the Supreme Court of Canada expressed its disquiet with the imposition of 'a standard of public … morality, solely because it reflects the conventions of a given community' but simultaneously disagreed that legislation 'cannot be enacted on the basis of some fundamental conception of morality for the purposes of safeguarding the values which are integral to a free and democratic society'.[136] The court found that the consent of the bearer of dignity is still relevant in determining the boundaries of public morality, but not determinative.[137]

As McCrudden illustrated, the Constitutional Court's stance in *Jordan*[138] is not reflective of its general approach to matters of this nature. There is a powerful thought stream present in numerous judgments of the Constitutional Court in terms of which societal morality is subordinated to the decision-making autonomy of the individual bearer of dignity.[139] The South African approach therefore seems to be cast from the same ambivalent mould as Canada in this respect.

It is contended that the difference in the approaches between these countries does not lie, as McCrudden partly appears to assert, in the extent to which dignity can be waived. Just like in Germany, one would be hard-pressed to find human rights jurisprudence emanating from

[129] See for instance A Spies 'Better late than never: Lessons from *S v Jordan* in straightening women's participation in litigation' (2015) 30 *Southern African Public Law* 506-518.

[130] 2002 (6) SA 642 (CC).

[131] Steinmann n 2 above 15.

[132] McCrudden n 2 above 705-706.

[133] ibid.

[134] ibid 705.

[135] (1992) 8 CRR (2d).

[136] ibid 30.

[137] McCrudden n 2 above 706.

[138] n 130 above.

[139] McCrudden n 2 above 706.

South Africa and Canada where courts have found that dignity can be waived. In other words, there may be a lack of consensus between these countries about the degree to which social morality should give meaning to an individual's dignity, but there is consensus that dignity cannot be waived.

Social morality is a notoriously unstable legal guide due to its fickleness. Relying on ad hoc interpretations of social morality to determine whether certain types of voluntary work dehumanise persons is a particularly arbitrary endeavour. Views in this regard are not only relative to different societies and persons within those societies, but also relative to time and context.[140] Furthermore, if the notion that certain types of freely chosen work objectify people is drawn to its logical conclusion, then most jobs must arguably be deemed to be dehumanising of people. There are many non-stigmatised jobs where people perform a function in the same way as an inanimate object. This is why many jobs are replaced by machines.[141] Judges should consequently be very reluctant to determine whether voluntary work dehumanises a person based on their perception of social morality. It is this type of same-kind dignity assessment that, it is asserted, should be avoided.[142]

As inconceivable as it may seem to some, people performing stigmatised work may have pursued such work because it provides them with their best version of self-fulfilment that they can experience in circumstances where the pursuit of their self-fulfilment does not harm another person or compete with another's claim for self-fulfilment. From this perspective, people performing stigmatised work are not more or less objectified than any other worker, and their self-fulfilment dignity may actually be impaired if they are not allowed to do the stigmatised work.

None of this means that communitarian considerations should play no role in determining the meaning of dignity. As will be shown below, communitarian ideals, interests and norms play a pivotal role

[140] In Germany and France, it is not illegal to participate in professional boxing and to do stunt work for entertainment purposes, but dwarf tossing is prohibited (see main text above). Offering peek shows is unlawful in Germany, but prostitution is not (see main text above). As the thorough comparative law analysis of the Constitutional Court in *Jordan* (n 131 above n 53) illustrates, there are very divergent approaches to the lawfulness of prostitution, not only transnationally, but also among different states in countries with federal systems. Twenty years after the Constitutional Court in *Jordan* confirmed that prostitution is a crime, the South African government commenced with legislative processes to have it decriminalised. See W Masuku and S Kwanje in *De Rebus* 'The decriminalising of sex work in South Africa: A brief trajectory overview of the Criminal Law (Sexual Offences and Related Matters) Amendment Bill of 2022' https://www.derebus.org.za/the-decriminalising-of-sex-work-in-south-africa-a-brief-trajectory-overview-of-the-criminal-law-sexual-offences-and-related-matters-amendment-bill-of-2022, accessed 27 February 2024.

[141] 'Human computers', pin boys, lift operators, switch board operators, cashiers, factory workers, warehouse workers, data-entry clerks and travel agents are just a few examples of jobs that have been replaced by technology. See *Think Automation* '10 jobs lost to technology' *https://www.thinkautomation.com/future-of-work/10-jobs-lost-to-technology*, accessed 27 February 2024.

[142] See part 5.2 above.

in mediating between an individual's claim to self-fulfilment and other competing interests, which include competing claims to self-fulfilment.

6.2 *Social justice, dignity, and purpose of labour law*

Social justice is a prominent concept in South African constitutionalism and labour law.[143] It has, however, never had a universal and timeless meaning.[144] There seems to be consensus though, that social justice, at the very least, concerns the distribution of opportunities and resources.[145] The discord regarding the meaning of social justice revolves around the precise basis upon which opportunities and resources must be distributed. Van Blerk describes this lack of consensus as tension between 'the opposing interests of the individual versus the collective, and of freedom versus equality'.[146]

According to Van Blerk the tension manifests itself in three predominant categories of theories of social justice.[147] The first category, welfare liberalism, involves needs-based distribution.[148] Rawls, one of the most prominent welfare liberalists, argued that this kind of distribution must be based on fairness.[149] Libertarianism, the second category, dictates that resources must be distributed proportionally according to different persons' contribution to society.[150] The final category of theories, socialist theories in the Marxist tradition, demands that every person should receive an equal share of resources.[151]

The three categories also differ regarding the degree of government intervention required to achieve a particular social justice outcome. From a labour relations perspective, Marxist socialists and welfare liberalists see the employment contract as an inadequate measure to achieve their favoured social justice outcomes, and therefore advocate for greater

[143] One of the aims of both the Constitution and the LRA is to achieve social justice. See the preamble to the Constitution and s 1 of the LRA. The Constitutional Court in *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) held: 'The people of South Africa are committed to the attainment of social justice and the improvement of the quality of life for everyone.' Also see M van Staden 'Towards a South African understanding of social justice: The International Labour Organisation perspective' (2012) 1 *TSAR* 91.

[144] The ILO, which has always described social justice as one of its main purposes, accepts that flexibility is a necessary quality of social justice. It has, for instance, stated that as '[n]ew issues of international social justice challenge us' it demands 'new attitudes and approaches to social justice at an international level', and that '[t]he notion of social justice is constantly evolving to keep pace with rapid technical and social change'. See Van Staden ibid 91-105.

[145] ibid.

[146] ibid n 8 citing AE van Blerk *Jurisprudence: An Introduction* (LexisNexis 2002) 127-128.

[147] ibid.

[148] ibid.

[149] ibid.

[150] ibid.

[151] ibid.

government intervention to achieve it.[152] Libertarians dislike government intervention in the labour market and hold the view that labour relations can be effectively regulated by the individual employment contract.[153]

Otto Kahn-Freund borrowed aspects from all three categories to develop his collective laissez-faire theory of labour law.[154] He accepted, as Marxist socialists and welfare liberalists do, that the contract of employment is inadequate for the achievement of social justice because of an inherent imbalance of bargaining power between the employer and the individual employee.[155] As a result of this power imbalance, employees' purported freedom to conclude an employment contract at arm's length with an employer is a fiction because the employer possesses the power to dictate the terms of the contract unilaterally.[156] But he also accepted, as libertarians do, that government intervention is unnecessary in labour relations.[157] He reasoned that collective bargaining is an adequate mechanism to resist the bargaining power of the employer to ensure a more equitable outcome for employees.[158]

A fusion of many of the above ideas produced a social justice framework that includes what is widely accepted as the purpose of labour law.[159] This model is based on the premise that there exists a substantial socio-economic inequality in the typical employment relationship which, if left unchecked, imbues employers with the power to impose their will to the detriment of employees.[160] The purpose of labour law is accordingly to restrict the power of employers to impose their will in the employment relationship so that employees are treated fairly.[161] This is achieved not only through collective bargaining as Kahn-Freund proposed, but also through a variety of statutory interventions.[162]

[152] A van Niekerk 'Is the South African law of unfair dismissal unjust? A reply to Martin Brassey' (2013) 34 *ILJ* 28; J Banaji 'Fictions of free labour: Contract, coercion, and the so-called unfree labour' (2003) 11 *Historical Materialism* 70-73; and H Khelalfa 'Building a holistic approach: Uniting Marxist and Smithian economics for a more resilient economic theory' (2023) 1 *J for Social Mathematical and Human Engineering Sciences* 7.

[153] Fourie n 22 above 39-40.

[154] ibid 41-42, and K Newaj 'An Appraisal of the Provision of "Benefits" as an Unfair Labour Practice in South African Labour Law' (unpublished thesis, University of Pretoria 2019, 26-27).

[155] ibid.

[156] ibid.

[157] ibid.

[158] ibid.

[159] L Rodgers 'Labour Law and Kantian Ideas of Legality and Citizenship' research paper 14-07, University of Leicester School of Law (2014) 1; *Sidumo* n 48 above paras 72 and 74; *SA Chemical Workers Union v Sasol Industries (Pty) Ltd* (1989) 10 *ILJ* 1017 (IC) 1025; and *SA Society of Bank Officials v Standard Bank of SA Ltd* (1994) 15 *ILJ* 332 (IC) 342.

[160] Rodgers ibid 1.

[161] ibid. It is not suggested that fairness is the standard that is applied in all modern labour law systems. But it is the predominant standard in South African labour law.

[162] See Currie and De Waal n 4 above 472-515 for a summary discussion of the individual and collective labour rights in the Constitution and its subordinate labour legislation. Various statutory provisions in South Africa also protect potential employees in the sphere of labour law. See for instance s 6 read with s 9 of the EEA.

Labour law theories have traditionally not been based predominantly on dignity, let alone based on Kant's account of it.[163] However, if it is accepted, as it is contended that it should be, that the protection of dignity is the purpose of labour law, the above social justice model that applies to labour law must be adjusted so that it reflects this purpose.

Opponents of the proposition that the protection of dignity is the purpose of labour law, often point out that it is difficult to reconcile Kant's formulation of dignity — as autonomy that treats each individual as having the capacity to be a self-legislating agent — with a purpose of labour law that assumes that employees do not have the freedom to contract.[164] Another complaint against the reliance on dignity as an ingredient of labour justice is also based on Kant's dignity as autonomy. It is said that it militates against interventions aimed at ensuring substantive equality in terms of which resources and opportunities are spread to categories of persons that have suffered patterns of historical disadvantage.[165] The concern is, as O'Connell puts it, that 'excessive focus on autonomy as free choice may condemn social protection measures as limiting free choice and so failing to respect dignity'.[166]

In essence then, the criticism is that dignity and the distributive function of the social justice framework that prevails in modern labour law are incompatible concepts. This would be problematic if it were the case. But it is contended that it is not. There are various authors that provide divergent but plausible accounts of dignity that accommodate distributive justice by relying to a greater or a lesser extent on Kant's broader thinking, or that rely on conceptions of dignity that are not based on Kant's conception of dignity at all.[167] The approach put forward in this article below falls in the latter category.

Michelman draws on the German conception of communal dignity to offer a single conception of dignity. He explains that the German Federal Constitutional Court held that the German Basic Law[168] proceeds from an image of humankind that strongly influences German Basic Law's idea of dignity.[169] This image of humankind according to the court

'is not that of an isolated, sovereign individual; rather, the [German Constitution] has decided in favour of a relationship between individual and community in the

[163] It would however be incorrect to state that the formulation of the purpose of labour law in dignity terms is a modern development. As Rodgers (n 159 above 1) pointed out, H Sinzheimer (1875-1945), who is regarded by some as the 'founding father of German labour law', incorporated Kantian ideas of dignity in the formulation of his labour law theory.

[164] ibid 2-4.

[165] O'Connell n 61 above 273.

[166] ibid.

[167] See for instance Rodgers n 159 above 1-19; Rawls as discussed in O'Connell n 61 above 274; and Gilabert n 35 above 68-86.

[168] Basic Law of the Federal Republic of Germany of 1949.

[169] The direct translation is 'image of man'. See BVerfGE 7, 15-16 (1954) quoted in Chaskalson n 54 above 1401.

sense of a person's dependence on a commitment to the community, without infringing upon the person's individual value'.[170]

Michelman furthermore argues that this conception of dignity resonates in many judgments of the South African Constitutional Court and with the South African Constitution[171] and then postulates as follows:

'Similar, perhaps, is the South African Constitution's image of humankind and correspondingly of human dignity: humankind not a collection of independent souls each trying to find [their] own way through life, but of individuals who are also citizens who understand themselves to be. Accordingly, to treat a person with regard for [their] dignity is to treat [them] as a person and citizen thus committed.'[172]

It is submitted that the point he essentially makes is that an individual's dignity is shaped, not limited, by the rules of distributive justice adopted by a community — a person's dignity is respected if it is defined in such a way that it makes space for other persons to share in resources and opportunities.[173] As such, the rules of distributive justice that form part of a particular community's conception of social justice mediate competing interests in society in order to define a person's dignity.

This mediating function of social justice can arguably never play a role in moulding a meaning for same-kind dignity that is based on a psychosocial belief that a person is not a human being. It suffices to state that distributive justice, in South Africa at least, has never been conceived in the constitutional era as countenancing the withholding of opportunities and resources based on a belief that a particular group of people are not human.

However, it is maintained that the mediating function of social justice plays a critical role in shaping dignity in terms of the self-fulfilment model. It is difficult to conceive of any version of self-fulfilment or any competing interest that can manifest itself without society and the institutions that it created. Businesses and gainful employment can only ever exist in relation to other persons.[174] The interest that a business has in being viable and in expanding, and the self-fulfilment that an employee experiences by working, would therefore evaporate if one of them was the only person that survived an apocalyptic event.

A person's claim to have her or his dignity protected within the self-fulfilment dignity model resultantly only arises when there are other persons who also have a claim to self-fulfilment dignity and/or there are institutions that have divergent interests. If a person is desirous to participate in societal relations so that she or he can experience self-

[170] BVerfGE 7 (1954) 15-16 quoted in Chaskalson ibid 1401.

[171] Chaskalson ibid 1400-1401.

[172] ibid 1401.

[173] ibid 1400-1401.

[174] Without societies' need for goods and services, and without employees who manufacture goods and provide services, businesses would not exist. Without the societal needs that precipitates businesses, and persons that establish such businesses, gainful employment would not exist.

fulfilment dignity, the person must by necessary implication accept that her or his claim to self-fulfilment dignity must co-exist with other competing interests, including other persons' claims to self-fulfilment dignity. To manage this co-existence, society must create rules to distribute resources and opportunities to enable each person to strive for the best version of self-fulfilment in relation to her or his unique attributes. These rules collectively form part of a particular community's conception of social justice.

In *National Coalition*[175] the Constitutional Court held as follows regarding the effects of discrimination:

> 'The harm caused by the provision can, and often does, affect his ability to achieve self-identification and self-fulfilment. The harm also radiates out into society generally and gives rise to a wide variety of other discriminations, which collectively unfairly prevent a fair distribution of social goods and services and the award of social opportunities for gays.'[176]

The court positioned the suppression of self-fulfilment and inequitable distribution as two separate but co-existing ideas. It is however asserted that it is more than just a co-existence, but an inter-dependence as well. The inequitable denial of resources and opportunities is precisely what suppresses self-fulfilment. Resources and opportunities must therefore be distributed in such a way as to give everybody a more substantively equal opportunity to experience self-fulfilment relative to their unique attributes.

When social justice rules are accepted by society and they have the effect of taking away resources and opportunities from some people to give to others, it cannot be seen as an impairment of the self-fulfilment dignity of those who forfeited resources and opportunities. The price of admission for participating in society is that the boundaries of every person's self-fulfilment is defined in relation to every other person's self-fulfilment based on the social justice rules that society created. No one can have a higher expectation of self-fulfilment than what these rules allow for.

This is precisely the point at which the divide between individualistic dignity and communitarian dignity disintegrates. Traditional individualistic notions of dignity, like the assumptions of substantive autonomy and contractual freedom, will only apply until social justice prescribes that dignity cannot be defined in relation to them.

In any event, the Kantian assumption of substantive autonomy plays a subordinate role in the self-fulfilment dignity model presented in this article. In this model it is self-fulfilment, and not autonomy in and of itself, that plays an overriding role in giving meaning to dignity. Although intentionality often plays an important role in self-fulfilment,[177] it cannot

[175] n 81 above.
[176] ibid para 36.
[177] Kleinig and Evans n 93 above 542.

be absolutely determinative of self-fulfilment. It is arguably not possible for any person to rely exclusively on her or his own will to achieve a desired self-fulfilment outcome,[178] and some people are even less able than others to achieve their best self-fulfilment state by relying on their own will.[179] Consequently, where an employee does not possess enough substantive autonomy to contract at arms-length with an employer, it can therefore be substituted or amplified with something else, like legislation or collective bargaining, if it can bring a person closer to her or his best self-fulfilment state.

7 Conclusion

In terms of the social justice framework that is applied in South African labour law, the purpose of modern labour law is often said to be to curtail the power of employers to exert their will in an employment relationship to ensure that employees are treated fairly. It was however argued in this article that when labour law was constitutionalised, the dignity premise was imported into it, which means that the overriding purpose of labour law became the protection of the dignity of employees.

For dignity to fulfil its role as the axis around which labour law turns, it must not only be incorporated into legal assessments that occur within labour law, but it must also be given meaning that enhances its application in labour law. To this end, it was proposed that the test for fairness of labour practices must be amended, and a dignity framework was presented.

Regarding the test for fairness of labour practices, it was advanced that the test should resemble the test for fairness/unfairness of discrimination on the understanding that the right to fair labour practices should fulfil a role of being the overarching right that serves to protect employees' dignity in every facet of labour relations, not only in relation to discriminatory labour practices. This means that a discriminatory labour practice that is unfair will simultaneously impair both affected rights, but an unfair labour practice that is not discriminatory impairs the right to fair labour practices, but not the prohibition of unfair discrimination.

[178] Human experience tells us that even less vulnerable members of society, who have a greater ability to impose their will on others, will very rarely, if ever, be able to achieve their best self-fulfilment state by relying on their will alone. A CEO, for instance, often only becomes a CEO after a sequence of interactions with people throughout her or his life without which she or he would not have become a CEO.

[179] Consider the hypothetical situation of a homeless person with an aptitude for science. She desperately wants to become an engineer, but due to a lack of resources she is unable to study engineering. Through pure chance another person comes to learn of her circumstances and provides her with the means to study engineering, which ultimately results in her fulfilling her life-long dream of becoming an engineer. It would be irrational to assert that she did not achieve the condition of self-fulfilment because it was not purely through her own efforts that she achieved that self-fulfilment outcome.

The dignity framework that was presented consists of two dignity models, the same-kind dignity model and the self-fulfilment dignity model. It was advanced that dignity impairments within a labour law context must always be determined through the application of the self-fulfilment dignity model; but it can, in addition to the self-fulfilment model, also be determined through the application of the same-kind dignity model if the complainant is disadvantaged by a discernible psychosocial belief that she or he is not human. Within this framework, the accepted social justice model that has been applied to labour law thus far still plays an important role. It shapes an individual's self-fulfilment dignity by mediating between individualistic and communitarian interests.