The Limits to Appearance Autonomy in the Workplace: An Assessment of the Law and Recommendations for Reform in South Africa

Aisha Adam

Dissertation presented for the degree of

DOCTOR OF PHILOSOPHY

In the Department of Commercial Law
UNIVERSITY OF CAPE TOWN

June 2023

Supervisor: Professor Debbie Collier (University of Cape Town)
Co-supervisor: Dr Emma Fergus (University of Cape Town)

PLAIGARISM DECLARATION

I hereby declare that the thesis for the degree Doctor of Philosophy at the University of Cape Town hereby submitted, has not been previously submitted for a degree at this or any other university, that it is my work in design and execution and all the materials contained herein have been duly acknowledged.

Signed by candidate

_____ _____

Aisha Adam Date

ACKNOWLEDGEMENTS

I would like to thank my family for their support. Dad, words cannot express how grateful I am to you for your support and reminders to make a name for myself. To my sister, Shaheena, thank you for your uplifting love and motivational speeches. To Judge Guddu Walia, my second dad, thank you for seeing my potential before I ever did, and for your check-in calls to ensure I was on track – they added an additional boost of strength.

I am extremely grateful to my supervisor Professor Debbie Collier, without whom this degree would not be possible. Thank you for your constant affirmation and countless carrot cakes. I am indebted to your support and kindness in providing space for me to grow and always finding opportunities to promote my academic research. My co-supervisor, Dr Emma Fergus, provided constructive feedback and always challenged me to think outside the box – I am thankful for your input near or far!

To Dr Abigail Osiki and Dr Justice Mavedzenge – thank you for being my soundboards and pillars of inspiration throughout this process. You helped me to see the light at the start and the end of the tunnel. I would like to acknowledge Professor Alan Rycroft, for our fruitful discussions, hearing my initial thoughts and guiding me on the development of this law. I express my gratitude to Professor Rochelle Le Roux, as your mentorship and guidance over the last few years have proven invaluable.

I am grateful to the staff of the Brand van Zyl Law Library for their excellent assistance throughout my research. I humbly acknowledge the scholarships received from the UCT Postgraduate Funding Office. I would also like to thank Linda van de Vijver, Jenna Frost and Joshua Chapple for their editorial services.

Thank you to several friends and colleagues for their patience and prayers: Toni Murphy, Ameerah Khan, Huda Abrahams, Jehan Khonat, Aaminah and Kaamilah Patel, Wassila Ibrahim, Tebogo Dambuza, Khoro Makhesha, Shahrain Coovadia and Jade Janeke.

Most of all, I would like to thank Aqeel Williams for the tedious task of proofreading and for enthusiastically supporting the completion of this degree. I am grateful for your unwavering patience, particularly during my waves of self-doubt.

ABSTRACT

Our physical appearance and how we dress and present ourselves are indicative of our personal expression and unique identity. Appearance is a fundamental aspect of an individual's sense of self and is worthy of protection. Despite this, adverse decisions are often made on the basis of appearance, and appearance may determine our advancement in the employment sphere. This thesis argues that the recognition of appearance autonomy is fundamental for the protection of dignity and that this should inform the extent to which an employer may impose standards of appearance in the workplace.

Currently, in the South African context, an individual's appearance in the workplace is not an explicitly recognised ground under section 6 of the Employment Equity Act 55 of 1998 (EEA), and protection from appearance discrimination will depend on whether the impugned conduct can be based on an existing ground in the Act.

Using dignity as an overarching concept, the thesis explores, through the lens of anti-discrimination law, the extent to which employers can regulate employees' appearance and the limitations that this may impose on an employee's personal autonomy. Furthermore, the thesis considers the constitutional right to privacy, as well as freedom of conscience, belief or opinion, and freedom of expression as mechanisms for protecting personal autonomy. By assessing appearance regulation using these frameworks, the thesis identifies gaps in protection.

Principles of international law and developments in selected foreign law jurisdictions are considered in the thesis and inform the proposed recommendations. Focusing on developments in Australia, the USA, the United Kingdom, France and Germany, the thesis considers the extent to which these countries provide protection from appearance discrimination, and draws lessons in particular from the legislative approaches adopted in Australia, France and selected states of the USA.

Having considered the difficulties in legislating appearance autonomy as a right, the thesis goes on to argue for augmenting the current regulatory framework. Specifically, the thesis recommends the explicit recognition of a right to appearance autonomy,

proposes a definition for physical appearance, and motivates for the inclusion of physical appearance as a listed ground in anti-discrimination law.

The recommendations provide a framework for protecting appearance autonomy in the workplace while recognising the legitimate interests of the employer. The proposals maintain a balanced approach to the employment relationship and clarify the limitations on appearance autonomy based on the inherent requirements of a job. Adopting the recommendations will promote substantive equality and will improve protection from intersecting forms of discrimination. Legislative developments in this regard will raise employer awareness and will advance policy formulation that protects appearance autonomy and encourages a work environment based on mutual respect and dignity. Finally, the thesis argues that the benefits of recognising and protecting appearance autonomy in the workplace outweigh concerns regarding unmeritorious and frivolous claims which should not deter the legislature from recognising and protecting appearance autonomy in the workplace.

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

ACT LRAC	Australian ACT Law Reform Advisory Council
ADA	Americans with Disabilities Act
ADEA	Age Discrimination in Employment Act
CFR	EU Charter of Fundamental Rights
CJEU	Court Justice of the EU
CROWN	Create a Respectful and Open Workplace for Natural Hair Act
DDD	*Défenseur des droits* (French Defender of Human Rights)
ECHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
EEA	Employment Equity Act
EEC	European Economic Community
EEOC	Equal Employment Opportunity Commission
EU	European Union
FED	Framework Equality Directive
FWA	Fair Work Act
HALDE	*Haute autorité de lutte contre les discriminations et pour l'égalité* (French Equal Opportunities and Anti-Discrimination Commission)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ILO	International Labour Organization
LRA	Labour Relations Act
PEPDUDA	Promotion of Equality and Prevention of Unfair Discrimination
RED	Race Equality Directive

SAPS	South African Police Service
SCA	Supreme Court of Appeal
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the EU
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
US	United States
USA	United States of America

CHAPTER 1: INTRODUCTION

> Dress not only defines us, it affects how we feel on a daily basis. People who like to dress up often say it makes them feel more handsome, dignified, and powerful. People who loathe dressing up say it makes them feel bound up, stilted, and oppressed. Conventions of appearance for women and men, and for racial, ethnic, and religious groups, express and observe political and spiritual commitments that affect people at a deep psychological level. Anyone who thinks that appearance regulation is trivial just is not thinking hard enough.[1]

1. INTRODUCTION

Dressing well affects the manner in which one carries oneself and is perceived by others. As we grow older, appearance becomes more important, and is almost always an area of contention should this appearance not fit certain criteria.[2]

With the added influence of magazines, entertainment channels and social media, it is unsurprising that meeting a certain appearance standard is crucial not only in society but also in the workplace.[3] Most people would agree that beauty is subjective, or, to put it another way, 'beauty is in the eye of the beholder'.[4] However, the rise in cosmetic procedures, physical health changes and the unrealistic cultural norms enforced by societal standards show how appearance matters today in certain contexts, including the workplace.[5]

It is optimistic to assume that all individuals are judged based on their intellect, character and human nature, and it is also naïve.[6] In a society full of cynics and bigots, stereotyping is inevitable, and its effects materialise into opinions that have been formed solely from prejudices.[7] The first thing a person sees is someone's appearance and a person's physical

[1] C Fisk 'Privacy, power and humiliation at work: Re-examining appearance regulation as an invasion of privacy' (2006) 66(4) *Louisiana Law Rev* 1112. See also A Rycroft 'Privacy in the workplace' (2018) 39 *ILJ* 743.
[2] H James 'If you are attractive and you know it, please apply: Appearance-based discrimination and employers' discretion' (2008) 42 *Val U L Rev* 629.
[3] Ibid.
[4] D Rhode 'The injustice of appearance' (2009) 61 *Stan L Rev* 1035–1036. See also FJ Cavico et al 'Appearance discrimination in employment: Legal and ethical implications of "lookism" and "lookphobia"' (2012) 32(1) *Equality, Diversity and Inclusion: An International Journal* 83.
[5] J Yates et al 'Good looks and good practices: The attitudes of career practitioners to attractiveness and appearance' (2017) 45(5) *British Journal of Guidance & Counselling* 547–549. See also Cavico et al (note 4) 85.
[6] James (note 2) 632.
[7] Ibid.

characteristics are part of appearance.[8] Appearance is a broad concept that encompasses one's looks and also one's grooming standards.[9]

Simply put, an individual's appearance speaks to their self-expression and identity.[10] Any form of unfair discrimination based on a person's appearance affects the dignity and equality of the individual as much as discrimination based on protected categories such as race, gender or religion.[11] Appearance discrimination or the term 'lookism' refers to how a person may be judged or prejudiced based on their physical qualities or external characteristics.[12]

Employers too are influenced by appearance and many employers have dress codes or policies addressing professional attire in the workplace. Employers may decide to hire, promote, demote or make any other decision about a current or potential employee based on their looks.[13] The following question therefore arises: if appearance is such a dominant social construct, how does it affect the workplace? And to what extent should this subjectivity be legally permitted?

2. PROBLEM STATEMENT

This thesis focuses on the extent to which appearance autonomy is protected in the workplace, particularly because it is a core aspect of an individual's dignity.[14] An individual's physical appearance is significant in society because it is the culmination of their autonomy and personality.[15] Physical appearance is not only about someone's personal characteristics but also encompasses a person's standards of grooming and dressing in the workplace.[16] Cavico et al state that appearance is part of one's non-verbal communication and is directly linked to the complex dynamic behind attractiveness.[17] Furthermore, the notion of an appearance 'norm' is often rooted in societal and cultural standards of beauty.[18] Physical attractiveness has been described as a person's most noticeable quality and one that

[8] K Dion et al 'What is beautiful is good' (1972) 24 *J Pers & Soc Psychol* 285.
[9] Cavico et al (note 4) 83–85.
[10] D Rhode *The Beauty Bias: The Injustice of Appearance in Life and Law* 2 ed (2010) 99.
[11] Ibid. See also s 6 of the Employment Equity Act 55 of 1998.
[12] Allison T Farrell 'Lookism: The silent discrimination' (2007) USFSP Honors Program Theses 2.
[13] Yates et al (note 5) 547–549 discuss the fact that beautiful applicants were offered a high number of positions, while obese applicants received negative reviews for similar job positions. See also Farrell (note 12) 2.
[14] Rhode 'The injustice of appearance' (note 4) 1033. See also S Sontag *Against Interpretation, and Other Essays* (1966) 18.
[15] K Klare 'Power/dressing: Regulation of employee appearance' (1992) 26 *New Eng L Rev* 1408–1409.
[16] Cavico et al (note 4) 83–85.
[17] Ibid.
[18] Ibid 85.

is instantly noted by others upon meeting.[19] Studies suggest that individuals perceived as physically attractive receive preferential treatment.[20] Consequently, the less appealing a person's physical appearance is, the less likely they are to experience better work prospects and favourable treatment.[21] This also results in the stereotype that persons perceived to be physically unattractive tend to have an unpleasant character.[22]

A formative study conducted in 1972[23] sought to observe aspects relating to appearance stereotypes and those personality traits possessed by people of varying degrees of beauty.[24] The participants were given images of people ranging from attractive to unattractive.[25] The results showed that attractive subjects were shown to be happier, to possess desirable personalities, to hold elite job positions, and to exhibit higher marital sufficiency.[26] Following this, the concept of 'what is beautiful is good'[27] was formed, which reinforces the notion of how being beautiful according to societal norms, often dictated by Western culture, has served as a reference.[28] This hypothesis emphasised that attractive people are perceived to be happier, more socially desirable, more suited to marriage, and more likely to be promoted.[29]

Despite the passage of time, the society we live in today has not changed.[30] Our society and our ideals shape the way in which we live and view the world.[31] Western cultural racial groups have influenced these norms,[32] and this deepens the effect that attractiveness has on every aspect of one's life. Any aspect outside of what has been dictated by societal norms is subject to further prejudice, thus leading to the 'silent discriminator', lookism.[33]

---

[19] Dion et al (note 8) 285.
[20] Cavico et al (note 4) 85.
[21] GL Patzer *The Physical Attractiveness Phenomena* (1985) 2.
[22] Ibid 8.
[23] Dion et al (note 8) 285. See S Johnson et al 'Physical attractiveness biases in ratings of employment suitability: Tracking down the "beauty is beastly" effect' (2010) 150 *J Soc Psychol* 301.
[24] Dion et al (note 8) 285.
[25] Ibid 286–287.
[26] Ibid 288–289.
[27] Ibid.
[28] R Mahajan 'The naked truth: Appearance discrimination, employment and the law' (2007) 14 *Asian AM LJ* 165.
[29] E Toledano 'The looking glass ceiling: Appearance based discrimination in the workplace' (2013) 19(3) *Cardozo Journal of Law & Gender* 692.
[30] Mahajan (note 28) 165.
[31] Ibid.
[32] Ibid 167.
[33] Farrell (note 12) 1–2.

The conception of dress as a form of expression is based on a number of ideals, but usually equates to the essentialist view of validating our innate identity.[34] Importantly, appearance correlates with personal beliefs, religious symbolism, racial personality and gender associations.[35] A variety of choices have an impact on our appearance, for example:

a) Muslim women who wear the headscarf for religious reasons;
b) Black women or men who braid their hair;
c) Sikh men who wear the turban; and
d) Transsexual men who wear dresses or skirts that contribute to their gender identity.[36]

These examples embody the crux of a person's personal choices, but policies that limit people's opportunities to wear what aligns with their identity contribute to inequality and divisive stigmas.[37] The injustice behind appearance prejudice adversely affects one's dignity and right to substantive equality.[38]

Furthermore, Klare[39] suggests that a person's identity and their autonomy to dress or look a certain way reflects their personality and lifestyle. While appearance autonomy may be protected under the existing right to privacy or the freedoms listed in the Constitution,[40] this is limited to aspects of culture, religion or expression and fails to fully protect all qualities linked to personal autonomy or individual liberty. The current approach is restrictive as not all forms of appearance discrimination claims can be categorised into these protected rights.[41]

Discrimination based on appearance should be understood broadly to include characteristics that are immutable, which are impossible to change, such as colour or race, and characteristics that are mutable, such as tattoos or hairstyles, which are easier to change. Part of the problem in conceptualising appearance discrimination is the difficulty in establishing whether certain characteristics fall under the category of appearance.[42] The concept of appearance is closely connected to other protected categories, hence the legal protection of

[34] Klare (note 15) 1409–1410.
[35] Rhode *The Beauty Bias* (note 10) 99.
[36] Ibid. See also P Lenta 'Muslim headscarves in the workplace and in schools' (2007) 124 *SALJ* 296.
[37] Ibid.
[38] Rhode 'The injustice of appearance' (note 4) 1048–1054.
[39] Klare (note 15) 1408.
[40] Constitution of the Republic of South Africa, 1996.
[41] A Taylor & J Taylor 'The place of tattoos, beards and hairstyles in discrimination law' (2020) 26(3) *Australian Journal of Human Rights* 472. See also Klare (note 15) 1410–1411.
[42] Rhode 'The injustice of appearance' (note 4) 1036–1037.

appearance highlights the significance of intersectionality.[43] Listed grounds such as sex,[44] race[45] and ethnicity[46] directly affect appearance and have their own legal or theoretical importance and recognition. However, external characteristics, such as dressing or grooming, are connected to innate physical features and contribute to measuring an individual's attractiveness.[47]

In this regard, Rhode recognises the scale of discrimination based on one's appearance. On one end are features that are impossible to change, such as height or facial features, characteristics such as weight lie in the middle,[48] while voluntary characteristics, such as dressing and grooming, lie at the other end of the spectrum.[49] This thesis aims to develop a coherent definition of appearance that embodies the important aspects of both mutable and immutable traits.

Should an employee's characteristics fall under a protected category, employers may be justified in regulating appearance policies in the workplace if this is for the purposes of affirmative action[50] or if this is based on an inherent requirement of the job.[51] Cavico et al explain that the employer is interested in regulating appearance mainly because an employee represents the company's image, which influences an employer's hiring decisions.[52] In essence, employers tend to manage appearance in the workplace by imposing certain restrictions on an employee's grooming or appearance.[53] This can lead to moral and ethical issues in the workplace because of the unfair treatment that occurs.[54]

[43] G Ramachandran 'Intersectionality as "Catch 22": Why identity performance demands are neither harmless nor reasonable' (2005) 69 *Alb L Rev* 309. Ramachandran argues that while identity performance regulation may be unavoidable, the restriction on personal expression can be discriminatory enough to limit an individual. Intersectionality is key to remedying this. See also A Delagrave *The Regulation of Physical Appearance in the Canadian Workplace as a Human Rights Issue* (2020) 241.
[44] Section 6(1) of the Employment Equity Act.
[45] Ibid.
[46] Ibid.
[47] Rhode 'The injustice of appearance' (note 4) 1037.
[48] Rhode *The Beauty Bias* (note 10) 25.
[49] Ibid.
[50] Section 6(2)*(a)* of the Employment Equity Act.
[51] Section 6(2)*(b)* of the Employment Equity Act. A Rycroft 'Privacy in the workplace' (note 1) 745; A Rycroft 'Inherent requirements of the job' (2015) 36 *ILJ* 900–906; SM Crow & D Payne 'Affirmative action for a face only a mother could love?' 1992 *Journal of Business Ethics* 869.
[52] Cavico et al (note 4) 85.
[53] Ibid 92–93.
[54] Crow & Payne (note 51) 869.

Based on the sensitivity surrounding the culture and history of South Africa, the country's laws adopt a strict approach to discrimination. Through the enactment of the Constitution, the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)[55] and the Employment Equity Act (EEA),[56] the right to equality is entrenched. However, appearance is not a listed ground, and therefore its protection remains inadequate.

This thesis argues that the South African Constitution and the relevant labour legislation, such as the EEA, do not provide sufficient protection against appearance discrimination. Building on fundamental rights and informed by international and foreign law, the thesis recommends law and policy reform to ensure sufficient protection.

The thesis contributes to the body of knowledge on appearance regulation in the South African context and seeks to ensure that such regulation does not infringe on an individual's right to equal treatment and dignity. Furthermore, the thesis provides an academic analysis of the tools that can be used to regulate appearance and the extent to which an employer may limit appearance autonomy in the workplace.

3. RESEARCH QUESTIONS

The research examines the extent to which appearance autonomy is protected in South African law, and the legitimate grounds for restricting a person's appearance autonomy in the South African workplace. The key research questions addressed in the research are:

- To what extent are employees currently protected against discrimination based on appearance?
- What role does dignity play in protecting personal autonomy in the context of appearance?
- In what circumstances are limits to personal autonomy in the workplace justified in the context of appearance?

The research seeks to identify gaps in the protection for an employee in the work environment; to reinforce dignity as a foundational overarching concept for bridging those gaps; and to propose amendments to the law, informed by the approach to appearance discrimination adopted in selected jurisdictions. The thesis provides a comprehensive

[55] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
[56] Employment Equity Act 55 of 1998.

analysis of appearance discrimination and the law. This analysis will serve as a platform for determining the appropriate legal response for the protection of appearance autonomy in the South African workplace.

4. METHOD OF RESEARCH

The research is primarily concerned with the key research questions from a theoretical perspective alongside an analysis of relevant legislation and case law. The principal method of research for this thesis is desktop-based research that focuses on primary and secondary legal material resources in South Africa as well as other relevant jurisdictions. The following are considered in the thesis:

4.1 Domestic statutory instruments, international and foreign laws

This thesis considers the statutory framework of South African law, as well as selected aspects of international and foreign laws and their mechanisms in discrimination law, and particularly each jurisdiction's primary labour legislation. The thesis provides a critical analysis of South Africa's current approach to protecting appearance discrimination, as well as a consideration of the relevant aspects of the statutory frameworks of the USA, selected countries in Europe, Australia, and the United Kingdom (UK). This analysis has informed the thesis and proposed law reform in the South African context.

4.2 Academic literature

Academic literature, including books, reports and peer-reviewed journal articles, informs the theoretical contexts of appearance autonomy. This is considered in the context of South Africa as well as other relevant foreign jurisdictions. The key readings and theoretical arguments are discussed in the next section.

5. SCOPE AND SIGNIFICANCE

5.1 Background to and context of discrimination in the South African workplace

The inequality that arose from apartheid remains systemically embedded in society.[57] Legislation that discriminated on the basis of race was abolished in 1994, and the protection of equality and democracy was realised with the introduction of the Constitution. In order to

[57] J Seekings 'The continuing salience of race: Discrimination and diversity in South Africa' (2008) 26(1) *Journal of Contemporary African Studies* 1.

recognise diversity within society, post-apartheid South Africa aimed to build 'a rainbow nation' by eradicating racial segregation and promoting substantive equality.[58] The thesis examines the basic tenets of equality; however, it is important to acknowledge those sources that embody the eradication of unfair discrimination.

The enactment of the Constitution created a system based on the fundamental principles of human dignity, equality, non-racism, human rights and the supremacy of the rule of law.[59] Sections 9 and 10 of the Constitution embody the rights to equality and dignity, ensuring equal protection for all. These sentiments are echoed in other prominent pieces of legislation such as PEPUDA and the EEA. The enactment of the EEA placed an onus on employers to eliminate unfairness and promote anti-discrimination in the workplace.[60] Likewise, PEPUDA aims to provide relief to those persons who are not covered by the definition of an 'employee'.[61] Additionally, discrimination in the employment sector is addressed by the EEA and the Black Empowerment Act,[62] both of which aim to encourage the fair appointment of employees, to level the playing field when it comes to employment, and to abolish discrimination on the basis of race, gender or any other protected characteristic.[63]

South Africa is said to be one of the few countries in the world that has established a legal category of 'unfair discrimination',[64] which is defined as discrimination in the derogatory sense, with the grounds of discrimination amounting to essential human characteristics.[65] Unfair discrimination, whether direct or indirect, is prohibited on a number of listed grounds. These 16 grounds listed in the Constitution[66] are increased to 19 in the EEA, which makes it easier to identify the correct ground under which to claim.[67] The non-exhaustive list in

[58] Ibid 6.
[59] D Collier & E Fergus et al *Labour Law in South Africa: Context and Principles* (2019) 412. See also C Albertyn *Constitutional Equality in South Africa: Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 75.
[60] Sections 5 and 6 of the EEA. See also D du Toit & M Potgieter *Unfair Discrimination in the Workplace* (2014) 15.
[61] Section 5 of PEPUDA.
[62] Broad-Based Black Economic Empowerment Act 53 of 2003.
[63] Section 2 of the Broad-Based Black Economic Empowerment Act and ss 5 and 6 of the EEA. See also Seekings (note 57) 5.
[64] D du Toit *The Prohibition of Unfair Discrimination: Applying s 3(d) of the Employment Equity Act 55 of 1998* (2009) 142.
[65] Ibid. The forms of discrimination will be further discussed in chapter 4 part 2.1.
[66] Section 9(3) includes the grounds of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.
[67] Section 6(1) of the EEA prohibits discrimination on the grounds of race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion culture, language, birth or on any other arbitrary ground.

section 6 of the EEA gave rise to the terms 'unlisted' and 'listed' grounds of discrimination.[68] If discrimination is based on a specific ground, such as those listed in section 6(1) of the EEA, then the discrimination is presumed to be unfair. However, if this is not the case, then the ground will need to be based on those aspects that tend to impair the dignity of the employee.[69] In this case, the prohibited ground of discrimination is known as an arbitrary ground, which provides for a category of unspecified grounds that may be capricious or random.[70]

When dealing with the unlisted grounds of discrimination, both discrimination and differentiation will need to be proved by the employee.[71] The test in the Constitutional Court case of *Harksen v Lane* established whether discrimination is unfair based on the three-stage determination of differentiation, discrimination and proportionality.[72] In terms of *Harksen*,[73] it must be proven that the unlisted ground is a defining factor and that the factor is worthy of protection as it impairs the individual's dignity or affects them in a serious manner to the same effect.[74] This test will be discussed in later chapters, but this section illustrates its significance in determining discrimination in the workplace. Furthermore, the thesis will consider how the ground of appearance can materialise as a ground that is either unlisted or listed, will analyse the route for claimants to follow, and will propose amendments to protect claims.

The Constitution and the EEA do not include a ground that is directly based on personality or personal identity, and Du Toit and Potgieter[75] argue that the scope of section 6(1) of the EEA should be broadened to include a provision that is integral to an employee's identity or dignity.[76] Importantly, *Harmse v City of Cape Town*[77] stipulated that the right not to be

[68] *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC); *Stojce v University of KwaZulu-Natal and Another* (2006) 27 *ILJ* 2696 (LC) states that unlisted grounds are analogous to listed grounds. See also Collier & Fergus et al (note 59) 437.
[69] *Harksen v Lane* (note 68). See also Collier & Fergus et al (note 59) 418; O Dupper et al *Essential Employment Discrimination Law*' (2004) 58.
[70] D du Toit 'Protection against unfair discrimination: Cleaning up the Act?' (2014) 35 *ILJ* 2623–2624.
[71] Section 11(1)–(2) of the EEA. See the further discussion on the burden of proof in chapter 4 part 2.2.2. See Dupper et al (note 69) 58.
[72] *Harksen v Lane* (note 68). This test is further discussed in chapter 3 part 3.2 and chapter 4 part 2.2.1.
[73] *Harksen v Lane* (note 68).
[74] Furthermore, in *Kadiaka v Amalgamated Beverage Industries* (1999) 20 *ILJ* 373 (LC) para 43 it was stated that in order for a ground to be potentially discriminatory and unfair, it needs to be 'purposeless or for a purpose of insufficient importance that outweighs the rights of the employee or it must be morally offensive'. See also *Ndudula and Others v Metrorail* (2017) 38 *ILJ* 2565 (LC) para 80.
[75] Du Toit & Potgieter (note 60) 15.
[76] Ibid 24–25. Further discussion on the debate of a broad or narrow interpretation will be addressed in chapter 4 part 2.4.

unfairly discriminated against is a right enjoyed by all employees regardless of whether they fall into a designated group.[78] This is the case particularly when it comes to appearance-based discrimination in the workplace, which is an area that is not explicitly protected by the listed grounds.[79]

5.2 Appearance discrimination: A human rights problem

Beauty and attractiveness may be skin-deep, but they lead to an amalgamation of advantages and disadvantages for an individual beyond their appearance.[80] Rhode describes appearance as more than just race, sex and ethnicity, as it generally implicates identity in a more fundamental sense, which contributes more to a person's individual right of self-expression.[81] She further reiterates that appearance encompasses the core values and cultural identity of an individual.[82] Sontag describes the manner of appearing as a manner of being, which implies that requiring an individual to conform to certain appearance policies may be an infringement of their personal autonomy.[83]

According to Klare,[84] personal appearance is a set of meanings that are constructed by social and economic circumstances. Hence, while employers may have a legitimate interest in regulating appearance due to the inherent requirements of the job, such as a health care provider's obligation to wear sterile clothing,[85] employers should not abuse this prerogative by imposing restrictions that cannot be justified on legitimate grounds.[86] Unjustified limitations tend to impede cultural diversity and standardise social life.[87] Furthermore, appearance regulation in the workplace limits individual dignity.[88] Thus, in building awareness of appearance-based discrimination, there is a need to use and further develop existing legal rights to recognise its significance and to provide adequate protection. This

---

[77] *Harmse v City of Cape Town* (2003) 24 *ILJ* 1130 (LC).
[78] Ibid.
[79] The categorisation of appearance as a protected ground is discussed in detail in chapter 4 part 2.4.
[80] Rhode 'The injustice of appearance' (note 4) 1035.
[81] Ibid 1058.
[82] Ibid.
[83] Sontag (note 14) 18.
[84] Klare (note 15) 1408.
[85] Rycroft 'Inherent requirements of the job' (note 51) 900–903; A Rycroft 'Accommodating religious or cultural beliefs in the workplace: *Kievits Kroon Country Estate vs CCMA; Dlamini v Green Four Security; POPCRU v Department of Correctional Services*' (2011) 23(1) *SA Merc LJ* 109–111.
[86] Rycroft 'Inherent requirements of the job' (note 51) 900–906. See also Klare (note 15) 1427.
[87] Klare (note 15) 1442.
[88] Ibid.

awareness should deter an employer from using appearance policies of a discriminatory nature or should encourage employers to eradicate them completely.[89]

In South Africa, the protection of physical appearance by means of an unlisted ground or an arbitrary ground[90] remains inadequate.[91] When it comes to dress and grooming, this right is likely to touch on aspects of an individual's freedom of expression;[92] likewise, if an employee is not allowed to wear religious attire, this may impair their freedom to religion.[93] Additionally, as McGregor confirms, the term personal appearance could also be regarded as an unlisted ground of unfair discrimination.[94] In this regard, when employees are constrained from expressing themselves and are stereotyped based on their appearance due to employer's blanket ban policies, this may impair a person's self-worth and autonomy,[95] in the same manner it would impair their expression or religious beliefs.[96]

The protection of appearance autonomy as an aspect of religion, culture and gender is illustrated by *Department of Correctional Services and Another v POPCRU and Others*,[97] involving a dismissal based on the employees' refusal to cut their dreadlocked hair. The employer's objective was to ensure neatness, with the secondary purpose relating to security and discipline.[98] The employees claimed discrimination on the basis of religion and culture, as well as gender. The Labour Appeal Court held that the prescribed dress code imposed disadvantages on those who wished to express themselves fully.[99] Furthermore, the Supreme Court recognised the need for a reasonable accommodation of diversity and found that a

[89] Ibid 1442–1443.
[90] Section 6(1) of the EEA.
[91] DJ Viviers 'Dress codes, grooming standards and South African employment law: Comparative insights on workplace discrimination based on mutable appearance characteristics' (2016) 133 *SALJ* 898 at 913. See also A Rycroft 'Privacy in the workplace' (note 1) 746. Rycroft discusses the 'dark side of appearance regulation, where disadvantage and discrimination occur often subconsciously, without overt regulation by the employer, and are difficult to prove'.
[92] Section 16 of the Constitution. Rhode *The Beauty Bias* (note 10) 99 refers to appearance discrimination as a restriction on 'individuals' right to self-expression'.
[93] Section 15 of the Constitution.
[94] M McGregor & W Germishuys 'The taxonomy of an unspecified ground in discrimination law' (2014) 35(1) *Obiter* 106.
[95] *IMATU v City of Cape Town* (2005) 26 *ILJ* 1404 (LC) examined the dangers of a blanket approach by employers when ascertaining the inherent requirements of the job defence. See also *Jansen van Vuuren v SA Airways (Pty) Ltd* (2013) 34 *ILJ* 1749 and *South African Airways (Pty) Ltd v GJJVV* [2014] 8 BLLR 748. See A Louw 'Language discrimination in the context of South African workplace discrimination law' (2022) 25 *PER* 15.
[96] Freedom of religion and freedom of expression are explored as links to appearance in chapter 5 parts 3 and 4.
[97] 2013 (4) SA 176 (SCA).
[98] *Department of Correctional Services and Another v POPCRU and Others* 2013 (4) SA 176 (SCA).
[99] *Department of Correctional Services and Another v POPCRU and Others* (2011) 32 *ILJ* 2629 (LAC) para 25. See also *MEC for Education: Kwazulu-Natal and Others v Pillay* 2008 (2) BCLR 99 (CC) para 46.

hairstyle could not lead to a reduction in productivity.[100] The case demonstrates that the courts have recognised the employer's right to engage in economic activity, but also that this must be balanced against an employee's constitutional rights.[101]

Dlamini and Others v Green Four Security[102] confirmed an important aspect of appearance-based discrimination and its regulation. If an employment policy restricts an aspect of appearance but is based on an inherent requirement, then the discrimination will be justified.[103] However, while the case law demonstrates sympathy for appearance-based claims, it is clearly still a developing and fragmented field in the labour law regime of South African law. Given the history of discrimination in South Africa, it is important to acknowledge the rights that are protected but to address those areas that have yet to be explicitly protected.

It has therefore been suggested that the list of additional prohibited grounds should be further articulated and applied.[104] Furthermore, Viviers[105] has argued that protection against appearance discrimination in the workplace should be recognised as a corresponding ground, or can be protected as an arbitrary ground that is listed or unlisted in the EEA. The examples in the cases discussed above and in later chapters of the thesis[106] will show that victims of appearance-based discrimination are isolated as a group of unidentifiable individuals who are often subject to treatment which is prejudicial to their worth and dignity. However, unless they can tie this differentiation to a listed ground, most employees are defenceless against such maltreatment.[107]

[100] *Department of Correctional Services and Another v POPCRU and Others* 2013 (4) SA 176 (SCA).
[101] Ibid.
[102] [2006] 11 BLLR 1074 (LC). This case is discussed further in chapter 4 part 2.4.3.
[103] Ibid paras 9 and 39–40.
[104] D Viviers 'A comparative labour law perspective on categories of appearance-based prejudice in employment' (2014) *http://scholar.ufs.ac.za:8080/xmlui/bitstream/handle/11660/2036/ViviersDJ.pdf;jsessionid=6710AF6427AEDE03E3CE2B0D3B942F1A?sequence=1*, accessed 27 October 2022. This will be discussed further in chapters 4 and 5.
[105] DJ Viviers 'Dress codes, grooming standards and South African employment law: Comparative insights on workplace discrimination based on mutable appearance characteristics' (2016) 133 *SALJ* 916.
[106] See chapter 4 part 2.4.3 for a discussion of appearance discrimination-related case law in South Africa and also see chapter 5 parts 3.2 and 4.2.
[107] A Farrell *Lookism: The Silent Discrimination* (2007) 8 USFSP Honours Program Theses (Undergraduate), *http://digital.usfsp.edu/honorthesis/27*, accessed 27 December 2018.

5.3 The role of dignity

Currie and De Waal explain that the foundations of an individual's right to physical integrity, psychological worth and the freedom to make choices are rooted in their dignity.[108] The concept of dignity is a prominent feature of the South African Constitution, and this thesis advances the argument that appearance-based discrimination is a violation of an individual's autonomy and their rights to dignity and equality.[109] Employers are obliged to protect their workers and ensure that their fundamental freedoms are respected.[110] However, while race, gender and religion are protected, because they are significantly inherent in defining one's dignity,[111] appearance as such is not. In this regard, the thesis argues that appearance should be given the same level of respect, because appearance is an integral part of who we are, and it is one of the fundamental ways in which individuals express themselves.[112]

South African courts have relied on an individual's worth and dignity to uphold equality rights in areas where the law is silent.[113] Human dignity plays a crucial role in social and political movements, as well as in the foundation of certain jurisdictions' fundamental rights.[114] Respecting an individual's sense of worth and culture is an essential value for humanity to progress in a diverse manner. However, dignity's definition and scope cannot be easily categorised due to its complexity and the disagreement over the worth of an individual.[115] Based on Kant's[116] discussions of dignity, Bal argues that there is no higher value of the workplace than upholding employees' dignity.[117] Any human being who is part of the workplace has a certain responsibility to respect the dignity of others.[118]

---

[108] I Currie & J de Waal *The Bill of Rights Handbook* (2005) 273.
[109] Du Toit & Potgieter (note 60) 14. See also *Minister of Health and Another v New Clicks SA (Pty) Ltd and Others* 2006 (2) SA 311 (CC).
[110] S Vettori 'The role of human dignity in the assessment of fair compensation for unfair dismissals' (2012) 15(5) *PER/PELJ* 103.
[111] R Henrico '*Religious Discrimination in the South African Workplace* (2016) 32. See also *Pillay* (note 99) para 62; Currie & De Waal (note 108) 273. See also K Zakrzewski 'The prevalence of lookism in hiring decisions: How federal law should be amended to prevent appearance discrimination in the workplace' (2005) 7(2) *University of Pennsylvania Journal of Labor and Employment Law* 434.
[112] Sontag (note 14) 18.
[113] B Hepple 'The aims and limits of equality laws' in O Dupper & C Garbers *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 89–90.
[114] Henrico (note 111) 80–81. See also J Kahn 'Privacy as a legal principle of identity maintenance' (2003) 33 *Seton Hall Law Review* 384.
[115] AC Steinmann 'The core meaning of human dignity' (2016) 19 *PER/PELJ* 2–3.
[116] I Kant *Groundwork of the Metaphysics of Morals* (translated and edited by Allen Wood) (2002) 1–66. See also M Bal *Dignity in the Workplace: New Theoretical Perspectives* (2017) 2.
[117] Bal (note 116) 2.
[118] Steinmann (note 115) 11–12.

Dignity has featured predominantly in constitutional matters regarding inhuman or degrading treatment.[119] This thesis will outline how dignity remains at the centre of resolving disputes relating to appearance-based discrimination. This may arise in areas of labour law such as discrimination or dismissals, which often involve a breach of an individual's right to dignity in the workplace.[120] Such incidents manifest as both labour issues and constitutional issues, and therefore it is essential that any remedies available should weigh the dignity that was impaired in both areas of the law.[121] Although parties should not have to seek remedies in the Constitutional Court, chapters 4 and 5 outline prominent discrimination cases heard by this court, as a forum of relief, based on the impairment of dignity.[122]

The protection of dignity in the workplace is established in the South African Constitution, particularly in section 10, which stipulates that 'everyone has the right to have their dignity respected and protected.' In terms of section 39(1)*(a)*, the court is required to promote values that underpin a democracy based on 'human dignity, equality and freedom'.[123] South African law aims to attain equality and justice between the rights of an employer and employee, and this balance needs to be achieved with the utmost respect for human dignity.[124]

The fundamental freedoms that protect against discrimination and ensure the right to dignity are central to South African labour law.[125] As mentioned above, the right to equality is embodied in section 9 of the Constitution. Furthermore, the courts are able to recognise new grounds that are not listed in section 9(3). This permits areas of unfair discrimination that have not been explicitly established in the law to be recognised. In order for an individual to be protected from appearance-based discrimination, the claim would have to be based on one of the listed grounds, an arbitrary ground or an unlisted ground.[126] However, this imposes a

[119] *Jansen v Legal Aid* (2019) JOL 42192 (LC). See also *Ntsabo v Real Security CC* (2003) 4 *ILJ* 2341 (LC).
[120] Vettori (note 110) 111.
[121] Ibid.
[122] *Gcaba v Minister of Safety and Security* 2010 (1) SA 238 (CC) para 73.
[123] Section 39(1)*(a)* of the Constitution. See the further discussion of this provision in chapter 3 part 2.2 on dignity and constitutional law.
[124] *Parry v Astral Operations Ltd* [2005] 10 BLLR 989 (LC) para 100. Pillay J recognised the delicate balance between establishing the interests of a business and socio-economic policies. He stated: 'The elevation of labour rights as a socio-economic constitutional right re-enforces the need to balance the various competing interests in labour disputes.' See also A Levin 'Dignity in the workplace: An enquiry into the conceptual foundation of workplace privacy protection worldwide' (2009) 11(1) *ALSB* 72.
[125] Sections 1, 7 and 10 of the Constitution. See also ss 5 and 6 of the EEA.
[126] Section 6 of the EEA. See also *Dlamini and Others* [2006] 11 BLLR 1074 (LC). Appearance protection under the current system is discussed further in chapters 4 and 5.

significant burden on the employee; the thesis therefore argues for the development of the law, particularly with regard to the protection of physical appearance.[127]

As the law on discrimination develops around the world, so should the law in South Africa.[128] Notably, the International Labour Organisation (ILO) has endorsed the notion that protection against discrimination relates inherently to the dignity of a person.[129] Furthermore, the ILO has acknowledged that appearance discrimination is a legitimate issue in the employment sphere.[130] ILO Convention 111 is important in South African labour law particularly as it is aimed at eradicating discrimination and providing equal opportunity and treatment within the workplace.[131]As an ILO member state, South Africa is obligated to uphold and actualise the rights specified in the Declaration on Fundamental Principles and Rights at Work, 1998, which includes the elimination of discrimination in respect of employment and occupation.[132] This underscores South Africa's responsibility to safeguard and ensure the guarantee and protection of human and worker rights as enshrined at the international level. Furthermore the EEA and PEPUDA must be interpreted in terms of the Convention.[133] While section 3*(d)* of the EEA ensures reliance on the Convention, it is appropriate that the ILO jurisprudence on methods of protection from discrimination should be considered more broadly. In this regard, Du Toit and Potgieter[134] reiterate that the ILO provides a definition for discrimination and that it would be appropriate to apply its definition.[135]

Dignity plays a crucial role in the workplace and other areas of employment. Its prominence in constitutional and employment law confirms its position in all aspects of South African jurisprudence. At the centre is an individual's sense of worth and value, linked strongly to their identity and position in society.[136] Employers are required to provide a safe environment

[127] This is discussed further in chapter 4 part 2.4.
[128] The foreign comparators are discussed in chapter 4 part 3 and chapter 6 part 4.
[129] ILO Declaration on Fundamental Principles and Rights at Work, 1998; A Bronstein *International and Comparative Labour Law* (2009) 125–126. This is discussed further in chapter 3 part 2 and chapter 4 part 2.
[130] The ILO has expressly recognised the protection of physical appearance in French Polynesia. See ILO Observation (CEACR) adopted 2016, 106th ILC session (2017) *https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3283916*, accessed 14 November 2022.
[131] Section 3*(d)* of the EEA. See also Collier & Fergus et al (note 59) 424. Convention 111 was ratified by South Africa in 2000.
[132] ILO Declaration on Fundamental Principles and Rights at Work, 1998.
[133] Section 3*(d)* of the EEA and ss 2*(h)* and 3*(d)* of PEPUDA.
[134] Du Toit & Potgieter (note 60) 25.
[135] Section 6(1) of the EEA.
[136] Rosana Juçara de Souza Reis et al 'Dignity promoted or violated: How does the deaf person included perceive it?' (2017) 18(3) *Revista de Administração Mackenzie* 181. See also M Mott Machado & M Mendes

for employees, which protects and sustain their dignity.[137] Often, employees do not acknowledge the lack of dignity in an organisation because the employer is unwilling to protect the employee and their self-worth.[138] The inclusion of dignity in many countries' Constitutions confirms the position of dignity in society.[139] Recognising the right of an individual to express themselves freely in their particularity promotes the recognition of human personality and moral capacity.[140] In this regard, the inequalities and social injustices present in workplaces and in society more generally speak to the need for a deeper understanding of the dynamics of dignity to correct and resolve actions that may undermine human dignity.[141]

5.4 Freedom of appearance autonomy

Laws that prevent discrimination on the basis of race, religion, gender, sex or culture provide legal recourse to and promote equal opportunities in the workplace.[142] Similarly, if the freedom of appearance autonomy was expressly recognised, employers would be encouraged to provide work based on skills and the ability to perform, rather than on an employee's clothing, body type or self-expression.[143] The recognition of freedom of appearance or regulating the discrimination that comes with appearance discrimination will provide victims with a recognised form of defence. As Klare argues, the right to appearance autonomy will form the basis of a constructive discussion for the recognition of this type of discrimination and the promulgation of new rights that could bring about meaningful reform.[144]

Furthermore, Rhode argues that appearance reflects not only physical integrity but also core values.[145] Additionally, she argues that, as with religion and disabilities, personal appearance that does not impose hardship should be accommodated.[146] It is argued that although it may be difficult to document the guidelines or set the boundaries for appearance discrimination,

---

Teixeira 'Dignity in the context of organizations: A look beyond modernity' (2017) 18(2) *Revista de Administração Mackenzie* 84.

[137] *Media 24 Ltd v Grobler* (2005) 26 *ILJ* 1007 (SCA) para 65.

[138] M Zawadzki 'Dignity in the workplace: The perspective of humanistic management' (2018) 26(1) *JMBA* 183.

[139] N Rao 'Three concepts of dignity in constitutional law' (2011) 86(4) *Notre Dame Law Review* 186.

[140] Ibid. See the further discussion in chapter 2 part 3.3 on the recognition of dignity as the freedom to be.

[141] Du Toit & Potgieter (note 60) 16.

[142] Section 6(1) of the EEA. See also Farrell (note 12) 27.

[142] Section 9(1)–(3) of the Constitution of the Republic of South Africa, 1996.

[143] E Adamitis 'Appearance matters: A proposal to prohibit appearance discrimination in employment' (2000) 75 *WLR* 222–223.

[144] Klare (note 15) 1442. See chapter 6 part 3 for a discussion on accommodating the freedom to appearance.

[145] Rhode 'The injustice of appearance' (note 4) 1097.

[146] Ibid.

the employer would have no choice but to follow the same standards that are set for other types of discrimination claims.[147] Not dealing with this issue will perpetuate the tolerance of discrimination based on appearance.[148]

However, there are concerns about the concept of appearance as a prohibited ground.[149] In this regard, one of the most significant issues is protection against unmeritorious claims. Although there is a possibility of opening the floodgates to fickle claims and litigation cases, there is evidence to the contrary from other jurisdictions that have enacted legislation against appearance discrimination.[150] The thesis argues that the principle of dignity is strongly rooted in fundamental freedoms such as religion and expression.[151] Therefore, implementing freedom of appearance would reinforce the right to dignity whilst protecting personality interests and identity.

5.5 Comparative perspectives on protection against appearance discrimination

The thesis considers research relevant to the context of labour law in South Africa as well as relevant developments in international and foreign law.[152] The thesis considers aspects of the law of foreign law jurisdictions, including the USA, the UK, selected countries in Europe, and Australia.[153] Although the primary focus of the thesis is the South African context, comparative analysis of selected aspects of foreign law is provided with a view to addressing deficiencies in protection within South African law. The thesis approach aligns with the relevant provisions in South Africa's Constitution on the consideration of international and foreign law.[154] The comparators considered in the thesis will inform the recommendations for reform, and illustrate how South African national law differs from foreign law in relation to appearance discrimination.

South African legislation does not explicitly deal with appearance autonomy, whereas the USA and Australia have taken steps to address appearance discrimination.[155] Developments in the UK and selected countries in Europe are useful for the South African context, due to

[147] Klare (note 15) 1395–1447.
[148] James (note 2) 657.
[149] These are considered in chapter 6 part 5.
[150] Rhode 'The injustice of appearance' (note 4) 1081. See also Adamitis (note 142) 222–223.
[151] L Barroso 'Here, there, and everywhere: Human dignity in contemporary law and in the transnational discourse' (2012) 35 *BC Int'l & Comp L Rev* 355.
[152] Section 39(1)*(a)–(c)* of the Constitution.
[153] Foreign comparators are explored in chapter 4 part 3.
[154] See sections 39(1), 232 and 233 of the Constitution.
[155] Rhode *The Beauty Bias* (note 10) 135.

the higher levels of sensitivity to human worth and dignity based on its historical circumstances.[156] Furthermore, the endorsement of the right to dignity in these countries' Constitutions shows the emphasis that these jurisdictions place on the protection and realisation of human rights. Although the USA does not explicitly protect dignity in its Constitution, the concept is used as an interpretative tool to understand liberty and rights.[157]

These comparisons facilitate an understanding of appearance regulation and the benefits of explicit legislation in this regard. In these jurisdictions the implementation of protection has allowed for legal resolutions for employees with legitimate claims.[158] Implementing legislative reform in South Africa could have the same result, whereas in the current legal framework, there is legal uncertainty as far as appearance prejudice in the workplace is concerned.[159]

5.6 Interdependence of rights

This thesis reinforces the significance of the interdependence of rights. Relying on constitutional rights such as dignity and equality means that the right to appearance autonomy and expressing oneself involves the broad interpretation of these rights.[160] Similarly, the thesis examines the law on privacy and the freedoms of religion and expression, since dignity is considered to be a foundational value for these rights. According to Scott, the purpose of fundamental rights is to provide full protection so that rights can be meaningful and not flawed.[161] Hence, treating freedoms and rights as interrelated allows for the protection of one right through the constitutional elements of other rights.[162]

It follows that the right to dignity requires the protection of appearance autonomy and the right to appearance autonomy, as a person cannot have their dignity respected without having

[156] Levin (note 124) 77.
[157] Barroso (note 150) 392–393. See also H Botha 'Human dignity in comparative perspective' (2009) 20 *Stell LR* 176. This is considered further in chapter 2 part 3.
[158] *Jamieson v Benalla Golf Club Inc* [2000] VCAT 1849; *Boychuk v Symons* (1977) IRLR 395 EAT; *Primmer v Mayflower Kebabs Ltd* (2007) (unreported) Employment Tribunal.
[159] *Dlamini* (note 126). See Rycroft 'Privacy in the workplace' (note 1) 744–746.
[160] C Botha *Statutory Interpretation: An Introduction for Students* 5 ed (2012) 193.
[161] C Scott 'Interdependence and permeability of human rights norms: Towards a partial fusion of the International Covenants on Human Rights' (1989) 27(3) *Osgoode Hall Law Journal* 779–781.
[162] Ibid. See also H Quane 'A further dimension to the interdependence and indivisibility of human rights: Recent developments concerning the rights of indigenous peoples' (2012) 25 *Harv Hum Rts J* 81–83.

the freedom to express their appearance.[163] While human rights cannot be treated or interpreted in isolation,[164] Scott goes further to explain that the interdependence of fundamental rights is 'mutually reinforcing or dependent but distinct'.[165] Thus, the right to freedom of appearance as an expression of one's individuality in a workplace is an aspect of the right to human dignity and equality, and should provide a distinct legal basis for the enforcement of a legitimate claim.[166]

5.7 Principles of substantive equality and intersectionality

One of the driving ideologies aiming to overturn inequality is the concept of substantive equality.[167] Addressing discrimination through this lens has allowed for the identification of those individuals subjected to disadvantages and those who have benefited from privilege.[168] Substantive equality aims to go beyond a single axis of equality by considering the social and economic background of individuals.[169] The thesis argues that the value of dignity should be interpreted alongside equality to promote and strengthen aspects of substantive equality. Furthermore, the thesis considers how substantive equality correlates with appearance discrimination as this type of discrimination inherently impairs an individual's worth and therefore their right to dignity.[170]

Another key principle of anti-discrimination law that this thesis aims to draw from is intersectionality.[171] Intersectionality recognises that different characteristics can intersect and co-exist in the same individual, which may compound their experiences of discrimination.[172]

---

[163] P Neves-Silva et al 'Human rights' interdependence and indivisibility: A glance over the human rights to water and sanitation' (2019) 19 *BMC Int Health Hum Rights* 14 emphasises how human rights are a 'system where all rights are interdependent, indivisible and interrelated'.
[164] Scott (note 159) 782–783.
[165] Ibid. See also Quane (note 160) 81.
[166] Rhode 'The injustice of appearance' (note 4) 1059.
[167] S Fredman 'Substantive equality revisited' (2016) 14 *International Journal of Constitutional Law* 713. Fredman reiterates the significance of substantive equality in interpreting the right to equality and as a concept that is regularly interpreted in South African jurisprudence. See also Collier & Fergus et al (note 59) 412; S Jagwanth 'South Africa: The inequality challenge' (2000) 15(3) *South African Report (Toronto)* 31.
[168] S Fredman 'Redistribution and recognition: Reconciling inequalities' (2007) 23(2) *South African Journal on Human Rights* 216.
[169] See chapter 3 part 2 and 3 and chapter 4 parts 2 and 3 for a further discussion of this concept.
[170] Ibid. See also P de Vos & W Freedman *South African Constitutional Law in Context* (2014) 427. See also P Langa 'Transformative constitutionalism' (2006) 3 *Stell LR* 351 at 352; Fredman 'Substantive equality revisited' (note 165) 733.
[171] A full exploration of intersectionality and substantive equality is beyond the scope of this thesis; however, this thesis aims to offer preliminary suggestions acknowledging these theories. See chapter 6 part 4.4.
[172] B Smith 'Intersectional discrimination and substantive equality: A comparative and theoretical perspective' (2016) 16 *The Equal Rights Review* 73. See also K Crenshaw 'Demarginalizing the intersection of race and sex: A black feminist critique of anti-discrimination doctrine, feminist theory and anti-racist policies' (1989) 4 *University of Chicago Legal Forum* 139.

The thesis recognises that the explicit protection of physical appearance allows for the reinforcement of the protection of one or more protected categories, thereby giving effect to intersectionality and positively transforming anti-discrimination law.[173] Acknowledging the role of intersectionality in appearance discrimination allows for an awareness of the complexities behind this type of discrimination and validates its prevalence as an area of substantive equality by recognising the rights owed to those people who may not have access to effective legal protection under a listed ground.

6. OVERVIEW OF CHAPTERS

This thesis consists of seven chapters. Chapter 1 broadly introduces the thesis question. This chapter presents the scope and significance of the research question as well as the way in which these will be addressed and approached.

Chapter 2 explores the concept of dignity and the law from a philosophical perspective. By looking into its history and definitions, the chapter examines the ways in which dignity has emerged and developed in different societies. The insight into diverse theories enables a comprehensive understanding of the topic. Thereafter, selected views of dignity with which this thesis aligns itself are identified in the chapter, with the aim of comprehensively articulating dignity and its foundational grounding principles. By examining this theory in further detail, the chapter substantiates the premise upon which one's identity and value is established, which is closely linked to one's personal attributes and autonomy.

Building on the previous chapter, chapter 3 considers the impact of dignity as a legal right and its influence on legal systems. The discussion includes a comprehensive account of the development of dignity in constitutional law, domestic law and international law. Furthermore, the role of dignity in the workplace and the scope of its protection in jurisprudence will be established. The basic tenets of dignity, equality and fairness underpin discrimination in the workplace. Thus, the chapter aims to reinforce dignity's role as the legal framework for anti-discrimination protection in the workplace.

Chapter 4 assesses the principle of equality as a core concept in the South African legislative framework, informed by international law and labour standards. This chapter describes the history of discrimination and anti-discrimination measures in the workplace with a particular

[173] See the discussion in chapter 6 parts 4.1.1 and 4.1.2 on categorising mutability in the context of appearance and part 5.3 on unmeritorious claims.

focus on case law and legislation in South Africa and foreign comparators such as the USA, the UK, selected countries in Europe, and Australia. The legal gaps in protection against appearance discrimination in each foreign comparator will be examined, with a view to determining the extent to which they may serve as a guide for South Africa.

Chapter 5 considers the lack of protection against appearance discrimination in South African law and the extent to which the current freedom mechanisms address the gap. Certain rights and freedoms in the South African Constitution, such as the rights to privacy, religion and expression, closely correlate with a person's appearance autonomy. The chapter will examine the extent to which these rights protect and provide scope for the freedom of appearance.

Chapter 6 outlines the overarching concept of dignity as a tool for promoting appearance autonomy. Using the existing legal framework, the chapter develops practical recommendations by expanding and relying on dignity to fill the gaps in appearance protection. This chapter addresses these concerns and argues for explicit statutory protection against appearance discrimination. Furthermore, the chapter provides a clear definition and approach for employer policies, ensuring a balanced employment relationship and reassuring the legislature about the possibility of trivial claims.

Chapter 7, the concluding chapter, summarises the main arguments developed in the thesis and the recommendations. The chapter will include a brief examination of those areas that call for further research in the development of appearance autonomy. These areas fall outside the scope of this thesis but require further consideration. The implementation of the proposed recommendations relating to appearance discrimination will promote the protection of appearance autonomy, ensure legal certainty, and further develop the anti-discrimination framework.

7. CONCLUSION

Appearance discrimination in employment law is not a new concept, but it remains a legal and ethical concern.[174] Employees should have the autonomy to dress, groom themselves and appear in a manner that depicts the best version of themselves in a space that consumes the majority of their time, skills and efforts.[175] The thesis proposes reform to allow the courts to

[174] Cavico et al (note 4) 116.
[175] Ibid.

develop social norms which discourage regimented stereotypical work cultures and thus strengthen an individual's substantive equality.[176]

Limiting the individual autonomy of employees without justification has the potential to impair their dignity. In the absence of explicit legal protection, this places the employee in a detrimental position in the workplace.[177] Hence, the thesis argues for legislative reform to explicitly protect against appearance discrimination to ensure a balanced employment relationship and the reinforcement of an individual's dignity. The thesis argues that, despite fears of opening the floodgates to frivolous litigation, the benefit recognises the importance of autonomy and outweighs these fears, as the perpetuation of this prejudice exacerbates objectionable inequalities in the workplace.[178]

Transformation in law is necessary to protect both parties to an employment relationship, especially as South African law aims to further develop and achieve strong anti-discrimination protection in labour law.[179] The thesis argues that dignity is a broad yet distinct phenomenon that influences and serves as an interpretative tool to understand human autonomy in South Africa.[180] The foundational value of dignity and its role in protecting appearance autonomy is considered in the next chapter.

[176] Fredman 'Substantive equality revisited' (note 165) 728–731.
[177] Ibid.
[178] A Mason *What's Wrong with Everyday Lookism?* (2021) 315.
[179] Viviers (note 104) 4.
[180] Botha (note 158) 176–177.

CHAPTER 2: THE CONCEPT OF DIGNITY

> The right to live includes the right to live with human dignity and all that goes along with it, viz., the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading writing and expressing oneself in diverse forms, freely moving about and mixing and mingling with fellow human beings and must include the right to basic necessities, the basic necessities of life and also the right to carry on functions and activities as constitute the bare minimum expression of human self.[1]

1. INTRODUCTION

Dignity lies at the heart of appearance autonomy, as it is closely tied to a person's liberty and freedom of choice.[2] Therefore, recognising the effect that appearance regulation control has on a person's dignity is necessary for understanding the foundation of this thesis.[3] The concept of dignity derives from the term '*dignitas hominis*', which, in the classical Roman tradition, was thought to mean status, as this title was awarded to somebody who was worthy of high honour and respect based on their societal status.[4] The use of this term was extended to institutions, and its meaning has been instilled in legal systems as a basis for protecting dignity in line with an individual's sense of worth.[5]

Dignity is used worldwide; for example, in South Africa, the term is recognised in the Constitution. Furthermore it is derived from Roman-Dutch law, in terms of which a person's *dignitas* amounted to a 'delict, and compensation could be acquired with the *actio iniuriarum*.'[6] Traditionally, in international law, dignity was a term used to refer to the status of sovereign states as well as their consulate staff serving abroad, emphasising the higher

[1] *Francis Coralie v Union Territory of Delhi* 1981 (2) SCR 516.
[2] In *Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 41 the court acknowledged the need for respect for human dignity regardless of which group a person may belong to. See also the US case of *Lawrence v Texas*, 539 US 588 (2003) where the courts held that the Texan law against sodomy was invalid. The court closely examined the relationship between an individual's right to choose and autonomy and found that people may choose to make decisions in the confines of their home and still retain their dignity as free persons.
[3] D Rhode 'The injustice of appearance' (2009) 61 *Stan L Rev* 1048.
[4] C McCrudden 'Human dignity and judicial interpretation of human rights' (2008) *EJIL* 656. See also AC Steinmann 'The core meaning of human dignity' (2017) 19 *PER/PELJ* 4.
[5] In *S v Makwanyane* 1995 (3) SA 392 (CC) para 328, O'Regan recognised the right to dignity as an acknowledgment of an individual's worth and respect. See also Steinmann 'The core meaning of human dignity' (note 4) 2.
[6] I Kroeze 'Human dignity in constitutional law in South Africa' in European Commission for Democracy through Law *The Principle of Respect for Human Dignity* Proceedings of the UniDem Seminar, Montpellier, 2–6 July 1998, 60.

ranking of these individuals.[7] Today, however, human dignity plays a crucial role in social and political movements, as well as in the foundation of certain jurisdictions' fundamental rights.[8] Respecting an individual's sense of worth and culture is an essential value that is required for humanity to evolve in a progressive and diverse manner.[9] However, its definition and scope cannot be easily categorised due to its complexity and the subjectivity about an individual's worth.[10] Additionally, its many interpretations in philosophy and judicial decisions make it a subject of dispute in the courtroom.[11]

The chapter provides a brief overview of dignity and how it is established in certain philosophical and legal frameworks as a source of guidance. The first part of this chapter examines the metaphysical perspectives of dignity and its derivatives in philosophy, religion and the law. Parallel to a consideration of South African law,[12] the chapter briefly refers to aspects of the law in Germany and the USA in so far as the role of dignity in their jurisprudence is concerned. Germany's fragile historical background bears a close resemblance to South Africa's, and it was chosen as a comparator to illustrate the protection of human dignity and how it is guaranteed as a constitutional right.[13] The choice of the USA contrasts with the position in South Africa, based on its Constitution's lack of a definition of dignity.[14]

Establishing dignity beyond a theory shows how far dignity is used as a fundamental tool in formulating constitutional rights. The second part of this chapter examines the principles and elements of dignity as well as the relationship between dignity and freedom.[15] An individual's freedom is a crucial aspect in developing their personal values and worth, and it will be shown that the concepts of dignity and freedom are inseparable. Finally, the chapter observes the extent to which human worth has informed the notion of equality in South Africa, and how the meaning of dignity is pertinent to the development of individual rights.

---

[7] McCrudden (note 4) 657. See also J Resnick & J Suk 'Adding insult to injury: Questioning the role of dignity in conceptions of sovereignty' (2003) 55 *Stanford L Rev* 1923.
[8] Section 10 of the Constitution of the Republic of South Africa, 1996.
[9] L Barroso 'Here, there, and everywhere: Human dignity in contemporary law and in the transnational discourse' (2012) 35 *BC Int'l & Comp L Rev* 393.
[10] Steinmann 'The core meaning of human dignity' (note 4) 3–4.
[11] McCrudden (note 4) 655. See also H Botha 'Human dignity in comparative perspective' (2009) 20 *Stell LR* 176.
[12] South Africa's explicit reference to dignity in the Constitution, particularly in s 1*(a)* and (10), is based on its turbulent history and commitment to human rights in its legal system.
[13] Section 10 of the Constitution.
[14] N Rao 'Three concepts of dignity in constitutional law' (2011) 86(4) *Notre Dame Law Review* 196.
[15] Barroso (note 9) 367.

2. CONCEPTUALISING DIGNITY

The concept of dignity derives from an amalgamation of philosophical, religious and legal interpretations of dignity.[16] It is central to the discourse of modern human rights and is perceived to be the basis of morality.[17] For example, if someone has been violated or injured in any way, this leads to sharp protest, because this damage has caused a fundamental threat to their dignity. The concept of dignity manifests itself in a variety of circumstances when it comes to decision-making; for example, homosexual couples should have the right to enter a civil union, or a dwarf should have the right not to be tossed into the air as a form of competition or entertainment.[18]

The criterion for determining discrimination against an individual is through the violation of their dignity.[19] In recent decades, dignity has developed in the constitutionalism of different countries as a moral guide for judiciaries when they are asked to protect an individual's basic rights.[20] Its role remains contested; however, an investigation into the theological and philosophical roots of human dignity highlights the extent to which dignity was viewed as a revolutionary tool in the development of a new era of democracy. The following discussion considers the theoretical and religious approaches that have developed dignity in a manner that has influenced several global jurisdictions.

2.1 Philosophical perspectives

The perspectives on dignity examined below address the seminal philosophies used in developing the meaning of dignity and its influence. Ackermann notes, and this is the view with which the thesis aligns itself, that recognising theological outlooks when dealing with normative values is not an attempt to construct these philosophies but rather an attempt to investigate the values that have directed the purpose of judicial decisions.[21] Similarly, the

[16] L Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2012) 26–30.
[17] Rao (note 14) 223.
[18] *Wackenheim v France* Comm No 854/1999 UN Doc A/57/40 Vol. II at 363 (HRC 2002) upheld a prohibition on dwarf tossing as it impaired dignity as a part of public order. See also Steinmann 'The core meaning of human dignity' (note 4) 15.
[19] Ackermann (note 16) 30 states that equality cannot be discussed without referring to dignity. See *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC).
[20] *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) para 149 emphasises the strong values that the conversation about religion, economics and politics holds when structuring a democratic society. S Moyn 'The secret history of constitutional dignity' (2014) 17 *Yale Hum Rts & Dev LJ* 40.
[21] Ackermann (note 16) 28–30. See also *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 54.

viewpoints addressed are intended to establish the role of dignity as an inherent value for individual rights.[22]

2.1.1 Aquinas

The derivations of dignity involve philosophical perspectives that add a depth of variety to its interpretation and meaning. Dignity emerged as a theory ascribed to individuals who occupied high social status and honour.[23] St Thomas Aquinas, a Catholic philosophical thinker, interpreted dignity's foundations through the coming of God.[24] This view of dignity, which signifies 'something's goodness on account of itself',[25] can easily be interpreted to show the high value that should be attached to dignity, according to Aquinas.

He believed that the concept of dignity is a fundamental aspect in society because it is attached to God's creation, and this view shows that all of God's creation and not only humans are entitled to the right to dignity.[26] Aquinas's view enables the interpretation that dignity can be ascribed to different forms of creation.[27] By attaching this theory to God, Aquinas showed that dignity has a place in all of creation, but still left the unanswered question of what kind of dignity people possess and how much it differentiates them from other living creatures.[28]

Aquinas's views on dignity and its intrinsic value attached to God shows the Catholic influence on his views.[29] Aquinas measures dignity's development in an individual to be strengthened when it is exercised through practising one's faith and may weaken if one relinquishes or turns away from their Creator.[30] Aquinas's views are similar to the views of those who developed dignity into a modern theory of human rights under Immanuel Kant.[31] Throughout the eighteenth century, Aquinas analysed justice as a general virtue associated

[22] P Kirchschlaeger 'Human dignity and human rights: Fostering and protecting pluralism and particularity' (2020) 5 *Interdisciplinary Journal for Religion and Transformation in Contemporary Society* 97. The views shared in this chapter aim to illustrate that dignity is a foundational value and not all views on dignity are represented.
[23] M Rosen *Dignity: Its History and Meaning* (2012) 11.
[24] Rosana Juçara de Souza Reis et al 'Dignity promoted or violated: How does the deaf person included perceive it?' (2017) 18(3) *Revista de Administração Mackenzie* 181.
[25] Rosen (note 23) 16–17.
[26] Steinmann 'The core meaning of human dignity' (note 4) 10.
[27] Rosen (note 23) 16–17.
[28] Ibid.
[29] Ibid 16–18. D Mattson & S Clark 'Human dignity in concept and practice' (2011) 44(4) *Policy Sciences* 305–306 acknowledge dignity in relation to traditional Christian values and assert that dignity is created through the image of God.
[30] F Guyette *Thomas Aquinas and Recent Questions about Human Dignity* (2013) 117–118.
[31] Rosen (note 23) 19.

with religion. However, it was not until Kant expanded on the theory that behind dignity lies individual liberty that its political interpretations were truly modernised.[32]

2.1.2 Kant

The egalitarian philosopher Kant believed that the idea of dignity is rooted in human beings and that every individual holds a level of value and worth, which should be absolute and equal.[33] As he is regarded as the father of dignity his seminal work[34] has set the stage for any historical debate on dignity.[35] He explained the value of dignity as follows: 'in the realm of ends everything has either a price or a dignity'.[36] He went further to say that anything which has a price can be replaced with its value but a human being, who is raised above all price and has no equivalent value or should not be viewed as a means to an end for other people, is one that holds dignity.[37] Simply put, Kant reiterates the notion that individuals should be viewed as an end in themselves.[38] This explanation shows that there is a clear sense of morality and humanity when it comes to defining dignity in Kantian terms.[39] This historical idea of morality has shaped the broad definition of dignity today.[40]

There are clear distinctions between the ideology of Kant and that of Aquinas. Most notably, Kant restricts his beliefs to human beings,[41] and through his conception of dignity, it is evident that the idea of morality is rooted in the moral law of human beings.[42] Unlike Aquinas's view of dignity, Kant's view does not depend on God. Although Kant believed that we are created by God, we are 'free beings' that understand morality regardless of any belief that we may hold.[43] This interpretation paved the way for a progressive understanding of human dignity. Kant's philosophy on dignity accords with his views on equality and autonomy.[44] He believes that autonomy is the 'ground of the dignity of human nature'.[45]

---

[32] I Kant *Groundwork of the Metaphysics of Morals* (translated and edited by Allen Wood) (2002) 1–66. See also Steinmann 'The core meaning of human dignity' (note 4) 10.
[33] Ackermann (note 16) 55. See T Hill 'Kantian perspectives on the rational basis of human dignity' in M Düwell et al *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (2014) 215–221.
[34] Kant (note 32) 1–66.
[35] Rosen (note 23) 19.
[36] Kant (note 32) 52.
[37] Steinmann 'The core meaning of human dignity' (note 4) 11–12.
[38] Ibid.
[39] J Eckert 'Legal roots of human dignity in German law' in D Kretzmer & E Klein (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 46.
[40] Steinmann 'The core meaning of human dignity' (note 4) 11.
[41] Rosen (note 23) 24.
[42] Ibid 25. See also Kant (note 32) 158.
[43] Kant (note 32) 158.
[44] Ibid 177; Steinmann 'The core meaning of human dignity' (note 4) 11.

Through this belief, Kant defines an autonomous being as one who is free from the obstacles and restraints imposed by this world and rather has the ability to control what is in their best interests.[46]

This sense of inner worth and respect is what represents dignity, as each person must be viewed as an end in themselves rather than a means to an end.[47] Kant's philosophy on dignity has shaped our understanding of the concept and its position as the core of human rights.[48] This influence has resulted in greater protection for dignity in the legal system as well. His theories on dignity are proof that this concept emanates from the moral law of humankind.[49] Building on this idea paved the way for other societies to establish dignity as a concept which reiterates the intrinsic value of an individual's life, being and organisation.[50] Ubuntu is derived from this outlook and its rationale echoes the sentiments of Kant's views whilst upholding communal integrity.[51]

2.1.3 Ubuntu

Ubuntu is a philosophical concept derived from African cultures, which expands our understanding of dignity into a contextual theory, thereby allowing for a more humane and customary definition of dignity.[52] According to Metz, ubuntu understands morality as a way by which people choose to live their lives in a dignified manner amongst those in their environment.[53] Therefore, a level of harmony and goodwill is required, as this concept relies greatly on the notions of community and honour.[54]

Metz's idea of ubuntu goes further in accepting Kant's secular views, as he believes that dignity should not be grounded in human life through a spiritual medium, as it does a poor

---

[45] Kant (note 32) 54.
[46] Ibid.
[47] D Cornell et al *The Dignity Jurisprudence of the Constitutional Court of South Africa: Cases and Materials* (2013) 8.
[48] Rosen (note 23) 30–31.
[49] Ibid.
[50] Ackermann (note 16) 77.
[51] *S v Makwanyane* 1995 (3) SA 392 (CC) para 225 discusses the interrelation between dignity and ubuntu. See also Steinmann 'The core meaning of human dignity' (note 4) 14.
[52] AC Steinmann *The Legal Significance of Human Dignity* (NWU 2016) 408 available at *http://dspace.nwu.ac.za/bitstream/handle/10394/25824/Steinmann%20AC_2016.pdf?sequence=1&isAllowed=y* accessed 26 April 2023.
[53] T Metz 'Ubuntu as a moral theory and human rights in South Africa' (2011) 11(2) *African Human Rights Law Journal* 537–559.
[54] Ibid.

job of accounting for human rights that do not concern 'life or death matters'.[55] Additionally, he believes that a more secular theory that does not depend on God or any supernatural force allows for a better interpretation of morality.[56] However, Metz does differ from Kant in his view of humans and dignity. Metz says that Kant's views of humans as superior beings is based on their capacity for autonomy, but, based on his understanding of ubuntu, he believes that humans are superior based on their capacity to improve the lives of others through aid and beneficial relationships.[57]

Metz believes that a sense of community is fundamental in establishing the interdependence between dignity and human rights.[58] Cornell affirms this view, defining ubuntu as a concept that is formulated through mutuality and reciprocity with a deep sense of ethical equality.[59] Cornell asserts that if human relationships are tarnished, then so is ubuntu.[60] According to Ackermann, the notion that being human is entirely constituted 'on the relation with others' is one that conflicts with other modern theories.[61] Although he agrees that to be a morally rounded human, an association with others is required, this does not fully represent one's dignity.[62]

The consensus between ubuntu and other modern theories is that a call to equality is necessary for human worth and value.[63] However, ubuntu goes one step further to recognise that human dignity is rooted in the honour and respect that we impart to one another.[64] It is evident that the foundation of South Africa's dignity is deeply rooted in the spirit of ubuntu, whilst standing together with other modern theories that prize individual identity and the superlative value of humans and their morality.[65]

---

[55] Ibid 544.
[56] Ibid.
[57] Ibid.
[58] Ibid 559.
[59] D Cornell *Law and Revolution in South Africa: uBuntu, Dignity, and the Struggle for Constitutional Transformation* (2014) 111. Cornell interprets the varying formulations of ubuntu to mean that 'a person is a person by or through other people' or 'I am because we are.'
[60] Ibid. See Botha (note 11) 205.
[61] Ackermann (note 16) 79.
[62] Ibid.
[63] M Rapatsa & M Gaedupe 'Dignity and ubuntu: Epitome of South Africa's socio-economic transformation' (2016) 5(9) *Socioeconomica – The Scientific Journal for Theory and Practice of Socio-economic Development* 67–68.
[64] Ibid.
[65] *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) paras 223–225; 307–308; *Hoffmann v South African Airways* 2000 (2) SA 628 (CC) para 38. Ngcobo J discusses how people living with HIV must be treated with compassion and understanding, particularly in relation to equal opportunity of employment. He states that we 'must show *ubuntu* towards them'.

Legal developments are premised on a combination of theories, philosophies, ethical principles and religion.[66] Dignity holds a foundational value in each of these categories.[67] Its value in areas like religion and philosophy shows the formative role that dignity plays with regard to autonomy and its need to be acknowledged.[68]

2.2 Theological perspectives

Religious views are as fundamental to the understanding of dignity as are philosophical perspectives.[69] An understanding of the religious influence of dignity alongside philosophical views allows for a broader consideration of dignity. During the Middle Ages, the concept of dignity was used to differentiate between the status of humans and other creatures.[70] Humans were said to have dignity because they were made by God, possessed the ability to uphold dignity, and were capable of 'self-knowledge and self-possession'.[71] According to Renaissance humanists, the gift of reason was closely associated with human dignity, and this was viewed as a gift from God.[72] This shows how religious interpretation based on the dependency of God set the tone in developing dignity.[73]

2.2.1 Christianity

Christianity portrays dignity as inherent in all human beings because everyone is created freely and equally by God.[74] The fundamental theme in Christianity in relation to dignity is that every human being has a responsibility to respect the dignity of another.[75] Furthermore, certain Christian declarations, such as the Roman Synod of Bishops, reinforce the relevance of religion with regard to dignity by stating that the roots of the dignity of a person stem from

[66] Steinmann 'The core meaning of human dignity' (note 4) 3–4, 8.
[67] Section 10 of the Constitution. See also Botha (note 11) 179.
[68] *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) paras 54–60. The court acknowledges how the applicant's religion is intertwined with cultural practices. Whilst this differs between individuals, the importance of their identity and the autonomy of expressing this identity as a means of religious and cultural expression is significant. See also Steinmann 'The core meaning of human dignity' (note 4) 9.
[69] Botha (note 11) 207. See also *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC).
[70] McCrudden (note 4) 658.
[71] Ibid.
[72] Steinmann 'The core meaning of human dignity' (note 4) 10.
[73] Ackermann (note 16) 31.
[74] Ibid 37.
[75] Ibid.

their creation as an image and reflection of God.[76] This attachment to God coincides with Aquinas's view that dignity is derived from being a creation of God.[77]

Huber expressed his views on the Christian ethic as being mindful of the 'dignity of the difference'.[78] He explained this notion as an understanding that every individual may be different in culture and personality.[79]Ackermann interprets Huber's view not to value the acceptance of this difference that makes one dignified, but rather the acceptance of the 'dignity of the different', and this should be perceived as a guiding light when it comes to equality.[80] Lorberbaum relies on the notion of the *imago Dei* (image of God) that shows that there is a 'spark' in humans that grants them a superior recognition amongst other creatures that are made by God.[81] This greatness thrust upon humankind is a portrayal of divine dignity. Whilst this 'image of God' concept allows one to view humans as responsible and mindful creatures of God, this is not always the inclusive approach taken.[82]

According to Rosen, the concept of dignity is a faith-based ethical discussion that occurs prominently in Christianity, specifically Catholicism.[83] Prior to Kant's secular philosophies, dignity was predominantly a Catholic concept, which was generally restricted to natural law circles.[84] During the nineteenth century, general social theories in Catholic society opposed any form of liberalism or associations with secularism.[85] Dignity during this era was associated with those that belonged to a higher hierarchical social order; the more religious or noble a person was, the more dignified they were perceived to be.[86]

---

[76] W Huber *Violence: The Unrelenting Assault on Human Dignity* (1996) 9.
[77] Rosen (note 23) 23–24.
[78] W Huber 'The dignity of the different: Towards a Christian ethics for pluralistic societies' (2013) 54 *Dutch Reformed Theological Journal*.
[79] Ibid 6–7. See also Ackermann (note 16) 42–43.
[80] Ackermann (note 16) 42–43.
[81] Y Lorberbaum 'Blood and the image of God: On the sacrifice of life in biblical and early rabbinical law, myth and ritual' in D Kretzmer & E Klein (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 55. See also Ackermann (note 16) 36.
[82] Ackermann (note 16) 36–43. Ackermann notes how, historically, the Christian churches supported the oppression of groups of people, for example, slavery and apartheid in South Africa. Additionally, the need to fight for women's rights as well as the rights of minority groups in the churches demonstrates the failure of the Imagio Dei concept to fully manifest in the church.
[83] Rosen (note 23) 3.
[84] Ibid 47.
[85] Ibid 49.
[86] C Starck 'The religious and philosophical background of human dignity and its place in modern constitutions' in D Kretzmer & E Klein (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 179–194.

Pope Leo XIII was the main advocate of this unequal hierarchical definition of dignity.[87] He believed that Catholics were awarded the right to rule by God as 'from a natural and necessary principle'.[88] Only once the views of the 'popular sovereignty'[89] have been rejected and there is more authority given to those rulers who have been incorporated with divine transmission will there be a proper idea of dignity.[90] This way of thinking has developed over time and the acceptance of fundamental documents such as the Universal Declaration shows how Catholics' understanding of social equality has progressed.[91] Despite the challenges and contradictions shown by the Christian church, there remains a drive towards social egalitarianism within religion in order to broaden the understanding of the concept of dignity and equality today.[92]

2.2.2 Judaism

Like the Christian perspective, the Judaic perspective of dignity influenced the general understanding of the concept of dignity. As one of the monotheistic religions, Judaism's classical humanist view of dignity is based on the conception of man as an establishment of God.[93] Ackermann's work reiterates this notion by stating that all human worth is absolute and cannot be measured, and therefore all human beings are equal.[94] Two cardinal rules of Judaism emerge from this ideology of equality, and Ackermann's explanation: 'the sovereignty of God and the sacredness of the individual',[95] showing how dignity should be upheld amongst one another.

Additionally, the concept of imago Dei is rooted in both Christianity and Judaism,[96] thus showing that the principle of dignity is a criterion for equality in both societies.

2.2.3 Islam

Islam is built on similar grounds to those of Judaism and Christianity, as a monotheistic religion that is defined through the word of God expressed in the Holy Qur'aan.[97] The

[87] Rosen (note 23) 48.
[88] Ibid. See Mattson & Clark (note 29) 306.
[89] Rosen (note 23) 50.
[90] Ibid.
[91] Ibid 51. The international legal framework on dignity will be discussed in more detail in chapter 3 part 2.1.
[92] Ackermann (note 16) 37.
[93] O Sensen 'Human dignity in historical perspective: The contemporary and traditional paradigms' (2011) 10(1) *EJPL* 78. See also Steinmann 'The core meaning of human dignity' (note 4) 4.
[94] Ackermann (note 16) 35–36.
[95] D Polish 'Judaism and human rights' in A Swidler (ed) *Human Rights in Religious Traditions* (1982) 40–41.
[96] Ackermann (note 16) 34.

Qur'aan aims to acknowledge the unity of humankind as a species that is created from the same soul.[98] The governing law of Islam is Shari'ah and the practices that Muslims are guided to follow are the Sunnah (way of life) of the Prophets.[99] Islam recognises the equal worth of all men and women, without any discrimination based on race, religion, language, belief, political affiliation or social status.[100] As Ackermann points out, the common attribute that is relevant for equality in Islam is human dignity.[101]

According to Kamali,[102] the imago Dei concept is also instituted in Islam, as there is a belief that individuals are the creation of God and are endowed with the responsibility of fulfilling themselves based on their essence of humanity and rights.[103] Whilst there is a controversial debate about certain elements of Shari'ah law that may ostensibly violate the principle of equality, there is a general consensus that Islam and the teachings of the Qur'aan are entrenched in human dignity and the religion aims to uphold that philosophy.[104]

2.3 Legal recognition of dignity

Aside from existing as a philosophical and religious concept, dignity is enshrined throughout constitutional law.[105] The history of dignity's value in law dates back to the twentieth century, where the term was referenced in the constitutions of Weimar Germany, Finland, Mexico, Portugal and various constitutions in central and South America.[106] Dignity also appeared in the Preamble to the Charter of the United Nations, as well as the Universal Declaration of Human Rights.[107] This Declaration acknowledged the importance of dignity by referencing the different values and meanings of human dignity as a basis for human rights.[108] Whilst there was much debate about the foundation of dignity and its meaning, there

---

[97] Ibid 44.
[98] A Al-Hibri 'Redefining Muslim women's rights' (1997) 12 *Am U J Int Law* 26.
[99] AA An-Naim 'Religious minorities under Islamic law and the limits of cultural relativism' (1987) 9 *HRQ* 17.
[100] Ackermann (note 16) 45.
[101] Ibid.
[102] M Kamali 'The dignity of man: An Islamic perspective' (2002) 6(2) *Journal of Qur'anic Studies* 281.
[103] Ackermann (note 16) 46.
[104] Ibid.
[105] Rao (note 14) 186.
[106] Rosen (note 23) 77. See also AC Steinmann *The Legal Significance of Human Dignity* (NWU 2016) 64, *http://dspace.nwu.ac.za/bitstream/handle/10394/25824/Steinmann_%20AC_2016.pdf?sequence=1&isAllowed=y*, accessed 26 April 2023.
[107] This will be further discussed in chapter 3 part 2.1.
[108] Rao (note 14) 193.

was a consensus that dignity was linked to 'something good' and was of value to human rights.[109]

One of the impacts of World War II on Germany was the inclusion of dignity in its laws and legal system.[110] Rosen acknowledges that no other country has integrated this concept as widely as Germany has,[111] to the point of it becoming a fundamental constitutional right in German Basic Law (*Grundgesetz*).[112] Article 1 provides that dignity is an important value throughout its law, and Germany was a role model for other neighbouring countries to implement the concept of dignity in their legal systems.[113] South Africa's Constitution and Bill of Rights upholds dignity as an underlying right alongside equality and freedom.[114] Although countries such as France, Canada and the USA do not make explicit reference to dignity in their constitutions, the term is still used in their courts as a foundation for human rights.[115]

In many aspects of the society, there is clearly a recurring theme of dignity, whether it is enshrined in a legal declaration or appears in theological foundations. There is, however, a significant debate as to what dignity entails and how it can be described. The next section will explore how dignity has been defined in modern society. Ironically, despite its many meanings, dignity struggles to be codified in a way that encompasses the variety of perspectives that aim to respect civil liberties and individualism.[116]

3. DEFINING DIGNITY

3.1 The difficulty behind the meaning

Defining dignity has been difficult because the law has struggled to formulate a detailed and comprehensive definition that can clearly capture all the elements of the idea.[117] One of the

[109] Ibid 194.
[110] Rosen (note 23) 77.
[111] Ibid 78.
[112] Section 1, Article 1(1) of the German Constitution (Basic Law) 1949 legally binds the force of basic rights and states that (1) Human dignity shall be inviolate. To respect and protect it shall be the duty all state authority.
[113] States that incorporated dignity include Finland (Constitution of Finland Part I: General Provisions), Portugal (Constitution of Portugal, Article 45 in 1933), and Ireland (Constitution of Ireland, Preamble in 1937). See McCrudden (note 4) 664. See also Rao (note 14) 193.
[114] Section 7(1) of the Constitution enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
[115] Rao (note 14) 196.
[116] Ibid.
[117] Ackermann (note 16) 26.

main reasons why this is so difficult is the fact that dignity is enshrined in human worth.[118] Therefore, defining a person's worth requires a deeper understanding of what it means to be human. As a 'loose cannon, open to abuse and misinterpretation'[119] the concept of dignity requires a broad view that can equally assimilate human rights within an impartial moral perspective of how humanity must be respected.[120]

As discussed earlier in this chapter, dignity was mostly attributed to 'free' individuals[121] and not to slaves.[122] Religions such as Christianity and Judaism correlate dignity with God by claiming that dignity is an internal trait to humans as God's creation. However, dignity is derived from an external source such as God.[123] Christianity recognises dignity as an inherent requirement of being human, especially as the religion recognises freedom and equality before God.[124] Alternatively, Gosdal attributed dignity to social status showing how dignity can drive division, as a person's dignity is based on the person's status in society.[125] All these religious and philosophical conversations about dignity show how perplexing it has been through the ages. In order to understand how this topic has played out in philosophy today, it is crucial to recognise the views of modern authorities on dignity.

Kant's modern philosophy of dignity[126] emphasises that individual worth and autonomy are inherent requirements in defining dignity.[127] Kant stated that nobody should 'be treated as a means to an end'[128] and that a person's worth is compromised when they are viewed as objects.[129] According to Bockenforde[130] and Gunther Durig,[131] human dignity includes elements of self-worth and a desire for self-fulfilment.[132] Dworkin claimed that people only

[118] Ibid 86.
[119] C Gearty *Principles of Human Rights Adjudication* (2004) 85. See also Steinmann 'The core meaning of human dignity' (note 4) 2.
[120] Steinmann 'The core meaning of human dignity' (note 4) 2–3.
[121] S Riley 'Human dignity: Comparative and conceptual debates' (2010) 6(2) *International Journal of Law in Context* 117–138. See also ER Rabenhorst *Dignidade Humana e Moralidade Democrática* (2001).
[122] M Mott Machado & M Mendes Teixeira 'Dignity in the context of organizations: A look beyond modernity' (2017) 18(2) *Revista de Administração Mackenzie* 83.
[123] Ibid.
[124] Rosana Juçara de Souza Reis et al 'Dignity promoted or violated: How does the deaf person included perceive it?' (2017) 18(3) *Revista de Administração Mackenzie* 181. See also Mott Machado & Mendes Teixeira (note 122) 84.
[125] Mott Machado & Mendes Teixeira (note 122) 84.
[126] Kant (note 32) 43. See also Rosen (note 23) 21.
[127] Steinmann 'The core meaning of human dignity' (note 4) 8–9.
[128] Eckert (note 39) 41–54. See also Steinmann 'The core meaning of human dignity' (note 4) 4.
[129] Ackermann (note 16) 101.
[130] E-W Bockenforde *Recht, Staat, Freiheit* expanded ed (2006) 382. See also Ackermann (note 16) 24.
[131] G Durig 'Der Grundrechtssatz von der Menschenwurde' (1956) 81 *AoR* 125. See also Ackermann (note 16) 24.
[132] Ackermann (note 16) 24.

have rights due to their dignity.[133] Ackermann accedes to this view by claiming that qualities and functions such as 'developing one's personality and exercising one's own judgment' contribute to human dignity.[134] It is apparent from these views that dignity stems from a great desire for self-actualisation and there is a clear indication that dignity manifests in different forms, but it ultimately coincides with Kant's view of a human's worthiness as a major source of dignity.[135]

In South Africa, the meaning of dignity has been derived from constitutional interpretations, as it aims to expand into an ideology that is ingrained in the concept of individual rights and which provides protection and is sensitive to the background of South Africa.[136] Due to South Africa's racist and autocratic past, the present environment requires protection for individuals' dignity, which encompasses the values of freedom, equality and fairness.[137] Dignity, as recognised by Botha, aims to be the centre point between the sensitive historical struggle and the new legal order.[138] Furthermore, Ackermann describes dignity in the Constitution as an inherent value in human worth and states that its meaning aims to justify the explanation that 'all persons have equal worth'.[139]

Courts such as the Constitutional Court have appeared to uphold the Kantian view of the value of and basis for human rights.[140] Although the courts do not explicitly state this, the reasoning behind Kant's moral view of human dignity as the ultimate value to respect emphasises the value that human dignity holds in the Constitution.[141] In particular, in *Dawood,*[142] the court identified human dignity as an integral part of our Constitution, as a 'justiciable and enforceable right that is to be protected'.[143] Additionally, in *Makwanyane,*[144] the death penalty came into question and the rationale for the court's negative view of capital punishment was that enforcing this sentence strips a human of their dignity and 'treats him or

[133] R Dworkin *Taking Rights Seriously* (1997) Harvard University Press 198–199.
[134] Ackermann (note 16) 86–87.
[135] Ibid 99.
[136] Botha (note 11) 197–200.
[137] Ibid.
[138] Ibid 171–220.
[139] Ackermann (note 16) 97.
[140] Ibid.
[141] Ibid.
[142] *Dawood and Another; Shalabi and Another; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) para 35.
[143] Ibid.
[144] *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 57.

her as an object'.[145] Objectifying an individual is one of the main areas[146] that the court aims to avoid as it impairs dignity,[147] thus demonstrating the court's Kantian approach when assessing cases such as these.

Similar to the South African Constitutional Court, the Federal Constitutional Court of Germany has used the Kantian approach as a guide to identify dignity and ascertain whether it has been infringed. Both jurisdictions are deeply rooted in Kantian principles; in fact, Article 1 of the German Basic Law outlines how a person's dignity is inviolable, and thus it is pertinent to protect the individual as well as socio-economic rights.[148] In the South African Constitution, section 7(2) states that the state must 'respect, protect, promote and fulfil the rights' in the Bill of Rights.[149] It is clear in both jurisdictions that the Kantian version of dignity[150] is a guiding philosophy in defining their boundaries and values.[151]

On the other hand, in the USA, dignity is not expressly protected in its Constitution but rather in its jurisprudence.[152] The use of the concept is held to be underdeveloped as it lacks the textual specificity to uphold a consistent approach.[153] US law has never defined human dignity or personality.[154] While South Africa and Germany have adopted Kantian ideologies and concepts of morality in their definition of dignity, the USA has not.[155] US legislation tends to uphold the value of freedom of speech and democracy without the need for community.[156] However, the USA adopts dignity as a constitutional tool to recognise the value of rights such as equality, freedom of expression and liberty.[157] The US Supreme Court has applied dignity as an 'unenumerated right' that informs the interpretation of constitutional

[145] Ibid. See also *Dodo v The State* 2001 (3) SA 382 (CC) para 38, where the court rationalised the consideration of dignity when balancing the proportionality of the offence against the period of imprisonment.
[146] *Larbi-Odam and Others v MEC for Education (North-West Province) and Another* 1998 (1) SA 745 (CC) paras 19–20.
[147] Ackermann (note 16) 101.
[148] Section 1, Article 1 of the German Constitution (Basic Law). See also GP Fletcher 'Human dignity as a constitutional value' 1984 *UWO L Rev* 175.
[149] Section 7(2) of the Constitution. See also *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 33.
[150] Kant (note 32) 1–66. See also H Allison *Kant's Groundwork of the Metaphysics of Morals: A Commentary* (2011) 121.
[151] Steinmann 'The core meaning of human dignity' (note 4) 15.
[152] *Re Yamashita* 327 US 1 (1946); *Screws v United States* 325 US 91 (1945); and *Korematsu v United States* 323 US 214 (1944) established dignity as a basic value and source of individual rights. See also Barroso (note 9) 347.
[153] V Jackson 'Constitutional dialogue and human dignity: States and transnational constitutional discourse' (2004) 65 *Mont L Rev* 18–20 and EJ Eberle 'Human dignity, privacy and personality in German and American law' (1997) *Utah L Rev* 1049–1050.
[154] Moyn (note 20) 67–68. See also Jackson (note 153) 15–40 and Eberle (note 153) 973.
[155] Eberle (note 153) 973.
[156] Jackson (note 153) 18. See also Eberle (note 153) 973.
[157] Barroso (note 9) 347. See also Steinmann *The Legal Significance of Human Dignity* (note 106) 249.

rights. In *Rochin v California*[158] the court condemned the use of force when securing a suspect's evidence as immoral and conflicting with due process.[159] Although the landmark case of *Brown v Board of Education*[160] does not refer to human dignity, the concept is recognised in the judgment.[161] Because of dignity's lack of constitutional status the concept is relatively absent from US jurisprudence as it is not a 'legal norm'.[162]

This thesis will examine the approaches of foreign comparators, either because they have a similar history of gross human rights violations or because of colonial links. The thesis will consider the ways in which they approach the enforcement of protection for social and economic rights.[163] Defining dignity may be problematic, but the elements of freedom and individual autonomy are closely connected to it.[164] To completely decipher the meaning of dignity, it is important to take note of the element of the freedom to be, as well as its key principles in matters of equality and non-discrimination.[165]

3.2 Elements and principles of dignity

Despite differences in jurisdiction, basic elements form a general foundation for defining dignity.[166] In South African and German law, the three basic elements are, firstly, the ontological claim, which looks at a person's unique qualities and what constitutes their dignity;[167] secondly, the 'relational claim', which looks at the recognition of and respect for inherent dignity; and, finally, the 'limited-state claim', which emphasises the ideology that the state should exist for the sake of the individual.[168] These three elements tend to frequently

[158] *Rochin v California* 342 US 165 (1952) added 'behaviour that shocks the conscience' into tests that violates due process under the 14th Amendment. See also Barroso (note 9) 349.
[159] Barroso (note 9) 349.
[160] *Brown v Board of Education of Topeka* 347 US 483 (1954) was a landmark decision that established racial segregation in public schools as unconditional.
[161] The USA has used dignity as a core ideal that has impacted significant cases about the use of contraception in *Griswold v Connecticut* 381 US 479 (1965) and the monumental case of *Roe v Wade* 410 US 113 (1973) that endorsed the right to have an abortion. See Barroso (note 9) 349.
[162] Steinmann *The Legal Significance of Human Dignity* (note 106) 249.
[163] Kant (note 32) 43. See also Rosen (n 23) 21. See the discussion of foreign comparators in chapter 4 part 3.
[164] Kant (note 32) 54.
[165] Ackermann (note 16) 102.
[166] McCrudden (note 4) 679.
[167] Steinmann 'The core meaning of human dignity' (note 4) 7–8; McCrudden (note 4) 379.
[168] Steinmann 'The core meaning of human dignity' (note 4) 7–8.

lead to frustration, as courts may not reach consensus on each element and how they should be applied when dealing with inherent dignity.[169]

According to Botha,[170] the concept of dignity is rooted in seven significant principles that reinforce the constitutional elements of dignity.[171] The first is equality, which is a component that is inherent in understanding opposition to discrimination.[172] Once a person has been subjected to discrimination, their dignity has been violated, hence it needs to be demonstrated that equality goes hand in hand with the concept of dignity.[173] The second principle is an element of respect for the character and identity of an individual. Dignity entails respecting an individual's sense of self-worth and personality regardless of what it may be. The third principle looks at the protection of a person's physical integrity, and this implies a complete rejection of torture and any other punishment that could be inflicted on a person.[174]

The fourth principle is personal self-determination, which often manifests in having children. Technology and scientific methods can enhance reproduction or restrict it, and objectifying a person through these tools is perceived to be degrading to that person's dignity.[175] The fifth principle looks at how upholding dignity prevents excessive force by the state, which usually entails the denial of equality and a restriction of autonomy to which an individual is entitled.[176] The sixth principle looks at the right to protect one's honour, and as with equality, the right to have one's honour and reputation upheld is directly related to one's dignity.[177] According to Botha,[178] this principle applies to those who have been convicted of a crime, so their right to be invited back into society once their time has been served should be afforded based on their inherent dignity.[179] The final principle of dignity as a constitutional norm

[169] *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) dealt with the multi-functional role that dignity upholds. The Constitutional Court acknowledged the importance of the constitutional value of dignity when examining the right to equality and the right to life. See also McCrudden (note 4) 679–680.
[170] Botha (note 11) 171–220.
[171] Ibid 188–189. See also Steinmann *The Legal Significance of Human Dignity* (note 106) 13–15.
[172] Botha (note 11) 188–189.
[173] Ibid; Kant (note 32) 35.
[174] Botha (note 11) 188–189.
[175] Ibid.
[176] Botha (note 11) 189. See also L Henkin 'Human dignity and constitutional rights' in MJ Meyer & WA Parent (eds) *The Constitution of Rights: Human Dignity and American Values* (1992) 211.
[177] Botha (note 11) 189.
[178] Ibid.
[179] Ibid. See also *August and Another v Electoral Commission* 1999 (3) SA 1 (CC) para 18 where it was held that prisoners are entitled to all their personal rights, and their dignity cannot be taken away by law or the circumstances in which they find themselves. See also *September v Subramoney NO and Others (Gender Dynamix as amicus curiae)* 2019 (4) All SA 927 (WCC).

involves the state guaranteeing the provision of an all-round dignified community.[180] Although these principles are all strongly linked to dignity, the thesis aims to draw upon the principles of equality, respect for identity and guaranteeing an all-round dignified community, particularly in recognising the elements of autonomy and promoting anti-discrimination measures.[181]

Although dignity is a broad and widespread ideology that occupies a variety of dimensions, it is not without its issues. Botha's views can be summarised to show three integral doctrines that play a key role in understanding the core of human dignity. The first is based around religion and the fact that dignity is rooted in God. However, Botha also acknowledges that this view may be problematic today as the world has become more secular and not everyone will subscribe to this belief system. His second foundation looks at dignity as a quality to be obtained, which correlates with the idea of autonomy and independence, rather than a quality that is inherent in every human being.[182] However, this is often a restrictive foundation, as it tends to step away from the ubiquitous nature of human dignity by excluding those who lack the ability to reason and pursue self-determination.[183] Botha's final foundation shows dignity as being expressed through an individual's social reputation and recognition.

Botha's view emphasises this thesis's recognition of dignity as the basis for dealing with issues relating to matters concerning identity and freedom. Furthermore, while almost correlating with the concept of ubuntu, dignity is perceived as a 'relational and communicative concept which can only be realised through the positive valuation'[184] in a community. This understanding is based on the notion of mutual understanding between members of society regarding their freedom, equality and individuality.[185]

South African courts have often struggled to deal with dignity's relation to freedom.[186] Despite this, intrinsic dignity remains a source for the fundamental freedoms to which humans are entitled,[187] thus showing how dignity holds many roles, particularly in guiding

[180] Ibid.
[181] See the discussion of dignity and equality in chapter 3 part 3.1.
[182] Botha (note 11) 189–190.
[183] Ibid.
[184] Ibid 190.
[185] Ibid.
[186] Ibid 211.
[187] B Beyleveld & R Brownsword *Human Dignity and the New Bioethics: Human Dignity and Constraint* (2001) 11. See also Steinmann 'The core meaning of human dignity' (note 4) 5. See the discussion of the fundamental freedoms and their relation to dignity in recognising the right to appearance autonomy in chapter 5 parts 3.2 and 4.2 and chapter 6 part 3.

the law against the degradation of an individual.[188] Based on the interpretations examined above, the discussion that follows examines the significance of an individual's freedom and the relationship of dignity. It will be shown how the empowerment that comes with the right to respect one's autonomy inevitably empowers one's dignity.[189]

3.3 Recognition of dignity as the freedom to be

As noted throughout this chapter, the idea of individual autonomy plays a crucial role in determining dignity.[190] To have the freedom to make decisions about oneself is to be aware of one's uniqueness.[191] In South African law, the case of *Ferreira v Levin*[192] emphasises this to the extent that the court states that freedom is almost synonymous with dignity.[193] Furthermore, to 'deny people their freedom is to deny them their dignity'.[194] This was also affirmed in *MEC for Education; KwaZulu-Natal and Others v Pillay*,[195] echoing Kant's approach, where it was held that freedom increases the value of an individual's dignity and, without this, personal development and fulfilment are impossible.[196] Additionally, Ackermann argues that the ability to exercise one's own judgment and to strive for one's self-worth requires the freedom to exercise these capacities.[197]

The link between freedom and dignity was closely examined in *Zealand v Minister of Constitutional Development and Another*.[198] This case involved the detaining of an unsentenced prisoner who was placed in a maximum-security prison rather than a medium-security prison which happened to have more facilities. He was entitled to these amenities and the court felt that, by wrongly detaining him, the state had impaired his dignity and failed to recognise his status.[199] This link to status in society relating to dignity emphasises Gosdal's

[188] McCrudden (note 4) 685.
[189] Ibid.
[190] Steinmann 'The core meaning of human dignity' (note 4) 4–5.
[191] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) para 49.
[192] Ibid.
[193] Ibid. See also *MEC for Education; KwaZulu-Natal and Others v Pillay and Others* 2008 (1) SA 474 (CC), 2008 (2) BCLR 99 (CC) para 150.
[194] *Ferreira v Levin* (note 191) para 49.
[195] *Pillay* (note 193). This case is discussed further in chapter 4 part 2.4 and chapter 5 parts 3.1 and 4.2.
[196] Ibid para 63. See also *Ferreira v Levin* (note 191) paras 51–52, where the court stated that freedom is a right belonging to 'every human being by virtue of their humanity'.
[197] Ackermann (note 16) 102. The court in *Pillay* (note 193) paras 61–63 may have distanced itself from the broad interpretation that Ackermann gave to freedom, but the court did not question his examination of the relationship between freedom and dignity.
[198] *Zealand v Minister of Constitutional Development and Another* 2008 (4) SA 458 (CC).
[199] Ibid para 32.

view on dignity.[200] Additionally, in *Van Heerden*, Sachs reiterated the relationship between freedom and dignity by stating that 'human dignity prospers least when caged'.[201] Without freedom, one's dignity is compromised, whether it is through their status or their individual identity. Another prominent scholar, Berlin, reiterated how the ability to exercise one's autonomy when making decisions about one's conduct expresses a great sense of value and esteem because it is a choice made solely by oneself and not one that is imposed by others.[202]

In relation to contract, and the ability to enforce one's freedom despite being legally bound by a document, the court has upheld the principle of dignity.[203] Cameron JA in *Brisley v Drotsky* summarised this principle by explaining that 'contractual autonomy informs the constitutional value of dignity'.[204] This clearly describes how there needs to be a careful balance between freedom and contracting in a way that does not diminish our dignity.[205]

Although it is important to have freedom in order to have dignity, this does not mean that freedom holds a higher value than dignity, but rather the opposite.[206] Freedom implies a person's independence when it comes to decisions, but there are certain constraints on a person's freedom.[207] Kant emphasised that freedom is often subject to one's dignity.[208] Bal reiterated this by using the example of a situation where you can sell your kidneys; although it is not necessary to have both, to sell one would go against maintaining the dignity of one's body.[209] This shows that although we have the freedom to make decisions about our body, we are still constricted by obligations that are rooted in the moral duty to protect one's body.[210]

In *Stransham-Ford,*[211] it was held that a person's decision regarding when to end their life is their choice based on their sense of dignity and integrity.[212] German law supports this sentiment because it allows free development and respects society's choices.[213] Additionally,

[200] Reis et al (note 124) 181. See also Mott Machado & Mendes Teixeira (note 125) 84.
[201] *Minister of Finance and Another v Van Heerden* 2004 (6) SA 121 (CC) para 146.
[202] I Berlin 'Two concepts of liberty' in *Four Essays on Liberty* (1969) 11. See also Ackermann (note 16) 105.
[203] *Dawood and Another; Shalabi and Another; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) paras 34–35.
[204] *Brisley v Drotsky* 2002 (4) SA 1 (SCA) para 7.
[205] Ibid.
[206] M Bal *Dignity in the Workplace: New Theoretical Perspectives* (2017) 58.
[207] Steinmann 'The core meaning of human dignity' (note 4) 5.
[208] Kant (note 32) 43. See also Bal (note 206) 58.
[209] Bal (note 206) 58.
[210] Rosen (note 23) 70–71, 76. Rosen states that even though smoking or eating unhealthily may be harmful to a person, this does not mean that the freedom to choose these behaviours should be withheld.
[211] *Stransham-Ford v Minister of Justice and Correctional Services* 2015 (4) SA 50 (GP) para 12.
[212] Ibid.
[213] Steinmann 'The core meaning of human dignity' (note 4) 20–21.

Article 1(1) of the Basic Law states that 'to respect and protect it shall be the duty of all state authority'.[214] Furthermore, the court stipulated that 'the free human person and his dignity are the highest values of the Constitution', which the state is required to respect and defend.[215] In South Africa, dignity lies at the foundation of human rights and, as in Germany, it is upheld alongside values such as freedom (the free development of the person), equality and solidarity.[216]

Freedom is a delicate notion in South African legislation and the courts have struggled to understand its relevance and its relationship with dignity.[217] By developing an understanding of the connection between dignity and choice, the thesis will address how far these notions can support an argument for recognising and protecting an individual's choice and identity.[218] Based on the cases above, it is clear that dignity and freedom are an important basis for equality and independence.[219] Although a restriction on freedom may not always appear to be an equality issue, the value of freedom speaks to more than just one's ability to make certain decisions, but rather to their 'achievable functionings', which can be attained through self-fulfilment.[220]

4. CONCLUSION

This chapter's primary aim was to establish the role of dignity in relation to the protection of human rights in every environment and as the foundation upon which appearance autonomy can be realised. The courts have been influenced by philosophical scholars, such as Kant, in defining dignity and its role in humanity. Kant argues that humans should not be treated as a means to an end, he asserts that everyone possesses equal dignity and emphasises the importance of recognising and safeguarding this principle within a legal framework.[221] These ideas have been employed by the judiciary in prominent cases to establish the foundation of human rights.[222] Therefore, understanding the different perspectives in the philosophies of

[214] German Constitution (Basic Law), Section 1, Article 1(1).
[215] *Life Imprisonment* case, 45 BVerfGE at 227 (1977).
[216] Botha (note 11) 173–176.
[217] Ibid 211–212.
[218] See the discussion in chapter 3 parts 3.1 and 4.1.
[219] Botha (note 11) 211–212.
[220] Ackermann (note 16) 72.
[221] Ibid 101.
[222] In *S v Makwanyane* 1995 (3) SA 391 (CC) Chaskalson CJ referred to the minority judgment of Brennan J in the US case of *Gregg v Georgia* (1976) USSC 171 to illustrate how the influence of human dignity is consistent with the values of the Constitution and has a right to be upheld. See also *Hoffman v South African Airways* 2000 (1) SA (CC) para 43; *Pillay* (note 193) paras 64–65; *ANC v Sparrow* [2016] ZAEQC 1 para 10.

dignity, such as the interdependence of dignity with God, and how a sense of community and social recognition are integral to the philosophy of ubuntu, is important when applying this ethical principle to individual identity and responsibility.[223]

An evaluation of the three monotheistic religions of Christianity, Judaism and Islam shows how each portray dignity as a criterion of reference for understanding human beings. It is evident that although dignity was tethered to religious moralism, this is no longer apparent today, as the influence of secular progressive philosophies has increased, and these philosophies have therefore become the foundation for this concept. Dignity has moved from being a conservative and elitist ideology to being a wider theological phenomenon that has influenced constitutional rights and values, based on the widespread legal declaration of dignity as an essential human right.[224]

The prevailing idea is that dignity remains rooted in the law. Dignity has played an important part in the German and South African Constitutions as well as in their legal systems. The countries' similarity in endorsing the right to dignity in their Constitutions shows the emphasis that these jurisdictions place on improving the protection of human rights. Although the USA does not have dignity enshrined in its law, it is implied in its jurisprudence, and it remains an important interpretative tool for understanding liberty and rights.[225]

This chapter has scrutinised the concept of dignity with reference to the themes of freedom and autonomy. Freedom includes the right of individuals not to have their autonomy restricted by the state.[226] Furthermore, freedom is a primary component of dignity.[227] Likewise, the element of privacy is used to foster the right to dignity,[228] based on its role in the Constitution as well as how it emphasises an individual's right to their personal liberty. The notions of autonomy and freedom, like dignity, cannot be viewed in isolation and these values need to be given equal importance due to their contribution to an individual's worth

[223] Steinmann 'The core meaning of human dignity' (note 4) 21. See also Ackermann (note 16) 79.
[224] Kant (note 32) 1. See Ackermann (note 16) 26; Steinmann 'The core meaning of human dignity' (note 4) 2.
[225] Barroso (note 9) 347; Botha (note 11) 176.
[226] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) para 54.
[227] Ibid.
[228] *Khumalo v Holomisa* 2002 (5) SA 401 (CC) para 27.

and value.[229] Through these themes and the examination of the interdependence of dignity through these rights, appearance autonomy can be realised.

Dignity's moral and philosophical roots make it a transcendental and transformative tool in building and fostering constitutional values. A key area that this chapter highlights is the role of dignity as an informative tool when dealing with situations concerning an individual's choices in upholding their independent identity or their identity as part of a community.[230] Hence, this chapter lays the foundation for the argument that the concept of dignity has value that has greatly transformed a variety of systems. The next chapter aims to build on its role, particularly in the law, as an inherent aspect of equality and freedom.

[229] Rao (note 14) 186.
[230] Botha (note 11) 201.See also *Pillay* (note 193) para 53; *ANC v Sparrow* [2016] ZAEQC 1.

CHAPTER 3: DIGNITY AND THE LAW

> Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected.[1]

1. INTRODUCTION

The previous chapter examined dignity as a foundational value from a number of theological, philosophical and religious perspectives. It was shown that dignity is regarded as an instrument for transformation in legal systems. The chapter highlighted the interdependency of dignity with aspects of freedom and autonomy so that it can accurately contribute to a person's worth. This chapter aims to build on this aspect, particularly with regard to dignity's role in the law and how it has been used as an influential and interpretative tool in the legislative framework.

The first part of the chapter will provide a brief overview of the presence of dignity in international law frameworks in order to broaden the scope of human rights law.[2] It will then be shown how dignity has impacted aspects of South Africa's constitutional and domestic law. The previous chapter demonstrated how dignity cannot be appreciated in isolation.[3] This chapter will show how the right to dignity is viewed alongside the right to equality, so as to fully recognise its value. This approach has led to the development of the protection of these rights in national legislation.[4]

The second part of this chapter emphasises dignity's impact as an interdependent right alongside the notions of equality, fairness and privacy. The relationship that dignity has with other rights emphasises its value as a structural and inherent component for expanding and

[1] *Dawood and Another; Shalabi and Another; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) para 35.
[2] G Le Moli 'Human dignity in human rights law' in *Human Dignity in International Law* (ASIL Studies in International Legal Theory 2021) 238.
[3] See chapter 2 parts 3.2, 3.3 and 4.
[4] Section 9(4) of the Constitution of the Republic of South Africa, 1996.

reinforcing competing rights.[5] The courts have continually employed dignity as an informative and progressive rule when considering matters of jurisprudence that could limit or promote other rights. The chapter will explore how dignity, both as a value and as a right, has informed disputes and their resolution in the courts.[6] A selection of seminal Constitutional Court and Labour Court cases will be examined in order to consider the role of dignity in advancing social progression outside and inside the workplace.[7]

The final part of this chapter fleshes out dignity's importance in the workplace and considers how it should be protected. By studying dignity in the workplace, a broader framework of how dignity manifests itself in an employment relationship can be realised, and we can determine, through the key findings, how far the concept of dignity can be used to recognise elements of autonomy and ensure a balance in an employment relationship.

2. THE LEGAL FRAMEWORK OF DIGNITY

The protection of human dignity plays a substantial role in the legal system, particularly in constructing legal principles that uphold and reinforce its value.[8] Although its meaning has been difficult to establish, its position in the legal system has been ratified as a significant source of human rights law.[9] Its role in the law has been ratified at three substantive levels that impact South African law: a supranational level, a constitutional level and a domestic level. Each of these is addressed below.

2.1 Brief overview of dignity in international law

Dignity in international law plays a central role in resolving any forms of discourse about humanity.[10] Upholding an individual's dignity is a recurring theme in international human rights law and its protection has been developed in a number of noteworthy instruments that have been ratified in South African law. Significantly, the Charter of the United Nations (UN Charter) imposed an obligation on UN members to co-operate with the organisation for the promotion of and respect for human rights, specifically with regard to dignity.[11] This

[5] Sections 36(1) and 8(3)*(b)* of the Constitution.
[6] AC Steinmann 'The core meaning of human dignity' (2016) 19 *PER/PELJ* 1. See also *Dawood* (note 1) para 35.
[7] Le Moli 'Human dignity in human rights law' (note 2) 229.
[8] K Doroszewska 'Human dignity in judicial reasoning: Study of national and international law' (2020) 43 *Rev Eur & Comp L* 119–120.
[9] C McCrudden 'Human dignity and judicial interpretation of human rights' 2008 *EJIL* 655.
[10] Ibid.
[11] Charter of the United Nations, 26 June 1945, 59 Stat 1031, UNTS 993, preamble.

emphasises the essential role that dignity holds in the law; it is placed at the centre of international law but is also used as a tool to develop human co-operation and progression.[12] The adoption of this obligation led to a substantial shift in the recognition of global world peace.[13]

Moreover, the UN Charter as an instrument for the development of dignity led to the materialisation of two significant charters that reinforced dignity: the Constitution of the United Nations Educational, Scientific and Cultural Organisation (UNESCO)[14] and the Universal Declaration of Human Rights (UDHR).[15] The preamble to the Constitution of UNESCO recognises the inherent role that dignity holds in democracy as it acknowledges that war is made possible by the denial of dignity. Furthermore, the preamble states that the 'education of humanity for justice and liberty and peace are indispensable to the dignity of man' and nations are obliged to fulfil this with assistance and concern.[16]

Likewise, the UDHR, adopted by the United Nations General Assembly, recognises dignity repeatedly.[17] The first instance is in its preamble, which recognises that the inherent dignity of all human beings is a foundational value for freedom and peace in the world.[18] The second instance, later in the preamble, reaffirms the recognition of dignity as a mechanism for promoting social justice and progression.[19] Additionally, Article 1 states that 'all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.'[20] In relation to social security, as well as social and cultural rights, dignity is referenced in Article 22 as indispensable to these rights and to the free development of personality.[21] Finally, Article

[12] G Le Moli 'The principle of human dignity in international law' in Mads Andedas et al (eds) *General Principles and the Coherence of International Law* (2019) 357.
[13] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956, 226 UNTS 3, preamble; Charter of the United Nations, 26 June 1945, 59 Stat 1031, UNTS 993, preamble.
[14] Constitution of the UN Educational, Scientific and Cultural Organization (UNESCO), adopted in London on 16 November 1945.
[15] Universal Declaration of Human Rights, GA Res 217A (III), UN Doc A/810 at 71 (1948).
[16] Preamble to the UNESCO Constitution.
[17] Preamble to the UDHR.
[18] Ibid.
[19] Ibid.
[20] Article 1 of the UDHR.
[21] Article 22 of the UDHR.

23(3) refers to dignity alongside an individual's rights to work, remuneration and social protection.[22]

Significant instruments which guarantee respect for everyone's dignity are the African Charter on Human Rights and Peoples' Rights,[23] the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), all of which guarantee that human rights are derived from dignity.[24] The ILO has also promoted dignity repeatedly in a number of its conventions, particularly in relation to indigenous workers, discrimination, family responsibilities and employment policy.[25]

This multitude of international instruments[26] shows how dignity has a fundamental structural role.[27] Although none of these instruments defines its meaning, its interpretation recognises its importance in shaping human ideals and legal principles.[28] Through the recognition of dignity at a supranational level, South Africa's legal framework has been developed to recognise the prominence of dignity at a constitutional level and a domestic level.

2.2 Overview of dignity in South Africa's legal framework

2.2.1 Constitutional provisions

Dignity in South African law plays an important role in the Constitution.[29] Following the guidance of international law measures, section 10 reinforces this by stating: 'Everyone has inherent dignity and the right to have their dignity respected and protected.'

---

[22] Article 23(3) of the UDHR.
[23] African Charter on Human and Peoples' Rights, 1981. In terms of Article (5), states guarantee the right to the respect of inherent dignity.
[24] International Covenant on Economic, Social and Cultural Rights (ICESCR), GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) at 49, UN Doc A/6316 (1966) and International Covenant on Civil and Political Rights (ICCPR), GA Res 2200A (XXI), 21 UN GAOR Supp (No. 16) at 52, UN Doc A/6316 (1966).
[25] C156 Workers with Family Responsibilities Convention, 1981; C122 Employment Policy Convention, 1964; C111 Discrimination (Employment and Occupation) Convention, 1958; C107 Indigenous and Tribal Populations Convention, 1957; C104 (Shelved) Abolition of Penal Sanctions (Indigenous Workers) Convention, 1955.
[26] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2000). The UN General Assembly determined that human rights should derive from dignity. This was shown in the Conventions on the Rights of Children (1989), the Rights of Migrant Workers (1990), Protection against Forced Disappearance, and the Rights of Disabled Persons (2007).
[27] Le Moli 'The principle of human dignity in international law' (note 12) 360.
[28] Ibid.
[29] A Fagan 'Human dignity in South African law' in M Duwell et al *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (2014) 401.

It is worth noting that dignity is acknowledged as both a value and a right in constitutional law.[30] Dignity has significant value in acknowledging the legal principles that have aided in the transformation of the country, alongside the values of freedom and equality.[31] Section 1 of the Constitution upholds these values, which include 'human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism; supremacy of the Constitution and the rule of law and universal adult suffrage.'

As a right, dignity is required alongside freedom and equality to determine whether the limitation of a right in the Bill of Rights by a legal rule is justifiable.[32] This requires a proportionality inquiry that involves balancing the competing interests. This analysis will take into account relevant factors such as the 'nature of the right; the importance of the purpose of the limitations; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.'[33] The rights to freedom of religion and expression have been justifiably limited on the ground that the limitations serve dignity.[34] Section 39 of the Constitution imposes an interpretative obligation on the courts to promote the values of a democratic society based on dignity, equality and freedom, as well as to consider international law and foreign law.[35] Furthermore, the courts are required, when interpreting any legislation and developing customary or common law, to 'promote the spirit, purport and objects of the Bill of Rights', particularly dignity, equality and freedom.[36]

One of the main ways in which 'transformative constitutionalism' is realised is by recognising the right to equality as a central component of dignity and equality law in South Africa.[37] Being cognisant of social differences and using the right to equality and dignity illustrates their value as tools for remedying the plight of the disadvantaged and transforming

[30] Ibid.
[31] Sections 1 and 7(1) of the Constitution.
[32] Sections 3(1) and 8(3)*(b)* of the Constitution.
[33] Section 36(1)*(a)–(e)* of the Constitution.
[34] *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); *De Reuck v Director of Public Prosecutions, WLD* 2004 (1) SA 406 (CC); *Khumalo v Holomisa* 2002 (5) SA 401 (CC). Freedom of religion and freedom of expression are discussed further in chapter 5 parts 3 and 4.
[35] Section 39 of the Constitution states*:* '(1) When interpreting the Bill of Rights, a court, tribunal or forum *(a)* must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; *(b)* must consider international law; and *(c)* may consider foreign law. (2) When interpreting any legislation and when developing the common law or customary law, every court, tribunal, or forum must promote the spirit, purport and objects of the Bill of Rights.' See the earlier discussion in chapter 1 part 5.3.
[36] Ibid. See Fagan (note 29) 403.
[37] P Langa 'Transformative constitutionalism' (2006) 3 *Stell LR* 351 at 352. See also S Fredman 'Substantive equality revisited' (2016) 14 *International Journal of Constitutional Law* 733. For the purposes of outlining the relevant legislation, the relationship between dignity and equality will be addressed in part 3.1.

society.[38] Therefore, the recognition of dignity is incomplete without acknowledging the right to equality in the Constitution.[39] Section 9 deals directly with the right to equality and clearly prohibits unfair discrimination:

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Section 9(1) establishes the constitutional value of equal protection by playing a monitoring role in ensuring that any measure includes the vision of transformative change.[40] Section 9(2) and (3) reinforces the commitment to substantive equality by developing equality in relation to an individual's identity, as well as the social inequalities that need to be addressed.[41] Furthermore, there is a constitutional obligation in subsections (4) and (5) of section 9 to ensure that national legislation expressly ensures anti-discrimination. Should the discrimination prove controversial, by falling under one of the listed grounds in subsection (3), then the discrimination is unfair unless it is established that the discrimination is fair in terms of subsection (5).[42] South Africa's current statutory framework is premised on

[38] C Albertyn & S Fredman 'Equality beyond dignity: Multi-dimensional equality and Justice Langa's judgments' 2015 *Acta Juridica* 439.
[39] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors* 2001 (1) SA 545 (CC); *Daniels v Campbell* 2004 (5) SA 331 (CC); *Masiya v DPP, Pretoria* 2007 (5) SA 30 (CC).
[40] E Grant 'Dignity and equality' (2007) 7 *HRLR* 315–316. See also D Collier & E Fergus et al *Labour Law in South Africa: Context and Principles* (2019) 412–415.
[41] *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) para 32 initially dealt with this provision in recognising the need for remedial measures. See also Grant (note 40) 315–317. See also Collier & Fergus et al (note 40) 415.
[42] *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) para 46.

promoting the values of dignity and equality in shaping the law.[43] Moreover, section 9(4) of the Constitution requires the legislature to enact legislation that aids in the promotion of these values.[44] This includes the Employment Equity Act[45] (EEA) and the Promotion of Equality and Prevention of Unfair Discrimination Act[46] 4 of 2000 (PEPUDA), both of which are discussed in the next section.

2.2.2. Statutory law provisions

In addition to sections 9 and 10 of the Constitution, addressing the disparities in the workplace, occupations and labour market for disadvantaged categories of people required the enactment of the EEA. The Act has two main objectives in promoting equity: the prohibition of unfair discrimination and the promotion of affirmative action.[47] This is implemented through formal and substantive systems of equality. When dealing with the prohibition of discrimination, a formal equality approach is adopted. Formal equality is premised on the idea that equal opportunities should be provided to everyone, focusing purely on an individual's personal merit.[48] However, this approach to equality is limited as it fails to recognise the individual's characteristics such as race, gender or ethnicity, which could negatively impact their ability to qualify for a position.

Hence, sections 6 to 11 address the application of the prohibition on unfair discrimination as a right not to be discriminated against in the workplace.[49] The EEA specifically refers to race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, sexual orientation, colour, age, disability, religion, HIV status, conscience, language, political opinion, culture, belief and birth, or any other arbitrary ground.[50]

To achieve affirmative action, substantive equality is applied; this form of equality offers a redistributive or restitutionary form of equality.[51] This form of equality aims to remedy or rather fill the gaps in protection for those groups affected by social, political and economic

[43] Collier & Fergus et al (note 40) 414.
[44] Section 9(4) of the Constitution led to the enactment of the EEA and PEPUDA.
[45] Act 55 of 1998.
[46] Act 4 of 2000.
[47] Sections 6 to 11 of the EEA. See Fredman 'Substantive equality revisited' (note 37) 715. See also Collier & Fergus et al (note 40) 415.
[48] Collier & Fergus et al (note 40) 412. See also S Fredman 'Providing equality: Substantive equality and the positive duty to provide' (2005) 21 *SAJHR* 165.
[49] Collier & Fergus et al (note 40) 412.
[50] Section 6 of the EEA.
[51] Albertyn & Fredman (note 38) 433.

inequalities.[52] Substantive equality is viewed as both a value and a legal right as it aims to serve the purpose of addressing inequalities in South Africa.[53] Providing equal opportunities requires state intervention in the form of laws and policies. This positive duty to provide anti-discrimination laws, which not only promote positive affirmation policies but also celebrate and enlighten an individual's identity, ultimately aims to redress exclusions and restructure institutions that fail to do this.[54] All in all, affirmative action is a more specific approach, applying to designated groups and employees. This method is designed to rectify those disadvantages experienced by protected categories such as black people, women and people with disabilities.[55]

PEPUDA is another significant statute intended to uphold equality for the 'State and all persons' who are not covered by the EEA, which may include members of the National Defence Force, the South African Secret Service and the National Intelligence Agency.[56] As another product of section 9(4), the primary aim of this legislation is to 'promote the enjoyment of rights and freedoms by every person, promotion of equality' and to 'prohibit unfair discrimination and the protection of human dignity' as well as prohibit any advocacy of hatred based on race, gender, religion or ethnicity.[57] Furthermore the enactment of the Broad-Based Black Economic Empowerment Act seeks to increase the economic participation of black people in the employment sphere, particularly through skills development, ownership and control of businesses.[58] This legislation makes it clear that the rights to equality and dignity as envisioned in the Constitution will materialise and promote equity in the workplace.[59]

3. DIGNITY AND THE INTERDEPENDENCE OF RIGHTS

It is evident that dignity has significant value in informing and developing South Africa's legislative framework. However, recognising the multi-dimensional approach of dignity in the law means recognising its ability to reinforce and strengthen other rights and freedoms.[60]

---

[52] S Fredman 'Redistribution and recognition: Reconciling inequalities' (2007) 23 *South African Journal on Human Rights* 216.
[53] Ibid.
[54] Fredman 'Substantive equality revisited' (note 37) 728–731.
[55] Chapter III ss 12–27 of the EEA. See also Fredman 'Substantive equality revisited' (note 37) 721.
[56] Section 5(3) of PEPUDA.
[57] Section 2*(b)* of PEPUDA.
[58] Section 9 of the Broad-Based Black Economic Empowerment Act 53 of 2003.
[59] Collier & Fergus et al (note 40) 416.
[60] Freedoms and other rights that are influenced by the right to dignity are discussed in chapter 5 and chapter 6 part 2.

An analysis of dignity alongside equality, fairness and privacy will reinforce its place as a strong determinant in equality-related matters.[61]

3.1 Dignity and equality

The courts have placed human dignity at the heart of equality.[62] As noted in the previous chapter, South African courts have upheld a Kantian approach with respect to dignity and equality in that human beings should be treated as an end in themselves rather than as a means to an end.[63] This approach has therefore been recognised as the criterion for the assessment of equality.[64] In the first major case about equality in the South African courts, *Brink v Kitshoff,*[65] the court recognised the purpose of equality and regarded dignity as a *sine qua non* for equality, emphasising that everyone is to be treated with equal concern and respect.[66] This early development characterised dignity and equality as significant criteria when identifying discrimination.[67] Whilst this will be discussed in more detail in the next chapter, this observation that equality and dignity are interdependent constitutional rights in determining whether discrimination has occurred shows that anti-discriminatory laws are developed through a nexus of these rights.[68]

Although section 9 of the Constitution is a redistributive tool intended to ameliorate societal inequalities, the reliance on equality as dignity is not without its criticisms. Fredman[69] notes that dignity can often be interpreted as focusing on an individual's rights and worth rather than focusing on group-based discrimination; in addition, dignity has a limited meaning when it comes to providing protection.[70] In assessing the relationship between dignity and equality, it is worthwhile examining the role that dignity plays in Fredman's multi-dimensional concept of substantive equality.[71] First, the focus is on a redistributive dimension which aims

[61] Grant (note 40) 301–302. See also Collier & Fergus et al (note 40) 412.
[62] H Botha 'Equality, plurality and structural power' (2009) 25 *South African Journal on Human Rights* 1–2. See also Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2012) 182.
[63] J Eckert 'Legal roots of human dignity in German law' in D Kretzmer & E Klein (eds) *The Concept of Human Dignity in Human Rights Discourse* (2002) 41–54. See also Steinmann 'The core meaning of human dignity' (note 6) 5.
[64] Ackermann (note 62) 186.
[65] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC).
[66] Albertyn & Fredman (note 38) 430.
[67] O Dupper & C Garbers *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 82.
[68] Botha 'Equality, plurality and structural power' (note 62) 7–9.
[69] Dupper & Garbers (note 67) 21.
[70] Ibid 89.
[71] S Fredman *Discrimination Law* 2 ed (2012) 25–26. See also Albertyn & Fredman (note 38) 433–440.

to eradicate the barriers of cyclical disadvantage in under-privileged groups.[72] The second aspect is the recognition dimension, which places the dignity and value of an individual at the forefront of their identity.[73] The third aspect is the transformative dimension that aims for progressive development.[74] The final aspect is the participative dimension that intends to overcome past practices and allow contributions from the community.[75] Each of these aims requires an overlap to fully ensure equality, and cannot be attained in isolation.

Similarly, Ackermann states that the right to equality cannot be described or defined without attributing it to a deeper normative value such as dignity or redistribution.[76] The Constitutional Court tends to support both sides of this argument. It is evident that equality cannot develop through a single facet. Both Fredman[77] and Ackermann[78] believe to a certain extent that the approach to follow when it comes to interpreting the aims of equality and dignity is that their relationship should be viewed as dependent values, like an individual's dependence within a community.[79]

Cowen[80] affirms that dignity is a value of equality. She argues that dignity does not solely focus on an individual, but also focuses on collective concerns, mainly due to the broad and foundational nature of dignity as a concept in the social, political and economic spheres.[81] Furthermore, Cowen's use of dignity and equality as dependent qualities reiterates and acknowledges the positive use of dignity as a tool for substantive equality, as she points out that dignity requires deeper thought into the factors underlying 'material disadvantage and economic power relations'.[82] Therefore, to fully appreciate the relationship between dignity and equality, it is more powerful to observe them together. Ultimately, the protection of one's dignity remains at the centre of recognising the value of one's equality.[83]

[72] Fredman *Discrimination Law* (note 71) 25–26.
[73] Ibid.
[74] Ibid.
[75] Ibid.
[76] Ackermann (note 62) 187.
[77] Fredman 'Redistribution and recognition' (note 52) 225.
[78] Ackermann (note 62) 187.
[79] Fredman 'Redistribution and recognition' (note 52) 225.
[80] S Cowen 'Can dignity guide South Africa's equality jurisprudence?' (2001) 17 *South African Journal on Human Rights* 34.
[81] Ibid 50.
[82] Ibid 51.
[83] Ibid 35–37.

3.2 Dignity and fairness

One of the main criteria in upholding an individual's dignity is fairness.[84] In keeping with the transformative approach of the Constitution, section 9 outlines the framework needed to guarantee that equality is upheld. Dignity and equality are powerful rights which may influence a rule or measure.[85] It is important to note that fairness is not equivalent to dignity and equality despite its significance in determining the threshold of unfairness.[86] Fairness and dignity come together when analysing whether the discrimination will impair an individual's dignity as a person.[87]

In *Harksen* the criterion of fairness laid out the legal standard that needs to be met to justify discrimination.[88] The case established the notion of fairness as a fundamental element concomitant to dignity and equality. Evidently the main value when protecting those who may be disadvantaged or compromised by unfair discrimination is dignity.[89] Although fairness remains at the centre of the test, the true measure of whether the policy is appropriate is the impact of the treatment on the affected person.

In *Barnard*, Moseneke noted that any mechanisms aimed at redressing the inequities of apartheid must be initiated with empathy and understanding so as not to 'invade unduly the dignity of all concerned'.[90] This case involved the non-promotion of a white woman after she was declared the best candidate based on her application. She claimed she was discriminated against based on her race. The Constitutional Court did not rule in her favour, holding that the decision of the South African Police Service (SAPS) was a restitutionary measure intended to promote equality.[91] This judgment also included a discussion about the meaning of fairness and what the criterion stands for in comparison to dignity and equality. Despite the references

[84] S Vice 'Dignity and equality in *Barnard*' (2015) 7 *Constitutional Court Review* 150–151.
[85] Section 36 of the Constitution addresses limitations on the Bill of Rights, particularly if the limitation is reasonable and justifiable based on factors such as dignity, equality and freedom. See Vice (note 84) 150.
[86] *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) paras 54–60. See Vice (note 84) 139. See also O'Regan J in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) para 221: 'Fairness is one of the core values of our constitutional order: the requirement of fairness is imposed on administrative decision-makers by section 33 of the Constitution; on courts by sections 34 and 35 of the Constitution; in respect of labour practices by section 23 of the Constitution; and in relation to discrimination by section 9 of the Constitution.'
[87] *South African Police Service v Solidarity obo Barnard* (2014) 35 *ILJ* 2981(CC) para 98. See also *Harksen v Lane* (note 86).
[88] *Harksen v Lane* (note 86). See chapter 1 part 5.1 for a brief overview of this case. The case is further discussed in chapter 4 parts 2.2 and 2.4. See also Collier & Fergus et al (note 40) 417.
[89] *Hoffman v South African Airways* 2000 (1) SA (CC) para 43.
[90] *Barnard* (note 87) paras 30–32. Although there were various judgments in this case, Moseneke, writing for the majority, concluded that the alleged discrimination was justified as set out in s 9(2).
[91] *Barnard* (note 87).

to the cases of *Harksen*[92] and *Van Heerden*,[93] this case illustrated that there is no explicit determinant of when discrimination is fair and when injury to dignity is outweighed by the greater good of equality.[94]

Vice references the threshold for fair discrimination to be for public reasons, which are acceptable to all and, through this aim, to uphold the legitimacy of the law that provides for all citizens.[95] This potential threshold for fair discrimination could avoid undermining an individual's dignity, and aligns with the judge's reasoning of rebuilding a divided country.[96]According to Van der Westhuizen J, the justification of fair treatment involves a two-factor consideration: first, whether the discriminatory measure has been chosen to contribute to equality; and second, whether the affected party was treated as a mere means to an end and whether this treatment resulted in an absolute barrier to their career.[97] These considerations still remain within the realm of recognising dignity whilst simultaneously allowing for the progression of equality.

It is evident that fairness and what constitutes unfair treatment is still an area that requires development.[98] Dignity and equality remain core constitutional values that aim to advance socio-economic rights. To ensure equality, the enquiry into unfairness must look at the impact on the whole of society rather than only a particular group, and this demands a balancing of interests between the individual and the broader community.[99] Integrating dignity into the test for unfairness can be viewed as an essential step in overcoming the limitations of the past, thus allowing for an expansion of substantive equality and the protection of the previously disadvantaged.[100]

---

[92] *Harksen* (note 86).
[93] *Minister of Finance and Others v Van Heerden* 2004 (6) SA 121 (CC) involved the investigation of the lawfulness of a scheme that provided preferential pension benefits to members of Parliament who had been discriminated against on the basis of race, particularly those who could not be members due to apartheid.
[94] E Fergus 'Towards unity — Reconciling fairness and rationality in affirmative action disputes' (2015) 36 *ILJ* 40. See also Vice (note 84) 151–153.
[95] Vice (note 84) 152–154.
[96] *Barnard* (note 87) para 30.
[97] Ibid para 180.
[98] D du Toit 'The evolution of the concept of "unfair discrimination" in South African labour law' (2006) 27 *ILJ* 1329. See also C Cooper 'The application of the Promotion of Equality and Prevention of Unfair Discrimination Act and the Employment Equity Act' (2001) 22 *ILJ* 1538–1539.
[99] Grant (note 40) 323.
[100] Ibid 329.

3.3 Dignity and privacy

Section 14 of the Constitution states that 'everyone has the right to privacy which includes the right to not have their person, home or property searched as well as their possessions seized or privacy of their communications infringed.'[101] This right is entrenched in society as fundamental to the protection of people.[102] Definitions of privacy have been developed over time and the importance of its representation in today's world is dealt with in *Bernstein and Others v Bester NO and Others*.[103] In this case, the Constitutional Court confirmed that the right to privacy has been recognised as an 'independent personality right' and that privacy rights are necessary to have 'one's own autonomous identity'.[104] Fisk argues that the right of privacy protects everyone's dignity in the workplace.[105] She states that autonomy, particularly physical appearance, should be protected by the right of privacy; this will be discussed further in chapter 5.[106] The purpose of this section is to show the interconnectivity between dignity and privacy.

Although privacy enforces one's autonomy and freedom, the commitment to this notion is not black and white, as each case must be taken on its own merits. The idea of privacy has been examined from three main perspectives: privacy in relation to a person's territorial space, choice, and personal information.[107] Van der Bank identifies the right to privacy as an essential aspect of every person's life.[108] Aside from it being core to democratic values, privacy rights are essential for the preservation of a person's dignity, as well as respect for their spiritual and physical wellbeing.[109] It will be shown in this section that privacy is one of the most valued human rights globally, whether it is through culture or religion, and particularly through its affiliation with dignity.

[101] Section 14(1) of the Constitution.
[102] CM van der Bank 'The right to privacy – South African and comparative perspectives' (2012) 1(6) *EJBSS* 79.
[103] *Bernstein and Others v Bester NO and Others* 1996 (2) SA 751 (CC).
[104] In *Bernstein* (note 103) para 68 the court noted that privacy is included in the concept of *dignitas*.
[105] C Fisk 'Privacy, power and humiliation at work: Re-examining appearance regulation as an invasion of privacy' (2006) 66(4) *Louisiana Law Rev* 1112. See also A Rycroft 'Privacy in the workplace' (2018) 39 *ILJ* 743.
[106] See chapter 5 part 2.
[107] Ibid.
[108] Van der Bank (note 102) 78.
[109] Ibid 78.

Privacy should be read in conjunction with the concepts of freedom and dignity, based on Kantian philosophies.[110] According to Ackermann, privacy automatically links to one's personal identity.[111] Alternatively, dignity means that an individual is respected for their own sense of self-worth and entails confirmation of the worth of humans in society. This requires consideration of each person's individual worth based on their personal accolades and including the worth shared by all people.[112] The relationship between these rights was examined by O'Regan J in *Khumalo v Holomisa*, where the relationship between human dignity and privacy was considered.[113] This link is recognised in the Constitution, which provides that humans have a right to a level of intimacy that should be protected from invasion, with the overall objective of fostering dignity.[114] This illustrates the proximity between privacy and dignity as separate rights but shows their value as human rights when approached concurrently.[115]

The relationship between an employer and employee is typically one of control, and usually appearance in the workplace will vary depending on the environment. Each party in the employment relationship has a specific understanding of how privacy and dignity should be protected. Employees tend to insist on the protection of their privacy for a variety of reasons; this includes preserving autonomy, upholding their dignity and well-being, as well as encouraging the progression of their ideas.[116] Employers may inhibit employees' privacy to ensure that their employees' productivity is not hindered. This may be for efficiency reasons, ensuring a safe environment, and reducing misconduct.[117]

The link between privacy and dignity in the workplace has been addressed in a number of cases. In *Pikitup (Soc) Ltd v South Africa Municipal Workers' Union obo Members and Others*,[118] an employer introduced compulsory breathalyser tests after one of its employees reported to work inebriated. The employees' union contested this stance and gave a notice of strike against the employer. The court ruled that, despite the validity of the employer's

[110] Ackermann (note 62) 98–99. In *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) para 30 the court recognised the interconnectivity between the right to dignity, equality and privacy.
[111] Ibid.
[112] *Khumalo v Holomisa* 2002 (5) SA 401 (CC) para 27.
[113] Ibid.
[114] Ibid.
[115] *National Coalition for Gay and Lesbian Equality* (note 110) para 30. See also *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) para 153.
[116] A Rycroft 'Privacy in the workplace' (note 105) 725.
[117] Ibid.
[118] *Pikitup (Soc) Limited v SAMWU and Others* (2014) 35 *ILJ* 983 (LAC).

concern for the employees' health and safety, the introduction of medical testing through a breathalyser without consent can be viewed as invasive and its enforcement can be viewed as intentionally limiting an employee's right to privacy.[119] The court further acknowledged that the use of a person's body to obtain information without consent automatically impairs the employee's right to personal privacy and autonomy which is essential for the preservation of their dignity.[120]

Autonomy in the workplace and the freedom to make our own choices is of paramount importance in the workplace, especially if an employer's policy limiting these choices cannot be justified in relation to the scope of the workplace duties. As will be shown in subsequent chapters, the issues of autonomy, dignity and privacy in the workplace are significant considerations for the limitations on appearance autonomy.[121] Failure to recognise appearance-based discrimination and the need for its prevention in the workplace may lead to the demoralisation of and discrimination against employees.

4. DIGNITY IN JURISPRUDENCE

For dignity's prominence in the law to be appreciated, it is essential to ascertain its role in evolving common law, not only as an interpretative value but also as a right that can be valued alongside other rights in the Constitution.[122] Thus, this section aims to analyse dignity's role in a number of Constitutional Court and Labour Court cases, particularly in the areas of discrimination, harassment and mental health, which were informed by and resolved by using dignity.

4.1 Constitutional Court cases

One of the earliest cases post-democracy involving the constitutionality of the death penalty, *S v Makwanyane*,[123] set out the importance of dignity and how respect for it in South Africa is especially important due to the undermining of human worth and common humanity during apartheid.[124] Aligning with the Kantian view, the court focused on the idea that dignity is

[119] Ibid para 63.
[120] Ibid. See also the Canadian case of *Communications, Energy and Paperworkers Union of Canada v Irving Pulp & Paper Limited* (2013) 2 SCR 458 where it was decided that an employer cannot unilaterally apply an obligatory random alcohol testing policy for safety sensitive employees, unless this is justified based on evidence to support the problem with alcohol use in that workplace.
[121] See the discussion in chapter 5 parts 2.2 and 2.3.
[122] Fagan (note 29) 403.
[123] *S v Makwanyane* 1995 (3) SA 391 (CC).
[124] Ibid para 237.

something 'that is inherent to every human being'.[125] Furthermore, Chaskalson J reiterated that even the 'vilest criminal' remains a human, entitled to common dignity.[126] This case emphasised the constitutional value of dignity and the importance of uplifting and protecting individuals in addition to ensuring their right to life.[127]

Based on this precedent, several significant cases, which are discussed below, emphasise the importance of dignity in resolving disputes. One case involved ensuring that foreign nationals who were legally married to South African citizens were entitled to the same right to dignity as citizens of South Africa.[128] *Booysen* highlighted the reality that establishing a balance in the economic and social rights of South Africans requires a more dignified presence for all those living in South Africa, especially those who have foreign spouses wishing to reside in the country.[129]

Defamation claims have also shed light on the importance of dignity in relation to an individual's reputation, as is the case when it comes to the law of delict.[130] In *Islamic Unity Convention*, the relationship between dignity and freedom of expression was assessed. It was established that although freedom of expression is a right afforded to those wishing to express their ideas and opinions, it is also true that certain expression is not always entitled to constitutional protection due to its potential to adversely impair dignity.[131] The balancing act in assessing what takes precedence in these cases was made clear in *Mamabolo* where it was stated that freedom of expression fails to hold a 'superior status in law' to dignity.[132] This indicates that the court encourages exercising freedom of expression with due care to avoid violating human dignity by publishing defamatory material.[133]

Dignity has also garnered significance in the area of domestic partnerships and marriage. In

[125] Ibid.
[126] Ibid para 57.
[127] Section 11 of the Constitution.
[128] *Booysen and Others v Minister of Home Affairs and Another* 2001 (4) SA 485 (CC) dealt with the unconstitutionality of the Aliens Control Act 96 of 1991 with regard to applications for work permits by foreign spouses of South African citizens or residents. The Act required applicants to apply for work permits from outside of the country, and disallowed the granting of work permits in cases where the applicant intended to engage in an occupation for which there were sufficient qualified persons in South Africa. This aspect of the Act was found to infringe on a number of rights, particularly the right to dignity.
[129] Ibid para 4.
[130] *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC).
[131] Ibid para 30.
[132] *S v Mamabolo* 2001 (3) SA 409 (CC) para 41.
[133] D Cornell et al *The Dignity Jurisprudence of the Constitutional Court of South Africa: Cases and Materials* (2013) 557–558.

Volks NO v Robinson and Others,[134] a claim for maintenance arose after the death of a partner in a permanent life partnership. The definition of 'spouse' was investigated by the executor of the estate, who claimed that the law regarding maintenance only applied to married couples.[135] The partner seeking maintenance applied to the court seeking an order that the Maintenance of Surviving Spouse Act also applies to permanent life partners, thus upholding the rights to dignity and equality.[136] The High Court held that the Act should be amended to include those in a permanent life partnership, as a failure to recognise this constituted unfair discrimination that overlooked the dignity of difference which implies respect given to those who are in domestic partnerships and those who live in them.[137] Although the Constitutional Court did not confirm the decision made by the High Court, they grappled with the concept of Mrs Robinson's dignity and her interests, and ultimately utilised this concept as one of the primary guides in its decision.

Additionally, dignity played a momentous role in the legalisation of marriages between same-sex couples in *Minister of Home Affairs v Fourie*.[138] The common-law definition of marriage was investigated in this case to show that it failed to align with sections 9 and 10 of the Constitution. Thus, the common-law definition of marriage was broadened and the Constitutional Court agreed unanimously that this exclusion impaired the spouses' right to dignity and equality.[139]

4.2 Dignity and workplace cases

The right to dignity appears in areas of labour law, particularly in discrimination disputes or dismissals, which are usually based on a breach of an individual's right to dignity in the workplace. When these incidents occur in the workplace, they manifest as labour matters but may, if not dealt with appropriately, advance as constitutional cases; therefore, it is essential to reinforce dignity as a remedial tool for regulation at the outset.[140] Depending on the facts, an employee may have a claim under the Labour Relations Act (LRA)[141] for an unfair

[134] *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC).
[135] Cornell et al (note 133) 711–712.
[136] *Robinson* (note 134) para 2.
[137] Ibid paras 23–24.
[138] *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC).
[139] Ibid para 75.
[140] S Vettori 'The role of human dignity in the assessment of fair compensation for unfair dismissals' (2012) 15(4) *PER/PELJ* 111.
[141] Labour Relations Act 66 of 1995.

dismissal or unfair labour practice that has occurred and may additionally claim for unfair discrimination in terms of the EEA.

It is inevitable that an employee will feel hurt when they are dismissed.[142] To reiterate, employers have a duty of care towards their employees.[143] Employers are required to take extra care when it comes to the safety of their employees, as they could also be held responsible if they provided the opportunities or conditions for injury or had the power to prevent it.[144] This duty of care is not restricted to physical harm but also includes psychological injury.[145] Likewise, the importance of upholding an employee's autonomy in relation to aspects of their dignity requires a deeper consideration in the workplace to ensure their mental and physical wellbeing.[146]

Dignity plays a crucial role in the workplace and spaces of employment. Its recognition in constitutional and employment law affirms its elevated position in all aspects of South African jurisprudence, particularly in the workplace. The essence is an individual's sense of worth that tends to link strongly with their contribution to society.[147] Employers are therefore obliged to provide a reasonable and safe environment for their employees and, above all, to protect and sustain their dignity.[148] To examine dignity's role in the workplace, we need to examine case law reflecting the position at which dignity should be placed in the workplace.

4.2.1 Discrimination

The role of dignity in resolving discrimination disputes was addressed in *Hoffmann v South African Airways.*[149] The applicant in this case applied for a flight attendant position but was denied the position based on his HIV-positive status.[150] Hoffmann took the matter to the High Court, which held that a failure to consider his recruitment impaired and violated his rights to

[142] Vettori (note 140) 112.
[143] M Brassey *Employment and Labour Law* (2000) 19–49.
[144] Ibid 30. See also Vettori (note 140) 114. In *Media 24 Ltd v Grobler* (2005) 26 *ILJ* 1007 (SCA) the court discussed the obligation on employers to take reasonable care of their employees' safety, particularly with regard to psychological harm.
[145] In *Media 24 Ltd v Grobler* (note 144) para 65 Farlam JA elaborated on the common-law duty of care not to 'be confined to an obligation to take reasonable steps to protect them from physical harm caused by what may be called physical hazards. It must also in appropriate circumstances include a duty to protect them from psychological harm …'.
[146] *Legal Aid South Africa v Jansen* (2020) 41 *ILJ* 2580 (LAC) para 50.
[147] Reis et al 'Dignity promoted or violated: How does the deaf person included perceive it?' (2017) 18(3) *Revista de Administração Mackenzie* 181. See also M Mott Machado & M Mendes Teixeira 'Dignity in the context of organizations: A look beyond modernity' (2017) 18(2) *Revista de Administração Mackenzie* 84.
[148] *Media 24 Ltd v Grobler* (note 144) para 65.
[149] 2000 (2) SA 628 (CC).
[150] Ibid.

dignity and fair practice.[151] On appeal. the Constitutional Court held that Hoffmann had been unfairly discriminated against and his dignity had been severely impaired.[152] This case illustrated the position that dignity holds in informing discrimination matters. Where there are alleged discrimination issues in workplace cases, the discrimination must be balanced against the dignity of the individual as well as the societal value of equality.[153]

Pioneer Foods (Pty) Ltd v Workers Against Regression and Others[154] dealt with an alleged unfair discrimination claim in the workplace.[155] In this matter the union brought its claim on an arbitrary ground, arguing that the employer discriminated against newer members of staff by paying them less in comparison to those workers that had been in service for longer periods of time.[156] However, the court applied *Harksen*, and had to determine whether the differentiation on which the arbitrary ground was based had impaired the dignity of the employees. The court held that the discrimination was not unfair and that the differentiation experience was justified.[157]

In *Naidoo v Minister of Safety and Security and Another*,[158] a case similar to *Barnard*,[159] an Indian female police officer was overlooked for appointment solely because there was a policy to appoint male Africans for the position, She felt that this constituted unfair discrimination, and effectively created barriers that undermined the purpose of redressing disadvantages against particular groups targeted in the employment policy.[160] The court held that the policy did not accord with section 9 of the Constitution or the EEA and had in fact impaired her dignity.[161] An effective affirmative action policy should have protected the employee's right to equality and dignity but this policy did the opposite.[162]

4.2.2 Harassment

Dignity is pertinent in South African jurisprudence on sexual harassment in the workplace. The harassment of an employee is a form of unfair discrimination and is prohibited by section

[151] Ibid.
[152] Ibid.
[153] Cornell et al (note 133) 407.
[154] *Pioneer Foods (Pty) Ltd v Workers Against Regression and Others* (2016) 37 *ILJ* 2872 (LC).
[155] Ibid para 22.
[156] Ibid paras 1–5.
[157] Ibid paras 72–76.
[158] *Naidoo v Minister of Safety and Security and Another* [2013] 5 BLLR 490 (LC).
[159] *Barnard* (note 87).
[160] *Naidoo* (note 158) paras 2–8.
[161] Ibid paras 217–227.
[162] Ibid.

6(3) of the EEA.[163] In terms of section 60 of the EEA, upon knowing of the alleged harassment an employer is obligated to address this harassment, failing which the employer would also be liable under section 6.[164] Harassment may occur on any of the prohibited listed grounds under section 6.[165] When it comes to addressing harassment in the workplace, the recently amended Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace provides guidance.[166] To establish sexual harassment in the workplace, there would have to be unwanted conduct, the nature of the conduct would have to sexual, and the impact of this should constitute an impairment of the employee's dignity.[167] The cases below illustrate the court's recognition of dignity as a fundamental factor in determining harassment in the workplace.

In *Ntsabo v Real Security CC,*[168] a security guard resigned after being sexually harassed by her supervisor. This took place after repeated reports of the incident to her employer, who took no action. The employee struggled to cope and struggled with suicidal tendencies based on the infringement of her privacy and dignity.[169] This ultimately resulted in a claim for constructive dismissal under section 186(1)*(e)* of the LRA[170] and it also fell under section 6(3) of the EEA.[171] Due to the lack of action by the employer, the court awarded the maximum compensation for the unfair dismissal.[172] Furthermore, under section 60 of the EEA,[173] the employer was ordered to pay for future psychiatric treatment as well as damages based on the statutory vicarious liability of the employer.[174]

Similarly, in *Biggar v City of Johannesburg*,[175] the employee was subjected to racial harassment that occurred off duty but at the premises provided by the employer. The employer was aware of the issue but failed to do enough to prevent the harassment from occurring and was held liable. The court acknowledged the belittlement and indignity felt by

[163] Section 6(3) of the EEA states that harassment is a form of unfair discrimination and is prohibited on any one or a combination of grounds of unfair discrimination listed in sub-s (1).
[164] Section 60(2) and (3) of the EEA obligates the employer to consult all necessary parties and, should the employer fail to do so, this will be a contravention of the provision.
[165] Section 6 of the EEA.
[166] Labour Relations Act 66 of 1995, Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace.
[167] Ibid s 5.
[168] *Ntsabo v Real Security CC* (2003) 4 *ILJ* 2341 (LC).
[169] Ibid.
[170] Section 186(1)*(e)* of the Labour Relations Act.
[171] Section 6(3) of the EEA.
[172] Section 194 of the Labour Relations Act; s 50(2) of the EEA.
[173] Section 60 of the EEA.
[174] Section 60(3) of the EEA.
[175] (2011) 32 *ILJ* 1665 (LC).

the employee and recognised the employer's duty in ensuring the prevention of discriminatory practices on workplace premises.[176] This case acknowledged the importance of the employment relationship and showed that the court recognised the need to place the impairment of the employee's dignity and equality at the forefront of the issue, by addressing the discrimination and compensating accordingly.[177]

In *K v Minister of Safety and Security*, the victim of a rape and assault by a uniformed on-duty police officer sought to hold the Minister vicariously liable for the conduct of his officers.[178] The Constitutional Court unanimously agreed that the Minister should be held liable based on the fact that the officers' wrongful conduct was closely related to their profession.[179] Officers of the law showed a complete disregard for the victim's rights and the threat of sexual violence to a woman compromises her security, dignity and privacy.[180]

4.2.3 Mental health

Psychiatric ailments relating to mental illnesses are not included in the grounds of discrimination in section 187(1) of the LRA.[181] When it comes to anti-discrimination, reasonable accommodation from an employer is significant for substantive equality, particularly under section 1 of the EEA.[182] The act of reasonable accommodation should be implied in all unfair discrimination issues under the EEA.[183] The importance of reasonable accommodation and dignity, particularly in relation to mental illness, was shown in *Marsland*.[184] The case involved an employee suffering a severe psychological breakdown following a separation from his wife. Upon returning to work, the employer verbally abused the employee to the extent that the court determined that the employer's conduct amounted to harassment.[185]

---

[176] *Biggar v City of Johannesburg* (2011) 32 *ILJ* 1665 (LC) paras 19–21.
[177] Ibid para 20.
[178] *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).
[179] Ibid para 56.
[180] Ibid para 18. See also *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 62.
[181] Section 187(1)*(f)* of the Labour Relations Act states that a dismissal will be automatically unfair if the reason for the dismissal is that the employee was discriminated against on one of the prohibited listed grounds.
[182] Section 1 of the EEA defines reasonable accommodation to include 'any modification or adjustment to a job or the working environment that will enable a person from a designated group to have access to or participate or advance in employment.'
[183] Reasonable accommodation will be discussed further in chapter 4 part 2.4.1.
[184] *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 *ILJ* 2875 (LAC).
[185] Ibid paras 24–26. The court found that the employee was subject to egregious treatment that fundamentally impaired his dignity, and awarded the maximum compensation to the employee.

The grounds expressed in section 6(1) of the EEA are not limited to what is in the provision, as specified by the term 'any other arbitrary ground'.[186] Furthermore, the list uses the word 'including', which indicates that the grounds can be beyond what is listed.[187] Du Toit states that 'arbitrary' must add something more to the grounds listed and must be given equal treatment to an unlisted ground in the provision; otherwise, it will prove to be irrelevant in the legislation.[188] The key ingredient in establishing whether there is discrimination on a ground that could fall under section 6(1) of the EEA and that is worthy of protection is whether the discrimination amounted to a violation of the individual's dignity.[189]

In *Jansen v Legal Aid*,[190] an employee, Jansen, was suffering from major depression and anxiety. A clinical psychologist informed Jansen's manager of his condition. However, Jansen's employer found his erratic behaviour unacceptable and, shortly afterwards, charged him with misconduct and dismissed him. The case was heard in the Labour Court, which held that he was automatically dismissed based on his mental illness and this was unfair discrimination.[191] However, on appeal, the Labour Appeal Court overturned the decision[192] and found that, although the employee did show that he suffered from depression, the employee failed to provide sufficient evidence that the cause of his dismissal was the depression. This judgment indicates the impact of dignity when addressing mental health issues in the workplace correctly. The LAC noted that, when dealing with an employee's diagnosed medical condition, an employer must consider reasonable accommodation and other alternatives in a correct manner which does not impair an employee's dignity by completely degrading them.[193]

In cases such as *Ntsabo* and *Jansen*, the impairment of dignity is viewed as a significant influence in controversial areas like harassment or discrimination in the workplace. This section examined the methods that the courts use when awarding compensation based on the type of dismissal. No amount of business profitability or efficiency gained from treating an employee in an unfairly discriminatory way justifies compromising their dignity. Therefore,

---

[186] Section 6(1) of the EEA. See D du Toit, S Godfrey, C Cooper et al *Labour Relations Law: A Comprehensive Guide* 6 ed (2015) 683.
[187] S Vettori (note 140) 119. See the discussion in Collier & Fergus et al (note 40) 440.
[188] Du Toit et al (note 186) 683. These provisions will be discussed further in chapter 4 part 2.4 and chapter 6 part 5.1.
[189] *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* [2009] 12 BLLR 1181 (LAC) paras 24–26. See *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC).
[190] (2019) JOL 42192 (LC*).*
[191] Ibid.
[192] *Legal Aid South Africa v Jansen* (2020) 41 *ILJ* 2580 (LAC).
[193] Ibid para 50.

any interpretation of the relevant labour legislation and common law must be read in line with the individual's fundamental rights in the workplace – their right to fair labour practices and their right to equality and dignity.[194]

5. CONCEPTUALISING A FRAMEWORK FOR DIGNITY IN THE WORKPLACE

Based on Kant's discussions about dignity, there is no higher value for the workplace to uphold than the dignity of the workforce.[195] There is a certain responsibility to respect the dignity of others in the workplace.[196] One aspect of dignity in the workplace is determining the situations in which people feel that their self-worth or self-esteem has been impaired. Another important aspect of dignity in the workplace is looking after the inherent value of an individual in the workplace as a mental and physical space where people perform their duties to meet a common goal.[197] Melé identified certain conditions in the workplace that lead to a loss of dignity, such as unequal treatment, discrimination, limitation of employees' freedom, and disrespect.[198] These conditions cover all aspects of appearance regulation, and are addressed to a certain extent in the thesis's argument in assessing the limits on appearance autonomy and the aspects to consider when regulating appearance.[199]

In a framework for organisations, Melé identified five levels of individual treatment conditions that are created by employers and employees who have the authority to impact decisions: maltreatment, indifference, justice, care and development.[200] Maltreatment is described as a 'blatant injustice based on the abuse of power' and leads to the limitation of an employee's autonomy.[201] Maltreatment, in the form of manipulation, may also manifest psychologically through bullying, disrespect or sexual violence.[202] A dangerous aspect of manipulation is when an employer uses his power to persuade co-workers to behave

[194] Section 23(1) of the Constitution.
[195] I Kant *Groundwork of the Metaphysics of Morals* (translated and edited by Allen Wood) (2002) 1–66. See also Steinmann 'The core meaning of human dignity' (note 6) 10.
[196] Section 10 of the Constitution. See M Bal *Dignity in the Workplace: New Theoretical Perspectives* (2017) 77.
[197] Ibid.
[198] D Melé 'Human quality treatment: Five organizational levels' (2003) 120(4) *Journal of Business Ethics* 462–468. See also M Zawadzki 'Dignity in the workplace: The perspective of humanistic management' (2018) 26(1) *JMBA* 176–182.
[199] Each condition is discussed in this thesis as follows: dignity (chapters 2 and 3), discrimination (chapter 4), limitation of employees' freedom (chapters 4, 5 and 6).
[200] Melé (note 198).
[201] Zawadzki (note 198) 177.
[202] R Hodson et al 'Chaos and the abuse of power: Workplace bullying in organizational and interactional context' (2006) 33 *Work and Occupations* 382–383.

immorally.[203] The second level, indifference, refers to the lack of recognition of a worker's needs and fears.[204] It is essential to understand the basic needs of a human as a social being.[205] Indifference is felt when a person's humanity and needs are disregarded when decisions are made in the workplace.[206] The third level refers to 'justice',[207] which requires the respect of the worker, as well as exercising power properly in the organisation through fairness and transparency in order to uphold the duties of labour law.[208] The fourth level, care, encompasses showing willingness to resolve issues and compassion for workers' interests.[209] This involves the consideration of personal issues to ensure that a clear balance can be established between an employee's professional and private lives.[210] Finally, the highest level of concern for dignity in the organisation refers to the willingness to develop an individual's ethical behaviour and to lead them to self-actualisation, through constant support and attention.[211]

This framework clearly outlines two levels of violations of dignity in the workplace – maltreatment and indifference – while the remainder are strategies for the protection of dignity in the workplace.[212] This thesis argues for recognising dignity as a fundamental right through these strands. Upholding dignity requires more than just recognition of a human's internal worth; it calls for a culture of fairness, selfless support and respect for a worker's autonomy with regard to decision-making.[213] In the workplace, certain obligations arise in an employment relationship and contribute to the dignity of employees.[214] Therefore, it is essential that senior persons in authority elevate their employees' dignity in every aspect of

[203] Zawadzki (note 198) 178; J Snyder 'Exploitation and sweatshop labor: Perspectives and issues' (2010) 20(2) *Business Ethics Quarterly* 187–213.
[204] Melé (note 198) 77–88.
[205] Zawadzki (note 198) 178; Snyder (note 203); P Kaufmann et al *Humiliation, Degradation, Dehumanization: Human Dignity Violated* (2011) 1–89.
[206] Zawadzki (note 198) 178; Snyder (note 203).
[207] Melé (note 198) 77–88.
[208] Ibid.
[209] Ibid.
[210] Zawadzki (note 198) 180; Snyder (note 203). See D Hicks 'A culture of indignity and the failure of leadership' (2016) 1(1) *Humanistic Management Journal* 113–124.
[211] Melé (note 198) 77–88.
[212] Ibid.
[213] Zawadzki (note 198) 182; Snyder (note 203).
[214] A Levin 'Dignity in the workplace: An enquiry into the conceptual foundation of workplace privacy protection worldwide' (2009) 11(1) *ALSB* 70–71.

the business, whether it is through their business processes or their employees' social welfare in the workplace.[215]

6. KEY FINDINGS

Chapters 2 and 3 have established the role that dignity holds in legal theories and frameworks. Dignity is a broad and complex topic yet its role in South African and comparative foreign law emphasises its value as a significant tool for equality. The chapter has illustrated the status that dignity has given and it remains a seminal expression of human experience and principle that serves the interests of individuals and the community.[216] To conceptualise the notion and structures of appearance autonomy, its limitations and the gaps for its protection, an assessment and an evaluation of its core framework were required, i.e. the value and right to human dignity. The discussion below illustrates the key findings that the thesis has examined in the chapter, particularly in recognising dignity as a practical tool for accommodating progressive legal reasoning.

Firstly, as an expansive theory that has widespread influence over psychological and intellectual works, dignity is viewed as a precursor in developing and progressing the needs of individual human rights and duties.[217] Through the thesis's development of the theory of dignity in the previous chapter and this chapter, it is found that dignity's historical development and impact remain relevant to this day.[218] Although the thesis did not examine all the wide-ranging perspectives of dignity, it emphasised and built on the concept of dignity as support for the recognition and development of appearance autonomy. The thesis showed the extent to which the complexity behind the meaning of dignity can be clarified to recognise human worth and experience.[219]

Secondly, the adoption of dignity in legal frameworks such as modern constitutions and international human rights instruments has only added weight to its value as a fundamental value for rights and liberties.[220] Dignity is engrained within South African law as a supreme

[215] Ibid. Levin discusses the recognition of their persona as maintaining their self-worth and reputation. See also Zawadzki (note 198) 173.
[216] D Mattson & S Clark 'Human dignity in concept and practice' (2011) 44(4) *Policy Sciences* 303.
[217] Ibid.
[218] Ibid.
[219] Ackermann (note 62) 55. See T Hill 'Kantian perspectives on the rational basis of human dignity' in M Düwell et al *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (2014) 215–221.
[220] N Rao 'Three concepts of dignity in constitutional law' (2011) 86(4) *Notre Dame Law Review* 185.

right and one that should be afforded to all individuals.[221] Alongside its position as a right it is valued for its multi-dimensional relationship with equality, freedom and privacy. As an inherent value it is viewed as focusing on human potential and remains neutral in its application to the individual choice.[222] Hence, it is established that dignity serves to develop autonomy in any manner that an individual may choose, consistent with the rights and freedoms of other individuals.[223]

The third finding recognises the value of dignity as an informative and interdependent value that is closely bound to freedom, equality and privacy.[224] As a mechanism for resolution or judicial guidance it has pragmatic value for the protection and interests of rights as well as for mediating any conflicts of interests that may occur.[225] Dignity not only overlaps with metaphysical theories, it also overlaps with constitutional values that serve and inform the judiciary on a variety of issues – particularly discrimination.[226]

Because of dignity's position as a symbiotic value in shaping regulation, both outside and inside the workplace, the thesis supports its value as a basis for recognising and protecting appearance autonomy. Establishing protection in the workplace requires a strong consideration for individual worth and those aspects that are linked to or contribute to aspects of one's dignity.[227] This includes respect for an individual's identity and development.[228] In true Kantian fashion, the chapter argues that there needs to be a balance between the humanist approach and the economic approach in the workplace.[229] This calls for an inclusive environment that promotes a high level of autonomy and freedom in the organisational framework.[230] This would serve to progress not only dignity but also human development that ensures a sincere respect for employees and employers' needs in the commercial relationship.[231]

7. CONCLUSION

[221] H Botha 'Human dignity in comparative perspective' (2009) 20 *Stell LR* 171.
[222] Rao (note 220) 187.
[223] Ibid.
[224] Botha 'Human dignity in comparative perspective' (note 221) 177.
[225] Ibid.
[226] Rao (note 220) 189.
[227] Vettori (note 140) 103.
[228] Ibid. See also Melé (note 198) 462–468.
[229] Zawadzki (note 198) 172.
[230] Ibid.
[231] Ibid.

This chapter elaborated on the pivotal role that dignity has played using an array of human rights, philosophical debates and the workplace. It has shown that dignity remains as the cornerstone of recognising the intrinsic worth of an individual and should be respected. The acceptance of dignity in international, constitutional and domestic law shows an acceptance of its significance as a constructive and productive tool in interpreting and validating specific rights.[232] Furthermore, South Africa's Kantian approach to human dignity recognises the protection of the inherent value of every individual, but also recognizes that dignity plays a foundational role in the development of other rights such as autonomy.[233] In assessing dignity as a value and a right, its relationship with equality, fairness and privacy emphasises its ability to reinforce and enhance the preservation of these rights.

Dignity is an imperative source of human rights protection. The cases have shown the courts' commitment to promoting a society that recognises differences and diversity.[234] Despite the conflicts which tend to arise in the difference of values when this concerns dignity and other areas such as discrimination or sexual harassment, the moral dilemma that is faced by the courts is dealt with in a deontological approach of Kantian ethics that emphasises the respect and worth of a human being.[235] Furthermore this calls for awareness in the law and the workplace to fully recognise the unequal treatment experienced by those unprotected groups that are still subjected to discriminatory treatment.

By focusing on interpreting dignity in the workplace and its role as a moral compass in employment relationships we can evaluate whether the workplace adequately recognises and upholds dignity.[236] Although dignity manifests itself strongly in the labour sector, the chapter illustrated the challenges that arise in organising and developing a workplace.[237] Melé's approach builds on the Kantian framework and provides an eloquent and practical tool to recognise dignity, and the violation thereof, in a contemporary workplace.[238] To conceptualise the notion of appearance autonomy in the workplace, it is important to use dignity as the foundation on which this notion must be built. The interdependence and recognition of the value of dignity to inform and impact other rights can only improve

[232] McCrudden (note 9) 723.
[233] Eckert (n 63) 41–54. See also Steinmann 'The core meaning of human dignity' (note 6) 14.
[234] Ibid.
[235] Cowen (note 80) 58.
[236] Ibid.
[237] Bal (note 196) 1.
[238] Melé (note 198) 77–88.

employee protection and ensure regulation in those areas of law where there are substantive gaps.

CHAPTER 4: ANTI-DISCRIMINATION LAW IN THE WORKPLACE: GAPS IN PROTECTION AGAINST APPEARANCE DISCRIMINATION

> A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. To penalise people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society.[1]

1. INTRODUCTION

Chapter 3 considered the legal framework for dignity and equality in the law. Beyond its foundational value in philosophy, dignity holds an influential constitutional position in South African law, which enhances and reinforces other related rights such as equality, fairness and privacy. It was shown that dignity is a significant factor to be considered in ascertaining a variety of cases, one of which is discrimination. Discrimination remains problematic in South Africa and the South African workplace; despite the introduction of anti-discriminatory measures, certain areas of the law lack recognition, which results in limited protection.

The purpose of this chapter is to identify and examine the gaps in the anti-discriminatory developments in the South African workplace. The workplace is a relevant arena in which an individual's worth is commonly measured. However, employees may be subjected to various types of treatment that may inhibit their position and hinder their personal development based on their innate characteristics.[2] Thus, the first part of this chapter aims to examine those corrective measures that have been established using the principle of dignity to mitigate these problems. Furthermore, this chapter will establish the extent to which appearance discrimination is protected in the workplace by regulation and case law, as well as the limits of its protection.

---

[1] *Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC) para 60.
[2] R Mahajan 'The naked truth: Appearance discrimination, employment and the law' (2007) 14 *Asian AM LJ* 175–176.

Selected global comparators will be considered in this chapter. The third part will examine Australia, the USA, selected European countries such as Germany and France, and the UK. All these comparators have influenced the South African legal system; by investigating their anti-discrimination measures and approaches, as well as their recognition of appearance in their law, we can determine how to address South Africa's approach to appearance autonomy. Finally, through assessing the anti-discrimination developments in foreign jurisdictions, the chapter will identify key findings that expand upon recognising the protection of appearance and how it may impact aspects of dignity and equality as well as promote awareness of autonomy.

2. DEVELOPMENTS IN SOUTH AFRICAN LAW

To fully conceptualise anti-discrimination law in the South African workplace and its development, the thesis provides an overview of discrimination and the corrective mechanisms established by the law to overcome it. This section investigates the significant tests established in the Constitution of the Republic of South Africa, 1996 and the Employment Equity Act[3] (EEA) to address unfair discrimination. The conversation about anti-discrimination includes complying with the principle of reasonable accommodation and, in instances where this is not possible, understanding when discrimination may be justified based on the inherent requirements of the job. The limitations of the current anti-discrimination framework and the gaps in protection for appearance discrimination in the law will be observed.

2.1 Overview of anti-discrimination law

Under the apartheid regime, employers were permitted to discriminate against employees based on their race and sex, and had the right to prohibit strikes by African workers.[4] Additionally, racial segregation was further imposed by legislation restricting skilled black employees from working in any areas except designated black areas.[5] South Africa legally recognised the term 'unfair discrimination' in the Labour Relations Amendment Act,[6] which

[3] Act 55 of 1998.
[4] Native Labour Regulations Act 15 of 1911.
[5] *Chamber of Mines v Council of Mining Unions* (1990) 11 *ILJ* 52 (IC) para 69 showed how employers unfairly discriminated against black workers by not giving them the same conditions of employment as whites. See also D du Toit *Protection against Unfair Discrimination in the Workplace: Are the Courts Getting it Right?* (2007) Social Law Project, UWC 3; T Deane 'Understanding the need for anti-discrimination legislation in South Africa' (2005) 1(2) *Fundamina* 8.
[6] Act 83 of 1988.

defined the term to include any unfair discrimination against any employee based on the grounds of 'race, sex or creed'.[7] Whilst this development appeared to resolve controversial issues about the inequality of race and sex, it failed to fully remedy these issues.

The interim Constitution came into being in 1993, with the hope that a new foundation could be built allowing for inclusion and accommodation. The aim was to uphold values such as human dignity, the advancement of freedom, and the development of opportunities for all South Africans despite any differences based on protected grounds.[8] This meant that employers had to exercise extra caution with regard to discrimination, as the previous approach to unfair discrimination was no longer permitted. Furthermore, both direct and indirect discrimination were prohibited under this provision.[9]

Direct discrimination occurs when the discrimination is overtly based on a protected characteristic.[10] Indirect discrimination occurs when the discrimination is based on a characteristic which is not protected but the impact of the discrimination is disproportionally felt by a group of people.[11] The court in *Association* of *Professional Teachers and Another v Minister of Education*[12] dealt with section 8 by stating that the denial of a homeowner's allowance to married female teachers, as opposed to male married teachers, was an unfair labour practice based on sexual discrimination.[13] The court expanded the concept of discrimination, stating that the use of the term 'unfair' is merely used to distinguish situations that tend to 'differentiate' rather than 'discriminate'.[14]

[7] See O Dupper & C Garbers *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 142.
[8] Section 8(2) of the interim Constitution of 1993 prohibited discrimination directly or indirectly on the grounds of race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language. See also Dupper & Garbers *Equality in the Workplace* (note 7) 143–144.
[9] Section 8(2) of the interim Constitution of 1993.
[10] D Collier & E Fergus et al *Labour Law in South Africa: Context and Principles* (2019) 435. See Du Toit (note 5) 4.
[11] *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd and Others* (1998) 19 *ILJ* 285 (LC) highlighted indirect discrimination. The court considered the ILO Convention when considering an issue about the unequal treatment of monthly and weekly employees with regard to their pension fund membership. There was, in effect, a distinction between weekly waged employees, who were black, and monthly waged employees, who were white, which was alleged to be indirect discrimination based on race. The differentiation between direct and indirect discrimination was outlined in this matter. The court ordered the company to address the discriminatory effects of this imbalance and the various benefit funds were merged into the staff benefit fund.
[12] *Association of Professional Teachers and Another v Minister of Education* [1995] 9 BLLR 29 (IC).
[13] Ibid paras 59–61.
[14] Ibid para 61. See also Du Toit (note 5) 5.

Differentiation is a *sine qua non* for discrimination.[15] Differentiation is a term used to describe treating people differently based on permissible grounds such as work.[16] In the workplace, this can occur when one applicant is chosen for a job over another applicant; however, this is all justified based on an employer's policies or practices that help to maintain the workplace.[17] Differentiation does not have a negative inference. However, unfair discrimination is treatment based on impermissible grounds.[18]

The end of 1997 saw the ratification of the ILO Convention 111 of 1958, and the enactment of the final Constitution, which essentially left the concept of unfair discrimination unchanged.[19] However, it can be argued that an all-encompassing overview was required when it came to dealing with the aftermath of apartheid, especially discrimination and inequality.[20] A prominent case arose in 1999 when the courts had to grapple with the meaning of unfair discrimination, as well as protecting an employee's dignity in *Hoffmann v South African Airways*.[21] The previous chapter briefly outlined this case's proximity to dignity and equality; the case also required the court to interpret the concept of unfair discrimination in a constitutional context.[22] Chapter 3 also provided an overview of the legislative framework for upholding these rights: the Constitution, PEPUDA and the EEA.[23] Additionally, the Labour Relations Act[24] (LRA) was enacted.[25] These transformative laws enacted in line with the Constitution were developed to ensure the preservation of human dignity and equality for all.[26]

2.2 Anti-discrimination corrective measures

The previous chapter showed how international law has served as a benchmark in regulating equality law and organisations in employment law, as South African law attempts to observe

[15] O Dupper et al *Essential Employment Discrimination* (2004) 33.
[16] Du Toit (note 5) 3.
[17] Dupper et al *Essential Employment Discrimination* (note 15) 33.
[18] Du Toit (note 5) 3. See *Mthembu and Others v Claude Neon Lights* (1992) 13 *ILJ* 422 (IC).
[19] International Labour Organisation (ILO) Convention 111 of 1958 guaranteed the prohibition of discrimination in the employment sphere on the grounds of race, sex, religion, political opinion, national extraction or social origin.
[20] Dupper & Garbers *Equality in the Workplace* (note 7) 145.
[21] [2000] 12 BLLR 1365 (CC).
[22] See chapter 3 part 4.2.1 for a discussion of dignity in constitutional cases.
[23] See the discussion in chapter 3 parts 2.2 and 2.3.
[24] Act 66 of 1995.
[25] Section 1 of the LRA states that the Act was enacted to give effect to s 27 of the Constitution, to regulate trade union organisational rights, to promote collective bargaining and employee participation, to establish the Commission for Conciliation, Mediation and Arbitration (CCMA), the Labour Court and the Labour Appeal Court, and to address other labour-related matters.
[26] Collier & Fergus et al (note 10) 414.

and implement these principles.[27] Additionally, section 233 of the Constitution places an obligation on the state and courts to ensure reasonable interpretation and compliance with international law.[28] Furthermore, progressive measures that aim to prohibit discrimination are laid out in in the ILO Convention 100, the Equal Remuneration Convention, which introduces equal pay for work of equal value.[29] This Convention expands on the EEA and ensures the upholding of equal remuneration throughout an employee's period of employment.[30] The recognition of these measures has guided a framework of both formal and substantive equality, especially relating to disadvantaged groups that are subject to discrimination.[31] The EEA and the LRA must comply strictly with international obligations, especially those laid out by the ILO, when promoting anti-discrimination measures.[32]

2.2.1 Test for unfair discrimination in terms of the Constitution

As mentioned in the previous chapter, the courts are obliged to consider the Constitution when dealing with discrimination.[33] Discrimination in the employment context and the broader constitutional perspective are closely related. The final Constitution guaranteed protection against unfair discrimination.[34] Unfair discrimination on listed and unlisted grounds is prohibited by the Constitution.[35]

The Constitutional Court judgment of *Harksen v Lane*[36] dealt directly with the interpretation of unfair discrimination.[37] This case is important in anti-discrimination law, as it explored how a three-stage test was formulated, which dealt directly with whether unfair discrimination had taken place, and how it was to be addressed within the parameters of section 9 of the Constitution.[38] The first part of the three-stage test determines whether differentiation was present and, if so, whether the differentiation was rational with a

[27] Section 39 of the Constitution states that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law. See chapter 3 part 2 for a discussion of the legal framework of dignity.
[28] Section 233 of the Constitution states that when interpreting any legislation every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.
[29] ILO Convention 100 (Equal Remuneration Convention) of 1951. See Collier & Fergus et al (note 10) 424.
[30] Preamble to the Equal Remuneration Convention 1951.
[31] Collier & Fergus et al (note 10) 424–425.
[32] ILO Convention 111 of 1958 and ILO Convention 100 of 1951.
[33] Du Toit (note 5) 5.
[34] Section 9 of the Constitution. See the further discussion in chapter 3 parts 2.2 and 2.3.
[35] Section 9(3) of the Constitution. See the discussion in chapter 3 parts 2.2, 2.3 and 4.2.1.
[36] *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC).
[37] Dupper & Garbers *Equality in the Workplace* (note 7) 151.
[38] Section 9 of the Constitution.

legitimate purpose.[39] The second stage involves ascertaining discrimination.[40] This entails an investigation into whether the dignity of the individual was impaired.[41] If it was impaired, the unfairness of this discriminatory impact will need to be shown.[42] If the discrimination is found to be on a specific listed ground, then unfairness is presumed; however, if not, then this will need to be proved. The final stage of this test deals with proportionality. If discrimination is found to be unfair then the proportionality of the provision will have to be justified.[43]

In this matter, Mrs Harksen challenged the constitutionality of section 21 of the Insolvency Act,[44] in terms of which the property of a solvent spouse vests in the trustee of the sequestrated estate.[45] She claimed that this clause breached the interim Constitution. The test establishes whether the key components of differentiation occurred, followed by discrimination, unfairness and proportionality.[46] The relevance of this test and its role in the workplace remain important to this day. However, dealing with unfair discrimination requires more than just a dependence on the Constitution or international instruments; it also includes an overall balance with precedent.

2.2.2 Test for unfair discrimination in terms of the EEA

As noted in chapter 3, the purpose of the EEA is to achieve equality in the workplace through affirmative action measures, to eradicate unfair discrimination, and to ensure inclusivity in the workplace at all levels.[47] In dealing with unfair discrimination, the Act remains confined to the protection of employees and in limited contexts to the protection of applicants for employment.[48] Specifically, section 5 encourages every employer to remain steadfast in eliminating any forms of unfair discrimination in its policies and practices.[49]

---

[39] *Harksen* (note 36). See also Collier & Fergus et al (note 10) 438–439.
[40] Ibid.
[41] *Harksen* (note 36) paras 54–60; *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC).
[42] *Harksen* (note 36) para 53.
[43] Ibid.
[44] Act 24 of 1936.
[45] Section 21(1) of the Insolvency Act states: 'The additional effect of the sequestration of the separate estate of one of two spouses who are not living apart under a judicial order of separation shall be to vest in the Master, until a trustee has been appointed, and, upon the appointment of a trustee, to vest in him all the property …'.
[46] *Harksen* (note 36) para 50(a)–(c).
[47] Section 2 of the EEA.
[48] Section 4 of the EEA.
[49] Section 5 of the EEA: 'every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.'

Furthermore, the wording of section 6 of the EEA is very similar to that of section 9 of the Constitution, with the additional prohibited grounds of HIV, political opinion and family responsibility.[50] These additions reinforce the purpose of this legislation and aim to give effect to the obligations of South Africa to uphold the provisions outlined by the ILO.[51] Notably, the test for unfair discrimination is distinct for either type of ground. Under the EEA, regardless of whether the ground is listed or unlisted, the onus is on the employer to prove fairness once discrimination is shown.[52] When dealing with arbitrary grounds, according to section 11(2) of the EEA, the employee or applicant will have to prove that the employer's conduct is irrational, discriminatory and unfair.[53] This would impose a significant burden on the employee as they would have to show credible evidence to this effect prior to proving irrationality and unfairness.[54] Once this is established, the employer will have to justify the policy.[55]

Du Toit recognises that the significance of the EEA in comparison to the Constitution is that it serves the economic interests of employees and provides protection when their dignity is undermined by unfair discrimination in the workplace.[56] As a complement to the LRA, the EEA allows for the further development of equality law in South Africa. PEPUDA is another measure that is aimed at complying with the protection of section 9, particularly for those to whom the EEA does not apply. As mentioned in the previous chapter, PEPUDA may involve workplace disputes if the EEA is not applicable.[57] The Act offers protection to any form of prohibited ground of discrimination that adversely affects the fundamental freedoms of an individual.[58]

[50] See chapter 1 part 5.1 on the background to and context of discrimination in the South African workplace for a list of the full grounds.
[51] ILO Convention 111 of 1958. See also T Deane 'Understanding the need for anti-discrimination legislation in South Africa' (2005) 1(2) *Fundamina* 11.
[52] Section 11(1)–(2) of the EEA outlines the burden of proof if unfair discrimination is alleged on a listed ground in s 6(1). The employer must prove under s 11(1) that the unfair discrimination *(a)* did not take place as alleged; or *(b)* is rational and not unfair. Section 11(2) deals with unfair discrimination on an arbitrary ground whereby the complainant must prove that *(a)* the conduct complained of is rational; *(b)* the conduct complained of amounts to discrimination; and *(c)* the discrimination is unfair.
[53] Ibid. See also *Harksen* (note 36).
[54] *Harksen* (note 36).
[55] Collier & Fergus et al (note 10) 469.
[56] Du Toit (note 5) 5–6.
[57] See the discussion of PEPUDA in chapter 3 part 2.3.
[58] Section 5 of PEPUDA.

2.3 The limits of anti-discrimination legislation

Although the current South African labour law framework has made significant changes to the workplace landscape, the current limitations of anti-discrimination law in the environment still need to be addressed. Despite the prohibition of unfair discrimination in the legislation, certain disadvantaged groups may have limited recourse within the scope of the prohibited grounds.[59] This often means that the psychological, social or even material inequality that they face cannot be remedied.[60] Dupper notes that the individualistic nature of anti-discrimination legislation is problematic as it focuses purely on the individual's traits according to which they fit into a particular group, rather than on the institutional nature of the discrimination.[61] The outcome of these individual claims is limited because the remedies are specific to the individual litigant, and do not consider the impact that the legislation (as implemented by the courts) seeks to have beyond each case.[62]

Another concern with anti-discrimination legislation relates to the implementation of asymmetrical treatment or rather the need to ensure that the principles of substantive equality have been met by examining all the detrimental consequences for an individual related to a protected group or various protected groups.[63] This concept requires that all protected groups must be treated with their systemic backgrounds in mind.[64] However, those groups that have more than one inequality or socioeconomic vulnerability are not fully considered or are viewed in isolation.[65] Therefore intersectional discrimination is another area to be aware of, particularly when dealing with discrimination against black people who may fall into a protected category of disability, age or gender.[66] The thesis acknowledges that although the

[59] Dupper & Garbers *Equality in the Workplace* (note 7) 4.
[60] Ibid.
[61] O Dupper & C Garbers 'The prohibition of unfair discrimination and the pursuit of affirmative action in the South African workplace' 2012 *Acta Juridica* 259–267.
[62] Ibid.
[63] S Fredman 'Substantive equality revisited' (2016) 14 *International Journal of Constitutional Law* 728–731. See also C O'Regan 'Equality at work and the limits of the law: Symmetry and individualism in anti-discrimination legislation' 1994 *Acta Juridica* 67.
[64] Collier & Fergus et al (note 10) 414.
[65] In *South African Police Service v Solidarity obo Barnard* (2014) 35 *ILJ* 2981 (CC) para 179 the court acknowledged how privilege may manifest in a variety of intersecting ways, which may create difficulties. See K Crenshaw 'Demarginalizing the intersection of race and sex: A black feminist critique of anti-discrimination doctrine, feminist theory and anti-racist policies' (1989) 4 *University of Chicago Legal Forum* 139–140.
[66] Fredman 'Substantive equality revisited' (note 63) 721. Fredman notes that intersectional identities and this type of discrimination need to be considered.

theory of intersectionality is not new, its acknowledgement is a progressive step in ensuring substantive equality.[67]

South African law has the most extensive open-ended list of prohibited grounds, but difficulties remain in seeking recourse for those groups that may not fit into or meet the categories listed in section 6. The provision separates grounds into listed and unlisted grounds of discrimination, and also recognises arbitrary grounds. However, arbitrary is meant to hold the same meaning as unlisted grounds, implying that the grounds are random and have the potential to infringe on a person's right to equality and dignity.[68] However, the problems and gaps that arise from this provision suggest a lack of protection against discrimination for those who are subjected to discriminatory treatment that remains unspecified.

2.4 The gap in protection for appearance discrimination

Although the 'rainbow nation'[69] has managed to make significant strides in breaking from the past, physical appearance is not legally recognised in legislation.[70] Neither the Constitution, nor section 6 of the EEA, nor any other legal provision stipulates appearance or anything similar as a ground worthy of protection from discrimination. The right not to have one's appearance considered as a factor in the hindering of promotion, recruitment or any other decision-making about employment should be upheld.[71] In the absence of protection, it is likely that appearance would fall under the claim for an unlisted or arbitrary ground of discrimination.

Grogan identifies the meaning of this ground as discrimination based on an unrelated standard or it may be perceived as those preferences or features that are not relevant to the job.[72] The interpretation of an arbitrary ground has been debated over the years, and

[67] This will be further discussed in chapter 4 parts 2.3, 3.3.1 and 3.4.1 and chapter 6 part 4.4.
[68] In *Ndudula and Others v Metrorail* (2017) 38 *ILJ* 2565 the court considered the meaning of arbitrary grounds to be analogous to the meaning of listed grounds. See *Kadiaka v Amalgamated Beverage Industries* (1999) 20 *ILJ* 373 (LAC). See Collier & Fergus et al (note 10) 440.
[69] A term coined by Desmond Tutu to describe South Africa's ethnic diversity after apartheid. See also N Tshawane *The Rainbow Nation: A Critical Analysis of the Notions of Community in the Thinking of Desmond Tutu* (2009) 8.
[70] DJ Viviers 'Dress codes, grooming standards and South African employment law: Comparative insights on workplace discrimination based on mutable appearance characteristics' (2016) 133 *SALJ* 898 at 913.
[71] Ibid 928–929.
[72] J Grogan *Workplace Law* 13 ed (2014) 107–111.

particularly whether a narrow or broad approach should be maintained.[73] Based on the broad interpretation, the purpose of this listed ground was intended to include discrimination based on grounds that are 'random, subjective, capricious or haphazard and … likely to infringe upon the individual's dignity'.[74] However, in *Naidoo and Others v Parliament of the Republic of South Africa*,[75] the court disagreed with this approach and held that a narrow approach was the correct route and that the word 'arbitrary' is not synonymous with 'capricious'.[76] The Labour Appeal Court ruled that unfair discrimination on a ground must have a rationale, and a significant point to consider was that 'the glue that holds the listed ground together is the *grundnorm* of human dignity'.[77]

Personal appearance or physical characteristics may nonetheless fall, if shown to impair one's dignity, under the ground of 'arbitrary' or unlisted grounds of unfair discrimination.[78] However, the lack of clarity about the meaning of 'arbitrary' often leads to the possibility of an appearance discrimination claim, but protection might not be guaranteed.[79] The thesis argues that the identity and physical appearance of an individual is an aspect closely linked to one's dignity, and thus requires consideration as a listed ground in the law.[80] Furthermore, an explicit listed ground will promote certainty and clarity around the presumption of unfairness, assisting individuals who wish to institute a claim of this nature.[81] To support the expansion of listed grounds in equality law, Albertyn has reiterated the need to carefully increase the listed grounds with the focus of paying attention to context and the systematic nature of the group-based disparities faced by this group as well as the impact on them.[82] Including protection for those who have suffered appearance-based bias in the workplace can only promote the values of equality and dignity. To fully understand how far this type of prejudice

[73] In *Chitsinde v Sol Plaatje University* [2018] 10 BLLR 1012 (LC) the court supported a wider interpretation. However, in *Pioneer Foods (Pty) Ltd v Workers Against Regression and Others* (2016) 37 *ILJ* 2872 (LC) the court adopted a narrow interpretation.
[74] D du Toit & M Potgieter *Unfair Discrimination in the Workplace* (2014) 25. See also *Kadiaka v Amalgamated Beverage Industries* (1999) 20 *ILJ* 373 (LC) para 43 in which the court discusses how unfair discrimination on an arbitrary ground usually occurs where the discrimination is for no reason or purposeless. If there is a reason, this may not be of sufficient magnitude. The court further states that the discrimination must be balanced against the dignity of the complainant and a society based on equality and the absence of discrimination.
[75] (2020) 41 *ILJ* 1931 (LAC).
[76] Ibid paras 26–27.
[77] Ibid. See also C Garbers & P le Roux 'Employment discrimination into the future' 2018 *Stell LR* 248–249 who highlight the importance of the impairment of dignity when carrying out the test for unlisted grounds.
[78] M McGregor & W Germishuys 'The taxonomy of an unspecified grounds in discrimination law' (2014) 35(1) *Obiter* 106.
[79] Grogan (note 72) 221.
[80] Further arguments for this are offered in chapter 6 part 4.
[81] Viviers (note 70) 927.
[82] Dupper & Garbers *Equality in the Workplace* (note 7) 96.

can be developed into a legal framework, it will be shown how far the duty to reasonably accommodate an employee is possible and to what extent an employer may be justified in their policies based on an inherent requirement of the job. Furthermore, appearance discrimination cases in South Africa and the gaps in protection in the workplace are examined below.

2.4.1 The limits of reasonable accommodation

Employers have a duty to make reasonable accommodation in the workplace.[83] As an anti-discrimination principle, its aim is to achieve substantive equality by accommodating differences, which enables full participation in the workplace.[84] In a country like South Africa, with a sensitive history of discrimination, legislation recognising the importance of reasonable accommodation is necessary. The underlying purpose of this concept is to recognise the barriers that may hinder progression or employment opportunities and to allow workplace policies, access and, if need be, education to eradicate them.[85] Thus, policies that recognise and protect individual choices about appearance can only expand on the principles of democracy that are grounded in the values of human dignity and worth.[86]

Section 1 of the EEA explicitly mentions reasonable accommodation and obliges the employer to accommodate diversity in the workplace; however, this must not lead to any undue hardship for the employer.[87] Therefore, this principle is designed to foster the development of anti-discrimination, and there is a positive duty to ensure that the needs of the employee are balanced against those of the employer.[88] Although this is for the court to acknowledge, the employee must take steps to ensure that the reasonable accommodation needed is communicated to the employer.[89] This requires a certain level of understanding

[83] Section 15(2)*(c)* of the EEA requires an employer's affirmative action measures to 'include making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer.' See also *Adams Damon v City of Cape Town* (2022) 43 *ILJ* 1549 (CC); *MEC for Education: Kwazulu-Natal v Pillay* 2008 (2) BCLR 99 (CC).
[84] Ibid.
[85] K Henrard 'Duties of reasonable accommodation in relation to religion and the European Court of Human Rights: A closer look at the prohibition of discrimination, the freedom of religion and related duties of state neutrality' (2012) 5 *Erasmus L Rev* 59 at 62.
[86] J Marshall 'Human rights and the legal regulation of dress' (2016) 25 *Nottingham LJ* 85.
[87] Section 1 defines reasonable accommodation to mean any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate in employment. See C Maimela 'The reasonable accommodation of employees with cancer and their right to privacy in the workplace' (2018) 21 *PER/PELJ* 12.
[88] Henrard (note 85) 67.
[89] Marshall (note 86) 85.

from the employer and ultimately leads to a beneficial situation that meets the interests of both parties.[90]

Employers are assessed by the court through their ability to accommodate based on three steps. Firstly, they are required to remove the obstacles that could prevent an employee from carrying out their tasks; secondly, the accommodation should allow the employee to access equal benefits that are provided to others in the organisation; and, finally, the employer must take these criteria into account in a cost-effective manner that remains consistent.[91] Therefore, when the employer enforces a measure that may be perceived as discriminatory, the court will examine the measures and the steps taken to ensure the rationality and proportionality behind the measure and its purpose.[92]

However, whilst it is important for reasonable accommodation to be provided by the employer, and it remains in the affirmative action for equity framework, it is not a measure of affirmative action.[93] Both concepts aim to achieve substantive equality but they remain two different concepts.[94] Despite the aim of ensuring equity, employers are not obligated to ensure absolute accommodation, but should make a reasonable level of accommodation, which may require providing resources such as prayer facilities, catering according to dietary requirements, and even providing toilet facilities that consider an individual's gender.[95]

The employer might justify their discriminatory practices based on the inherent requirements of the job.[96] Thus, in cases about dress policies, the reference to their dress codes was assessed against the employees' need to perform their responsibilities.[97] This shows that balancing the employer's and employee's interests in appearance policies can often be difficult through accommodation. However, the thesis acknowledges this limit, and it will be

[90] Maimela (note 87) 12–13.
[91] Ibid 3.
[92] R Bernard 'Reasonable accommodation in the workplace: To be or not to be?' (2014) 17(6) *PER/PELJ* 2880. See also *September v Subramoney NO and Others (Gender Dynamix as amicus curiae)* 2019 (4) All SA 927 (WCC) para 128; Maimela (note 87) 3.
[93] Maimela (note 87) 5.
[94] Ibid.
[95] *September v Subramoney* (note 92).
[96] Section 6(2)*(b)* of the EEA. See also Collier & Fergus et al (note 10) 470. This justification is discussed further in the next section.
[97] *Department of Correctional Services and Another v POPCRU and Others* (2013) 34 *ILJ* 1375 (SCA); *Dlamini and Others v Green Four Security* 2006 JOL 17853 (LC).

argued that employees should not be compelled to choose between their personal identity and their financial needs.[98]

2.4.2 Considerations for the inherent requirements of the job

In some instances an employer may justify their discrimination practices on the basis that they are justified or fair: either in the interests of affirmative action or because of an inherent requirement of the job.[99] The onus is on the employer to prove that such discrimination does not impair an employee's dignity and that the discrimination was sufficiently important to outweigh the employee's right to equality.[100] This section examines this provision, considering the limits it may pose for employees and how employers should apply this defence when regulating appearance.

Appearance matters in society and the workplace, thus making it a factor in employment processes.[101] Arguments against appearance discrimination reform in the workplace fixate on the idea that appearance is a strong measure of productivity and customer engagement – the more attractive you look, the more appealing you are.[102] Therefore, employers believe that they should be afforded a level of preference in whom they select as their employees by taking into account their appearance, as this relates to people's perception of the business.[103] An inherent requirement of the job justification may often relate to the company's branding, the position, as well as the health and safety rules that the employee is obliged to follow.[104] Companies often have strict appearance policies due to their distinct need to project a favourable image to consumers.[105] Employees are generally perceived to be the face of the company and this often means interacting with various parties who will contribute to the

[98] K Klare 'Power/dressing: Regulation of employee appearance' (1992) 26 *New Eng L Rev* 1397. See the further discussion in chapter 6 parts 3 and 4.
[99] Section 6(2)*(a)* and *(b)* of the EEA justifies any discrimination if it is to *(a)* take affirmative action measures consistent with the purpose of this Act; or *(b)* distinguish, exclude or prefer any person on the basis of an inherent requirement of the job.
[100] Section 9(2) of the Constitution; *Harksen* (note 36) paras 50–51; s 11 of the EEA; Dupper et al *Essential Employment Discrimination* (2004) 70.
[101] A Adam & D Collier 'High heels in the workplace – a health hazard or a symbol of femininity? Observations on appearance regulation in Mofokeng v CCMA & Others 2022 ZALCJHB 169' (2023) 44 *ILJ* 85.
[102] L Vo 'A more attractive look at physical appearance-based discrimination: Filling the gap in appearance-based antidiscrimination law' (2002) 26 *S Ill U LJ* 340–342.
[103] Ibid 356.
[104] A Delagrave *The Regulation of Physical Appearance in the Canadian Workplace as a Human Rights Issue* (2020) 82–84.
[105] Ibid.

company's success.[106] Thus, it is in the organisation's best interest for appearance to be maintained in a manner that upholds that success.

Another instance where appearance discrimination may be justified is when the position calls for a particular look. In appearance-based jobs, such as acting or modelling, the role requires a certain appearance. It is crucial to note the variation with which this justification may be applied: if a business sells looks exclusively, there are often far more stringent aesthetic standards.[107] However, if a restaurant owner has higher standards for his serving staff, this may not be perceived to be the same, as the position does not necessarily call for high aesthetic standards.[108]

Additionally, health and safety policies are important in the workplace and therefore implementing codes of practices that dictate aspects of appearance may be justified. Protective clothing or uniform may often be necessary to allow for a safe and effective workplace.[109] Employers may require construction workers to wear helmets or safety gear when operating machinery,[110] or impose certain rules about facial hair.[111] The case examined in the next section will show instances of police officers and firefighters being required to shave their beards, as beards may interfere with the sealing of safety masks. Similarly, in the food production industry, hairnets may be required or piercings may be disallowed due to contamination risks.[112] Although health and safety is a more legitimate reason for discriminatory appearance policies, the employer must legitimise their policies based on the high risk of harm that may occur should employees' appearance not be standardised.[113]

However, an employer's dress policies should not leave an employee compelled to follow the broad blanket approach created by the employer's policies. Rather, it would be useful for the employer to subjectively consider the impact of these dress policies, their legitimacy, and if

[106] J Yates et al 'Good looks and good practices: The attitudes of career practitioners to attractiveness and appearance' (2017) 45(5) *British Journal of Guidance & Counselling* 547.
[107] T Pagliarini 'It can't get that ugly: Why employers should be able to take aesthetics into consideration' (2014) 19 *Rogers Williams University Law Review* 292–293.
[108] Ibid.
[109] A Steadman 'Is it discriminatory to require hospital staff to be clean shaven to facilitate the effective wearing of personal protective equipment?' (2021) 89(2) *Medico-Legal Journal* 93.
[110] Ibid.
[111] Delagrave (note 104) 174.
[112] *Dlamini and Others v Green Four Security* 2006 JOL 17853 (LC); *Department of Correctional Services and Another v POPCRU and Others* (2013) 34 *ILJ* 1375 (SCA); *Downey v Police Service of Northern Island* (2018) 4182/18IT. See also Steadman (note 109) 97.
[113] Delagrave (note 104) 174.

they can be implemented in an inclusive way.[114] If, for safety reasons, it is necessary for a chef to remove their piercings, then the employer should make an effort to establish if this rule is absolutely justified or if the piercings can be accommodated in other ways. Employers should re-evaluate their regulation of an employee's appearance as there may be other ways in which an employer can meet their business requirements without harming an employee's autonomy.[115]

2.4.3 Appearance-related case law

The cases discussed below are related to aspects of appearance and dress codes in the workplace. Although the claims in these cases were not made under an unlisted or arbitrary ground of appearance, the cases concerned aspects of appearance, illustrating the increase in these types of claims and the likelihood of applicants seeking protection under existing categories. It will be shown how these routes are limited, indicating that there is inadequate protection of appearance autonomy in the law.

In *MEC for Education: Kwazulu-Natal v Pillay*[116] the Equality Court did not view a school's refusal to permit a Hindu student to wear a nose stud at school as unfair discrimination, despite the stud's religious and cultural symbolism for the student.[117] The Equality Court's decision was overturned by the High Court, in terms of PEPUDA, because of the stud's cultural significance, and the fact that the student's inability to fully express herself resulted in indirect discrimination.[118] The school's defence of maintaining discipline was held to be invalid as wearing a stud had no disruptive effect on the school itself.[119] This case was appealed to the Constitutional Court, which declared that the school body had unfairly discriminated against the student on the basis of her culture and religion.[120] This case impacted the school's Code of Conduct, and the school was ordered to provide reasonable accommodation for religion and culture in its Code. Although this discrimination claim was brought on religious or cultural grounds, it shows how the wearing of jewellery, which is plainly connected to one's appearance, may lead to unfair discrimination. However, in

[114] Adam & Collier (note 101) 91; C Fisk 'Privacy, power and humiliation at work: Re-examining appearance regulation as an invasion of privacy' (2006) 66(4) *Louisiana Law Rev* 1127 discusses the focus on employer legitimacy and if there are alternative methods to serve the business needs.
[115] Fisk (note 114) 1130.
[116] *MEC for Education: Kwazulu-Natal v Pillay* 2008 (2) BCLR 99 (CC).
[117] Ibid para 14.
[118] Ibid para 18.
[119] Ibid.
[120] Ibid para 62.

appropriate circumstances, relying on a listed ground to contest this form of discrimination may succeed although it may be a lengthy process.

Dlamini and Others v Green Four Security[121] was heard before *Pillay*. This result was in stark contrast to that in *Pillay* and the outcome would probably have been different if *Pillay* had already been heard. The employees, who were security guards, were dismissed for refusing to shave their beards. They belonged to the Baptised Nazareth Group which forbade them from shaving their beards. The Labour Court held that being clean-shaven was an inherent requirement of the job and ruled in favour of the employer, as the employees were aware of the policy imposing this rule.[122] The court considered other countries' standards of being clean-shaven and found this rule to be an inherent requirement of the job. However, the court noted that the parties did not make section 36 or section 39 claims, which would require the court to consider other comparator approaches to the discrimination. Viviers notes that had this occurred, the court might have been open to considering an appearance-based discrimination claim.[123]

Ehlers v Bohler Uddenholm Africa (Pty) Ltd[124] involved an employee who worked in a male-dominated engineering industry. The employee underwent a sex change procedure and no longer presented as a male, which led to her dismissal. Despite her agreement to hide her sex status, the Labour Court held that she had suffered unfair discrimination, which in no way was justified. This case illustrates the reinforcement of perceived favourable appearance and pressures that employees face, including suppressing their own identity to fit a mould, which the court recognised as regressive behaviour.[125]

Department of Correctional Services and Another v POPCRU and Others[126] involved multiple claims of discrimination relating to employees' gender, religion and culture, all of

[121] (2006) JOL 17853 (LC) para 39. The court stated that the decision in this case was in line with Article 1(2) of ILO Convention 111 on Discrimination Employment and Occupation 1958, which stipulates that any distinction in respect of an inherent requirement of the job shall not be deemed to be discrimination.
[122] Ibid para 71.
[123] DJ Viviers 'Dress codes, grooming standards and South African employment law: Comparative insights on workplace discrimination based on mutable appearance characteristics' (2016) 133 *South African Law Journal* 898 at 921.
[124] (2010) 31 *ILJ* 2383 (LC).
[125] *Ehlers v Bohler Uddenholm Africa (Pty) Ltd* (2010) 31 *ILJ* 2383 (LC) para 35. The court noted that the employer's justifications were reminiscent of the Dark Ages, and if the employee's femininity might upset backward customers, that was not a justification for appearance regulation. See A Rycroft 'Privacy in the workplace' (2018) 39 *ILJ* 725.
[126] (2013) 34 *ILJ* 1375 (SCA).

which contribute to an individual's appearance.[127] The employees in this case were long-serving male correctional officers at a prison, who wore dreadlocks and were dismissed for failing to remove them. The justification for this was to eliminate any risk of the employees' promoting criminality through the association of dreadlocks with marijuana use.[128] The employees identified as Rastafarian and removing their dreads went against their culture. Additionally, the female officers who wore dreadlocks were not subjected to the same restrictions. Multiple claims of gender, religion and culture discrimination were brought to the Supreme Court of Appeal (SCA), which held that the applicants' hairstyles had no direct impact on their work.[129]

In contrast to *Dlamini*, the court in this matter paid careful attention to the employees' cultures and belief as well as to their appearance in relation to their faith. The court upheld their dignity and constitutional right to religion over operational requirements.[130] The fact that the SCA highlighted the importance of reasonable accommodation in the workplace illustrates how diversity through appearance needs to be recognised by employers in the workplace.[131] The case demonstrates that appearance through a protected ground is possible; however, in instances where religious or cultural practices are applied, this may be a complex and burdensome process.[132]

Smith v The Kit Kat Group (Pty) Ltd[133] was a tragic example of how employers fail to recognise the personal dignity of their employees. The employee attempted suicide by shooting himself in the mouth; after undergoing reconstructive surgery, he was left disfigured and impaired. Upon returning to work as a general manager, he was informed that his appearance was unacceptable, and that he was unfit to return to work based on cosmetic reasons. The Labour Court held that the discrimination faced by the employee was unfair, based on his disability, and as his appearance had no effect on his work, the assertion that his appearance was unacceptable was without merit. The applicant was awarded damages and compensation as well as costs.[134]

---

[127] Ibid.
[128] *Department of Correctional Services and Another v POPCRU and Others* (2013) 34 *ILJ* 1375 (SCA) para 19.
[129] Ibid para 25.
[130] Ibid paras 21–22.
[131] Ibid.
[132] See the discussion of freedom of religion in chapter 5 part 3.
[133] [2016] 12 BLLR 1239 (LC).
[134] Ibid para 86.

The court recognised the appalling and condescending behaviour of the employer as a catalyst for the employee's humiliation which caused further distress.[135] This case is a prime example of how appearance standards enforced by employers may cause unnecessary psychological harm.[136] The Labour Court awarded generous compensation and damages to the employee, recognising how appearance should not have an effect on an employee when they are able and willing to perform their work to the standard required of them.[137] Although the claim succeeded as a disability claim, the employee's appearance was at the heart of the dispute.

Similar to the *Ehlers*[138] case, in *September v Subramoney NO and Others (Gender Dynamix as amicus curiae)*[139] the applicant was an incarcerated transgender person. She was transitioning into a woman and her identity involved appearing more feminine and wearing makeup.[140] The respondent, the head of the prison, denied her permission to express her true identity, which she averred amounted to unfair discrimination in terms of PEPUDA. The respondent's justification was that permission was denied for the safety of the applicant. However, the court felt that the respondent failed to make provision for transgender inmates and that the failure to make reasonable accommodation for the inmate's identity was unlawful and unconstitutional on the basis of sex and gender.[141] The case reinforces the idea that appearance and identity require reasonable accommodation, and demonstrates the willingness of the court to recognise the dignity of the applicant at the forefront of this issue.[142] Although the term 'transgender' as an aspect of appearance remains an unlisted ground, the court acknowledged the importance of the right to equality, and cases similar to this call for further expansion of the listed grounds in the legislation.

In *Mofokeng v CCMA and Others*[143] the employee was dismissed for gross insubordination and incitement, based on her objection to the 2015 amendment of the employer's policy regarding the wearing of high heels in the workplace. The employee had worked as a human resources co-ordinator in the main building of the employer, a mining company, since 2013. Given the ambiguity surrounding the policy she continued to wear her heels until 2017.

[135] *Smith v The Kit Kat Group (Pty) Ltd* [2016] 12 BLLR 1239 (LC) paras 61–65.
[136] Ibid.
[137] Ibid paras 84–86.
[138] *Ehlers v Bohler Uddenholm Africa (Pty) Ltd* (2010) 31 *ILJ* 2383 (LC).
[139] (2019) 4 All SA 927 (WCC).
[140] Ibid.
[141] *September v Subramoney* (note 92).
[142] Ibid.
[143] [2022] ZALCJHB 169.

Observing this, the employer carried out a risk assessment, which found that high heels posed a safety risk, and that only flat shoes would be permitted. Although the employee complied with the policy, she pleaded with the employer to allow her to retain her feminine identity, but her request was refused.[144] After she expressed her concerns to her colleagues and trade union representative, the employer felt she was causing incitement, which led to her being charged with gross insubordination and incitement and, following a disciplinary hearing, she was dismissed.[145] The CCMA upheld the dismissal which was brought on review to the Labour Court. The court assessed the fairness of her dismissal and found it to be procedurally fair, but substantively unfair.[146] The court held her dismissal to be baseless as there was no evidence of gross insubordination; she had merely reacted to the policy change, and this reaction was allowed. Accordingly, the court set aside the award.

This case touches on aspects of appearance regulation. It shows how an employer may regulate an employee's appearance but they should never underestimate the significance of the employee's identity and expression. As a matter of mutual interest, employees have a right to react to and question the validity of a policy in the workplace.[147] Although the change in policy was for health and safety reasons, which are important, these still need to be balanced against the employee's interests. *Mofokeng* illustrates the need for context to be taken into account and shows that the inherent requirements of the job must be interpreted narrowly to allow for the recognition of an employee's dignity and autonomy.[148]

3. DEVELOPMENTS IN SELECTED FOREIGN JURISDICTIONS

Inequality remains a fundamental issue on a global scale, and the principle of equal treatment remains a socio-economic imperative that most, if not all, countries still deal with today.[149] Hence, foreign anti-discrimination law and the systemic inequalities that are faced at work must be examined holistically when exploring these developments as a useful source of guidance for South African law.[150] The discussion that follows considers developments in a number of foreign jurisdictions, including Australia, the USA, selected European countries and the UK. This section will also identify different approaches to appearance discrimination

[144] Ibid paras 7–8.
[145] Ibid paras 9–12.
[146] Ibid para 29.
[147] Ibid para 15.
[148] Adam & Collier (note 101) 91.
[149] C Sheppard 'Mapping anti-discrimination law onto inequality at work: Expanding the meaning of equality in international labour law' (2012) 151 *Int'l Lab Rev* 1–2.
[150] Ibid.

and the application of anti-discrimination measures in these jurisdictions. This will provide further insight for South Africa, particularly with the spirit of evolving employment laws progressively.

3.1 Australia

Anti-discrimination law in Australia has established a progressive foundation over the last twenty years as the country shifted its approach to employment law and individual law matters at both the federal and state levels.[151] The changes adopted through the enactment of progressive legislation have provided a swifter process to address the burden of proof for discrimination victims, providing public enforcement compliance as well as facilitating changes that allow for a broader interpretation of protection, to promote equality in the workplace.[152] Jurisdictions like Australia are useful to countries like South Africa which need to progressively develop their anti-discrimination law to fill the gaps in protection against discrimination.

3.1.1 Overview of anti-discrimination law

As a country that began with radical discrimination, and then became one of progressive inclusion, Australia has played a significant role in addressing discrimination.[153] The protection of human rights and dignity was a significant focus in improving anti-discrimination laws from the 1970s. These laws were enacted in all spheres, whether public service or retail, but not as a tool for employment law.[154] In the 1990s, protection against unlawful termination was afforded within international law, through ILO Convention 158, for a number of issues that fall within the scope of anti-discrimination law.[155] Although Australia acknowledges equality, the federal anti-discrimination laws are not to be interpreted in a

[151] R Blanpain et al *New Developments in Employment Discrimination Law* (2008) 141.
[152] A Hewitt 'Can a theoretical consideration of Australia's Anti-Discrimination Law inform law reform?' (2013) 41 *Fed L Rev* 37.
[153] Ibid 115.
[154] B Gaze & A Chapman 'Bringing the human right to non-discrimination into workplace law: Towards substantive equality at work in Australia?' (2013) Labour Law Research Network Inaugural Conference (UPF, Barcelona) 3.
[155] Article 5 of ILO Convention 158 of 1982 established valid reasons that do not allow for termination, such as '(a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours; (b) seeking office as, or acting or having acted in the capacity of, a workers' representative; (c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities; (d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; (e) absence from work during maternity leave …'.

constitutional context, but as substantive Acts relating to discrimination on race,[156] sex,[157] age[158] and disability.[159] However, by the early 2000s, there was an overwhelming demand for the substantial protection of individual rights.[160]

The introduction of the Fair Work Act (FWA)[161] led to significant changes in the anti-discrimination framework. This Act prohibits employment discrimination on a variety of grounds[162] that are monitored by the Fair Work Ombudsman.[163] Any issues relating to discrimination in the workplace are handled by the State.[164] The introduction of this Act not only expands protection for employees but also highlights the importance of promoting equality to employers.[165] There is an expectation that practices and policies are implemented to improve the working environment.[166] Following this, the Equal Opportunity Act[167] came into effect and aimed to strengthen discrimination law by repealing the 1995 statute,[168] and expanding the definition of discrimination while retaining the protected characteristics from its predecessor.[169] The historical shift in the approach that Australia adopted in the workplace aimed to fill the gaps in anti-discrimination legislation.[170]

Due to the separation of anti-discrimination laws from the industrial relations system,[171] the approach has since shifted and the country's laws have been transformed to adopt a regulatory approach across all states through its Federal Acts.[172] From a historical overview, it is easy to see that the Australian model resembled that of the UK's when dealing with anti-

[156] Racial Discrimination Act 1975.
[157] Sex Discrimination Act 1984.
[158] Age Discrimination Act 2004.
[159] Disability Discrimination Act 1992.
[160] Gaze & Chapman (note 154) 2.
[161] Fair Work Act 2009.
[162] Section 351 of the Fair Work Act 2009 includes 'race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.'
[163] Section 8 of the Fair Work Act.
[164] P Harpur et al 'Australia's Fair Work Act and the transformation of workplace disability discrimination law' (2012) 30 *Wis Int'l J* 193.
[165] B Smith 'Fair and equal in the world of work: Two significant federal developments in discrimination law' (2010) 23 *Australian Journal of Labour Law* 2.
[166] Ibid.
[167] Equal Opportunity Act 2010.
[168] Equal Opportunity Act 1995 (Vic).
[169] Sections 6, 10 and 119 of the Equal Opportunity Act 2010.
[170] Blanpain et al *New Developments* (note 151) 115.
[171] Gaze & Chapman (note 154) 3. The Australian system proved faulty when facing inequality, as it prohibited discrimination but remained inactive when addressing the actual prejudices present in the workplace.
[172] Racial Discrimination Act 1975, s 15; Sex Discrimination Act 1984, s 14; Disability Discrimination Act 1992, s 15; Age Discrimination Act 2004, s 18.

discrimination law.[173] The 'individual complaints' system, which Australian law adopted in order to deal with discrimination, proved to be faulty; unless the employer's conduct was found to be discriminatory, they were only liable to the victim but unfortunately not obliged to be proactive in promoting anti-discrimination or equality in the workplace.[174] On the other hand, affirmative action policies were not realised in the workplace due to the lack of a substantive process to promote equality.[175] Fortunately, with the implementation of the FWA, there was increased regulation of issues between employer and employee. This indicated a shift in approach from the State to fix those instruments or employer policies that failed to address inequalities that ineffectively struggled to gain recognition and protection.[176]

Furthermore, section 351 of the FWA outlines the vast list of grounds on which an employer is not permitted to take adverse action.[177] To emphasise this, an exhaustive list of prohibited discrimination grounds appears in the Equal Opportunity Act, which includes disability, parental status, physical features, sexual orientation, and other categories that have been subject to prejudicial behaviour.[178]

3.1.2 Appearance discrimination regulation and case law

States in Australia grant limited legal protection to victims who suffer from appearance prejudice through a number of instruments that may support physical appearance claims.[179] The Australian Human Rights Commission Act of 1986 provides federal protection under listed grounds that include race, gender, age and pregnancy.[180] However, laws that apply to a variety of states implement variations of appearance discrimination relating to an individual's physical aspects.[181] The Sex Discrimination Act of 1984 provides protection for protected categories such as 'gender identity', which includes any gender expression identity, appearance or mannerisms, or other gender-related characteristics of a person despite their

[173] Blanpain et al *New Developments* (note 151) 120.
[174] S Fredman 'Changing the norm: Positive duties in equal treatment legislation' (2005) 12 *Maastricht Journal of European and Comparative Law* 369–370.
[175] Harpur et al (note 164) 197.
[176] In the Fair Work Act 2009 the word 'workplace' was extended to include the law of the 'Commonwealth, State or Territory'. See also Blanpain et al *New Developments* (note 151) 142.
[177] Fair Work Act 2009, s 351.
[178] Equal Opportunity Act 2010, s 6(e)–(p).
[179] P Waring 'Keeping up appearances: Aesthetic labour and discrimination law' (2011) 53(2) *Journal of Industrial Relations* 199.
[180] Australian Human Rights Commission Act 1986. See also the ILO Discrimination (Employment and Occupation) Convention 111 of 1958.
[181] Waring (note 179) 199.

sex at birth.[182] This provides protection for those who wish to appear as and identify with a gender of their choice.[183]

In terms of physical looks or characteristics, Victoria is the only jurisdiction that has acknowledged appearance or 'physical features' as a protected category.[184] The Equal Opportunity Act of 2010 prohibits discrimination on the basis of several factors that include, but are not limited to, 'physical features'.[185] Physical features are defined in the Act to mean a person's 'weight, height, size or other bodily features'.[186] As this applies in the employment context, physical features usually relate to those attributes on the basis of which a potential employee could be denied an opportunity.[187]

The Australian case of *Woolworths Ltd (t/as Safeway) v Brown*[188] involved the unfair dismissal of an employee who covered his eyebrow ring with a band aid. The judge in this case initially ruled that due to the piercing not having any effect on the work of the employee, it should not have led to his termination. However, on appeal, it was found that the removal of the piercing was viewed as necessary for hygienic reasons of which the employee was aware, since he worked in a butcher shop. This shows that the inherent requirement of the job is a valid defence but may be applied differently, particularly in relation to the food industry. This case emphasises how workplace policies on hygiene and the general safety of the employee take precedence over any potential appearance-based discrimination.[189]

3.1.3 Lessons to learn from Australia

As one of the more progressive comparators, Australia's position when it comes to appearance prejudice in employment is useful when considering the approach that South Africa should adopt. State law has acknowledged the prohibition of appearance discrimination. Physical features are included in Victorian legislation and are defined to include an individual's 'height, weight and bodily characteristics'. The Discrimination Act has a similar definition that includes bodily features rather than characteristics. In this regard, the definition of appearance discrimination should be carefully considered; not only does it

[182] Interpretations and s 5B of the Sex Discrimination Act 1984.
[183] Ibid.
[184] Equal Opportunity Act 2010, s 6.
[185] Equal Opportunity Act 2010, Part 1.
[186] Ibid.
[187] Waring (note 179) 198.
[188] (2005) 145 IR 285.
[189] Ibid.

provide clarity, but it defines the boundaries, thus allowing lawmakers to acknowledge the limits of lookism.[190]

It is recommended that the South African legislature should adopt an approach like that of the Australian ACT Law Reform Advisory Council (ACT LRAC) with regard to interpreting the definition of physical features or characteristics broadly.[191] The difficulty in determining whether a mutable or immutable characteristic should fall within appearance discrimination protection will be addressed in a subsequent chapter.[192] Nevertheless, the ACT LRAC has concluded that any real difference between the two categories is irrelevant as both categories should be considered with regard to appearance; the main purpose is ultimately to protect the freedom of autonomy – regardless of whether these choices are ones that can be controlled or not.[193]

Following Victoria's implementation of physical features within their legislation, claims related to physical features discrimination have risen and, in certain cases,[194] claimants have been granted relief in this regard, particularly in the workplace.[195] Importantly, the number of cases per year has decreased significantly over the last few years.[196] This was due to the suspension of all activities during the Covid-19 pandemic. Based on the Victorian Equal Opportunity and Human Rights Commission's Annual Report there still appeared to be a higher number of physical feature claims than those related to discrimination on the basis of politics, religion and sexual orientation, thus showing the importance of the law recognising physical features and its ability to aid claimants who struggled to ensure protection in the past.[197] The Victorian Equal Opportunity and Human Rights Commission can deal with claims related to physical features discrimination, with the option to conciliate or arbitrate.[198]

---

[190] A Taylor & J Taylor 'The place of tattoos, beards and hairstyles in discrimination law' (2020) 26(3) *Australian Journal of Human Rights* 472.
[191] In *Jamieson v Benalla Golf Club Inc* [2000] VCAT 1849, 2303 Deputy President McKenzie recommended that broad interpretations of the definition should always be in line with the Equal Opportunities Act 1995 rather than focusing on fine technicalities. See the further discussion in chapter 6 part 4.1.
[192] See chapter 6 parts 4.1, 4.2 and 4.3.
[193] Taylor & Taylor (note 190) 472.
[194] Victorian Equal Opportunity & Human Rights Commission *Annual Report* (2020–2021).
[195] L Meagher 'Should physical features discrimination be prohibited?' (2019) *Minerva Access at the University of Melbourne* 37–38, *https://minerva-access.unimelb.edu.au/items/8d738bf5-c050-58c9-8112-91cde66ff271*, accessed 4 May 2023.
[196] Victorian Equal Opportunity & Human Rights Commission *Annual Report* (2020–2021) 158.
[197] Ibid 13.
[198] Ibid. Also see Meagher (note 195) 37–38.

In South Africa, it is recommended that these cases, like discrimination cases, should be dealt with by the CCMA in the first instance.[199]

3.2 United States of America

The USA has a history of exclusion and discrimination in its workplace legislation.[200] Anti-discrimination law was further developed in response to the post-World War II tensions between black and white civilians that continued to rise despite the end of slavery a century earlier.[201] Similar to apartheid in South Africa, this acted as a catalyst for significant developments in USA anti-discrimination law. Thus, it is valuable to examine a country with a history of discrimination, like South Africa, in order to establish how both countries' anti-discriminatory practices can positively influence one another.

3.2.1 Overview of anti-discrimination law

A popular doctrine which governed and influenced legislatures was the employer at will doctrine.[202] This gave an employer the autonomy to hire or dismiss an individual for any reason they chose, without any requirement of logic or rationality.[203] A fundamental shift in approach followed the enactment of Title VII of the Civil Rights Act, the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA).[204] These statutes are enforced by the Equal Employment Opportunity Commission (EEOC), which oversees practices or regulations relating to employment.[205] Aside from race, sex, national origin and religion were included as prohibited grounds.[206] These laws have had a limited effect, and the USA's negative rights model, which is a similar model to formal equality, still allowed employers greater power in their decision-making. There were calls for the further expansion of the prohibited grounds at a federal level.[207]

Formal equality methods in the USA centred around intentional employment discrimination.[208] This allowed for the progression of women and certain minorities in the

[199] See the discussion in chapter 6 part 4.
[200] Blanpain et al *New Developments* (note 151) 1.
[201] M Finkin & G Mundlak *Comparative Labor Law* (2015) 224.
[202] Blanpain et al *New Developments* (note 151) 2.
[203] Ibid.
[204] Civil Rights Act of 1964; Americans with Disabilities Act of 1990 (ADA); Age Discrimination in Employment Act of 1967 (ADEA).
[205] Section 701 of the Civil Rights Act of 1964.
[206] Section 701(b) of the Civil Rights Act of 1964. See also Blanpain et al *New Developments* (note 151) 1.
[207] Blanpain et al *New Developments* (note 151) 4–5.
[208] Ibid.

workplace; however, it remains limited in advancing these employees. This type of equality did not address the needs of the minority group.[209] Fortunately, both countries have moved towards a model of substantive equality.[210] Furthermore, the courts have allowed intersectional claims of discrimination to be considered. However, the courts remain divided on whether intersectionality should be interpreted as a unique area of discrimination or whether to adopt a formalistic approach. Generally, in the efforts to prohibit discrimination on these different bases, the courts have acknowledged intersectional claims as making progress towards substantive equality.[211]

By relying on Title VII[212] the USA has moved towards a substantive or disparate impact approach.[213] The purpose of this approach was to remove further employment obstacles that have generally favoured certain groups of employees, such as men, over other less recognised employees, such as women.[214] Significantly, Title VII allows employers to voluntarily adopt affirmative action measures in respect of members of protected categories.[215] Voluntary plans are more difficult to justify under constitutional equal protection standards, which often requires the employer to prove that the plan aims to fulfil interests to remedy discrimination.[216] In addressing categories of prohibited discrimination there has been an increase in the governing Acts addressing employment. Certain federal law has helped to expand the list of prohibited grounds to include age,[217] pregnancy and childbirth,[218] citizenship[219] and sexual orientation.[220] Whilst federal law includes a limited number of protected categories, in some areas protection has expanded at a state level to include political affiliation,[221] medical conditions,[222] familial status,[223] height and weight,[224] and personal appearance.[225]

---

[209] Ibid 14.
[210] Ibid.
[211] K Crenshaw et al 'Toward a field of intersectionality studies: Theory, applications, and praxis' (2013) 38 *SIGNS* 792. See also Blanpain et al *New Developments* (note 151) 17.
[212] Civil Rights Act of 1964.
[213] Blanpain et al *New Developments* (note 151) 20–21.
[214] *Griggs v Duke Power Co* 401 US 424 (1971). See also Blanpain et al *New Developments* (note 151) 20–21.
[215] Finkin & Mundlak *Comparative Labor Law* (2015) 232.
[216] *City of Richmond v JA Croson Co* 488 US 469 (1989).
[217] The ADEA protects individuals aged 40 and above from any form of age discrimination.
[218] Pregnancy Discrimination Act of 1978.
[219] Civil Rights Act of 1964.
[220] *Bostock v Clayton County, Georgia* 590 US (2020).
[221] Fair Employment and Housing Act of 2010 in California.
[222] District of Columbia Human Rights Act of 1977 s 2-1401.01.
[223] Fair Employment and Housing Act of 2010 in California; District of Columbia Human Rights Act of 1977. See also the New Jersey Law Against Discrimination (N.J.S.A. 10:5-12).

3.2.2 Appearance discrimination regulation and case law

The USA does not have a federal law that explicitly prohibits appearance discrimination. Any claim related to appearance discrimination under Title VII or the ADEA will need to be protected under an existing protected category, which are limited in providing protection.[226] However, some states have enacted legislation that attempts to prohibit appearance discrimination in a manner that upholds equality. Michigan recognises height and weight as protected categories.[227] Urbana, Illinois implemented a general prohibition on appearance discrimination and the District of Columbia prohibits discrimination based on outward appearance, irrespective of sex, manner of style and personal grooming.[228] Furthermore, Santa Cruz recognises the prohibition on appearance discrimination based on 'height, weight and physical characteristics'.[229]

Additional jurisdictions that provide legal protection against lookism include Madison, Wisconsin,[230] San Francisco, California[231] and Howard County in Maryland.[232] Although appearance discrimination needs to be prohibited in more states, protection is at least afforded through law that is applicable in a number of territories. The following section will examine cases that have dealt with appearance-related claims. It is noteworthy that the majority of these cases were heard in those areas where there is no specific protection from appearance discrimination.

In *Hedum v Starbucks Corp*[233] an employee who wore a Wiccan pendant, a symbol for the modern Pagan religion, was dismissed for refusing to remove it at work.[234] The issue was brought to the US District Court. The employee felt that this prohibition discriminated against

---

[224] Elliott-Larsen Civil Rights Act.
[225] District of Columbia Human Rights Act of 1977 s 2-1401.01.
[226] E Adamitis 'Appearance matters: A proposal to prohibit appearance discrimination in employment' (2000) 75 *WLR* 217.
[227] Elliott-Larsen Civil Rights Act; D Rhode *The Beauty Bias: The Injustice of Appearance in Life and Law* (2010) 125. See also E Toledano 'The looking glass ceiling: Appearance based discrimination in the workplace' (2013) 19(3) *Cardozo Journal of Law & Gender* 703.
[228] District of Columbia Human Rights Act of 1977 s 2-1401.01.
[229] Santa Cruz Municipal Code s 9.83.010 Prohibition Against Discrimination. See also D Rhode 'The injustice of appearance' (2009) 61 *Stan L Rev* 1081–1088.
[230] The Madison Equal Opportunities Ordinance recognises 'physical appearance' as a form of discrimination. This means the outward appearance of a person regarding their hairstyle, beard, dress, weight, height, facial features, or other aspects of appearance.
[231] The San Francisco Discrimination Prohibition Ordinance specifically only protects characteristics such as height and weight.
[232] The Howard County MD Code, s 12.207 prohibits discrimination on the basis of personal appearance, which includes hairstyle, facial hair, physical characteristics, and manner of dress. See also Toledano (note 227) 703.
[233] *Hedum v Starbucks Corp* 546 F Supp 2d 1017 (D Or 2008).
[234] Ibid.

her religion, with which the court agreed. This demonstrates how wearing jewellery may be protected against discrimination. However, as in the South African case of *Pillay*, this claim was made by linking appearance to an existing protected category.

Another case similar to *Pillay*, *Cloutier v Costco Wholesale Corp*,[235] involved a cashier employee who was required to remove her eyebrow ring at work and to replace it with a clear stud. The employee claimed that this was an act of discrimination as she belonged to the Church of Body Modification; however, the First Circuit US Court of Appeals upheld the employer's approach. The court's reasoning was that the employer had provided reasonable accommodation by allowing her to wear a discreet piercing, whereas wearing any other jewellery would result in undue hardship for the business.[236] Despite the case failing to uphold the employee's autonomy to wear her selected jewellery, this case signified the court's recognition of reasonable accommodation by the employer, emphasising how the courts wish to see a balance of interests: protecting the employee's right not to be discriminated against while upholding the employer's professionalism.

In the US District Court, another case that followed a similar approach was *EEOC v Papin Enterprises Inc*,[237] where a Subway employee wore a nose ring and refused to remove it because it was part of her religion. She was dismissed. The court found in her favour and recognised that she was unfairly discriminated against based on her religion.[238]

If there was ever a claim that represented the absurdity and realities of appearance discrimination, then *Lorenzana v Citigroup Inc*[239] was it. The employee claimed she was fired for being 'too hot'.[240] Her physical attractiveness in the workplace resulted in sexual harassment and unnecessary comments from her colleagues about her figure. She was advised to wear looser clothing and, when she claimed she could not afford to purchase more clothing to meet these demands, she was dismissed. She asserted that her dismissal was due to her clothing choices. Because of the lack of explicit appearance discrimination protection, her claim was one of sex discrimination.[241] Unfortunately, Lorenzana had signed a mandatory

[235] *Cloutier v Costco Wholesale Corp* 390 F 3d 126 (1st Cir 2004).
[236] Ibid paras 29–30.
[237] *EEOC v Papin Enterprises Inc* Case No 6:07-cv-1548-Orl-28GJK (MD Fla Apr 7, 2009).
[238] Ibid.
[239] *Lorenzana v Citigroup Inc* No 116382/09 (NY Sup Ct filed Nov 20, 2009).
[240] W Corbett 'Hotness discrimination: Appearance discrimination as a mirror for reflecting on the body of employment discrimination law' (2011) 60 *Cath U L Rev* 616.
[241] *Lorenzana* (note 239).

arbitration agreement and her suit was dismissed.[242] This case demonstrates how explicit legal protection is necessary, as attempting to fit the discrimination into an already listed ground is not always effective in guaranteeing adequate appearance discrimination protection.[243]

The American Abercrombie & Fitch store is notorious for hiring employees who are sexually attractive and have a typical white American look.[244] *Equal Employment Opportunity Commission v Abercrombie & Fitch Stores*[245] was a prime example of an employer's inequitable practices when hiring applicants. Although the employer was impressed by the applicant, who wore a headscarf, she was refused the job because the company had a policy that hats were not allowed in the workplace. This case was first taken to the Federal Court and then the Court of Appeals, and it was eventually heard by the Supreme Court which, in 2015, ruled in favour of the applicant. The court held that the applicant had a right not to be religiously discriminated against and the employer should have made reasonable accommodation to allow her to wear a headscarf.[246] This case emphasises the need for employers to revisit their appearance policies to meet the requirements of Title VII.

Rogers v American Airlines[247] is an older case involving a black female employee who wore dreadlocks and was often subjected to a variety of questions by her managers about her hair and jewellery. Her position was terminated as the company prohibited the wearing of braided cornrows, yet the court did not find that she was discriminated against based on race or appearance.[248] The court found that a braided hairstyle was not exclusively worn by black people and that her hairstyle was not an immutable characteristic. Thus, the enactment of specific legislation prohibiting appearance discrimination will deal with this type of litigation in a formalised and regulated way.

The USA has provided for appearance discrimination protection to an extent, under Title VII and particularly when argued correctly under a protected category.[249] A seminal case which set the tone for appearance-related claims was the Supreme Court decision in *Price*

[242] Ibid.
[243] Corbett (note 240) 633.
[244] Ibid 2. Rhode *The Beauty Bias* (note 227) 106.
[245] *Equal Employment Opportunity Commission v Abercrombie & Fitch Stores* 575 US (2015).
[246] Ibid 6.
[247] *Rogers v American Airlines* 527 F Supp 229 (SDNY 1981).
[248] Ibid. See also Rhode *The Beauty Bias* (note 227) 100.
[249] Ibid. Toledano (note 227) 700–701.

Waterhouse v Hopkins,[250] in which a female accountant was denied partnership because she failed to dress femininely. This was ruled to be unlawful sex discrimination under Title VII. Similarly, in the case of *Bradley v Pizzaco*,[251] a black employee was fired for his failure to comply with the employer's no-beard policy. This employee suffered from a skin disease that affects black men and the court recognised that this appearance discrimination was unlawfully burdensome on such employees.[252] In contrast, in *Jespersen*,[253] an employer's policy that women had to wear makeup and had to style their hair in a particular way every day was held not to be discriminatory as the complainant was a bartender and this was an inherent requirement of her position.[254] The inconsistencies between these cases amplify the need for further protection from appearance bias, as its own explicitly recognised right.

3.2.3 Lessons to learn from the USA

The standard of relief afforded to these claimants in the territories referenced in this section varies, but these successes have brought about small but significant reforms in dealing with appearance discrimination and provide useful insights for the South African context.[255] Michigan,[256] Urbana,[257] Santa Cruz,[258] Madison,[259] San Francisco,[260] Howard County,[261] Binghamton and New York[262] have a variety of definitions when it comes to dealing with physical appearance, going as far as referencing an individual's height or weight as a form of prohibited discrimination. Additionally, a growing number of states have successfully enacted protections that relate to appearance. Washington DC explicitly implemented laws

[250] *Price Waterhouse v Hopkins* 490 US 228 (1989).
[251] *Bradley v Pizzaco of Nebraska, Inc* 7 F 3d 795 (8th Cir 1993).
[252] Ibid paras 799–800. See also Toledano (note 227) 700–701.
[253] *Jespersen v Harrah's Operating Co* 444 F 3d 1104 (9th Cir 2006).
[254] Ibid.
[255] Rhode *The Beauty Bias* (note 227) 128.
[256] Elliot Larsen Civil Rights Act 453 of 1976. Michigan is the first and only state to prohibit appearance discrimination in its employment legislation. See also Rhode *The Beauty Bias* (note 227) 132.
[257] Urbana Human Rights Ordinance, Chapter 12 of the City Code. Urbana explicitly mentions 'personal appearance' as a form of prohibited discrimination in employment.
[258] Chapter 9.83 of the Santa Cruz Municipal Code includes physical characteristics such as accidents of birth, disease or natural physical development or other events beyond the control of the person.
[259] The Madison Equal Opportunities Ordinance recognises 'physical appearance' as a form of discrimination. This means the outward appearance of a person regarding their hairstyle, beard, dress, weight, height, facial features, or other aspects of appearance.
[260] The San Francisco Discrimination Prohibition Ordinance specifically only protects characteristics such as height and weight.
[261] Section 12.207 of the Howard County MD Code prohibits discrimination based on personal appearance which includes hairstyle, facial hair, physical characteristics and manner of dress.
[262] The Binghamton Human Rights Law, Ordinance No 5 of 2009 states that discrimination based on an individual's height or weight is expressly prohibited.

that prohibit all forms of personal appearance discrimination in its human rights laws.[263] Recently, the New York City Commission recognised a guide that prohibits hair-based discrimination.[264] New Jersey has also proposed legislation that aims to ban discrimination based on hair traits associated with race, such as twists or braids, due to the rising prejudice against employees who wear dreadlocks.[265]

California has also become the first state to protect its citizens against hairstyle discrimination by enacting the CROWN Act,[266] which aims to prohibit any institutions, such as schools or workplaces, from discriminating against individuals who have styles such as cornrows, dreadlocks and afros.[267] The state is increasingly recognising the need to include mutable aspects such as hairstyles, facial hair and manner of dress on the list of protected freedoms.

Protection from the appearance discrimination has gained traction through claims related to race and religious discrimination.[268] Despite difficulties, in a number of cases the courts were able to successfully provide relief to those employees who linked their claims to protected categories that fell within Title VII. Notwithstanding the fact that appearance discrimination is not prohibited in the majority of the states in the USA, Cavico et al[269] note that amendments and progress have been made to amend civil rights law to encompass appearance discrimination protection and to prevent any forms of 'lookphobia' from materialising.[270]

3.3 Selected European countries

Countries in Europe have contributed to and informed anti-discrimination law significantly over the years.[271] Equality has played a significant role in shaping aspects of economic

[263] The DC Human Rights Act mentions personal appearance as a protected category. See also *Ivey v District of Columbia* 949 A 2d 607, 615 (DC 2008) which recognised appearance as a valid form of prohibited discrimination.
[264] The New York State Human Rights Law NY Exec L § 292(37) expanded the protected category of race to include traits such as hairstyles and hair texture.
[265] *EEOC v Catastrophe Management Solutions* 852 F 3d 1018 (11th Cir 2016).
[266] The CROWN (Create a Respectful and Open Workplace for Natural Hair) Act (SB 188) of 2019.
[267] Ibid.
[268] *Pillay* (note 116); *Department of Correctional Services and Another v POPCRU and Others* (note 128).
[269] F Cavico et al 'Appearance discrimination in employment: Legal and ethical implications of lookism and lookphobia' (2012) 32(1) *Equality, Diversity, and Inclusion: An International Journal* 102–103.
[270] Ibid. Cavico et al define lookphobia as a label that recognises and stigmatises employers who actively participate in appearance discrimination.
[271] U Belavusau & K Henrard 'A bird's eye view on EU anti-discrimination: The impact of the 2000 Equality Directives' (2019) 20 *German Law Journal* 614–615.

opportunities and the wellbeing of individuals, particularly through membership in the European Union (EU).[272] South Africa and the EU share common values in promoting economic and anti-discriminatory progress, both have dealt with areas such as poverty, underdevelopment, democracy and human rights, and have committed to advancing the development of equality.[273] This section addresses the anti-discriminatory patterns of EU law and the development of these laws in the EU – specifically in Germany and France – in recognising appearance discrimination.

3.3.1 Overview of anti-discrimination law in the EU

The Community of EU member states is governed by Community law.[274] However, each member state retains its own national law, but is required to implement and enforce the laws of the EU through its own specific and national legislation.[275] The EU governs several member states, some of which – for example, Germany and France – have a contentious and discriminatory background. Nevertheless, these countries have been more protective of employees' interests in dignity and privacy.[276]

EU anti-discrimination law has developed in three significant phases. The first involved the adoption of the European Economic Community (EEC) treaty, which introduced the rationale for a single economic market and the prohibition of discrimination based on nationality and gender.[277] This was intended to support freedom of movement between member states, allowing individuals of those member states to travel freely and benefit from working opportunities in other states.[278] The inclusion of gender allowed the notion of equal pay to evolve, thereby making it advantageous for women to be paid the same as men.[279] During this

[272] Ibid.
[273] South African Government 'Facts on South African European Relations', *https://www.gov.za/facts-south-africa-european-union-sa-eu-relations*, accessed 2 April 2023.
[274] The original title 'European Economic Community' was abbreviated to 'European Community' by the Treaty of the EU.
[275] The Treaty of Amsterdam 1999 provides that member states must transfer certain powers from national governments to the European Parliament.
[276] Rhode 'The injustice of appearance' (note 229) 1092–1094.
[277] Article 12 of the EEC Treaty 1957 prohibited discrimination based on nationality and gender. See Belavusau & Henrard (note 271) 617; E Ellis & P Watson *EU Anti-discrimination Law* (2012) 495–496. Three phases were identified by both sources. See also M Bell *Anti-discrimination Law and the European Union* (2002) 6–12.
[278] Article 12 of the EEC Treaty 1957.
[279] Ellis & Watson (note 277) 1–2.

phase the Court Justice of the EU (CJEU) played a significant role in the prohibition of domestic violence and trafficking, and the promotion of gender equality.[280]

The second phase included the Treaty of Amsterdam. Gender equality was applied constitutionally through the enactment of Article 3(2) of the Treaty of the European Union (TEU).[281] Furthermore the number of prohibited grounds were increased with the inclusion of race, religion, disability, age and sexual orientation.[282] During this phase the recognition of equal treatment and the promotion of human dignity were realised.[283] Following this, two directives – the Race Equality Directive (RED) and the Framework Equality Directive (FED) – were introduced.[284] Each directive focused on the protection of those prohibited grounds.[285]

The final phase recognised the enactment of the Lisbon Treaty which solidified the EU's goals of non-discrimination and equality.[286] Through this Treaty the EU Charter of Fundamental Rights (CFR) became a primary source for EU law and ensured the development of human rights and a direct focus on equality before the law.[287] The non-discrimination clause increased the prohibited grounds to include sex, colour, genetic features, language, belief or political opinion, language, property and birth.[288] The development of these grounds served to guide EU policies and direct their implementation by national authorities.[289] Following the interpretation of the 2000 Equality Directives, Henrard and Belavusau have identified the four areas of discrimination that are covered: direct discrimination, indirect discrimination, harassment, and instruction to discriminate.[290] Furthermore, they note how the FED and the RED are used to protect individuals from unfavourable treatment that may impact the principles of equal treatment.[291]

[280] Article 119 of the EEC Treaty 1957 provided equal pay for women.
[281] Article 3(2) of the TEU 1992 stipulated that the EU aims to 'eliminate inequalities, and to promote equality, between men and women.'
[282] Article 13 of the TEU 1992.
[283] Belavusau & Henrard (note 271) 620. See also Bell (note 277) 6–12.
[284] Race Equality Directive 2000/43/EC.
[285] Framework Equality Directive 2000/78/EC.
[286] Lisbon Treaty 2009.
[287] The Preamble and Article 1 of the CFR (2016) enshrined the importance of dignity. Article 20 states that 'everyone is equal before the law'.
[288] Article 21 of the CFR (2016).
[289] Article 51 of the CFR (2016).
[290] Belavusau & Henrard (note 271) 630.
[291] Ibid.

Another preliminary source of anti-discrimination measures is Article 19 of the Treaty on the Functioning of the EU (TFEU).[292] Similar to section 9 of South Africa's Constitution, there is a focus on affirmative action, or positive action as it is referred to in the EU.[293] Furthermore, the CJEU adopts a proportionality approach to positive action, thus looking at each protected ground on a case-by-case basis.[294] Reasonable accommodation, another principle adopted that holds similar importance in South African anti-discrimination law, was enshrined in the FED, which seeks to counter discrimination.[295] Building on the inclusion of a substantive equality framework, this principle is interpreted narrowly and has only been recognised in EU law for disability.[296] Like South Africa, reasonable accommodation is not an absolute right but rather a dimension of equal treatment, but should not place any burden on the employer or business.[297]

Significantly, aspects of intersectionality are recognised in EU law as multiple discrimination.[298] However, the CJEU has struggled to come to terms with such innovation and the promotion of equality and has adopted an aloof approach in order to limit the range of contentious discrimination matters.[299] The CJEU considered intersectional claims in *Parris v Trinity College Dublin* on the basis of age and sexual orientation with regard to the pension claims of same-sex surviving partners.[300] The claims of discrimination on the basis of sexual orientation and age discrimination were rejected as they were viewed in isolation, which resulted in the CJEU being unable to establish the disadvantages associated with being gay and over the age of 60 at the same time.[301]

The changes that have been adopted in EU law are similar to the approaches adopted in South Africa. With respect to the above-mentioned developments in EU anti-discrimination law, it is worthwhile considering the approach adopted to appearance discrimination.

---

[292] Article 19 of the TFEU 1957 grants the EU powers to eliminate discrimination based on sex, race, ethnicity, belief, religion, disability, age or sexual orientation.
[293] Ibid. See also C-476/99 *H Lommers v Minister van Landbouw Natuurbeheer en Visserij* (2002) ECR I-2891 for a discussion of the CJEU's position on positive action.
[294] K Henrard 'Boosting positive action: The asymmetrical approach towards non-discrimination and special minority rights' (2011) 71 *Heidelberg J Int'l L* 388–389; Belavusau & Henrard (note 271) 632–633.
[295] Henrard (note 294).
[296] The FED. See also L Waddington et al 'Reasonable accommodation' in *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (2007) 630.
[297] Article 5 of the FED mentions disproportionate burden or undue hardship. See also s 15(2)*(c)* of the EEA.
[298] S Atrey *Intersectional Discrimination* (2019) 109.
[299] M Bell 'Advancing EU anti-discrimination law: The European Commission's 2008 proposal for a new directive' (2009) 3 *The Equal Rights Review* 16.
[300] *Parris v Trinity College Dublin* Case C-443/15 P, [2017] ICR 313 (CJEU). See also Atrey *Intersectional Discrimination* (note 298) 112.
[301] *Parris v Trinity College Dublin* (note 300).

3.3.2 Appearance discrimination regulation and EU case law

Similar to South Africa, the concept of equality in the EU is ever-evolving, and the EU recognises the need to prohibit prejudice against any person. It recognises the prohibition on discrimination especially for the purpose of equality and fairness.[302] The core legislation that deals with this includes the TEU, the TFEU and the CFR. Appearance discrimination features subtly in EU law, through the listed grounds of genetic features.[303] Although this reiterates the principles of equality, the listed grounds are not a fixed list and the list is open to new terms and legal grounds that arise in an ever-changing society.[304]

A recent report investigated the expansion of protected grounds in the TFEU.[305] Physical appearance was included in the recommended grounds, and while the report acknowledged the challenges in implementing these additions, it mentioned both EU and non-EU European countries that have adopted this ground in their national law.[306] Furthermore it recognised the meaning of physical appearance to be measured against 'societal representation, beauty, fitness and properness'.[307] Additionally it recognised how a standalone ground of appearance would assist those individuals who struggle to seek protection with regard to their weight, tattoos and aspects of their dress or hairstyles.[308] Thus the recognition of this ground can only reshape values around the stigma and bias of appearance discrimination-related issues.

In *Kara v United Kingdom*,[309] the European Commission of Human Rights (ECHR) upheld the London Education Authority's right to prohibit a transvestite from wearing dresses to work due to the likelihood that the employer's public image would be tarnished.[310] Moreover, in two recent German rulings, *Cases C-804/18 (WABE)* and *C-341/19 (MH Muller Handel)*, regarding the wearing of the Islamic hijab in the workplace, two employees brought a claim of unfair religious discrimination.[311] Although the wearing of the headscarf is a contentious issue in Europe, the CJEU found that the prohibition of any religious or political covering in the workplace is valid, based on the neutrality policy of the employer. Both applicants in

[302] The Preamble and Article 1 of the CFR (2016) enshrined the importance of dignity.
[303] Article 21 of the CFR (2016).
[304] M Connolly *Discrimination Law* (2006) 21.
[305] S Ganty & J Sanchez 'Expanding the list of protected grounds within anti-discrimination law in the EU' (2021) Equinet European Network of Equality Bodies 22–23.
[306] Ibid 16. The three countries are Belgium, Serbia and France. See the further discussion in part 3.3.4.
[307] Ibid 67.
[308] Ibid.
[309] *Kara v United Kingdom* No. 36528/97, ECommHR (First Chamber), 22 October 1998.
[310] Ibid 232–233.
[311] *C 804/18 and C-341/19 IX and MJ v Germany* (2021) ECR.

these cases were subject to the court's assessment of upholding the neutrality policy for workers.[312] Rhodes notes that having a protected category status does not always guarantee protection, and the lack of accommodation by employers indicates that employees' dignity and autonomy to express a personal identity in the workplace are dismissed.[313]

As mentioned earlier in this section, certain member states with discriminatory backgrounds have adopted a progressive approach to anti-discrimination law in the workplace. Hence, Germany and France's anti-discrimination frameworks as well as their approach to appearance-related discrimination will be considered below and will prove useful for recognising the level of implementation at the supranational and national levels.

3.3.2.1 France

Overview of anti-discrimination law

As a country that has adopted a more secular approach to discrimination, French systems are based on the notion of liberty. Significantly, South Africa is a secular state, but its political and legal systems have constitutionally recognised the freedom to religion.[314] This may prove useful when comparing France's liberal approach to anti-discrimination, particularly in relation to the recent developments in respect of protected grounds of discrimination and their promotion of neutrality.

As an EU member state, France's laws are influenced by EC law. The French Labour Code, otherwise known as the Code du Travail, governs employment law in France.[315] The current Labour Code was formulated in 1973 and comprises nine parts on employment.[316] These parts include regulation, disputes, and the development of employment law itself.[317] Historically, France failed to develop systems that are sensitive to prejudice and was not as expansive as South Africa and Germany in dealing with these issues.[318] Industrialisation

[312] Ibid paras 25 and 36.
[313] Rhode *The Beauty Bias* (note 227) 99.
[314] A Leatt *The State of Secularism: Religion, Tradition and Democracy in South Africa* (2017) 1.
[315] French Labour Code (Code du Travail) 1973 *Journal Officiel.*
[316] Ibid 73–74.
[317] The French Labour Code includes (1) agreements relating to employment, (2) statutory regulation of working conditions, including leave, safety and health; (3) placement and development of employment; (4) employee representation and professional groups; (5) labour disputes; (6) applicants and control of labour regulation; (7) special schemes (including mines and energy industry); (8) special regulations applicable to overseas French territories; and (9) French education.
[318] R Blanpain et al *The Global Workplace: International and Comparative Employment Law* (2007) 455 state that the French recognised direct discrimination but not unintentional or indirect discrimination.

paved the way for regulation and called for the just development of labour relationships.[319] Through the two World Wars France was able to establish its foundation in labour law.[320] The implementation of the French Constitution in 1946 recognised the need for individual and collective rights for workers, particularly the Preamble, which prohibited discrimination in relation to sex, belief and race.[321] Shortly after this, the repeal of the Constitution in 1958 enabled the enforcement of equality for all citizens regardless of their ethnic origin, race or religion.[322] Lokiec argues that although discrimination is significant in France, the focus is predominantly shifted to collective labour law instead of individual rights.[323] Therefore, the majority of France's anti-discrimination laws have been a direct result of its being a member of the EU, rather than its own development of its national legislation.

One of the most significant changes enacted by French anti-discrimination policies was the formation of the *Haute autorité de lutte contre les discriminations et pour l'égalité* (HALDE), whose main aim was to combat any forms of discrimination that conflict with French statutory instruments.[324] Since its inception in 2007, it has encouraged diversity and promoted non-discrimination in an arguably socially responsible manner.[325] Furthermore, the provisions of Article L 120-2 alongside Article L 122-45 aim to provide extra protection for fundamental rights relating to an individual's dignity in the employment relationship.[326]

Appearance-related protection

Compared to EU law, France's legislation expands the definition of protected categories of discrimination, particularly in Article L 122-45 of the French Labour Code.[327] This definition acknowledges the protection of anyone who is discriminated against based on 'origin, sex, sexual orientation, age, family circumstance, pregnancy, genetic characteristic, belonging,

[319] Ibid.
[320] Blanpain et al *The Global Workplace* (note 318) 432–434.
[321] The preamble of the French Constitution of 1946 states that 'the people of France proclaim anew that each human being, without distinction of race, religion or creed, possesses sacred and inalienable rights …'.
[322] Article 1 of the French Constitution of 1958 states that 'France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs. It shall be organised on a decentralised basis. Statutes shall promote equal access by women and men to elective offices and posts as well as to position of professional and social responsibility.'
[323] Blanpain et al *New Developments* (note 151) 95.
[324] C Sachs-Durand *Analyza rapide du dernier rapport de la HALDE: Des pratiques pour l'egalite des chances: que repondent les entreprises a la Halde? Revue de droit du travail* (2007) 659. See also Blanpain et al *New Developments* (note 151) 110.
[325] Blanpain et al *New Developments* (note 151) 111–113.
[326] Ibid.
[327] French Labour Code (Code du Travail) 1973 *Journal Officiel* 73–74 Article L122-45.

ethnicity, nation, race, political opinion, trade union activities, religion, health and physical appearance.'[328] Physical appearance includes those characteristics that may or may not be changed, which pertain to the person's physique such as height, weight, face, hair, skin colour, clothing, piercings, makeup and tattoos.[329] Additionally, the ILO noted with satisfaction the implementation of a prohibited ground of 'physical appearance' in the Labour Code of French Polynesia.[330] This inclusion was made in line with the L 1132 Labour Code of France.[331] The inclusion of this ground in these ILO member states is in line with the development of their anti-discrimination laws.

However, this approach is not without its problems, such as the interpretation of restrictions based on justification and proportionality.[332] This has been identified as an issue of discrimination in two scenarios. Firstly, in relation to prejudice against a sick employee, the court held that the objective overview was based on the proper functioning of the company and was a proportionate ground for dismissal.[333] Secondly, discrimination on the basis of religion is a contentious issue, as France has now banned the donning of the Islamic veil, the 'niqaab',[334] based on security and the need to live together harmoniously. The issue is not only connected to Muslim women's freedom of religion, but also to their autonomy to dress as they wish.[335] This shows how the principle of neutrality has been an issue for France over the last few years, particularly in relation to how it is applied.[336]

3.3.2.2 Germany

Overview of anti-discrimination law

Germany's labour and employment policies have shifted with the evolution of the country's

[328] Ibid.
[329] C Michon 'Physical appearance and discrimination at work' (2019), *https://cms-lawnow.com/en/ealerts/2019/12/physical-appearance-and-discrimination-at-work*, accessed 2 April 2023.
[330] Labour Code of French Polynesia 2021, 1121-1, Article 1.
[331] ILO Observation (CEACR) adopted 2016, 106th ILC session (2017), *https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3283916*, accessed 14 November 2022.
[332] Ibid.
[333] Cass.soc., 16 Jul. 1998, Droit social 1998, p. 950, *A. Mazeaud* dealt with discrimination on the basis of health: an employee cannot be dismissed if sick, but he can be dismissed due to long absences from work that may affect his functionality. See also Blanpain et al *New Developments* (note 151) 114.
[334] Religious veil worn by Muslim women. See also N Gal-Or 'Is the law empowering or patronizing women? The dilemma in the French burqa decision as the tip of the secular law iceberg' (2011) 6(3) *Religion & Human Rights* 315–320.
[335] French Law Act, no 2010-1192 of 11 October 2010, prohibiting the concealment of the face in public space. See also *SAS v France* (2014) Application No 43835/11 695 (ECHR).
[336] S Smet 'The impossibility of neutrality? How courts engage with the neutrality argument' (2022) 11(1) *Oxford Journal of Law* 1–2.

economy and politics over the years.[337] Unlike the UK, and more in line with South Africa, the Basic Law of Germany was adopted when the country became a democratic republic.[338] Earlier in the thesis, it was established that Germany would serve as a strong comparator for South African law based on its constitutional approaches to dignity, its similar historical background, and its fundamental protection of human rights.[339] For the purposes of this chapter, its anti-discrimination background will provide further clarity on its approach to appearance discrimination, particularly since the EU has recently dealt with two relevant cases that touch on aspects of appearance.

Germany, as a member state, has developed its law in accordance with the obligations imposed on it by EC law.[340] The Constitution recognises the importance of work and the right of individuals to be afforded opportunities equally.[341] Protection from discrimination is laid out explicitly in Article 3 of the Constitution, which holds that 'all persons shall be equal before the law'. Additionally, the state is obligated to respect equal rights for women and men, whilst eliminating any prejudices that exist.[342] Article 3 further includes a provision dealing with prohibited characteristics that call for protection based on sex, parentage, race, language, faith, religion, disability and political opinion.[343] However, there is a slight difference in the applicability of Article 3 to the employment relationship, as this provision cannot be used when dealing with individual employment issues. Hence, there is reliance on the German labour law principle of equal treatment in the *arbeitsrechtlicher Gleichbehandlungsgrundsatz*.[344] The protection against employment discrimination is reinforced by the enactment of the General Equal Treatment Act, which is aimed at abolishing any unjust treatment to employees based on their race, ethnicity, sex, religion or belief, disability, sexual orientation and age.[345]

Appearance-related protection

The principle of equal treatment with respect to labour law is considered when addressing discrimination.[346] This is closely connected to Article 2 of the Basic Law, which grants

[337] Blanpain et al *The Global Workplace* (note 318) 395.
[338] Ibid.
[339] See chapter 2 parts 1, 2.3, 3.1 and 3.3.
[340] Ibid.
[341] Blanpain et al *New Developments* (note 151) 72.
[342] Article 3(2) of the German Constitution, the Basic Law (*Grundgesetz*).
[343] Article 3(3) of the German Constitution, the Basic Law (*Grundgesetz*).
[344] Article 3 of the Basic Act, the principle of equal treatment.
[345] Section 19 of the General Equal Treatment Act (*Allgemeiner Gleichbehandlungsgrundsatz*).
[346] Ibid. See also Blanpain et al *New Developments* (note 151) 75.

protection to an individual's freedom to develop their personality.[347] This shows the constitutional level at which autonomy protection is placed: autonomy should be afforded to everyone to freely develop. The General Equal Treatment Act is now the main source of guidance when addressing employment discrimination.[348] Although the Act establishes a specific set of statutory prohibitions, in the case of discrimination there is a general duty on employers not to differentiate between employees.[349] The Act applies to those grounds that are explicitly laid out in the provision and the grounds are understood to be exhaustive, which means that any other grounds cannot lead to legal action against the employer.[350]

More importantly, it is recognised that individuals in the workplace must have their dignity protected and more notably must not be treated as mere objects.[351] This respect for an employee as a person extends to the employer's right to regulate their behaviour at work. In relation to appearance, workplace dress codes are subject to co-determination with the works council.[352] For instance, in *Bayreuth* an employee's hair was longer than what was required, and the court ruled that his refusing to cut his hair was not a valid reason for his dismissal.[353] Employees have the right to the free development of their personality as long as this is in keeping with safety, hygiene and good customer relations.[354]

3.3.4 Lessons from selected European countries

Countries in Europe have a variety of approaches to appearance discrimination, specifically in terms of seeking relief. However, there are conversations about the expansion of prohibited grounds of discrimination, particularly with regard to appearance.[355]

While Germany does not recognise appearance discrimination as a form of discrimination in its law, the Basic Law's Article 2 protects an individual's freedom to develop their personality. The identification of this factor is interesting and has the potential to provide

[347] Article 2 of the German Constitution, the Basic Law (*Grundgesetz*) states that everyone has the right to free development of his personality insofar as he does not violate the rights of others or offend the Constitution.
[348] General Equal Treatment Act (*Allgemeiner Gleichbehandlungsgrundsatz*).
[349] Blanpain et al *New Developments* (note 151) 76.
[350] Ibid 79.
[351] M Finkin 'Menschenbild: The conception of the employee as a person in Western law' (2002) 23 *Comp Lab L & Pol J* 585.
[352] Section 75 of the BetrVG (Works Constitution Act) 1972 discusses the principles of treatment for employees. See P Schwartz 'Privacy in German employment law' (1992) 15 *Hastings Int'l & Comp L Rev* 150–152.
[353] ArbG Bayreuth, BB 1972, 1083 at 175.
[354] ArbG Essen, BB 1966, 746 at 860.
[355] S Ganty & J Sanchez 'Expanding the list of protected grounds within anti-discrimination law in the EU' (2021) *Equinet European Network of Equality Bodies* 16.

protection as this factor recognises how one's personality is closely related to one's identity.[356] As a human right, it shows how one's dignity and the freedom to develop one's personality cannot be carried out without the ability to interact as a social being.[357] Marshall argues that we present aspects of ourselves through our actions, dress, expressions, movements and speech, which anti-discrimination law tries to encapsulate. However, she argues further that the protection of these identity traits remains incomplete.[358]

Meanwhile, France and French Polynesia explicitly recognise appearance in their legislation.[359] According to Article L 1132-1 of the French Labour Code, 'no person may be excluded from a recruitment or appointment procedure or from access to an internship or training period in a company, and no employee may be sanctioned, dismissed or be the subject of a discriminatory measure, direct or indirect' based on their physical appearance.[360] This allows employees the autonomy to choose their clothing and bodily attributes, which employers must respect. Furthermore, the French Defender of Human Rights ('DDD') states that employers are required to check that their practices and dress codes are in line with the evolution of social and cultural norms.[361] Nevertheless, this requires a balancing of personal freedoms, health and safety, as well as the right not to be discriminated against, whilst being mindful of societal evolutionary patterns.[362]

In addition to the countries mentioned above, a few selected European countries have implemented appearance-related definitions in their law. Countries such as Serbia and Belgium explicitly recognise appearance in their legislation.[363] Article 2 of the Serbian Law on the Prohibition of Discrimination explicitly lists appearance and personal characteristics as prohibited grounds.[364] On the other hand, EU member Belgium has physical and genetic characteristics formalised as a legal prohibited ground of discrimination; however, this is restricted to innate characteristics, independent of a person's will, such as scars or

[356] J Marshall 'Human rights and the legal regulation of dress' (2016) 25 *Nottingham LJ* 85.
[357] Ibid.
[358] Rhode *The Beauty Bias* (note 227) 138. See also J Marshall 'Human rights and the legal regulation of dress' (2016) 25 *Nottingham LJ* 85.
[359] Article 1 of the Labour Code of French Polynesia 2021, 1121-1. See Ganty & Sanchez (note 355) 66–67.
[360] Article 1132-1 of the French Labour Code.
[361] French Defender of Rights DDD (Défenseur des droits), October Framework Decision.
[362] Capstan Avocats 'Tackling discrimination based on looks guidance from France', *https://iuslaboris.com/insights/tackling-discrimination-based-on-looks-guidance-from-france/*, accessed 23 June 2022.
[363] Ganty & Sanchez (note 355) 16.
[364] Article 2 of the Law on the Prohibition of Discrimination in the Republic of Serbia 2009 (Official Gazette of the Republic of Serbia No 22/2009).

birthmarks.[365] Although physical appearance in Belgium law does not cover immutable characteristics, it still respects those individuals who have physical qualities that may be stigmatising.

3.4 United Kingdom

Since it was previously a British colony, South Africa has been greatly influenced by the UK and its legal system. The UK comprises England, Scotland, Wales and Northern Island.[366] These four distinct countries can be treated as one single system with no real differences in their law.[367] Given the UK's departure from the EU, it is worth noting the development or otherwise of its anti-discrimination law. Prior to Brexit, the UK was obligated to follow certain procedures and guidelines under the supranational law of the EU.[368] Amendments to the law following upon Brexit have not negatively affected UK employment anti-discrimination law.[369] However, the UK's approach is worth considering for South African law, specifically in the development of appearance autonomy.

3.4.1 Overview of anti-discrimination law

Despite Brexit, the UK remains committed to respecting the employment rights set out in the European Convention of Human Rights (ECHR). However, this does not require the UK to give effect to the ECHR in its domestic law, and therefore the UK is free to amend its law through Parliament but in a manner consistent with its international commitments.[370] One of the UK's most important pieces of legislation that was enacted and conforms to EU requirements is the Employment Relations Act.[371] Although it took some time for the UK to develop its anti-discrimination law in compliance with EU laws, the UK has now adopted a balanced and protective framework.[372]

[365] Belgium Anti-Discrimination Act 2007.
[366] Blanpain *The Global Workplace* (note 318) 332.
[367] Ibid.
[368] Amsterdam Treaty 1999.
[369] Article 6:3 of the EU-UK Trade and Cooperation Agreement 2020 enforces a non-regressive principle to ensure the protection of workers.
[370] Article 387 of the UK/EU and EAEC: Trade and Cooperation Agreement [TS No.8/2021] states that '[t]he Parties affirm the right of each Party to set its policies and priorities in the areas covered by this Chapter, to determine the labour and social levels of protection it deems appropriate and to adopt or modify its law and policies in a manner consistent with each Party's international commitments, including those under this Chapter'
[371] Employment Relations Act 1999.
[372] O Dupper et al *Essential Employment Discrimination* (2004) 80.

In contrast to the situation in South Africa, a UK employee cannot depend on any constitutional rights granted to them, as the UK has no written Constitution. Whilst previously there was no specific legislation dealing with the protection of employees against discrimination based on prohibited characteristics, a variety of statutes helped in this area. The Race Relations Act[373] placed a duty on public officers to have due regard to race and equality when considering opportunities in the workplace.[374] The Sex Discrimination Act provided protection to those who suffered discrimination based on matters not covered in terms of recruitment and dismissal, and assisted with the removal of restrictions on women in the workplace.[375] Additionally, the Act dealt with a variety of concepts connected to substantive equality and focused on providing protection to those seeking equal opportunities.[376]

After the UK government carried out a review of its anti-discrimination law, the Equality Act[377] was passed in 2010. This Act developed anti-discrimination law so as to prohibit discrimination on the grounds of listed characteristics.[378] The Act provides a uniform approach to protection against unfair discrimination, and almost mirrors the aims of the EEA in South Africa. Evidently, the Equality Act aimed to have a 'comprehensive effect' with regard to the rights to equality and non-discrimination.[379] Similar to South Africa's affirmative action framework, the UK promotes equal opportunities by using the notion of positive action.[380] This concept applies to minority groups, which are required to undergo training programmes and fair selection procedures during recruitment.[381]

The inclusion of prejudiced groups in the definition of discrimination is justified mostly through political motivation and the demand for proposed categories of protection.[382] O'Cinneide and Liu have recognised the restrictive scope of bringing intersectional

[373] Race Relations Act 1976.
[374] Blanpain et al *New Developments* (note 151) 42.
[375] Sex Discrimination Act 1975 and Sex Disqualification (Removal) Act 1919, s 1.
[376] Blanpain et al *New Developments* (note 151) 40.
[377] The Equality Act 2010 repealed the Equality Act 2006.
[378] Employment Equality Framework Directive Council Directive 2000/78/EC.
[379] C O'Cinneide & K Liu 'Defining the limits of discrimination to the United Kingdom: Principle and pragmatism in tension' (2015) 15 *Intl'l J Discrimination & L* 80 at 84–85.
[380] Section 158(1) of the Equality Act states that this section applies 'if a person reasonably thinks that (a) persons who share a protected characteristic suffer a disadvantage connected to the characteristic, (b) persons who share a protected characteristic have needs that are different from the needs of persons who do not share it, or (c) participation in an activity by persons who share a protected characteristic is disproportionately low.'
[381] Blanpain et al *New Developments* (note 151) 50–53.
[382] O'Cinneide & Liu (note 379) 86–88.

discrimination claims.[383] They argue that the Equality Act allows claims to be brought against intersectional discrimination only if the number of characteristics applicable to the individual are limited to two.[384] This is because claims that have multiple characteristics could prove detrimental for employers to deal with as this may open the floodgates for multiple discrimination claims within the workplace.[385] However, O'Cinneide and Liu note that there could be a consideration of three of more protected characteristics only on a marginal basis, as this may be a burdensome and complex area for employers to deal with.[386] Thus, the scope of anti-discrimination law requires a pragmatic balance and can be subject to exceptions, especially concerning intersectional discrimination and the classification of individuals in a protected category.[387]

Much of English law is influenced by and derived from EU Directives and, despite the implementation of the European Union (Withdrawal) Act of 2018,[388] any UK law relating to discrimination will not change as long as it is unaffected by an agreement.[389] However, it may provide scope for England to change its law without being restricted by EU law. Any decision where there is no ruling relating to issues in the UK follows decisions adopted by the CJEU. This also means that international principles derived from the ILO and the European Social Charter of the Council of Europe must be adhered to.[390]

3.4.2 Appearance discrimination regulation and case law

As in South Africa, protection from discrimination based on appearance must be linked to a protected category. There is no explicitly recognised protection for appearance in the Equality Act; if any claim were to be made, it would have to fall under an indirect discrimination claim.[391] However, the term 'aesthetic labour'[392] is regarded as synonymous with appearance discrimination in the UK, due to job advertisements that sought workers who

[383] Ibid.
[384] Section 14(1) of the Equality Act 2010 deals with combined discrimination and states that '[a] person (A) discriminates against another (B) if, because of a combination of two relevant protected characteristics, A treats B less favourably than A treats or would treat a person who does not share either of those characteristics.'
[385] O'Cinneide & Liu (note 379) 86–88.
[386] Ibid.
[387] Ibid. Multiple discrimination claims will be further discussed in chapter 6 part 4.
[388] The European Union (Withdrawal) Act 2018.
[389] E Livingstone & J Mann, *https://www.shrm.org/resourcesandtools/hr-topics/global-hr/pages/uk-employment-law-brexit.aspx*, accessed 12 September 2021.
[390] Ibid.
[391] A Mason & F Minerva 'Should the Equality Act 2010 be extended to prohibit appearance discrimination?' (2020) 70(2) *Political Studies* 434.
[392] Waring (note 179) 193. See also L Tietje & S Cresap 'Is lookism unjust? The ethics of aesthetics and public policy implications' (2005) 19(2) *Journal of Libertarian Studies* 32–33.

were 'stylish, attractive, smart and well-spoken'.[393] Mason and Minerva argue that law- and policy-makers might view the development of appearance discrimination as futile because it constitutes indirect discrimination.[394] However, they argue that this stance is problematic as it fails to see the harm in systemic and consequential discrimination.[395] This is particularly concerning in the employment context where there have been cases that could seamlessly fall under the category of appearance discrimination.

An example of a successful indirect discrimination claim is *Downey v Police Service of Northern Island.*[396] In a scenario similar to that in *Dlamini*, an employee was required to keep his face clean-shaven to wear a particular mask as a police officer.[397] He refused to shave off his moustache as he felt it benefited his personal appearance and did not interfere with his mask. He was suspended shortly after, and he brought a claim for indirect sex discrimination.[398] His claim was successful as the Tribunal found that the employer had no legitimate purpose in requiring the employee to shave off his moustache. This shows that employers should adopt appearance policies that provide legitimate reasons. There should be no restrictions on allowing the employee to comfortably appear in a manner they view as suitable, and to do so without specific reason can be viewed as indirect discrimination on the basis of sex.[399]

In an unreported case, an English woman was sent home from work because she wore flats instead of heels of up to four inches.[400] She insisted that forcing her to wear heels every day would have a negative impact on her health, and called for a petition and government action to remove this discriminatory dress code policy. Due to the attention that this issue received in the media, the company announced that it had removed the requirement to wear high heels in the workplace.[401]

[393] Ibid.
[394] Mason & Minerva (n 391) 434.
[395] Ibid.
[396] *Downey v Police Service of Northern Island* (2018) 4182/18IT (NIIT).
[397] Ibid. See also Steadman (n 109) 97.
[398] Ibid.
[399] Ibid.
[400] House of Commons Petitions Committee and Woman and Equalities Committee 'High heels and workplace dress codes' (2017), *https://publications.parliament.uk/pa/cm201617/cmselect/cmpetitions/291/29104.htm*, accessed 12 September 2021.
[401] Ibid.

Chaplin v Royal Devon & Exeter NHS Foundation Trust[402] was heard in the European Court of Human Rights (ECtHR). The employee, a nurse, was forbidden from wearing a crucifix necklace. She claimed she had suffered indirect discrimination on the ground of her religion. The Employment Tribunal found that the employer's health and safety justification was legitimate, but she argued for her right to uphold her religious choices and the issue was bought to the ECtHR.[403] The ECtHR, with reference to *Chaplin* and other applicants, considered *Eweida v British Airways Group plc* in deciding this case.[404] Although the ECtHR had upheld Eweida's right to wear jewellery, Chaplin was a nurse, and the health and safety of other staff members had to be protected, hence the discrimination was justified.[405] In *Eweida,* in a similar approach to Pillay, the court had ruled that the company failed to accommodate a balance between her religious ideals and the company's image. The court in *Eweida* further found that her piece of jewellery was discreet and would not detract from the dress code. This showed the narrow interpretation adopted in *Eweida* in relation to dress codes and the employee's position, as opposed to *Chaplin* where the inherent requirement of her job as a nurse took precedence.

3.4.3 Lessons to learn from the UK

The UK does not explicitly prohibit appearance discrimination in the workplace. Although employees can rely on the protected ground of discrimination, these grounds, as in South African law, remain limited. Mason and Minerva argue that an expansion of the protected categories in the Equality Act should be encouraged to uphold substantive equality for systemically disadvantaged groups of people.[406] They argue that including appearance, or similar terminology relating to it, in the legislation should strongly be considered because persons claiming appearance discrimination are offered limited protection.[407]

4. KEY FINDINGS

[402] *Chaplin v Royal Devon & Exeter NHS Foundation Trust* (2010) 4 WLUK (ET) 25; *Dhinsa v Serco and Another* (2011) (1315002/09) (ET).
[403] *Eweida & Others v United Kingdom* (2013) ECHR 37 involved four applications brought against the UK by Christians who believed they had suffered unlawful discrimination by their employers on the basis of their religion. Two applications involved the wearing of the cross around the neck and the other two applications were marriage registry employees who were dismissed for refusing to carry out their duties in registering same-sex couples as they believed that homosexual activity could not be condoned and was contrary to their religious beliefs.
[404] *Eweida v British Airways Group plc* (2010) EWCA Civ 80.
[405] *Chaplin* (note 402); *Dhinsa* (note 402).
[406] Mason & Minerva (note 391) 427.
[407] Ibid 437.

An examination and analysis of both South African and foreign comparators' approaches to anti-discrimination law reveals that some areas of protection from appearance discrimination still need to be developed. Appearance autonomy is a rising global concern that requires further investigation and protection. The discussion that follows covers the key considerations in appearance discrimination law, in order to develop and progress South African labour law.

Firstly, it is evident that there is no legally recognised ground of appearance discrimination in South African law. This has adverse effects for those seeking protection. Whilst claims might be sought under unlisted or arbitrary grounds, these offer limited protection and make it difficult for applicants to pursue a claim. Providing a listed ground of protection from appearance discrimination will provide a direct source of relief to claimants who will not need to use an indirect form of discrimination.[408] States in both the USA and Australia have explicitly recognised variations of appearance discrimination. The UK, South Africa, Germany and the EU do not explicitly recognise the ground, which means that they are unable to address the systemic disadvantages that these groups of people are facing.[409]

One significant factor that all the countries discussed in this chapter have in common is their respect for and recognition of equality and dignity. Therefore, the second finding from this chapter is that, regardless of whether it is through the Constitution or other legislation related to human rights, dignity and equality remain as a strong foundation for strengthening and developing the countries' laws.[410] Appearance has been shown to have clear links to both these rights as any aspect of an individual's appearance that has been impaired impacts their self-worth and expression.[411] A person's appearance speaks to the heart of their self-expression and identity.[412] Any form of discrimination based on a person's appearance affects the dignity and equality of the individual as much as does discrimination based on the protected categories of race, gender, religion, etc.[413]

Thirdly, protecting appearance would improve protection from intersectional forms of discrimination. The thesis has shown that intersectional discrimination is an evolving concept

[408] *Downey* (note 396).
[409] See also Mason & Minerva (note 391) 434–435.
[410] Section 10 of the Constitution; the Preamble and Article 1 of the CFR (2016) enshrined the importance of dignity; Article 1 of the German Constitution, the Basic Law (*Grundgesetz*); *Wackenheim v France, Comm. No. 854/1999* U.N. Doc. A/57/40, Vol. II, at 363 (HRC 2002)
[411] Rhode *The Beauty Bias* (note 227) 99.
[412] Ibid.
[413] Section 6 of the EEA.

in equality law. Whilst the USA, the EU and South Africa have acknowledged the effect of this concept in their case law, they fail to fully recognise the value that appearance would offer to intersectionality.[414] Appearance touches on a number of aspects that relate to a number of protected grounds, and whilst developing its protection will allow for multiple claims for protection, it may also serve to mitigate the problems faced with implementing intersectional discrimination protection.[415]

Fourthly, although the concept of discriminating against someone in the workplace based on their attractiveness, height, dress, tattoo or even their hairstyle may seem trivial to some, it is still an area that impacts a disparate group of disadvantaged people.[416] Defining and recognising appearance in the law provides clarity for employees, employers and prospective employees in ascertaining the limits of their appearance autonomy.[417] Moreover, protection will promote awareness and guide those employees subjected to this prejudice in the workplace, and will ensure that employers avoid or at least balance this category when regulating appearance.[418]

Building on the notion of awareness, prohibiting appearance discrimination can only strengthen the employment relationship as it requires both the employer's and the employee's interests to be balanced.[419] It was shown in *Mofokeng* that dress codes are a matter of mutual interest and, therefore, in regulating appearance it is only fair for an employee's autonomy and identity to be considered when making these policies.[420] Building on this, it is shown that employers should not impost blanket bans on certain aspects of appearance as this may affect an individual's self-expression and autonomy.[421] Employees should not have to face pressure both inside and outside the workplace to appear in a certain way if appearing in this way is not proportionally justified with reference to the employees' role.[422] Unless a specific dress code is an inherent aspect of the position, employees should be allowed to express their identity through their physical appearance.[423] Furthermore, recognising appearance autonomy in the law will limit intrusions on the inherent requirement of the job limitation as the courts

[414] G Ramachandran 'Intersectionality as "Catch 22": Why identity performance demands are neither harmless nor reasonable' (2005) 69 *Alb L Rev* 311–313.
[415] See the further discussions of intersectionality in chapter 6 part 4.4.
[416] Mason & Minerva (note 391) 435.
[417] Ibid 432–433.
[418] Ibid 436.
[419] Fisk (note 114) 1130.
[420] *Mofokeng v CCMA and Others* [2022] ZALCJHB 169.
[421] Adam & Collier (note 101) 85.
[422] Klare (note 98) 1443.
[423] Ibid.

have adopted a narrow approach.[424] This will oblige an employer to accommodate or reasonably establish the purpose of the dress code with reference to the employee's interests and their position.

Finally, one of the most significant issues about protecting appearance is the fear of frivolous claims being made. There is a fear that the trivial or irrelevant claims will be lodged, which could overwhelm the judicial system.[425] However, this 'floodgates' argument only serves to emphasise the need for the legal protection of appearance. This thesis will show that this fear should not justify failing to recognise the need to protect appearance autonomy. Foreign jurisdictions such as Australia, which have appearance as a listed ground, are successfully managing the number of disputes in line with the number of other listed grounds.[426]

Klare notes that reforming appearance regulation and destabilising the importance of appearance in the workplace allows all employees to meet their full potential and to expand on opportunities in both their personal and vocational capacities.[427] Although appearance discrimination may not appear to be of significant concern, it is alive and well in society and the workplace.[428] Appearance needs to be recognised and protected, even if it has a disparate impact on the justice system.[429] In the past there were similar fears about other forms of discrimination, such as gender or race; however, such concerns did not prevent their legal recognition, but have only shown that legal remedies have the power to raise awareness about the social injustice behind the inequality.[430] This section has proposed that appearance, regardless of how it is perceived, should not wield power in the measurement of job performance.[431] Furthermore, the obstacles to enforcing appearance autonomy should not overshadow the possibility of its being legally protected.

5. CONCLUSION

[424] Adam & Collier (note 101) 91.
[425] See the discussion in chapter 1 part 7, chapter 4 part 4, chapter 5 part 5 and chapter 6 part 5.3; *Rogers v American Airlines* 527 F Supp 229 (SDNY 1981); Mason & Minerva (note 391) 434–436.
[426] Victorian Equal Opportunity & Human Rights Commission *Annual Report* (2020–2021) 158; Rhode *The Beauty Bias* (note 227) 112–115; E Adamitis 'Appearance matters: A proposal to prohibit appearance discrimination in employment' (2000) 75 *WLR* 222–223.
[427] Klare (note 98) 1443.
[428] Rhode *The Beauty Bias* (note 227) 140.
[429] Ibid.
[430] Ibid.
[431] Mahajan (note 2) 165. See also H James 'If you are attractive and you know it, please apply: Appearance-based discrimination and employers' discretion' (2008) 42 *Val U L Rev* 660 at 629–631.

This chapter has shown the many ways in which protection from discrimination in the workplace has evolved, as well as how dignity has been recognized as an inherent aspect of this transformation. Anti-discrimination legislation may ameliorate the position of disadvantaged workers. The chapter has shown that, despite the fact that anti-discrimination law has addressed historical discrimination to some extent, gaps in protection remain. This is particularly the case for those disadvantaged employees whose appearance autonomy has limited protection. The chapter has shown that protection against appearance discrimination is possible in South African law, but as an underexplored area appearance discrimination may not fully warrant comprehensive legal protection.

By examining a variety of jurisdictions that have either implemented, failed to implement or are yet to fully implement appearance anti-discrimination frameworks, reform in South Africa is considered. The comparative analysis is conducted with caution, as the developments in and parallels between these jurisdictions reveal a strong starting point for South African appearance law. One means of protection is to include physical appearance as a protected category in the law; the USA and Australia have shown that prohibiting appearance discrimination in the workplace strengthens awareness of appearance autonomy and provides more benefits than concerns.

Through a legal recognition of appearance autonomy, interests in the employment relationship are balanced, as employees' identity and self-expression will be considered alongside the development of dress codes. One concern is the possibility of exposing the judicial system to frivolous claims. Ironically, this fear might not be warranted given the experience of the USA and Australia with regard to other protected categories. However, overcoming these concerns is not without its difficulties and shows how further development is required. One such way is to recognise the limits of appearance autonomy at a fundamental human rights level and how this route may validate and protect such claims. Therefore, a further argument for the recognition of autonomy and physical appearance as a protected ground follows from an analysis of the right to privacy and the freedoms that may support appearance autonomy.

CHAPTER 5: PRIVACY AND THE FREEDOMS SUPPORTING APPEARANCE AUTONOMY: IS THE LAW ADEQUATE?

> A necessary element of freedom and of dignity of any individual is an 'entitlement to respect for the unique set of ends that the individual pursues' … that we choose voluntarily rather than through a feeling of obligation only enhances the significance of a practice to our autonomy, our identity and our dignity.[1]

1. INTRODUCTION

Chapter 4 examined the anti-discrimination framework and identified the gaps in South African law with regard to the protection of appearance autonomy in the workplace. The purpose of this chapter is to investigate the adequacy of protection for appearance autonomy in terms of other current fundamental rights and freedoms. This includes the rights to privacy, religion and expression – all of which are related to aspects of an individual's appearance and are connected to aspects of an individual's dignity. Moreover, the thesis seeks to establish the extent to which each of these rights may support the argument for appearance autonomy.

The first part of the chapter considers the right to privacy. As discussed in chapter 3, the right to privacy is connected to dignity and autonomy in the workplace.[2] Thus the thesis intends to examine this right and its ability to protect appearance, particularly through the lens of Fisk's framework. Fisk's argument re-examines appearance regulation through the notion of privacy.[3] The thesis will examine this approach as well as its limitations as a means of protecting appearance autonomy.

The second and third parts of this chapter will consider those fundamental freedoms that are closely related to one's appearance, religion and expression. Each freedom's legal framework will be set out, as well as the developments of this freedom and how it is perceived in the law. Furthermore, as in the previous chapter, those appearance-related cases that can potentially fall under a claim for freedom of religion or expression will be identified. Thus, these cases will show that the courts have balanced an employee's individual autonomy and recognition of personal identity against other competing interests. Finally, the chapter will address the limitations of these freedoms in adequately protecting appearance, as well as key

[1] *MEC for Education: Kwazulu-Natal v Pillay* 2008 (2) BCLR 99 (CC) para 64.
[2] See the discussion in chapter 3 part 3.3 on dignity and privacy in the workplace.
[3] C Fisk 'Privacy, power and humiliation at work: Re-examining appearance regulation as an invasion of privacy' (2006) 66(4) *Louisiana Law Rev* 1111–1113.

findings identified in this chapter that further support the protection of appearance autonomy as a fundamental freedom.

2. PRIVACY AND A RIGHT TO APPEARANCE AUTONOMY

An under-explored right when dealing with the right to appearance autonomy is the right to privacy. Warren and Brandeis described privacy simply as the right to be left alone.[4] In the workplace, individuals are subject to rules that affect the manner in which they carry out their daily duties; this may involve dress codes that impact their physical appearance.[5] Consequently, these dress codes may adversely affect an employee's autonomy to express their identity. This section addresses the right to privacy as a route to protecting appearance autonomy. This includes a brief examination of privacy's legal framework as well as Fisk's privacy framework. Fisk recognises that one's lifestyle and personal choices may influence one's appearance in the workplace.[6] Her approach includes advocating the right to privacy as a source of protecting appearance autonomy.[7]

2.1 Legal framework

Chapter 3 outlined the fundamental right to privacy in section 14 of the Constitution. It was also shown that privacy is connected to one's dignity and is closely linked to one's personal identity.[8] The court in *Bernstein and Others v Bester NO and Others*[9] noted how privacy shrinks as soon as individuals move into a public space or workplace.[10] However, this does not imply that one's privacy has no value outside of one's private realm, but rather that the legitimate expectation of one's privacy differs. Privacy was shown to be an extension of a person's right to dignity, therefore the violation of privacy is an inexorable impairment of their dignity.[11] Thus, in assessing elements of a person's privacy in relation to their dignity, chapter 3 examined how certain rules in the workplace may not be warranted and, if not

[4] J Warren & M Brandeis 'The right to privacy' (1980) 4(5) *Harvard Law Review* 193. See also A Rycroft 'Privacy in the workplace' (2018) 39 *ILJ* 725.
[5] A Rycroft 'Privacy in the workplace' (note 4).
[6] Fisk (note 3) 1112–1113.
[7] Ibid.
[8] See the discussion of privacy and dignity in chapter 3 part 3.3.
[9] *Bernstein and Others v Bester NO and Others* 1996 (2) SA 751 (CC).
[10] Ibid para 67.
[11] CM van der Bank 'The right to privacy – South African and comparative perspectives' (2012) 1(6) *EJBSS* 78.

justified appropriately, they can be viewed as detrimental and limiting to an employee's privacy.[12]

As mentioned in chapter 3, Fisk and Rycroft recognise that the protection of personal privacy is equally important in the workplace, and this includes protection from intrusive choices about appearance, particularly as these relate to one's personal autonomy.[13] In the workplace, the relationship between privacy and appearance is not a novel idea and they are viewed as reinforcing each other. Furthermore, Rycroft reiterates that the concept of privacy is based on an individualistic society, which suggests that valuing one's personality, autonomy and privacy is a priority.[14] Therefore, in identifying the relationship between the right to privacy and appearance regulation, the connection to dignity is important as the interpretation of both rights makes the development of human rights more purposeful.[15]

2.2 Appearance and the right to privacy: Fisk's framework

In the previous chapter, the thesis investigated the ways in which anti-discrimination law may serve to protect against appearance discrimination in the South African workplace.[16] This chapter addresses the protection of appearance autonomy in the workplace through the right to privacy. Fisk advocates a privacy-driven approach over an anti-discrimination framework.[17] Her approach is relevant to the thesis as it aligns with the recognition that workplace appearance regulation should not deny an employee's autonomy to adopt a particular physical appearance because the latter is an extension of their identity.[18]

The thesis recognises the need for appearance regulation for specific business requirements, but the employer's exercising of power should not be extended to the point of rendering their actions unfair.[19] Fisk poses a framework for the protection of appearance autonomy in relation to dress policies by asking four questions in seeking the right to privacy. A discussion of each of these follows.

---

[12] See the discussion in chapter 3 part 3.3. See *Pikitup (Soc) Limited v SAMWU and Others* (2014) 35 *ILJ* 983 (LAC) paras 63–66.
[13] Rycroft (note 4) 726–727; Fisk (note 3) 1111–1114.
[14] Ibid.
[15] See the discussion in chapter 3 part 3.3.
[16] See the discussion in chapter 4 part 2.4.
[17] Fisk (note 3) 1111.
[18] D Rhode *The Beauty Bias: The Injustice of Appearance in Life and Law* (2010) 99.
[19] Fisk (note 3) 1112–1113.

The first question is the extent to which an employer's dress code infringes on the employee's autonomy or, in Fisk's terms, their right to freedom of choice in dress.[20] To elaborate, this question aims to address the severity of the impact of the employment rule or policy on the employee.

This second question is whether the employee had a genuine and reasonable expectation of privacy. Fisk states that, in answering this question, there needs to be a subjective examination of the employee and whether the dress code violates an integral aspect that an employee would classify as important.[21] The interpretation of this question implies that personal beliefs or choices such as religion or culture would be assessed here, but Fisk emphasises that these factors should not be determinative. Although she acknowledges the risk of trivial claims that may arise from this, she asserts the judiciary's credibility by acknowledging the same level of examination to appearance be applied as the courts undertake when assessing claims that establish whether an individual's religion requires a particular way of dressing.[22] Additionally, this question calls for further investigation of the workplace and whether the reasonable person would decide that the environment and the imposed policy are likely to invade autonomy.

The third question is an assessment of whether the employer has a legitimate reason for imposing the dress code. Fisk notes that this will involve an empathetic balance between the parties in the relationship.[23] The final question addresses whether the employer's interest can be served through less invasive methods.[24] This focuses on the employer exhausting all other alternatives prior to implementing the dress code and suggests a level of accommodation towards the employee prior to implementing any rule.

All in all, it is clear that there are some benefits to Fisk's privacy analysis, in comparison to the anti-discrimination framework. There is a better focus on balancing the interests of the employment relationship by gauging the need for the employer's rule or policy against the likely impact of the regulation on an employee's freedom.[25] This minimises any potential abuse of power by an employer. Significantly, Fisk argues that the protection afforded by a privacy analysis ensures that there are no gaps in the protection of anyone affected by

[20] Ibid 1127–1128.
[21] Ibid 1128.
[22] Ibid.
[23] Ibid 1129–1130.
[24] Ibid 1127.
[25] Ibid 1136–1138.

appearance discrimination.[26] Compared to the group-based approach afforded by anti-discrimination law, this form of protection ensures that all individuals are covered, as everyone has a right to privacy. This reiterates the notion of upholding the individual's dignity and ensuring access to all.[27] Fisk's framework encourages employers to establish a degree of flexibility, accommodation and necessity when enforcing dress codes, which inevitably calls for analytical thinking at every stage.[28] A significant benefit is the focus on autonomy, and reiterating the importance of an individual's expression and individuality, which, Fisk argues, provides further context for the reasoning that a dress code should be prohibited.

2.3 Limitations of privacy as a means to protect appearance autonomy

Although there are benefits to regulating appearance through privacy, there are a few criticisms of Fisk's approach. The most significant concern is weighing the autonomy of an employer versus their employees' autonomy.[29] The question of whether a business's appearance requirements are stronger than an employee's right to decide on their appearance is contentious.[30] However, similar to the anti-discrimination framework in protecting appearance autonomy, this still requires respect for the business necessity justification.[31] Fisk argues that this calls for an awareness of breaking regressive stereotypes and recognising why people choose a particular appearance. This will provide employers with insight into whether their appearance regulations are justified or not.[32] Another concern about addressing appearance protection only through privacy is the limited understanding of why appearance protection is crucial in the first place. Although Fisk's framework advocates strongly for recognising an individual's rights, she notes that a topic like appearance can only elicit notable change if identity, like the anti-discrimination structure, is attached to a certain group.[33] This is due to a strong recognition of an individual's identity through an association

[26] Ibid.
[27] Ibid 1137–1139.
[28] Ibid.
[29] Ibid 1140.
[30] Ibid.
[31] See the further discussion in chapter 4 part 2.4.2 on the considerations for the inherent requirements of the job. See also M Finkin 'Employee privacy, American values and the law' (1998) 72(1) *Chi-Kent L Rev* 235; Fisk (note 3) 1140–1141.
[32] Fisk (note 3) 1143–1145; K Klare 'Power/dressing: Regulation of employee appearance' (1992) 26 *New Eng L Rev* 1445. See also A Taylor & J Taylor 'The place of tattoos, beards and hairstyles in discrimination law' (2020) 26(3) *Australian Journal of Human Rights* 482.
[33] Fisk (note 3) 1144.

with a group i.e. strength in numbers, but this does not have to be limited to one single identity; rather, it allows for the interpretation of a multi-faceted meaning of appearance.[34]

Nevertheless, this section has shown that protection against appearance discrimination requires a stronger recognition of autonomy and dignity. Furthermore, the thesis argues for the eradication of conventional stereotypes that employers overlook or fail to accommodate unless there is an efficacious imposition on them.[35] This entails adopting an approach that encompasses the values of both anti-discrimination and a privacy analysis. However, the importance of one's appearance autonomy remains limited if not accurately protected by the law.[36]

Fisk has shown that protection under privacy law is possible, but this approach fails to fundamentally offer protection in a meaningful way like the anti-discrimination approach. She recognises that group identity holds weight in protection from appearance regulations, particularly when ascertaining what appearance choices should be allowed in a dress code and what choices should not be allowed.[37] As a listed ground, physical appearance will reinforce the principles of substantive equality. Furthermore, there will be certainty behind who is protected which will result in a presumption of unfairness, thereby clarifying the burden of proof and jurisdiction. Since an employee's dress preference is subjective, a group-based formation can provide significant context to an employer, which the privacy approach may not do. Although Fisk argues for both sides of the anti-discrimination framework, she reiterates that, regardless of whether a privacy or an anti-discrimination analysis is used when examining autonomy protection, the dignity of every group or individual should be reinforced.[38] This reinforces the need for the fundamental legal recognition of autonomy when expressing one's appearance.

3. FREEDOM OF CONSCIENCE, RELIGION, BELIEF AND OPINION

[34] Ibid. Fisk provides the example of the headscarf, which can be worn for multiple reasons: as a Muslim or nun for their religion, as an expression of one's heritage, such as African or Caribbean women, or even to portray Hollywood glamour, as in the 1950s.
[35] A Delagrave 'The regulation of physical appearance in the Canadian workplace as a human rights issue' (2020) 370, *https://dspace.library.uvic.ca/bitstream/handle/1828/12052/Delagrave_AnneMarie_PhD_2020.pdf?sequence=1* accessed 17 February 2022. See also Rhode *The Beauty Bias* (note 18) 140.
[36] Rycroft (note 4) 747.
[37] Fisk (note 3) 1140–1144.
[38] Ibid 1144–1145; Rycroft (note 4) 725 and 747.

The freedom of conscience, religion, belief and opinion is important to consider when examining protection for appearance autonomy because of the nexus between one's appearance and the influence of an individual's conscience, religion, belief and opinion.[39] This section examines the adequacy of this fundamental freedom in addressing unfair discrimination and ensuring the values of a transformative society that promote equality and dignity. Furthermore, this section will recognise the extent to which the fundamental freedom of conscience, religion, belief and opinion may address appearance discrimination. This will be demonstrated by a brief examination of the legal framework as well as the significant appearance-related cases that can be categorised under this freedom.

3.1 Legal framework

When considering the freedom to conscience, religion, belief and opinion, we need to consult sections 15 and 31 of the Constitution. Section 15(1) states that 'everyone has the right to freedom of conscience, religion, thought, belief and opinion'. Section 15(2) provides that religious observances may be conducted at state or state-aided institutions, provided that those observations follow rules made by the appropriate public authorities, are conducted on an equitable basis, and attendance at them is free and voluntary.[40] Additionally, section 31(1) provides that 'persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community *(a)* to enjoy their culture, practise their religion and use their language; and *(b)* to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.' The protection of religious freedom requires a tolerance of all aspects, not only in the organisation or religious association, but also in other spaces that an individual occupies, such as the workplace.[41]

The concept of religion has evolved, and while it is often viewed as a belief, view or system, it has also developed into a way of life and culture that encompasses the essence of spiritual conduct.[42] Religion is understood as a 'belief in a transcendental reality with a worldly view that describes the human role in the universe', and allows the individual to practise their rituals, partake in festivals, worship, and follow their texts in an organisation that develops

[39] Rhode *The Beauty Bias* (note 18) 99.
[40] Section 15(1)*(a)–(c)* of the Constitution.
[41] R Henrico *Religious Discrimination in the South African Workplace* (2016) 23–26.
[42] Ibid 354–355.

their belief system.[43] Religions have different meanings for different groups of people, and this requires the courts to interpret this freedom in a manner that encourages religious diversity.[44] This includes those people who align with non-religious groups, and broadens the definition of religion to incorporate people's culture and lifestyle beyond religious doctrine.[45] Thus section 15 includes freedom of conscience, thought and opinion or belief, and protects philosophical beliefs, views and principles that are not particularly 'religious'.[46]

Christian Education South Africa v Minister of Education[47] established that religion was a lifestyle and an integral aspect of an individual's ethos and culture.[48] Furthermore, *Prince v President Cape Law Society*[49] indicated that, regardless of how intangible religion and beliefs could be, it is not for the court to question the reality of the practices; it must rather examine whether there is an issue relating to the centrality of the practice.[50] Therefore, atheism or non-religious practices may not be protected under the 'religion' umbrella, but that does not restrict the individual or group from seeking protection under conscience or belief.[51] In *Taylor v Kurstag NO and Others*,[52] the autonomy of an individual practising their beliefs, whether it is through their speech, worship, rituals or even through participating in religious discussions or contributing towards financial religious payments, was recognised. If the systems and practices align with the individual's religion or belief, then the individual may seek fundamental protection under this section, read with section 31.[53]

Alternatively, a route to religious protection can be sought under section 31. This gives those people that belong to a religious group the opportunity to have their right to their cultural or

---

[43] G van der Schyff 'The legal definition of religion and its application' (2002) 119 *African Law Journal* 289–290.
[44] E Goodsell 'Constitution, custom, and creed: Balancing human rights concerns with cultural and religious freedom in today's South Africa' (2007) 21(1) *Brigham Young University Journal of Public Law* 118.
[45] Ibid. See also *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) paras 33–34.
[46] Henrico (note 41) 29–33. Henrico argues that a broader spectrum of factors needs to be considered when interpreting religious freedom. This includes 'belief, conscience, culture, way of life, self–worth and human dignity …' See also P Farlam 'Freedom of religion, belief and opinion' chapter 41 in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (2013) 12–14. Farlam states that section 15 clearly expresses a secular interpretation by allowing for the protection of having no belief and embraces a comprehensive view of the good life that derives from 'political, sociological and philosophical ideologies …'. He argues that even areas like abortion and euthanasia could potentially be protected under this freedom if they stem from personal morality or from a conscientious belief that may not be religiously motivated.
[47] *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).
[48] Ibid para 19. The court stated that 'religion includes both the right to have a belief and the right to express such belief in practice'.
[49] *Prince v President Cape Law Society* 2002 (2) SA 794 (CC).
[50] Ibid para 42.
[51] Ibid.
[52] *Taylor v Kurstag NO and Others* 2005 (1) SA 362 (W) para 37.
[53] Ibid. See also Henrico (note 41) 55.

religious beliefs protected.[54] However, there are overlaps between sections 15 and 31. The right to be protected under section 31 requires the right to be balanced against other rights in the Constitution.[55] This is significantly addressed in *Pillay*, which adopted a three-stage test for balancing these rights: firstly, the applicant must have a recognised religion; secondly, the practice carried out by the applicant must be central to the religion; and finally, the applicant's belief in the religious practice must be genuine.[56]

3.2 Developments in the freedom of conscience, religion, belief and opinion and appearance-related case law

South African courts have adopted a liberal approach in dealing with claims for freedom of religion, culture, belief or opinion. Lenta notes that the courts have valued the importance of culture and religion for groups of people as well as ensured the right to equality.[57] Seeking protection under the Constitution is a right afforded to everyone and there is a right to seek protection as a minority group. This emphasises the court's ability to recognise the autonomy of all individuals to enforce choices that speak to their human dignity and equality.[58] Examining the jurisprudence of these principles helps to understand their scope and content of application inside and outside the workplace. Certain cases discussed in this overview have connections to dignity and autonomy because they are examples of an individual's beliefs being demonstrated through their appearance. Although the cases discussed in this section are not all workplace-based, they are relevant as the principles apply to the fundamental rights of an individual.

Dignity plays a significant role in religion and, in a recent decision of the Constitutional Court, *Freedom of Religion South Africa v Minister of Justice and Constitutional Developments and Others*,[59] it was held that although parents may view corporal punishment of a child as a permissible act under religious Christian scriptures and writings, it is inconsistent with the rights in sections 10 and 12 of the Constitution.[60] This shows that,

[54] Y Fessha & B Dessalegn 'Freedom of religion and minority rights in South Africa' (2021) 12 *Religions* 4.
[55] Section 36 of the Constitution. See also Fessha & Dessalegn (note 54) 5.
[56] *Pillay* (note 1) para 97. See the discussion of *Pillay* in chapter 4 part 2.4.3.
[57] P Lenta 'Muslim headscarves in the workplace and in schools' 2007 *SALJ* 298.
[58] Fessha & Dessalegn (note 54) 6.
[59] *Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others* [2019] ZACC 34 paras 9, 34, 48, 71 and 76. Mogoeng CJ in his judgment evaluated the need for greater protection of children, particularly against violent abuse. He noted how freedom of religion can be used by parents as a justification to conflate reasonable or moderate chastisement with brutal abuse. He found this to be inconsistent with the right to dignity.
[60] Section 10 of the Constitution guarantees dignity and s 12 guarantees freedom and security of the person.

regardless of the fundamental right to religion and religious belief, if the right goes against the individual's security and dignity, then the latter rights will prevail.[61]

Significantly, in assessing the court's approach to workplace disputes about competing interests, the case of *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi and Others*[62] is noteworthy. The court dealt with an employer's duty to reasonably accommodate diverse religions and cultures, as opposed to the employer's inherent requirements of the job. The employee was dismissed for disobeying instructions and absconding from work. She requested unpaid leave for traditional healing training for five weeks, as part of her cultural beliefs. She explained that if she failed to attend this training, she could fall ill and die, but the employer refused to oblige. The SCA held that the dismissal was substantively unfair due to her genuine beliefs about her ill-health, which qualified for sick leave. The court established that the employer should have reasonably accommodated her by exploring alternatives to her taking leave rather than resorting to dismissal.[63]

In *Carlin Hambury v African Hide Trading Corporation*,[64] the court found that the employer's inherent requirement of the job justification took preference over the employee's refusal to work on Saturdays as he was a practising Seventh Day Adventist. However, the employee was selective about his practices, and the court found that in these circumstances the employee needs to make more effort to accommodate a solution.[65] In contrast, in *TDF Network Africa (Pty) Ltd v Faris*,[66] a Seventh Day Adventist employee was dismissed for failing to attend stocktaking once a month on a Saturday. She offered to work on another day, but the company refused to accommodate her, fearing it would open the floodgates for other employees. However, the Labour Appeal Court, agreeing with the Labour Court's decision, reiterated the employer's duty to reasonably accommodate an employee's freedom of religion and held that this would not cause undue hardship for the employer. Hence, Faris's dismissal was held to be automatically unfair.[67] This case shows that the courts consider all factors and

[61] Fessha & Dessalegn (note 54) 5. See also *Christian Education South Africa v Minister of Education* (2000) (4) SA 757 (CC).
[62] *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi and Others* 2014 (1) SA 585 (SCA).
[63] Ibid paras 30–31.
[64] *Carlin Hambury v African Hide Trading Corporation* unreported Labour Court case. See also A Govindjee 'Freedom of religion, belief and opinion' in A Govindjee *Introduction to Human Rights* (2016) 113–123.
[65] See also *Dlamini and Others v Green Four Security* 2006 JOL 17853 (LC) where the employees were selective with their beliefs and insisted on wearing beards in accordance with their religion.
[66] *TDF Network Africa (Pty) Ltd v Faris* (2019) 40 *ILJ* 326 (LAC).
[67] Ibid paras 47–51.

matters influencing discrimination and the fairness thereof, with a particular respect for accommodation.[68]

Prince involved a Rastafari law graduate who wished to qualify as an attorney. This required the completion of community service, which Prince had done. However, the Law Society refused his application for registration as it failed to find that he was a fit and proper person.[69] This was due to Prince's convictions for the possession of cannabis; as a Rastafari, he continued to possess cannabis. He challenged the Drugs and Drug Trafficking Act[70] and the Medicines and Related Substances Control Act[71] on the basis that they violated his freedom to religion under section 15 as well as section 31 of the Constitution. The court, applying the three-step test, recognised Rastafarianism as a religion and accepted the use of cannabis as a central practice of the religion.[72] When addressing the final consideration about whether Prince's belief in the practice was genuine, the court did not doubt Prince's faith in the religion as it established through his statements and actions that he was a genuine member of the faith. This indicates the subjective assessment of the court, therefore indicating that each case should be determined on its own merits.[73]

A recent case concerned a Muslim woman's right to wear a hijab under her military uniform, despite the South African National Defence Force (SANDF) claiming that she was infringing the military discipline code. The employee's right to uphold her religious beliefs prevailed and the claim was withdrawn. Following this decision, the military religious dress policy was amended by the SANDF to include a headscarf.[74]

Significantly, when *Pillay* was handed down, a similar situation arose involving a student wearing a beaded necklace to mourn the death of her mother's relative; the school did not

[68] S Ebrahim 'The employee's right to freedom of religion versus the employer's workplace needs: An ongoing battle: *TDF Network Africa (Pty) Ltd v Faris* (2019) 40 ILJ 326 (LAC)' (2021) 24 *PER/PELJ* 22.
[69] *Prince v President Cape Law Society* 2002 (2) SA 794 (CC). Another case which dealt with a similar issue was *Antonie v Settlers High School Governing Body* 2002 (4) SA 738 (C). A student was suspended from school for wearing dreadlocks after converting to Rastafarianism, even though he covered them with a black cap. Despite the school condemning the student for infringing the code of conduct which required students to tie up their hair if it is below the collar, the court ruled in favour of the student. The court emphasised that punishing the student for developing and respecting her religion infringed on her right to dignity and reinforced the need to protect her constitutional right.
[70] Act 104 of 1994.
[71] Act 101 of 1965.
[72] *Prince* (note 69) para 97.
[73] Ibid. See also Fessha & Dessalegn (note 54) 8.
[74] K Masweneng 'Muslim SANDF major allowed to wear headscarf – under set restrictions', *https://www.timeslive.co.za/news/south-africa/2020-01-22-muslim-sandf-major-allowed-to-wear-headscarf-under-set-restrictions/*, accessed 17 February 2022.

allow her to do so.[75] Although the school was not aware of the *Pillay* ruling, it was clear that school rules were required to allow the practice of cultural and religious beliefs.[76] As a 'pageant of diversity',[77] an attempt to showcase one's beliefs, culture and thoughts should be celebrated as enriching the school's operations of inclusivity rather than demoralising the student and infringing her human rights without any form of accommodation.[78]

Prince[79] and *Pillay,*[80] recognising the importance of personal autonomy, illustrated the progression of the courts in respecting the freedom of religion, and this was further elaborated on in *POPCRU* when the employees were allowed to continue wearing their dreadlocks as an expression of their beliefs.[81] In *Woodways v Vallie*[82] a Muslim customer entered a Christian-owned company and was told to remove his religious head covering in order to obtain service.[83] Mr Vallie argued that he was discriminated against on the basis of his faith, while the owners of Woodways felt that they were expressing their religious beliefs. The High Court, reaffirming the Equality Court's sentiments, found that the request to remove his fez impaired Mr Vallie's dignity and identity.[84] This case illustrated the court's recognition of the need to uphold an individual's dignity and emphasised the close link between aspects of the claimant's religious appearance and their identity.

When balancing the boundaries of the legislative framework, transformation needs to be considered, and particularly dignity and equality. The non-workplace-related cases ensured that these principles were upheld and the workplace disputes showed the reinforcement of a specific test when deliberating. Thus, the courts are committed to ensuring a balance in these cases, particularly when considering an individual's right to freedom of religion. This section has shown how to understand the background to and value of the right to freedom of religion, belief and opinion, which is essential in recognising the importance of expressing oneself.

[75] E de Waal et al 'Religious and cultural dress at school: A comparative perspective' (2011) 14 *PER/PELJ* 76–77.
[76] Ibid.
[77] M McGregor 'Employees' right to freedom of religion versus employers' commercial interests: A balancing act in favour of religious diversity: A decade of cases' (2013) 25 *SA Merc LJ* 227.
[78] Ibid.
[79] *Prince* (note 69).
[80] *Pillay* (note 1).
[81] See the discussion of appearance-related cases in chapter 4 part 2.4.3.
[82] *Woodways CC v Vallie* 2010 (6) SA 136 (WCC).
[83] Ibid paras 15–17.
[84] Ibid paras 72–74.

Conducting religious tasks and showcasing one's opinion requires a degree of expression, one that expands and exercises a broader degree of personal development.[85]

4. FREEDOM OF EXPRESSION

This chapter and the previous chapter have shown that expression is an essential aspect of considering appearance autonomy because acknowledging one's identity requires the freedom to express this through one's appearance.[86] Therefore, this section, like the section on freedom of religion, considers the ways in which appearance autonomy may be protected through this freedom. Expression takes many forms, and the boundaries of one's freedom of expression can be realised by examining these areas through the legal framework and jurisprudence of freedom of expression.

4.1 Legal framework

Section 16 guarantees the right to freedom of expression, which includes '*(a)* freedom of the press and other media; *(b)* freedom to receive or impart information or ideas; *(c)* freedom of artistic creativity; and *(d)* academic freedom and freedom of scientific research.'[87] Although this is not an exhaustive list, the provision's meanings are not limited to the interpretations identified in this section.[88] Section 16(2) emphasises the wide interpretation of the meaning to state that the right does not extend to '*(a)* propaganda for war; *(b)* incitement of imminent violence; or *(c)* advocacy of hatred that is based on race, ethnicity, gender of religion, and that constitutes incitement to cause harm.' In this context, freedom of expression is more than just how a person speaks; it includes the right to hear, read, wear and seek when developing one's form of outward expression, which may involve expression through certain hairstyles or clothing items.[89]

[85] K Alston 'Freedom of expression and school dress codes: South African and international perspectives' (2006) 11(1) *Australia & New Zealand Journal of Law & Education* 84 examines the complexity between expressing religious freedom and the notion of individualism characterised by Western cultures, as in some instances the wearing of a headscarf by a Muslim woman is viewed as part of their religious expression whereas Western governments such as Germany view this practice as repressive towards women.
[86] Rhode *The Beauty Bias* (note 18) 99.
[87] Section 16(1) of the Constitution.
[88] Section 16(2) of the Constitution.
[89] Alston (note 85) 181 and 300.

Since South Africa is a democratic state, freedom of expression must be protected and enforced.[90] The South African High Court in *Mandela v Falati*[91] recognised freedom of expression as the freedom that all the other freedoms depend upon, and without which the other freedoms would not endure for long.[92] Freedom of expression is a fundamental right to communicate not only through one's speech but also through behaviour that enshrines an individual's identity.[93] The ability to express oneself fully is more than presenting oneself to the world; it is also a key ingredient in creating a picture of who one is and what one communicates to the world.[94] The freedom to express oneself goes beyond protecting someone's right to express an opinion; it is much wider, as it allows for the opportunity to hear that opinion and acknowledge it.[95] It is a right that is accorded to everyone regardless of any limiting criteria on their expression.[96] Kahn states that the freedom to express one's personality or identity is a constitutional doctrine that has its foundation in the value of human dignity.[97] As individuals, our morals and values are intertwined with the truth of our identity, and by showcasing these truths, individuals are able to fully comprehend and dispense their freedom of expression.[98] If people are censored in what they say or how they communicate, whether it is through their clothing or behaviour, then those who are not held accountable for this censorship can undermine the goals of a democratic society.[99]

Philips and Another v Director of Public Prosecutions and Others[100] illustrated how the right to expression includes other forms of non-verbal communication, such as hand gestures, wearing controversial clothing, or even movements that constitute a form of communicating.[101] In *Islamic Unity Convention v Independent Broadcasting Authority and*

[90] SALC Litigation Manual Series 'Freedom of expression: Litigating cases of limitations to the exercise of freedom of speech and opinion' (2016) 11, *https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Freedom-of-Expression-Manual.pdf*, accessed 17 February 2022.
[91] *Mandela v Falati* 1994 (4) BCLR 1 (W).
[92] Ibid 8.
[93] J Marshall 'Human rights and the legal regulation of dress' (2016) 25 *Nottingham LJ* 74–75.
[94] Ibid.
[95] SALC Litigation Manual Series (note 90) 14.
[96] Alston (note 85) 83–84. See G Allsop et al 'Constitutional law for students' (2020) 435 *https://doi.org/10.15641/0-7992-2546-4*, accessed 17 February 2022 emphasises the need for freedom of expression to ensure a democratic society.
[97] J Kahn 'Privacy as a legal principle of identity maintenance' (2003) 33 *Seton Hall Law Review* 373. Kahn notes how privacy is integral to individual development and this is ultimately grounded in one's dignity. See also Marshall (note 93) 75. See the discussion in chapter 3 part 3.3.
[98] Allsop et al (note 96) 430.
[99] Ibid 435.
[100] *Philips and Another v Director of Public Prosecutions and Others* 2003 (3) SA 345 (CC) para 15.
[101] Ibid. See also Allsop et al (note 96) 440.

Others,[102] the Constitutional Court went further in stating that the fundamental right to expression may lead to shock or offence, but this does not imply that the conduct of expression is outside the boundaries of protection.[103] With this broader interpretation in mind, Cohen argues that if a certain freedom listed under section 16(1) is called into question, then protection can be sought under this provision; however, where the form of expression is not listed, then the litigant may still seek protection.[104] Unless it is listed under section 16(2), what is required is to show that the conduct is part of their expression.[105] This is not to say that anything can fall under this freedom, since there are limitations; this implies that the focus should be on whether the conduct, verbally or behaviourally, constitutes demeanour that may justifiably be proscribed under section 16.[106]

4.2 Developments to the freedom of expression and appearance-related case law

When addressing disputes relating to freedom of expression, the courts have to adopt a balancing exercise, which involves balancing the infringement of the right against the purpose that the infringement seeks to achieve.[107] For the purposes of this thesis, freedom of expression as a form of artistic creativity is relevant to the notion of appearance autonomy.[108] To conceptualise what expression means in the law, selected comparative cases alongside South African jurisprudence that deal with this freedom will be referenced.

The word 'expression' is often associated with speech, and while this is an equally important right, it is not the sole meaning of expression, but rather a subsection of it.[109] When dealing with information of undisputable importance, media institutions must act with integrity and responsibility.[110] *Khumalo and Others v Holomisa*[111] recognised the importance of the press and its role in respect of the government, particularly in dealing with hate speech and how it

[102] *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC) paras 28–29.
[103] Allsop et al (note 96) 463.
[104] Ibid.
[105] Ibid 441.
[106] Ibid.
[107] *S v Mamabolo* 2001 (3) SA 409 (CC) para 37. See also Fessha & Dessalegn (note 54) 5.
[108] D Milo et al 'Freedom of expression' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed Original Service (2003) 52–54.
[109] Alston (note 85) 100 notes that 'linguistically expression would appear to have wider connotations than speech …'.
[110] In *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) para 24 the court recognised the media's role as 'primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility.' See also Allsop et al (note 96) 440–444.
[111] *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC).

must be balanced against the right to expression. This was the first case where the Constitutional Court had to deal with direct application, which is where the courts have to test whether an aspect of the common law is inconsistent with the Constitution.[112] Holomisa sued a newspaper for publishing defamatory statements, alleging that the statements were false.[113] The courts had to balance the right to individual freedom against human dignity, and to assess whether the common law of defamation was inconsistent with the Constitution.[114]

Non-speech forms of expression may develop but are not limited to political clothing or even bodily art such as makeup, jewellery or tattoos.[115] Artistic creativity may not be limited to fine art but in its broadest form would be fundamental to self-fulfilment, dignity and autonomy.[116] Unless expression is premised as hate speech,[117] tattoos and piercing are generally accepted under the broader forms of expression, which are deemed as inherently indicative of one's visual identity.[118] As a form of personal taste, tattoos may have reference for one's personality, identity or personality.[119]

In examining tattoos as a form of expression two contrasting USA cases have addressed the relevance of their position. In *Riggs v City of Fort Worth*,[120] a police officer was required to cover his tattoo. The employer deemed his tattoo unprofessional, and the court upheld the employer's views based on a previous ruling that, at the time, stated that tattoos are not a form of expression.[121] However, eight years after *Riggs*, in *Anderson v City of Hermosa Beach*[122] the court confirmed that the right to display a tattoo goes beyond matters of public interest, and that the employer should meet higher standards of intermediate scrutiny before

[112] E de Waal et al 'Religious and cultural dress at school: A comparative perspective' (2011) 14 *PER/PELJ* 69.
[113] *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC).
[114] Ibid para 4.
[115] I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013). See also R Davey & L Dahms-Jansen *Social Media in the Workplace* (2017) 71–72; Alston (note 85) 323; J van der Westhuizen 'Freedom of expression' in D van Wyk, J Dugard, B de Villiers & D Davis (eds) *Rights and Constitutionalism* (2003) 285.
[116] Alston (note 85) 323.
[117] *Masuku and Another v South African Human Rights Commission obo South African Jewish Board of Deputies* 2019 (2) SA 194 (SCA) para 31.
[118] Recently, the Minister of Police, Bheki Cele, made comments about how tattoos should be viewed in the workplace. He stated that applicants with tattoos are perceived to be gangsters, therefore they would not be hired. Comments like this further exacerbate the stigma and degradation behind these perceptions and constitute a fundamental impairment of an individual's expression and autonomy. In another instance, a uniformed South African Police Services (SAPS) police officer caused an uproar by posting an image on social media displaying her tattoo, which is prohibited. The tattoo, if procured prior to their employment as an officer, should be concealed.
[119] W Rima 'The human body: The canvas for tattoos; the public workplace: An exhibit for a new form of art?' (2018) 66 *Drake L Rev* 716.
[120] *Riggs v City of Fort Worth* 229 F Supp 2d 572 ND Tex (2002).
[121] Rima (note 119) 725.
[122] *Anderson v City of Hermosa Beach* 621 F 3d 1051 (2010).

restricting them.[123] This meant that the employer should question the legitimate aim of its policy prior to imposing restrictions.

Significantly, in dealing with matters of public interest, the court in *Pillay*, dealing with freedom of religion and expression, recognised the issue as one of public interest. The court acknowledged how expressing aspects of one's religion or culture in public is a step in the right direction for a transformative society.[124] This case has repeatedly been referenced in this thesis, through the tenets of dignity, equality, religion and now expression. Although the focus of this thesis is limited to the workplace, the wearing of jewellery such as a nose stud remains a relevant form of expression.[125] Chapter 4 reiterated that there should be no restriction when it comes to piercings, unless such restrictions are for health and safety purposes.[126] Expression through clothing may also have a political purpose, for example wearing arm bands or t-shirts in support of opposition to the Vietnam war.[127] This shows that aspects of physical appearance such as clothing, accessories and tattoos have a close connection to one's expression and autonomy which may ultimately impact on one's dignity and identity if restricted.

5. KEY FINDINGS

The focus at the start of this chapter was the court's ability to protect and recognise an individual's freedom of choices through their fundamental rights. However, by examining the frameworks of the fundamental freedoms of expression and religion, conscience, belief or opinion, it was shown that these rights are a significant tool in seeking protection for personal identity. However, the development of these freedoms in the case law emphasises the limited powers that these fundamental freedoms hold. It was shown that an increasing number of cases seeking relief for appearance-related discrimination led to claims filed under the freedom of religion or expression.[128] Thus, it is necessary to consider whether the right to

[123] Rima (note 119) 725.
[124] *Pillay* (note 1) para 107.
[125] Alston (note 85) 181 and 300.
[126] *Cloutier v Costco Wholesale Corp* 390 F 3d 126 (1st Cir 2004); *Woolworths Ltd (t/as Safeway) v Brown* (2005) WL 2341333.
[127] Alston (note 85) 114.
[128] *Pillay* (note 1); E Kelly 'Accommodating religious expression in the workplace' (2008) *Employee Responsibilities and Rights Journal* 52.

appearance discrimination can be reconciled with the human rights framework and why these measures have struggled to sufficiently resolve these types of claims.[129]

Currently, a claim of appearance discrimination in the workplace must fall under either one of the protected grounds or the unlisted grounds stipulated in the EEA or the Constitution.[130] An examination of how the fundamental freedoms are addressed revealed that the courts often struggle to deal with these freedoms against competing constitutional rights. This shows that despite these human rights being enshrined in fundamental law, they are not absolute and are limited.[131] Likewise, the restriction on wearing religious symbols or cultural clothing to work is not always a violation of human rights, as they may be regulated by the justifiable aims of the employer.[132] Courts are then required to establish what is necessary and proportional, and despite the margin of appreciation, there is no consistent application, as evidenced by the different approaches discussed above. Therefore, explicitly recognising the right to appearance may provide an additional route of certainty for employees that the right to privacy and the freedoms of religion and expression may not provide.

The thesis has shown how the right to choose one's appearance in the workplace based on one's religion or expression is not without its consequences.[133] An additional shortcoming when seeking protection of appearance autonomy in the workplace under current constitutional law is the process of seeking relief.[134] An examination of the case law and the framework of the Constitution showed that any claims relating to freedom of religion or expression may be limited based on an inherent requirement of the job.[135] Therefore, this section emphasises the need for the courts to adopt a relativist approach.[136] Henrico suggests that when addressing a case of discrimination on the grounds of religion or expression, the courts need to adjudicate each dispute based on whether there was a standard of mutual accommodation, whereby both parties openly communicated and addressed the conflicting

[129] K Henrard 'Duties of reasonable accommodation in relation to religion and the European Court of Human Rights: A closer look at the prohibition of discrimination, the freedom of religion and related duties of state neutrality' (2012) 5 *Erasmus L Rev* 59 at 61.
[130] See the discussion on tests for unfair discrimination in chapter 4 parts 2.2.1 and 2.2.2.
[131] J Squelch 'Religious symbols and clothing in the workplace: Balancing the respective rights of employees and employers' (2013) 20(2) *Murdoch University Law Review* 45.
[132] Section 6(2)*(a)* and *(b)* of the EEA. See the discussion of inherent requirements of the job in chapter 4 part 2.4.2.
[133] J Bowers 'Accommodating difference; How is religious freedom protected when it clashes with other rights; Is reasonable accommodation the key to levelling the field?' 2021 *Oxford Journal of Law and Religion* 277.
[134] Henrico (note 41) 373.
[135] See the discussion in chapter 4 part 2.4.2.
[136] Henrico (note 41) 342–343.

rights.[137] Therefore, the imbalance of power between the employer and employee when dealing with discrimination related to religion and expression would not require adjudication, but rather the use of alternative routes of resolution which allow for the maintenance of the trust relationship.[138]

Furthermore, the chapter has shown how presenting appearance as an aspect of religion or expression may often be difficult for both parties in an employment relationship. Employees often have to decide whether they should uphold their beliefs or expression or whether they should keep their position at work, and have to accept that the employer may impose a rule that may affect their personal identity choices.[139] If an employee wishes to express their religion, the employer may reasonably accommodate it; however, in order to manage expectations in the workplace this must be done in a productive and amicable manner.

Bowers notes the sensitivities that an employer would have to be aware of as it tries to accommodate other non-religious employees or clients.[140] She states that employers claim that there is a risk of a 'snowball effect' occurring because other employees may harbour animosity towards those employees whose beliefs have been reasonably accommodated.[141] This leads to a dilemma for employers about positively allowing diversity, as this may undermine other employees who do not share the same sentiments. However, it is the latter attitude that employers need to eliminate from the workplace, as undermining the diversity of society and demeaning the recognition of minority rights reinforces the need for legally recognised protection from such discrimination.

This chapter has shown that the rights to privacy, religion and expression are all aspects of appearance and ultimately support the promotion of autonomy by acknowledging the right to dignity.[142] Earlier in this chapter, it was noted that Fisk argues that the privacy framework is an important consideration for the development of appearance autonomy as it focuses on individual rights; however, for autonomy to be recognised, group identity through an anti-discrimination approach holds significant weight in ensuring protection.[143] The thesis builds on this notion to find that it is difficult to protect appearance using related freedoms or

[137] Ibid 378.
[138] See the discussion of reasonable accommodation in chapter 4 part 2.4.1. See also Henrico (note 41) 381.
[139] Fisk (note 3) 1140.
[140] Bowers (note 133) 277–278.
[141] Ibid.
[142] D Rhode 'The injustice of appearance' (2009) 61 *Stan L Rev* 1059.
[143] Fisk (note 3) 1143–1144.

grounds. This illustrates the importance of upholding individual rights at a fundamental level. Thus, the thesis argues, appreciating both these frameworks will require advocating the protection of appearance as a fundamental right.

Protecting appearance autonomy as a fundamental right allows for the reinforcement of the rights to dignity, privacy, religion and expression.[144] Appearance incorporates each of these individual rights but goes further to protect individuality and autonomy.[145] Furthermore, a fundamental rights framework promotes a balanced approach to reasonably accommodating both parties in the workplace, in relation to a policy, through mutual accommodation. The principle of reasonable accommodation and the courts' narrow interpretation of the inherent requirements of a job require an employer to justify and ascertain whether the dress policy outweighs the autonomy of an individual.[146] This reinforces Fisk's framework by questioning legitimate interests and encouraging an inclusive work environment.

Fundamentally protecting appearance autonomy will also promote awareness of diversity and transformation in society because a fundamental definition will discourage any frivolous claims. Furthermore, the fear of this occurring is unfounded as the legal protection of appearance autonomy reinforces the recognition of one's culture, identity, expression and dignity. Hence, it is argued that appearance protection in fundamental law can transform society into the democratic and equal society envisioned by the Constitution.[147]

6. CONCLUSION

The previous chapter showed that the anti-discrimination framework remains the most common route for challenging appearance discrimination. Significantly, this chapter expanded on its protection by examining regulation using a privacy analysis. Although a privacy approach fails to comprehensively regulate appearance discrimination, it reinforces the protection of autonomy, including appearance autonomy.[148] Analysing the courts' approach to the religious freedom and freedom of expression is crucial to understanding equality.[149] Hence, the chapter examined the courts' different interpretative approaches in

[144] Ibid 1136.
[145] Ibid 1126.
[146] A Adam & D Collier 'High heels in the workplace – a health hazard or a symbol of femininity? Observations on appearance regulation in *Mofokeng v CCMA & Others* 2022 ZALCJHB 169' (2023) 44 *ILJ* 91.
[147] This is discussed further in chapter 6 parts 3 and 4. See also *Pillay* (note 1) para 107.
[148] Rycroft (note 4) 726–727.
[149] Henrico (note 41) 340–341.

ascertaining an individual's freedom of religion and expression, considering the workplace and other areas of an individual's life.[150]

The thesis showed how freedom of religion is not without its limitations. Although an employer is allowed to impose a reasonable dress code as an inherent requirement of the job, this chapter showed the importance of recognising this freedom in developing the right to freely manifest one's beliefs in both the private and the public spheres.[151] There is no absolute protection and relief is obtained on a case-by-case basis.[152] If there are any ambiguities about this right, then the courts are required to assess the proportionality and rationality needs of the individual, which have to be reasonable.[153] On the other hand, it was shown that freedom of expression is interpreted broadly, particularly as denying a person's expression means denying their personal growth and position in society.[154] Freedom of expression jurisprudence in South African law is limited to speech forms of expression. Although non-speech forms of expression may include other aspects of expression, such as tattoos, this aspect is yet to be developed and recognised in the law.

Thus, in the absence of explicit protection, employees may be subject to stringent dress codes that deny their dignity and fail to uphold their fundamental rights to equality. Although the courts require employers to reasonably accommodate their employees, there is a limit to how far this can occur. Furthermore, courts and employers may be unwilling to acknowledge certain appearance discrimination-related claims because they are not addressed in legislation and may have a snowball effect.[155] Therefore the current approach to protecting appearance autonomy offers only partial protection.

The thesis finds that freedom of appearance reinforces the importance of an individual's identity.[156] Theorising and acknowledging this in constitutional law automatically allows employees to seek protection under a definition that rightfully acknowledges the legal protection they deserve, and it places an obligation on the employer to validate and protect the interests of the employee.[157] Reshaping the law and the norms upon which society is

[150] Ibid.
[151] Squelch (note 131) 56–57.
[152] Ibid.
[153] R Bernard 'Reasonable accommodation in the workplace: To be or not to be?' (2014) 17(6) *PER/PELJ* 2880.
[154] Alston (note 85) 83–84.
[155] Bowers (note 133) 277–278.
[156] G Ramachandran 'Freedom of dress: State and private regulation of clothing, hairstyle, jewelry, makeup, tattoos, and piercing' (2006) 66 *Maryland L Rev* 93.
[157] Klare (note 32) 1445.

premised will advance a society based on acceptance and self-actualisation, both within and outside the workplace.[158] The next chapter builds on dignity as the overarching concept that is foundational in protecting a person's appearance autonomy through its multitudinous value in the law. The chapter proposes the development of an appearance autonomy framework as a means of explicit legal protection as the current fundamental framework remains limited in providing relief to individuals for these types of claims.

[158] Ibid.

CHAPTER 6: RECOMMENDATIONS FOR A RIGHT TO APPEARANCE AUTONOMY AND PROTECTION FROM APPEARANCE DISCRIMINATION IN THE WORKPLACE

> If well-designed, such legal rights might provide significant protection to employees in general and minority racial and religious groups in particular. The enactment of appearance rights would shake things up in a productive manner and get people talking about, and hopefully reconsidering, prevailing attitudes about appearance.[1]

1. INTRODUCTION

Appearance discrimination is a complex yet widespread phenomenon that manifests in a variety of contexts and impacts individuals in the workplace in several ways.[2] The preceding chapter examined appearance regulation with reference to the right to privacy and significant fundamental freedoms that are closely related to the protection of appearance. It was shown that employers are encouraged to accommodate an employee's personal autonomy by adopting an inclusive work environment. However, chapters 4 and 5 have shown that the current regulatory framework that may be used to protect appearance is not consistent or sufficient. Therefore, this chapter seeks to develop theoretical and practical tools for addressing these issues by developing the law and promoting protection against appearance discrimination in the workplace.

In the first part of the chapter, the foundational value of dignity will be identified as an integral component of the argument for the protection of appearance autonomy. Dignity has many roles in the legal system and is a primary philosophical framework for the development of individual rights. Dignity serves to develop the equality framework for a legal recognition of appearance that functions to protect individual autonomy and other relevant rights and freedoms that have been referenced throughout the thesis. The second part of this chapter recommends that appearance should be recognised as a fundamental freedom. The previous chapter identified shortcomings in the current fundamental freedoms, and therefore this chapter aims to advocate and recognise the benefits of a fundamental freedom of appearance.

[1] K Klare 'Power/dressing: Regulation of employee appearance' (1992) 26 *New Eng L Rev* 1445.
[2] A Mason *What's Wrong with Everyday Lookism?* (2021) 1.

Although this area may be challenging to establish, it can be viewed as a means of upholding and protecting democratic values.[3]

Building on the developments examined in chapter 4, this chapter argues that developing a listed ground of appearance serves to promote the principles of dignity and provides clarity about and awareness of this form of discrimination. This includes developing a specific definition that recognises which characteristics may fall under its protection. Furthermore, the chapter considers intersectionality in relation to appearance and examines how developing a listed ground of appearance may serve to reinforce protection from intersectional discrimination and to advance substantive equality.

Finally, the chapter will explore the technical considerations in relation to the recommendations above and examine the practicality of manifesting these propositions in the law and in the workplace. This includes investigating whether amending the law to include appearance autonomy is necessary and examining considerations for employer responsibility. Finally, this chapter addresses concerns about frivolous appearance-based claims being made, which may overburden and distract the courts.[4] However, it will be shown that appearance as a protected category has similar value to the current protected grounds and therefore strengthens the awareness of intersectionality and an individual's dignity.

2. DIGNITY AS THE OVERARCHING CONCEPT OF PROTECTION

The thesis has recognised the role of dignity in a variety of contexts. Chapters 2 and 3 have shown that dignity plays an integral role in society.[5] Dignity is a fundamental aspect of every individual's freedom and ethos.[6] Dignity has been enshrined as a right in the Constitution that deserves to be safeguarded and protected at a superior level.[7] Cowen has reaffirmed the notion that dignity serves a purpose beyond being an inherent value, and is a transformative

[3] Klare 'Power/dressing' (note 1) 1398–1399. Klare advocates for a democratic revision of appearance regulation particularly with a respect for individual choice and a restructuring of power between employer and employee that upholds the recognition for personal appearance. See also A Delagrave *The Regulation of Physical Appearance in the Canadian Workplace as a Human Rights Issue* (2020) 303.

[4] D Rhode *The Beauty Bias: The Injustice of Appearance in Life and Law* (2010) 110–113. See also *MEC for Education: Kwazulu-Natal v Pillay* 2008 (2) BCLR 99 (CC) para 107.

[5] See the discussion of dignity's metaphysical presence in chapter 2 part 2 and the discussion of dignity in the law in chapter 3 parts 6 and 7.

[6] AC Steinmann *The Legal Significance of Human Dignity* (NWU 2016) 151–152, *http://dspace.nwu.ac.za/bitstream/handle/10394/25824/Steinmann%20AC_2016.pdf?sequence=1&isAllowed=y* accessed 26 April 2023 and I Kant *Groundwork of the Metaphysics of Morals* (translated and edited by Allen Wood) (2002) 1–66.

[7] Section 10 of the Constitution of the Republic of South Africa, 1996.

tool that can guide jurisprudence by upholding the principles of democracy.[8] This thesis has illustrated that dignity is not a linear concept, but is complex, especially because it is a broad concept to delineate.[9]

Dignity and appearance are closely related as they are both attached to a human's *amour-propre*[10] and self-worth.[11] Dignity and appearance are hindered when an individual is subjected to unfair treatment based on factors that are unrelated to their merits or skills. Consequently, these individuals are marginalised or devalued, which inevitably tarnishes and undermines their dignity.[12] Although dignity is difficult to encompass in a single definition, it is closely tied to the autonomy of making decisions that allow an individual the freedom to be and empowers them to enhance their immanent abilities.[13] This section aims to realise the ways in which dignity can serve as the foundation of and the overarching concept for recognising and protecting appearance autonomy in the workplace. Building on the principles discussed earlier in the thesis, this section identifies three significant ways in which dignity can impact, value and guide autonomy.

2.1 'Dignity as the lodestar for equality'[14]

Human rights and equality-related jurisprudence reaffirms the concept of dignity as a core and essential right for individuals.[15] It is an important value that governs many aspects of life

[8] S Cowen 'Can "dignity" guide South Africa's equality jurisprudence?' (2001) 17 *SAJHR* 35.
[9] Delagrave (note 3) 309; L Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2012) 86; Steinmann *The Legal Significance of Human Dignity* (note 6) 116.
[10] J Rousseau *The Basic Political Writings* (trans D Cress) (1987) 106. See also T Bass 'Freedom, morality and self-love? Reinterpreting Rousseau's amour-propre as fundamental for the virtuous citizen, Reinvention' (2013) 6 *An International Journal of Undergraduate Research*, *https://warwick.ac.uk/fac/cross_fac/iatl/reinvention/archive/volume6issue1/bass/*, accessed 30 April 2023. Bass interprets Rousseau's *amour-propre*, roughly translated to mean a form of self-love which allows an individual to make more of themselves or, based on the Kantian interpretation, *for an individual to be given equal consideration of all efforts*.
[11] Delagrave (note 3) 307–310.
[12] G Ramachandran 'Freedom of dress: State and private regulation of clothing, hairstyle, jewelry, makeup, tattoos, and piercing' (2006) 66 *Maryland L Rev* 36.
[13] In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC) paras 51–52, Ackermann J emphasises how a broader interpretation of freedom does not imply the individual as being heroic or isolated from humanity. Rather, any legitimate limitations on freedom must occur through justified principles formulated in s 33(1). He states that 'freedom (independent from the constraint of another's will), insofar as it is compatible with the freedom of everyone else in accordance with a universal law, is the one sole and original right that belongs to every human being by virtue of his humanity.'
[14] Ackermann *Human Dignity* (note 9) 2. Ackermann's use of the word 'lodestar' is purposive and descriptive. This section emphasises dignity's importance to the thesis's argument as a guide for recognising and protecting appearance autonomy.
[15] Whilst the thesis does not claim that dignity is the only significant value in socio-economic rights, the thesis aims to emphasise the foundational value of this right. See also H Botha 'Human dignity in comparative perspective' (2009) 20 *Stell LR* 171.

and its ideals.[16] Regardless of its various interpretations as an antecedent in religion or philosophy, a long-standing phrase that embodies its meaning is 'inherent worth'.[17] This interpretation is consistent with the Kantian interpretations adopted by the courts and has remained as a recurring phrase throughout case law.[18] Individuals are shown to have worth that entitles them to respect and the freedom to shape their identity and be free from the injustices of society.[19] Ackermann builds on this concept and recognises that human dignity enables a person to exercise their judgment, to have self-awareness, to exercise self-determination and to allow the development of personality in the pursuit of self-actualisation.[20]

Ackermann's view on dignity establishes that human dignity is a primary guide for the evolution and understanding of equality.[21] The Kantian approaches adopted by the courts align with Ackermann's understanding, as dignity is held to be the underlying principle of equality, particularly for transformation within society and the law.[22] Ackermann goes further to acknowledge dignity as a 'crucial criterion of reference' when dealing with non-discrimination.[23] However, whilst there have been contrasting views about dignity's role in the pursuit of substantive equality, it is nonetheless an important factor for consideration.[24] Cowen has argued that the value of dignity in supporting the right to equality cannot be separated, and to some extent agrees with Ackermann that dignity's position within equality is as its 'kingpin'.[25] Furthermore, the thesis has acknowledged Ackermann's argument that the notion of freedom is an aspect of dignity and equality.[26] The significance of these core

[16] R O'Connell 'The role of dignity in equality law: Lessons from Canada and South Africa' (2008) 6(2) *International Journal of Constitutional Law* 268.
[17] Ackermann *Human Dignity* (note 9) 98. See also O'Connell (note 16) 271.
[18] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) para 42; *Pillay* (note 4) para 150. Langa CJ states that 'rights like all others in our Constitution, must be interpreted in light of the founding value of human dignity which asserts the equal moral worth of human beings and the right of each and every person to choose to live the life that is meaningful to them.'
[19] S Liebenberg 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *SAJHR* 7.
[20] L Ackermann 'Equality and non-discrimination: Some analytical thoughts' (2006) 22 *SAJHR* 602.
[21] Ibid 598.
[22] B Hepple 'The aims and limits of equality laws' in O Dupper & C Garbers *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 7.
[23] Ackermann *Human Dignity* (note 9) 23.
[24] Hepple (note 22) 8. Hepple argues that there is no connection between unfair discrimination and dignity and emphasises how, instead of advancing the principles of substantive equality, dignity may limit it. See also A Fagan 'Human dignity in South African law' in M Duwell et al *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (2014) 405–406, who argues that dignity's foundational role is purely formal and holds no play in the identification of rights.
[25] Cowen (note 8) 54.
[26] See the discussion in chapter 2 parts 2 and 3.3.

triad values cannot be appreciated in isolation; these values serve to encourage substantive equality and the recognition of materially disadvantaged groups in the workplace.[27]

Critics would argue that dignity should not be the informative value for equality, but rather the value of equality itself.[28] However, as Cowen argues, to value equality alone poses a number of questions, as its nature differs from dignity; equality serves a distributive purpose which may be subjective based on the social and economic position of the jurisprudence,[29] whereas dignity holds a foundational purpose in both international law and philosophical theories. Dignity is the standard that informs human rights law and develops societies.[30] Furthermore, dignity serves as a value to limit interference with individual liberties and to reinforce respect for personal autonomy.[31] As a varied principle that has served as a lodestar for religion, philosophy and law, there is a clear recognition that human dignity serves its purpose for people and the enforcement of their rights.[32]

Thus, to appreciate the argument for using dignity in the context of appearance autonomy, the thesis supports the position that dignity should not viewed as exclusionary or limiting but rather as an underlying right to serve individual and collective components.[33] Cowen argues that the individual right to dignity can be viewed as an individual right, or a collective right as a member of a group, or even as a right that is denied to a group because of certain shared features shared that place them at a disadvantage.[34] This argument emphasises the principles of Ubuntu and Kant's view of dignity, by recognising the moral worth of humans and community.[35] Furthermore, understanding how an individual's choice to appear in a manner that expresses their independent worth or as a way of honouring their identity within a community or group can be limiting if viewed without considering one's dignity.[36]

This thesis also argues that autonomy and choice are correlated with dignity.[37] Autonomy, as an element of dignity, promotes the idea of self-choice and recognition for one's interests and

[27] Cowen (note 8) 51.
[28] Ibid 48–49.
[29] Ibid.
[30] See the discussion of dignity in the international law framework in chapter 3 part 2.1.
[31] Liebenberg (note 19) 9.
[32] L Barroso 'Here, there, and everywhere: Human dignity in contemporary law and in the transnational discourse' (2012) 35 *BC Int'l & Comp L Rev* 362.
[33] Cowen (note 8) 50–51.
[34] Ibid.
[35] Ibid.
[36] See the discussion in chapter 2 part 2.1.3 on ubuntu and dignity.
[37] See chapter 2 part 2.1.2 on Kant and part 3.3 on the recognition of dignity as the freedom to be.

values.[38] Whilst Kant's moral views on autonomy were recognised earlier in the thesis, the recommendation for dignity to be recognised as a foundational value for appearance protection can also be appreciated by using the principle of personal autonomy.[39] In this context, individual autonomy is derived from the influence of socio-economic and cultural norms.[40] However, this concept, if pressured by law and governing interferences, may shrink the value of personal choices related to religion, social identity or cultural practices.[41] Hence, personal autonomy is not an absolute concept and thus may only be protected by aspects of constitutional freedoms and rights.[42] It does not hold the same value as dignity and therefore can be constrained in a non-legitimate way by social or commercial interests, such as the workplace.[43]

Therefore, in assessing the progression of appearance autonomy in the workplace, dignity is a fundamental value that provides guidance for international and South Africa law. Dignity remains ingrained in protecting the equal worth of all individuals. Through this approach the thesis argues that dignity has value as a determinant in equality law and in resolving disputes, particularly in the balancing of competing rights.[44]

2.2 Dignity as a value in resolving disputes

Dignity is enshrined as both an independent value and an interdependent value amongst values and rights. Chapter 3 has shown that dignity has significant value in a wide variety of cases, whether in relation to corporal punishment, expression, marriage, maintenance and, the focus of the thesis, discrimination.[45] An examination of relevant case law has shown that dignity's position as a value affirms Kantian philosophical views.[46] The Constitutional Court and the Labour Courts have affirmed the role of dignity in the context of equality jurisprudence and its role as a tool to address any unfair or derogatory treatment of a

[38] Kant (note 6) 54.
[39] Barroso (note 32) 368–369.
[40] J Waldron 'Moral autonomy and personal autonomy' in *Autonomy and the Challenges to Liberalism* (2009) 312.
[41] Ibid.
[42] Barroso (note 32) 369.
[43] Ibid 374. Barroso argues that dignity as a community value alongside autonomy may show the role of the state and community when establishing collective goals and restrictions on individual freedoms and rights. He argued that lines need to be properly drawn alongside dignity, autonomy and intrinsic value to understand the existence of community values.
[44] Fagan (note 24) 403; H Botha 'Human dignity in comparative perspective' (2009) 20 *Stell LR* 176–177.
[45] See the discussion of dignity in jurisprudence in chapter 3 part 4.
[46] Fagan (note 24) 404; H Botha 'Equality, plurality and structural power' (2009) 25 *South African Journal on Human Rights* 3.

particular group.[47] Liebenberg has argued that equal treatment through a substantive equality approach requires a response that contextualises the needs of different groups appropriately.[48] Therefore, the thesis argues that when considering the role of appearance autonomy in relation to dress codes in the workplace, one would have to consider the seriousness of the infringement of the dignity of the individual who is affected by the policy or rule.[49]

When analysing dignity's role as an objective value, it is evident that human dignity holds a superior status and cannot be outweighed by individual rights, but it may be limited by other values such as equality or liberty.[50] Furthermore, in balancing competing rights, once again, dignity is used as a means of resolution.[51] The thesis argues that dignity is ever-present in the interpretation of substantive areas, and serves to limit the protection of rights or public interest obligations.[52] In *De Reuck v Director of Public Prosecutions*,[53] the Constitutional Court had to examine the conviction of a film producer for a crime relating to child pornography. The court weighed the dignity of children's rights and the recognition of their worth as a necessary purpose.[54] Similarly, as the court stated in *Christian Education South Africa*,[55] there are certain rights such as the freedom of religion and expression which may be justifiably limited by the value of dignity.[56]

Hence dignity as an objective value is demonstrated through its role in interpreting equality jurisprudence and in justifying the protection of social rights.[57] This section has shown how the value of dignity at both the physical and psychological levels aims to enforce and enhance values (alongside equality and freedom) for a dignified existence.[58] By evaluating dignity's

[47] In *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) paras 90–92, O'Regan J affirmed that the need to avoid discrimination is based on the Constitution's commitment to dignity. Such patterns can occur when people are treated without the respect that individual human beings deserve and particularly where '*treatment is determined not by the need of circumstance of particular individuals, but by their attributes and characteristics, whether biologically or socially determined*' (emphasis added).
[48] Liebenberg (note 19) 14–15.
[49] Ibid.
[50] H Filip 'Human dignity in legal argumentation: A functional perspective' (2022) 18 *European Constitutional Law Review* 245–247.
[51] Ibid.
[52] C McCrudden 'Human dignity and judicial interpretation of human rights' 2008 *EJIL* 702.
[53] *De Reuck v Director of Public Prosecutions* 2004 (1) SA 406 (CC).
[54] Ibid para 61.
[55] *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).
[56] Also see *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC); *De Reuck* (note 53).
[57] *Khosa and Others v Minister of Social Development* 2004 (6) SA 505 (CC) para 44.
[58] E Grant 'Dignity and equality' (2007) 7 *HRLR* 312.

value, the need to balance an individual's needs and a community's needs may purposefully serve the court's approaches to transformation.[59]

2.3 Dignity as a consideration for fundamental rights

Dignity has been shown to have significant status in society; its status in the law is equally fundamental.[60] The previous two sections have emphasised dignity's role in the law and its function as an independent right and value. However, this section aims to build on the foundational value of dignity as the overarching theory for this thesis through its relationship with fundamental rights. Throughout the thesis, it has been argued that dignity may serve as an interdependent right that seeks to reinforce other rights, namely equality, freedom and privacy.[61] Dignity, enshrined as a fundamental right, is also included as a fundamental value and principle that serves as a core and moral justification for fundamental rights.[62]

As established in the previous section, dignity is considered by the judiciary when it ascertains the weight of legal principles in different contexts.[63] It is argued that this constitutional principle may have two different roles.[64] Barroso argues that the first role of dignity is to ensure that the legal system recognises its core value, and dignity may therefore be an initial source of understanding when certain rights and duties are owed.[65] For example, there might be no explicit legal recognition of a prohibition against torture. However, upholding human dignity implies a ban on torture. Therefore, in the absence of legal recognition, human dignity should be relied on. However, if there is a concrete specific rule, this may not be necessary.[66] In this instance, dignity has served to inform the principles of the rule, therefore it is valuable as a source in the creation of these unenumerated rights. Secondly, Barroso argues that dignity has an interpretative function, particularly as it is one of the central integral rights.[67] Therefore, dignity serves to define the meaning of particular

[59] Cowen (note 8) 39. See also Grant (note 58) 314.
[60] G Le Moli 'The principle of human dignity in international law' in *General Principles and the Coherent of International Law* (2019) 360. See also Botha 'Equality, plurality and structural power' (note 46) 1–2.
[61] See the discussion on the interdependence of dignity in chapter 3 part 3 and chapter 5 parts 2, 3 and 4.
[62] Barroso (note 32) 355. See also Botha 'Equality, plurality and structural power' (note 46) 6–10.
[63] Barroso (note 32) 355.
[64] Ibid 356.
[65] Ibid.
[66] Ibid. Barroso goes further to say that this role can influence instances of the right to privacy or the right against self-incrimination which may not be so explicitly outlined as is the case in the USA and Brazil.
[67] Ibid. See also Fagan (note 24) 403.

rights and in instances where there are significant gaps in the constitutional right or tensions between rights, then dignity would be an essential source of guidance.[68]

Thus, when recognising dignity's foundational value, one may use dignity as a source of direct protection when dealing with appearance-based discrimination. Although dignity poses a compelling argument as a route for protection against appearance discrimination, the use of dignity in this thesis emphasises its value in reinforcing other rights and the formation of rights that may better serve to protect appearance autonomy. Dignity is not an absolute principle, but it has been significant as a fundamental value and principle for jurisdictions around the world.[69] In a number of analyses dignity has been shown to be an interpretative vehicle that affirms the principles of substantive equality.[70] Hence, the thesis argues that the recognition of appearance autonomy promotes dignity, not only because it is a constitutional right, but because of its foundational value in recognising and supporting other core rights.

3. APPEARANCE AUTONOMY AS A FUNDAMENTAL FREEDOM

This thesis recommends that entrenching a freedom of appearance would be an effective mechanism for protecting appearance autonomy. The thesis proposes that this freedom should be recognised with its own unique constitutional particulars, which would reinforce the foundations of an individual's freedom of religion, culture and belief, and expression. The main purpose of this protection would be to encourage a democratic and inclusive society as envisioned in the Constitution. If implemented as a right, this would allow for the seamless manifestation of one's identity with full autonomy and would reduce second-guessing or restricting certain idiosyncrasies that would fail to be expressed otherwise. Although anti-discrimination law has developed to protect certain listed and unlisted grounds that deal with discrimination, even with the support of the Constitution and the related freedoms, an individual's appearance both in and outside the workplace is not fully protected.[71]

3.1 Advocating a freedom of appearance

The Constitution has recognised a variety of freedoms that are worthy of protection. This section proposes that a freedom of appearance is needed to strengthen an individual's

[68] Barroso (note 32) 356–367.
[69] Ibid.
[70] S Liebenberg & B Goldblatt 'The interrelationship between equality and socio-economic rights under South Africa's transformative constitution' (2007) 23 *SAJHR* 344.
[71] See the discussion in chapter 3 part 2.2, chapter 4 part 2 and chapter 5 parts 3 and 4.

liberty.[72] The courts appear to be inconsistent and uncertain when it comes to dealing with competing rights, and despite the decisions about hairstyles,[73] dress[74] and even facial features, they are bound to apply the law.[75]

Ramachandran notes that one of the biggest challenges of expanding anti-discrimination protection is identifying the unexplored grounds that should be explicitly recognised in the law. Those grounds that fall outside the range of immutable traits might not be protected.[76] Notably, aspects of appearance may change or evolve, but the fundamental issue is that appearance constitutes an individual's expression of self.[77] Freedom of appearance extends beyond what an individual says, expresses or does as a recognition of identity. Although many behavioural factors contribute to one's identity, the legal protection of all these considerations is not proposed.[78] Rather, the thesis aligns with Ramachandran's view that encourages the recognition of an individual's integrity, self-development, individualism and communication of one's self-presentation.[79]

Furthermore, section 12 of the Constitution recognises the fundamental right to bodily integrity, stating that 'everyone has the right to bodily and psychological integrity', which includes having the autonomy to make decisions about reproduction and the control of one's body, and being free from medical experiments without consent.[80] The freedom of appearance is closely connected to this notion of self-presentation, and involves expression through one's physical characteristics, whether these are tattoos, clothing, jewellery piercings or make-up.[81] Since these aspects are all related to one's outward appearance, they can be closely linked to integrity.[82] Therefore, limiting or regulating these aspects has a significant impact on the fundamental ethos of an individual.

---

[72] Ramachandran (note 12) 30–31.
[73] *Department of Correctional Services and Another v POPCRU and Others* (2013) 34 *ILJ* 1375 (SCA).
[74] *Pillay* (note 4).
[75] *Smith v The Kit Kat Group (Pty) Ltd* [2016] 12 BLLR 1239 (LC).
[76] Ramachandran (note 12) 30–40. Ramachandran rejects the notion that a freedom to dress should be based on the formal equality rubric of anti-discrimination law because it is a type of identity performance that is indistinguishable from categories like race. Instead, she recognises how arguments need to be explored further by the court to determine why certain areas should be protected rather than neglected.
[77] Rhode *The Beauty Bias* (note 4) 99.
[78] Ramachandran (note 12) 33–40.
[79] Ibid.
[80] Section 12 of the Constitution.
[81] Ramachandran (note 12) 34.
[82] Ibid. See also Rhode *The Beauty Bias* (note 4) 26–27.

While limiting an individual's freedom of appearance is not a novel concept, this echoes the regressive period that once isolated disadvantaged groups. One example is when women's dress and right to work were limited. Ramachandran argues that upholding integrity speaks to how far women's rights have evolved since this era.[83] It is through the progression of society that women who were once prohibited from wearing trousers are now allowed to represent and control aspects of their body that speak to who they are, and this is one of the underlying aspects of feminism.[84]

The right to appear as one chooses is closely linked to dignity, and when this is compromised, it can appear to be a limitation on liberty.[85] Put simply, recognising a person's appearance as an underlying foundation of their identity promotes the acceptance of the person's self – whether this is through natural, irreversible, artificial or even preferred aspects of one's body.[86] However, this does not imply that one's body equates to one's appearance, but that it is a large contributor amongst other modifications that one may or may not make. These choices are built on one's personality, which is shaped by an amalgamation of ideas, qualities and lifestyle decisions.[87] People often express their personality through their clothing or develop their personality over time, influenced by their family, friends or societal trends.[88] Both freedom of religion and freedom of expression are influential in determining the choices that a person makes to express and individualise themselves; however, if these choices are restricted, then a person's self-development is hindered by the need to conform.[89]

The previous section showed that dignity may serve to guide the legal system where gaps or ambiguities in constitutional rights arise or intersect. Appearance autonomy as a fundamental freedom will serve as an enumerated right based on the value of dignity because one's appearance touches on aspects relating to a variety of rights examined in the thesis, particularly one's innate worth.[90] Therefore, the fundamental protection of appearance

[83] Ramachandran (note 12) 42. See also K Bartlett 'Only girls wear barrettes: Dress and appearance standard, community norms and workplace equality' (1994) 92(8) *MLR* 2543.
[84] Ramachandran (note 12) 35–42.
[85] Ibid 36.
[86] Klare 'Power/dressing' (note 1) 1396–1397.
[87] Rhode *The Beauty Bias* (note 4) 99.
[88] Ibid.
[89] Ibid 29. See the further discussion in chapter 5 part 5.
[90] Barroso (note 32) 356.

autonomy will serve not only to promote dignity but also to reinforce other constitutional rights and freedoms and to address any uncertainty about its protection.[91]

Personal appearance is perceived to be one of the ways in which people may negotiate or converse on aspects which express their individualism.[92] For the community groups that present themselves in a particular way, appearance remains crucial to their ethos as both members and individuals.[93] In expressing one's belief, whether political or religious, there is an influential structure that shapes the experience of the individual.[94] The symbolism in one's appearance by expressing their conformation to a particular socio-political, religious or cultural groups validates the manner by which one chooses to exist. The cases about hairstyles[95] and beard length[96] in the workplace have shown that these claims are brought by individuals who have been subjected to infringements which speak to their distinctiveness, and explains why they instituted lawsuits.[97]

Despite the current framework for seeking rights under the freedom of expression, personal appearance claims under this right do not recognise that appearance is inherent to identity – it is its own form of communication.[98] A woman who dons a headscarf or dresses modestly in the workplace may be regarded as oppressed; alternatively, women wearing miniskirts may be viewed as provocative or inappropriate.[99] Expression of appearance is unique to the individual and should be treated as such. Imagination, creativity and the demonstration of one's ideas go beyond words or speech, and thus political statements and ideas can be expressed through dressing or even accessories, all of which are a form of artistic self-expression.[100] Communication through appearance is subjective and appearance is a personal manifestation that forms part of an individual's reality. To categorise this as lower than a form of speech speaks against the theory of personal autonomy.[101]

---

[91] Klare 'Power/dressing' (note 1) 1405.
[92] Ramachandran (note 12) 42.
[93] Rhode *The Beauty Bias* (note 4) 26.
[94] Ramachandran (note 12) 42–43.
[95] *Department of Correctional Services and Another v POPCRU and Others* (note 73).
[96] *Dlamini and Others v Green Four Security* 2006 JOL 17853 (LC).
[97] Ramachandran (note 12) 44.
[98] Ibid 45. See also K Dion et al 'What is beautiful is good' (1972) 24 *J Pers & Soc Psychol* 285. See also T Lynn 'A more attractive look at physical appearance-based discrimination: Filling the gap in appearance-based antidiscrimination law' (2002) 26 *S Ill U LJ* 339.
[99] A Adam & D Collier 'High heels in the workplace – a health hazard or a symbol of femininity? Observations on appearance regulation in *Mofokeng v CCMA & Others* 2022 ZALCJHB 169' (2023) 44 *ILJ* 89.
[100] Ramachandran (note 12) 47.
[101] Ibid 50.

3.2 The benefits of regulating freedom of appearance

Freedom of appearance is a right that should be recognised in legislation as the law evolves to fulfil and uphold a democratic society that provides equal opportunities. Human rights set a higher standard; this calls for dispensing with burdensome rhetoric and rather using human rights as a tool for social acceptance and tolerance.[102] Klare reiterates that a constitutional interpretation of appearance autonomy would help to overcome any prevailing attitudes about appearance.[103] Despite its broad and open-ended appeal, freedom of appearance seeks to protect people from a general and recurring problem about issues of diversity and equality.[104]

To fully comprehend the impact of fundamental freedoms in the Constitution, the examination of the case law in the previous chapter clarified how jurisprudence can build on the legislative framework.[105] For instance, in situations where section 36 is called into question and where there are competing rights – the employee's freedom of appearance versus an employer's dress policy or interest – then the outcome will have to be weighed upon.[106] Klare notes that through this trajectory there will be a shift in the workplace towards egalitarian practices that can serve to protect any abuse by the employer or other co-workers.[107] Despite the fact that appearance changes dynamically in a variety of ways, the authority to resolve these disputes is in the hands of those who can shift decision making – namely judges.[108] Therefore, the protection that is offered under the Constitution requires a progressive outlook as opposed to the status quo of traditional sentiments.[109] Questions or concerns about freedom of appearance will require a broader outlook from the courts and, unless they are afforded constitutional guarantees, sensitive matters relating to equality, diversity and the overall call for an individual's dignity will be placed on hold.[110]

The thesis has argued that appearance is rooted in an individual's dignity. By analysing the current rights and freedoms identified in chapter 5, it was established that appearance deserves safeguarding under a prohibited ground in South African human rights legislation.[111] Although labour law may be more restrictive, the principle of subsidiarity encourages this

[102] Klare 'Power/dressing' (note 1) 1442.
[103] Ibid 1444–1445.
[104] Ibid.
[105] See the discussion of freedom of religion and expression in chapter 5 parts 3 and 4.
[106] See the earlier discussion of s 36 in chapter 3 part 3.2 and chapter 5 part 3.1.
[107] Klare 'Power/dressing' (note 1) 1444–1445.
[108] Ibid.
[109] Ibid 1444–1451.
[110] Ibid.
[111] See the discussion of fundamental rights in chapter 5 parts 2, 3 and 4.

route, as it allows for the adjudication of substantive issues with a more particular focus on constitutional norms.[112] Therefore, a proposed clear definition of physical appearance is recommended.[113]

Tackling the problem of appearance-based prejudice within the framework of fundamental human rights is usually driven by the right to equality.[114] Expanding the definition of equality may prove useful in developing anti-discrimination law, and including physical appearance reinforces substantive equality. As the previous chapter showed in the analysis of cases, judges and legislators have the right to intervene in the workplace in instances where equality is called into question. Hence explicitly recognising the freedom of appearance and expanding the protected grounds will provide sufficient protection for appearance autonomy.[115]

Ramchandran recognises that a freedom of this nature would provide a better understanding of an individual's association with identity and self-expression, an ideal that will be properly regulated in both the public and private realms of the workplace.[116] South Africa is a capitalist society, and an individual's appearance is firmly rooted in the choices that build and maintain such a society.[117] Recognising an individual's choice to reconstruct their appearance or to progress by changing their values allows for the democratic foundations of South Africa to be strengthened through its people.[118] Although appearance should not be tied to performance, it unfortunately is, and this reinforces the notion that physical appearance deserves to be formally enshrined in the law.[119] Freedom of religion and freedom of expression are two areas that are closely linked to appearance, and in workplace situations where employment law has failed to address a claimant's concerns about prejudice, these

[112] M Murcott & W van der Westhuizen 'The ebb and flow of the application of the principle of subsidiarity – Critical reflections on *Motau* and *My Vote Counts*' (2015) 7 *CCR* 44.
[113] The Washington DC Human Rights Act mentions personal appearance as a protected category. See also *Ivey v District of Columbia* 949 A 2d 607, 615 (DC 2008), which recognised appearance discrimination as a valid form of prohibited discrimination.
[114] Ramachandran (note 12) 28.
[115] Klare 'Power/dressing' (note 1) 1444.
[116] Ramachandran (note 12) 17–29.
[117] N Nattrass 'A South African variety of capitalism' (2014) 19(1) *New Political Economy* 74. See also Ramachandran (note 12) 54.
[118] S Fredman 'Substantive equality revisited' (2016) 14 *International Journal of Constitutional Law* 730.
[119] Dion et al (note 98) 285. See S Johnson et al 'Physical attractiveness biases in ratings of employment suitability: Tracking down the "beauty is beastly" effect' (2010) 150 *J Soc Psychol* 301.

freedoms are often used as protective barriers, which, like other protected grounds, fail to provide adequate relief.[120]

Freedom of appearance in the Constitution may prove difficult to realise, based on the technical difficulties and processes behind implementing such a fundamental right, which are addressed later in this section. However, this should not discourage scholars and legislators from recognising the benefits of realsing this freedom. Klare has advocated the protection of appearance and a notion of the freedom to appearance autonomy, despite the difficulty of enacting such a freedom, and notes that it may assist in the reconsideration of prevailing attitudes towards appearance.[121] He argues that current appearance law is based on stereotypical gendered views on appearance, but a rights-based rhetoric may provide great symbolic power in evaluating the 'status quo and projecting images of justice'.[122] Chapter 5 has shown how fundamental freedoms have the ability to strengthen and reinforce one other in the Constitution; because appearance is closely related to sections 15 and 16, implementing a well-designed provision relating to the freedom of appearance will provide even greater protection to racial and religious minority groups.[123]

4. DEVELOPING THE LAW THROUGH A LISTED GROUND OF PROTECTION

The possible inclusion of a physical appearance ground is an option for South Africa based on the rate at which its democratic society is developing. As discussed earlier in this thesis, it is argued, using the recommended frameworks of Melé and Fisk, that an explicit recognition of protection will address the gaps in the protection of an individual's appearance and will establish a humanistic framework for their dignity to be realised in the workplace.[124] Rhode argues that this category needs to be a listed ground for two reasons. Firstly, appearance discrimination is closely linked to equal opportunity and dignity, although individuals should be assessed on their merit rather than their physical attributes.[125] In this instance, the EEA

[120] See the further discussion in chapter 5 part 5.
[121] Klare 'Power/dressing' (note 1) 1445.
[122] Ibid.
[123] Ibid 1431.
[124] See the discussion of Melé's framework in chapter 3 part 5, which reinforces the need for dignity to be upheld in the workplace by elevating and recognising employees' dignity. Fisk's framework in chapter 5 part 2.2 reinforces the awareness of and need for appearance-based protection in the workplace through the right to privacy, as it impacts aspects of one's dignity, which can provide effective protection when recognised in the law.
[125] Rhode *The Beauty Bias* (note 4) 93.

and PEPUDA are the most suitable statutes to give effect to this notion and to eradicate this type of unfair discrimination.

Secondly, amending anti-discrimination law to include appearance as a listed ground will prevent the reinforcement of those disadvantages faced by protected categories such as race or gender.[126] Statutorily regulating appearance-based discrimination in the law will be an effective, long-term solution to the problem.[127] This will inevitably assist those people whose claims fail under established protected categories.[128] Claims brought to the South African courts based on appearance discrimination will give effect to the right to equality and allow a primary option for claimants who struggle to obtain relief. Therefore, it is recommended that section 6 of the EEA, which includes the list of protected categories related to unfair discrimination, should be expanded to include the ground of physical appearance. This will send a symbolic message of inclusion for those unidentified groups that suffer this prejudice but have not yet been defined as a social group in need of protection.

Additionally, those claimants who are not covered by the EEA could seek protection under PEPUDA. Chapter 1 of PEPUDA defines prohibited grounds as those that are listed and '*(b)* any other ground that (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph *(a)*'.[129] Hence it is recommended that the prohibition of discrimination on the basis of physical appearance should fall under a provision in this section. This will give physical appearance the same status as the current protected categories, aligning its position with the other prohibited grounds, and thereby ensuring protection for those individuals who fall within and outside the scope of the EEA.

Moreover, developing the law through a listed ground of protection will allow South African law to progress at the same level as the selected progressive comparators discussed in chapter 4. The definitions and approaches adopted by states in Australia and the USA provide a strong foundational standpoint. In Victorian legislation, the definition of physical features is used to broadly cover those traits that relate to bodily characteristics – particularly when

[126] Ibid 126–131. See also Delagrave (note 3) 285.
[127] Rhode *The Beauty Bias* (note 4) 20.
[128] Ibid 146–147.
[129] Section 1 of PEPUDA, definition of prohibited ground. See the discussion of PEPUDA in chapter 3 part 2.3.

recognising the difference between mutable and immutable features.[130] Furthermore, claims are brought to the Victorian court of first instance in matters related to discrimination, sexual harassment, victimisation or any other race and religious vilification.[131] Hence it is recommended that South Africa's CCMA should deal with these claims, in a similar fashion as to how they have dealt with any other prohibited category of discrimination.

In contrast, Serbia and Belgium have adopted a narrower approach to focus their protection of physical appearance on those aspects that are immutable; their definitions are limited to 'physical and genetic characteristics'.[132] This approach may prove limiting as it does not cover those aspects that are susceptible to change. Mutable and immutable features within the boundaries of appearance is a debated topic and will be discussed in further detail. The approach that South Africa should follow will also be discussed. A discussion of the recommended approaches that protect physical appearance through the lens of inclusivity, including whether to categorise certain characteristics, follows.

4.1 An inclusive approach to protecting physical appearance characteristics

One of the challenges in legalising appearance discrimination as a protected ground is the difficulty of categorising appearance-based traits that relate to physical features.[133] Discrimination laws are based on a range of prohibited grounds, which vary from those characteristics that are immutable (or 'unchangeable'), such as race, to those that are mutable, such as hairstyles.[134] Labour laws are designed to be interpreted purposively, with the understanding of whether certain behaviours should be accepted or not; therefore, a clear and coherent scope of characteristics is needed.[135] In other words, protecting appearance characteristics covers a wide range of traits.[136]

Thus, setting out guidelines for legislators and employers in defining the boundaries of physical appearance depends on certain considerations.[137] Understanding the scope of

[130] See the discussion in chapter 4 part 3.1.3.
[131] Section 6 of the Equal Opportunity Act 2010. See the discussion of this in chapter 4 part 3.1.3.
[132] Law on the Prohibition of Discrimination in the Republic of Serbia 2009 (Official Gazette of the Republic of Serbia No 22/2009) Article 2; Belgium Anti-Discrimination Act 2007. See the discussion in chapter 4 part 3.3.4.
[133] A Taylor & J Taylor 'The place of tattoos, beards and hairstyles in discrimination law' (2020) 26(3) *Australian Journal of Human Rights* 471–472.
[134] Ibid 468.
[135] Ibid.
[136] D Rhode 'The injustice of appearance' (2009) 61 *Stan L Rev* 1035–1037.
[137] K Zakrzewski 'The prevalence of lookism in hiring decisions: How federal law should be amended to prevent appearance discrimination in the workplace' (2005) 7(2) *University of Pennsylvania Journal of Labor and Employment Law* 454.

immutability or mutability affecting appearance discrimination is important in situations relating to the onus of proof, as an individual may struggle to show that they are being discriminated against on the basis of physical appearance because it is difficult to prove that they meet that category of prejudice.[138]

4.1.1 Categorising immutability within the context of appearance

Immutable characteristics include biological aspects of individuals such as their sex, height and race, as well as those constructs that are designed by society at birth, such as illegitimacy.[139] They are recognised as those attributes that are so fundamental to a person's identity or ethos that they cannot be altered or should not be required to change.[140] This implies a level of difficulty in implementing any change that is linked to the individual's cultural, historical and internal dynamics.[141] Based on this understanding of immutability, race, sex, disability, genetic features and national origin are areas that fall under this category.[142] However, closely examining these aspects reveals that some of them could be changed; sex, for example, can be changed through reassignment surgery, despite the difficulty in doing so.[143] Although additional categorisations of protected grounds in South African law can be shifted, such as religion, pregnancy or even sexual orientation, the law recognises how these aspects are central to an individual's identity, which requires protection as a listed ground under the EEA.[144] This incentive discourages lawmakers and employers from creating stringent policies that punish employees for appearing in a manner that is beyond their control.[145]

Chapter 4 examined those jurisdictions that have included terms of appearance discrimination protection in their law, basing their categorisation on features that are immutable, such as height, weight and facial features.[146] Consequently, those mutable qualities of an individual, such as hairstyles, facial hair, dressing and other voluntary grooming aspects are usually not

---

[138] Ibid.
[139] Ibid.
[140] S Hoffman 'The importance of immutability in employment discrimination law' (2011) 52 *Wm & Mary L Rev* 1532. See also R Post 'Prejudicial appearances: The logic of American antidiscrimination law' (2000) 88 *Cal L Rev* 1.
[141] Hoffman (note 140) 1532.
[142] Taylor & Taylor (note 133) 475.
[143] Hoffman (note 140) 1515.
[144] See the discussion of the listed grounds in chapter 4 part 2.1.
[145] Hoffman (note 140) 1520–1521.
[146] See the discussion in chapter 4 parts 3.1.3, 3.2.3 and 3.3.4. This discussion examines Australia, the USA and selected European countries that have cities and states which have listed variations of the term 'appearance' in their legislation and case law.

afforded the protection that immutable characteristics are often given.[147] Chosen physical qualities may often be adopted by those individuals who wish to display an image for themselves in order to identify with a particular group and to be accepted in society.[148] Although this may not lead to systemic discrimination in the same way as one's race might, the choices that an individual makes to appear in a particular way may often be central to their way of life, and it is these choices that are held to be fundamental in respecting their individual identity.

4.1.2 Categorising mutability within the context of appearance

Mutable physical appearance aspects that are fundamental to identity should be recognised in employment policies and the law in order to eradicate any form of discriminatory attitudes towards them.[149] Lawmakers must be cognisant of how society is changing and developing. Now resources are available for modifying immutable traits. For example, listed grounds such as gender, sex and disability are regarded as protected, yet these can be modified nowadays with medical assistance. However, this does not mean that they no longer warrant legal protection.[150] Likewise, features such as height may also be altered by surgery. Even in the case of tattoos and hairstyles, these features are core aspects of an individual – and this is key to their protection.[151]

The debate on whether a trait of an employee is immutable or not has excluded the legal protection of mutable qualities of appearance, despite the rise in claims for the protection of these qualities.[152] As discussed earlier in the thesis, direct discrimination may often occur on immutable characteristics such as sex or gender, whereas indirect discrimination has a disproportionate impact and grounds such as height or weight or dreadlocks may give rise to claims under disability,[153] race or religion.[154] However this fails to cater for those

[147] H James 'If you are attractive and you know it, please apply: Appearance-based discrimination and employers' discretion' (2008) 42 *Val U L Rev* 660.
[148] L Meagher 'Should physical features discrimination be prohibited?' (2019) *Minerva Access at the University of Melbourne* 44–46.
[149] Ibid.
[150] Ramachandran (note 12) 39 notes how body modification is on the rise. For example, transsexual persons may alter their gender, Asian-Americans may opt for eyelid surgery, and even changing the colour of one's skin may be possible, if we consider the case of Michael Jackson.
[151] Ibid 46.
[152] Ibid.
[153] *Kaltoft v Municipality of Billund*, C-354/13, (2014) ECR defined obesity as a disability and that employers are required to reasonably accommodate employees who are affected by this. See also Taylor & Taylor (note 133) 480.

disadvantaged people who may be in more than one protected group. Thus, an additional listed ground not only expands this list but provides an intersectional approach which may provide a clearer focus for physical appearance.[155] Additionally, this will reinforce anti-discrimination as a long-term goal especially in dealing with any stigmas or discriminatory behaviour.

Anti-discrimination law remains focused on those aspects that protect an individual's dignity and those traits that are the crux of their being.[156] The development of medicine and technology means that the line between immutable and mutable characteristics has been blurred.[157] Fitness centres and gym memberships are more readily available, and plastic surgery, which was once only available to the wealthy, has become more accessible. Similarly, cosmetic creams that alter facial features can lead to an individual being viewed as more attractive.[158] Considering the evolving nature of society, the workplace cannot remain oblivious to the need to protect an employee's choice to express their individualism.

Therefore, employers and the law need to align their policies with both mutability and immutability, so long as the policies are applied coherently and equally across the organisation.[159] An individual's attractiveness matters to employers, even though it should not; however, the focus of this section is to encourage an employer to improve their appearance regulation policies in line with societal norms.[160] Race, gender, religion and pregnancy were once all difficult grounds to protect but this does not mean that they did not deserve protection.[161] Hence, physical features are increasingly recognised or protected in anti-discrimination law and the workplace, despite the difficulty with their definition and inclusion.

---

[154] *Department of Correctional Services and Another v POPCRU and Others* (2013) 34 *ILJ* 1375 (SCA). See the discussion of direct and indirect discrimination in chapter 3 part 2.1.
[155] Taylor & Taylor (note 133) 482.
[156] Ibid.
[157] Rhode 'The injustice of appearance' (note 136) 1034.
[158] Zakrzewski (note 137) 459–460.
[159] Ibid 454.
[160] Ibid 461. See the discussion in chapter 4 part 3.6. The French Defender of Rights DDD (*Défenseur des droits*) October Framework Decision encourages employers to check that their workplace practices are in line with the evolution of social norms.
[161] Rhode *The Beauty Bias* (note 4) 112–115.

4.2 Proposed definition for a listed ground of physical appearance

With regard to how appearance discrimination should be categorised in legislation, a variety of terms have been adopted around the world, such as physical features or genetic characteristics. However, the most unequivocal term that would cover those characteristics is linked to one's appearance. Based on a comparative definition of this phrase, Viviers and Smit discuss the possible definition of appearance discrimination to include personal appearance or physical characteristics.[162] The thesis seeks to shape and formulate this definition in line with the Madison Equal Opportunities Ordinance examined in chapter 4.[163]

Therefore, it is proposed that physical appearance should be defined in the EEA as 'the outward appearance of any person, irrespective of sex or gender, with regard to hairstyle, beards, manner of dress, weight, height, facial features, or other aspects of appearance'.

This definition allows for the recognition of those immutable characteristics that are linked to physical attractiveness, such as birthmarks or scars, as well as those qualities that are attached to an individual's identity and dignity, such as tattoos, piercings or weight.[164] Furthermore, the inclusion of this specific definition will allow judicial interpretation to expand into policy- and decision-making that advocates legal protection.[165] Decisions made by employers that are linked to appearance may often restrict one's cultural identity, self-expression or core individuality.[166] This could inexorably lead to the deterioration of one's human rights. Specifying physical appearance as a protected ground in anti-discrimination law sets the tone for developing legislation which makes it possible to explicitly protect individuals and allow claimants to seek relief.[167] Rhodes identifies how explicit legal protection for appearance discrimination does not undermine the prejudice of the current protected categories of discrimination or reduce the hardships faced by these groups, but rather argues that by implementing appearance-based anti-discrimination measures, an eradication of justifying the

[162] D Viviers & D Smith *Vulnerable Employees* (2017) 141. See also Urbana Human Rights Ordinance, Chapter 12 of the City Code. Urbana explicitly mentions 'personal appearance' as a form of prohibited discrimination in employment. Santa Cruz Municipal Code Chapter 9.83 includes physical characteristics that are defined as accidents from birth, disease or natural physical development or other events beyond the control of the person.
[163] Madison Equal Opportunities Ordinance s 39 recognises 'physical appearance' as a form of discrimination. This means the outward appearance of a person in respect of their hairstyle, beard, dress, weight, height, facial features, or other aspects of appearance. See the discussion in chapter 4 part 3.8.5 on the lessons to be learned from the USA.
[164] Ibid.
[165] S Ganty & J Sanchez 'Expanding the list of protected grounds within anti-discrimination law in the EU' (2021) *Equinet European Network of Equality Bodies* 25.
[166] Rhode *The Beauty Bias* (note 4) 93.
[167] Ibid.

prevailing tolerance of appearance discrimination occurs and promotes the awareness thereof.[168]

4.3 Definition of a listed ground of physical appearance in the Constitution

Similarly, it is recommended that freedom of appearance should be defined and developed in the Constitution in alignment with the proposed definition in the EEA. Added to this definition should be the recognition of cultural and political views, given how the thesis has shown the pivotal role that societal, political and cultural changes play in developing an individual's personal interests and identity as a member of society.[169] The recommended definition should serve to reinforce those aspects of the right to privacy, religion and expression.

Thus, the proposed definition of freedom of physical appearance will include 'the outward appearance of any person, irrespective of sex, with regard to hairstyle, beards, manner of dress, weight, height, facial features, or other aspects of appearance and any physical effects due to gender reassignment, cultural and political views.'

5. PROMOTING SUBSTANTIVE EQUALITY AND ADDRESSING INTERSECTIONALITY

Adopting a listed ground for appearance may serve to develop and expand on the theory of intersectionality and to advance the notion of substantive equality.[170] Earlier in the thesis, substantive equality was offered as a justification for protecting an individual's identity and for addressing the gaps in protection for legally unrecognised disadvantaged groups.[171] As will be shown later in this section, the development of explicit legal protection for appearance autonomy touches on aspects of intersectionality.[172] Atrey argues that intersectionality's social justice developments advance the goal of substantive equality through the transformation of social movements.[173]

---

[168] Ibid 110–114. Rhodes discusses how some courts and critics of appearance protection fear a risk of trivialising other serious forms of discrimination, and this may impact individuals with more serious disadvantages.
[169] Ramachandran (note 12) 14–15.
[170] See the earlier discussion in chapter 1 part 5.7 on the principles of substantive equality and intersectionality, and chapter 4 parts 2.3, 3.3.1, 3.4.1 and 4 on intersectional discrimination.
[171] See discussion in chapter 1 part 5.7 and chapter 4 parts 2.2 and 2.3.
[172] S Atrey *Intersectional Discrimination* (2019) 60–61.
[173] Ibid. See B Smith 'Intersectional discrimination and substantive equality: A comparative and theoretical perspective' (2016) 16 *The Equal Rights Review* 98.

Therefore, the thesis argues that intersectionality remains a detailed and evolving concept; however, for the purposes of the thesis's argument, this section examines the role of intersectionality, its relationship with physical appearance, and the ways in which appearance may serve to reinforce the theory of intersectionality.

5.1 Overview of intersectionality

Intersectionality is a term coined by Crenshaw.[174] The notion explains the disparities faced by black women based on two significant protected categories, race and sex.[175] The intention was to show the combined disadvantage suffered by white women on the basis of their sex, or black men on the basis of their race, as well as both categories impacting black women.[176] Crenshaw argued that certain civil rights movements in the USA failed to address those disadvantages faced beyond a single categorical axis and failed to address discrimination that may impact individuals beyond a single ground.[177] The focus of this theory is to recognise when people belong to multiple protected categories or minority groups that may face similar yet different disadvantages.[178]

Thus, acknowledging intersectional discrimination upfront enhances knowledge on the categories of identities and the challenges of discrimination that they may face.[179] Atrey argues that intersectionality may provide recognition for multiple groups or identities to thrive, as it acknowledges the 'ontological plurality in people's existence and experiences'.[180] As with a category like physical appearance, there are multiple aspects that impact on building an individual's identity, such as race, gender, sex, ethnic or social origin, culture, belief, religion, sex, disability or sexual orientation. Thus, the motivations behind intersectionality and the thesis's arguments on the assessment of protection for physical appearance correlate, as both areas aim to promote a transformative approach to discrimination that allows respect for inclusivity and identity.[181] Recognising intersectionality

[174] K Crenshaw 'Demarginalizing the intersection of race and sex: a black feminist critique of anti-discrimination doctrine, feminist theory and anti-racist policies' (1989) 4 *University of Chicago Legal Forum*
[175] Ibid 139.
[176] Ibid.
[177] Ibid 152.
[178] Ibid.
[179] S Atrey *Intersectional Discrimination* (note 172) 79. Atrey states that intersectionality is used to refer to the theoretical framework developed by Crenshaw whereas intersectional discrimination is used to define discrimination based on the experience of multiple identities that relate to the framework.
[180] Ibid 51.
[181] S Salem 'Feminist critique and Islamic feminism: The question of intersectionality' (2013) 1 *The Postcolonialist* 5–6. Salem states that 'the aim of intersectionality is to listen to the voices of women and men

as a tool for reform seeks to break the harmful cycles of disadvantages that have affected groups which have struggled to hold space in anti-discrimination doctrines.[182]

Despite intersectionality's goal of transformation, there are, as with any legal theory, critiques that grapple with the conceptual and practical implications of this concept. Cho, Crenshaw and McCall have noted that intersectionality may be viewed as too shallow or lacking depth, by opening a 'Pandora's box' for relying on identity categories, and also as too narrow by focusing solely on the disparities faced by black women, thus having no recognition for the generalised qualities of a theory or other underlying inequalities.[183] Similarly, explicit legal protection and recognition against appearance discrimination has led to fears of endless claims of new and trivial appearance-related categories that may overburden the system and may merit the law's interference on these issues.[184] However, Atrey argues that neither reliance on identities nor the group-based anti-discrimination framework's reliance on prohibited grounds should deter courts from dealing with the complex forms of disadvantages that one may face.[185]

Atrey argues that concerns about intersectionality's reliance on identity categories are strategic as it uses identities as markers for inequality which can be redirected as tools for resistance, thereby addressing the disadvantages faced by those identities and creating space for them.[186] Therefore, examining the experiences of groups within identity categories allows one to avoid making assumptions about the experiences faced by the disadvantaged group. By focusing on intersectional sub groups or intra groups, Atrey argues that the differences and specifics of individuals in certain subgroups will usually relate back to those initial broader groups and allows for a 'purposeful invocation of group identities'.[187] Fredman

---

on their own terms, in order to piece together narratives and unpack experiences that can help in understanding social life.'

[182] S Cho et al 'Toward a field of intersectionality studies: Theory, applications, and Praxis' (2013) 38 *Signs* 791–792.

[183] Ibid 796. See also B Smith 'Intersectional discrimination and substantive equality: A comparative and theoretical perspective' (2016) 16 *The Equal Rights Review* 83; S Fredman 'Double trouble: Multiple discrimination and EU law' (2005) 2 *European Anti-Discrimination Law Review* 14.

[184] E Adamitis 'Appearance matters: A proposal to prohibit appearance discrimination in employment' (2000) 75 *WLR* 223. See the discussion of unmeritorious claims in part 5.3.

[185] Atrey *Intersectional Discrimination* (note 172) 55.

[186] V May *Pursuing Intersectionality: Unsettling Dominant Imaginaries* (2015) 113.

[187] Atrey *Intersectional Discrimination* (note 172) 58–59. Atrey recognises the difficulties that may arise through an intersectionality approach to identity because there is a likelihood of creating smaller groups of identities which may not have much in common. Therefore, mapping intra groups differences can provide a collective recognition of individual experiences which may annihilate the basis of groups. She therefore argues that intersectionality does not serve to renounce identity politics but through relating intra group experiences back to the group disadvantage, rehabilitation of identity politics is realised.

argues that focusing on identities can promote an open-textured approach that examines the underlying structures of discrimination claims.[188] Furthermore, Smith argues that any critiques of intersectionality's inability to deal with the underlying inequalities is mistaken, as this theory encourages courts to examine the structural disadvantages that may have occurred based on the individual's or group's intersectional identity and their situation, as well their societal and historical treatment.[189]

Intersectionality is not a novel issue in South African case law; in a number of instances, the courts have briefly dealt with intersectional discrimination. For instance, in *Barnard*,[190] the courts recognised how Ms Barnard's traits sat at the intersection of privilege through her white race and underprivilege through her gender, which may lead to her promotion in some instances but may require more promotion in other contexts.[191] Prior to this, intersectional discrimination was dealt with in *Hassam v Jacobs*,[192] which involved a challenge to the Intestate Succession Act and the Maintenance of Surviving Spouses Act, which excluded the surviving spouses of polygynous marriages.[193] The claimant argued that her exclusion from inheriting from her deceased husband constituted unfair discrimination on the basis of religion, marital status and gender.[194] She argued that the discrimination she faced was contentious as it failed to protect Muslim widows of polygynous marriages.

The court noted that the values of equality, dignity and diversity formed part of the transformative constitutionalism approach.[195] Applying *Harksen*, the court found that excluding the claimant would not allow for the goal of substantive equality to be achieved and found the discrimination against her to be a significant and material disadvantage.[196] The court acknowledged each argument about each listed ground and through a careful

[188] Fredman 'Double trouble' (note 183) 18.
[189] Smith (note 183) 83–84.
[190] *South African Police Service v Solidarity obo Barnard* (2014) 35 *ILJ* 2981 (CC).
[191] Ibid para 98. See also *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) para 153; D Collier & E Fergus et al *Labour Law in South Africa: Context and Principles* (2019) 414.
[192] *Hassam v Jacobs* 2009 (5) SA 572 (CC).
[193] Ibid para 2. The court declared that s 1(4)*(f)* of the Intestate Succession Act 81 of 1987 was inconsistent with the Constitution, to the extent that it made provision for only one spouse in a Muslim marriage to be an heir in the intestate estate of their deceased husband. *Hassam* also challenged the term 'survivor' in the Maintenance of Surviving Spouses Act 27 of 1990, stating that it should include a surviving spouse or spouses of a polygynous Muslim union.
[194] Section 1(4)*(f)* of the Intestate Succession Act.
[195] *Hassam* (note 192) paras 36–38. Nkabinde J stated that to discriminate against women in polygynous marriages on the grounds of religion, gender and marital status reinforced a pattern of stereotyping and patriarchal practices that relegates women to being unworthy of protection and conflicts with the principle of gender equality which the Constitution strives to achieve.
[196] Ibid para 33.

discrimination analysis the court was able to penetrate the complexity of this type of intersectional discrimination.[197] Recently, in *Mahlangu and Another v Minister of Labour and Others*,[198] the court went further than it did in *Hassam* and recognised the significance of intersectionality as a theory of constitutional law.[199] This case challenged a provision in the Compensation for Occupational Injuries and Diseases Act[200] which excluded domestic workers from the definition of an employee when accessing social security assistance following any injury or death in the workplace.[201] The case honed in on the rights of domestic workers, particularly black women, and their right to social assistance. The court adopted a broad interpretation and recognised that multiple grounds made the reliance on an intersectionality analysis inevitable.[202] Atrey has noted that the recognition of this theory was monumental in ascertaining how multiple-grounds discrimination may differ from intersectional discrimination, which can only be appreciated by analysing the complex patterns behind such indirect discrimination.[203]

This case was seminal for its promotion of intersectionality within human rights and constitutional law. The courts have adopted a much broader interpretation by using its discrimination analysis, and transformative equality can be realised through cases like this one.[204] Significantly, there are certain similarities between appearance and aspects of intersectionality that argue for its development. Atrey notes how physical appearance may lead to a type of intersectional indirect discrimination, which as in *Mahlangu*, touches on multiple grounds and impacts intersectional claimants on different grounds such as height, weight, hair, makeup and dress.[205] One could argue that a recognition of physical appearance touches on aspects of intersectionality; by giving effect to appearance autonomy, the principles of substantive equality and intersectionality are realised.

[197] Atrey *Intersectional Discrimination* (note 172) 130.
[198] *Mahlangu and Another v Minister of Labour and Others* (2021) 42 *ILJ* 269 (CC).
[199] Ibid paras 73–102.
[200] Compensation for Occupational Injuries and Diseases Act 130 of 1993.
[201] Section 1(xix)(v) of the Compensation for Occupational Injuries and Diseases Act expressly excluded domestic workers from the definition of an employee.
[202] *Mahlangu* (note 198) para 74.
[203] S Atrey 'Beyond discrimination: *Mahlangu* and the use of intersectionality as a general theory of constitutional interpretation' (2021) 21(2) *International Journal of Discrimination and the Law* 174.
[204] *Mahlangu* (note 198) para 79. Victor J indicated that an intersectional approach is the kind of interpretative approach that will achieve 'the progressive realisation of our transformative constitutionalism'.
[205] Atrey *Intersectional Discrimination* (note 172) 161 notes 'how grooming and physical appearance may be explicitly based on criteria like height, weight, hair, makeup and uniform dress code'.

5.2 Appearance as a tool for protection against intersectional forms of discrimination

To comprehend how appearance may be used as a tool for intersectionality, we must acknowledge that both concepts hold similar positions in a number of ways; this serves as a useful guide for reinforcing the protection of appearance as a listed ground. Critics examining the development of a listed ground of appearance argue that this may be futile, as protection may be sought through related protected categories, unlisted or arbitrary grounds.[206] Moreover, the protection of appearance autonomy may be pursued through one or more grounds such as religion or gender which in some instances have accommodated appearance protection.[207]

Although appearance autonomy, like intersectionality, is a fundamental issue and even though intersectional discrimination relief is currently somewhat guaranteed without a listed provision of protection, Atrey argues that language is not always determinative but it does matter.[208] This implies that the legal recognition of intersectionality may certainly assist as a starting point for its recognition; however, it is not the only way to interpret its relevance in the law.[209] Hence protection for physical appearance as a listed ground serves to acknowledge those related grounds and provides an all-encompassing provision of protection which reinforces these grounds.[210] Atrey notes that identities in intersectionality serve a similar purpose to grounds in anti-discrimination law; linking inequality to these indicators reinforces the distributive purpose behind prohibiting discrimination.[211]

Expanding on the importance of recognising grounds, intersectional claims have *gravitas* should they touch on multiple claims or aspects of an individual's experience.[212] This ensures further protection for those grounds that may not be legally recognised.[213] However, appearance autonomy, like intersectionality, is usually recognised based on the reinforcement

---

[206] See the earlier discussion of this in chapter 4 part 2.4. A further discussion appears in parts 5.1 and 5.3 of this chapter. See also M McGregor & W Germishuys 'The taxonomy of an unspecified ground in discrimination law' (2014) 35(1) *Obiter* 106; W Corbett 'The ugly truth about appearance discrimination and the beauty of our employment discrimination law' (2007) 14 *Duke Journal of Gender Law & Policy* 178. Corbett argues that, based on the complexities and nuances of employment discrimination, no such law for appearance discrimination will be passed.

[207] *Department of Correctional Services and Another v POPCRU and Others* 2013 (4) SA 176 (SCA); *Pillay* (note 4).

[208] Atrey *Intersectional Discrimination* (note 172) 143.

[209] Ibid.

[210] Adamitis (note 184) 212–214. See also Ramachandran (note 12) 63.

[211] Atrey *Intersectional Discrimination* (note 172) 148.

[212] Ibid 155.

[213] Ibid.

of other grounds.[214] Significantly, in seeking protection for appearance, there are multiple rights which may serve to protect claimants, which may argue against the need for its development in the law. Although this can be argued in both ways, a route for protection against appearance discrimination through a single ground which touches on the aspects of privacy, dignity, equality and supporting freedoms can only strengthen its need for a defined category of protection.[215]

A significant finding in chapter 4 of the thesis was that developing protection for appearance autonomy will promote awareness and clarity for employers and lawmakers.[216] Individuals who are subjected to appearance-based discrimination may not be aware of the stereotypical prejudices or discriminatory impacts in an employer's policy. Claimants may fail to seek recourse for any prejudice they face because of a lack of information about or awareness of this type of discrimination, which often leads to hostile workplaces or unfair treatment that can affect their dignity.[217] Similarly, an individual who falls under multiple identities or grounds of discrimination may often be unaware of the type of discrimination they are facing.[218] Therefore a legally recognised framework for and definition of appearance may serve to guide both employers and employees. Likewise, if intersectional discrimination is recognised by the courts it will educate people about the harms of stereotyping, lack of autonomy and loss of dignity.[219]

A final consideration that impacts both appearance and intersectionality is the lawmaker's interpretation of the definition of a ground. Atrey argues that intersectional discrimination requires a broader interpretation to ensure there is no exclusion for any disadvantages that may impact two grounds.[220] In *Mahlangu* the court considered socio-economic status and poverty status alongside the grounds of sex, race and gender, which strengthened its analysis.[221] Likewise, to fully ensure protection from all forms of appearance discrimination, a broader definition of the ground for physical appearance should include both immutable and mutable aspects to ensure that no plausible categories are excluded from protection. Atrey argues that an isolated reading of grounds may not identify the problems between

[214] Adamitis (note 184) 212–214. See the discussion in chapter 4 part 2.4 on appearance-related claims.
[215] Ibid. See also Ramachandran (note 12) 63.
[216] See the discussion in chapter 4 part 4.
[217] A Mason & F Minerva *Should the Equality Act 2010 be Extended to Prohibit Appearance Discrimination?* (2020) 70(2) *Political Studies* 436. See also Klare 'Power/dressing' (note 1) 1442–1443.
[218] Atrey *Intersectional Discrimination* (note 172) 162–164.
[219] Ibid.
[220] Ibid 149.
[221] *Mahlangu* (note 198) para 128. See also Atrey 'Beyond discrimination' (note 203) 174.

intersectional grounds and can lead to a narrow interpretation of a defined ground, which may not accurately reflect the specific disadvantages associated with the category.[222]

All in all, promoting appearance autonomy protection and legally recognising its definition may serve many purposes that ultimately benefit the principles of substantive equality and intersectionality. The proposed definition that outlines a broad range of characteristics can provide clarity about its implementation. The thesis has argued that recognising the framework of intersectionality and utilising appearance through this lens is likely to ensure transformative constitutionalism.[223] This provides meaningful recourse for those who struggle with aspects of intersectionality in their appearance and establishes progression in our law. This may not be a seamless process as there are technical considerations about appearance autonomy that may serve to limit or discredit its implementation. A discussion of these considerations follows.

6. TECHNICAL CONSIDERATIONS FOR RECOMMENDATIONS

In advocating a change in discrimination law about appearance technical aspects need to be examined. The thesis has discussed how an employee's aesthetic or look may be important for the job and, as recommended earlier in this chapter, a clear definition of what constitutes appearance as a protected category should be developed. This section aims to address those questions that critique the need for the protection of appearance. The first issue is whether the law needs to be amended considering that there is a current route for the protection of appearance. The second issue is its implementation in the workplace; this requires employer responsibility and policy changes. The final issue – and probably the most controversial issue – is its potential for opening the floodgates of litigation.[224] This follows concerns about the problem of proof and the practicality of its administration in the law.

---

[222] Atrey *Intersectional Discrimination* (note 172) 148.

[223] S Liebenberg & B Goldblatt 'The interrelationship between equality and socio-economic rights under South Africa's transformative Constitution' (2007) 23 *SAJHR* 338. See also K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146; *S v Makwanyane* 1995 (3) SA 392 (CC) para 262.

[224] *Pillay* (note 4) para 107 Langa CJ dealt with the slippery slope argument of how allowing Pillay to wear a nose ring would allow more learners to come to school with tattoos, body piercings, dreadlocks and loincloths. The court rebutted this floodgates argument in three ways – firstly, *Pillay* dealt with a bona fide religious and cultural practice. Secondly, ruling in favour of Pillay would encourage others to express themselves, especially those who are afraid to express their culture or religion, Finally, the acceptance of one practice does not imply protection for all practices; if there is a likelihood that the practice may cause an undue burden then it might not be permitted. This shows how each claim or practice will need to be analysed on its own merits. See Adamitis (note 184) 222.

6.1 An unlisted form of relief: Is it necessary to amend the law?

The current system allows employees or those who are victims of appearance-based prejudice to seek relief under an unlisted or 'arbitrary' ground for a claim. The thesis dealt with these concepts earlier and their potential for use as anti-discrimination regulatory tools.[225] Building on chapter 4's discussion of proving discrimination under section 11 of the EEA, if an employee were to bring this claim on an unlisted ground, they would have to prove that the unfair discrimination infringed on their rights to dignity and equality.[226] Employees will have to rely on the three-stage test adopted in *Harksen* and ascertain whether differentiation, discrimination and unfairness were present to prove that there was appearance discrimination based on an unlisted ground.[227] Differentiation requires establishing whether the employer has treated the employees differently based on their appearance, either through conduct or workplace policy.[228] Discrimination based on appearance is linked to dignity and, therefore, if an individual's self-worth has been diminished based on the discrimination suffered, this will result in discrimination. Currently, appearance as an unlisted ground requires further investigation by the employee to prove that unfairness has occurred. If appearance were a listed ground, this would be presumed and would result in a less complex process.[229]

Harksen[230] establishes that unfairness requires focusing on the impact of the appearance discrimination on the employee and others in a similar position. Appearance prejudice in the workplace can severely impact the employee's state of being in the workplace and perpetuates stigmas and stereotypes that indicate that appearance has greater value than merit.[231] Thus, establishing appearance as an unlisted ground is possible, but proving this and the complexity of defining this prejudicial treatment without linking it to a listed ground can be difficult.[232] Not presuming unfairness and discrimination makes proving these aspects an

[225] See the discussion in chapter 1 part 5.1 and chapter 4 parts 2.2 and 2.4.
[226] See the discussion in chapter 4 part 2.2.2; *Harksen v Lane* 1998 (1) SA 300 (CC) paras 46–47.
[227] *Harksen* (note 226) paras 42–43.
[228] Ibid.
[229] Section 9(5) of the Constitution.
[230] *Harksen* (note 226) paras 50–51.
[231] M Hosoda et al 'The effects of physical attractiveness on job related outcomes: A meta-analysis of experimental studies' (2003) 56 *Personnel Psychol* 431–434. See also E Toledano 'The looking-glass ceiling: Appearance-based discrimination in the workplace' (2013) 19 *Cardozo J L & Gender* 692–693.
[232] *Harksen* (note 226) paras 46–47.

arduous task.[233] Most claimants avoid seeking relief because of the difficulty of proving appearance as an unlisted ground of discrimination.

Therefore, protection against appearance discrimination under the current framework is possible, but it offers a patchwork of protection that may not adequately serve claimants in the same way that a listed ground can. Appearance is closely linked to dignity and equality and employers must consider these when implementing policies or dress codes. Therefore, the current approach does not clarify the boundaries of appearance protection. Failing to promote a balance between the employer and employee leads to an employer abusing their power.[234] Hence a developed listed ground will educate employers on how to manifest appearance regulation in the workplace appropriately.

6.2 Implementation: Workplace policies and employer responsibility

Employers should affirm appearance autonomy by adopting policies in the workplace that protect employees' dignity whilst simultaneously upholding their right to equality.[235] Any dress or uniform requirement should promote affirmative action and ensure the proscriptive parameters of the uniform, within reason.[236] Employers should ensure that there is a comprehensive policy in place, with a coherent definition of appearance discrimination, including those characteristics that may be affected such as the style or type of clothing worn, restrictions on hair length, presence of facial hair, jewellery, piercings or cosmetics, body tattoos as well as other accessories that are permitted.[237] These may be in the form of compulsory or optional terms that give the employee the autonomy of dressing as they wish whilst simultaneously performing in terms of their job specifications.[238]

[233] DJ Viviers 'Dress codes, grooming standards and South African employment law: Comparative insights on workplace discrimination based on mutable appearance characteristics' (2016) 133 *SALJ* 898 at 927. See also Adamitis (note 184) 222–223.
[234] See the discussion in chapter 4 part 2.4 on the gap in protection against appearance discrimination. Part 2.4.2 examines the likely abuse of employer power.
[235] M Bandsuch 'Dressing up Title VII's analysis of workplace appearance policies' (2009) 40 *Colum Hum Rts L Rev* 338–340. See also C Fisk 'Privacy, power and humiliation at work: Re-examining appearance regulation as an invasion of privacy' (2006) 66(4) *Louisiana Law Rev* 1111 at 1136.
[236] Bandsuch (note 235) 338–340.
[237] D Kuhn & J Pearce 'The legality of using employee appearance policies to promote organisational culture' (2007) 24 *Hofstra Labor and Employment Law Journal* 185.
[238] Bandsuch (note 235) 338.

For example, companies in the USA, such as Walmart, allow employees to display inoffensive tattoos and workplace-safe piercings and jewellery.[239] Recently, the British airline Virgin Atlantic implemented a 'championing individuality' policy in their operations to allow their airline staff to display their tattoos.[240] If any specific restrictions are supported by legitimate business reasons, these should be specified by the employer, whilst ensuring they do not degrade any protected class and grant employees the freedom to wear attire that is true to their identity.[241] To ensure that any groups or associations are not at risk of being stigmatised, the employer should clarify the ruling behind the policy and communicate the business reasons adequately.[242] Additionally, the employer should ensure reasonable efforts at accommodation to balance the needs of the employment relationship.[243] It is recommended that the employer documents the requirements of the job, whilst respecting the principles of proportionality, transparency and enforceability.

Moreover, employers should clearly communicate that any discrimination based on an employee's physical appearance is prohibited and that, should this occur, the guilty party will face repercussions.[244] Any violations of the appearance policy will result in sanctions such as suspension, fines or dismissal, if necessary. These policies should include mandatory training for employees that reiterates their freedom of appearance, as well as the necessary restrictions that are based on the inherent requirements of the job. Employers should be kept aware of the ever-shifting standards in the industry, as well as community dynamics that could potentially develop the policy further.

Significantly, employers should ensure that no practice infringes on any evolving employment or human rights laws that could limit an employee's dignity in the company.[245] To ignore this would reinforce archaic ideals that fail to conform to an ever-progressing society.[246] The development of appearance-based policies should be a collaborative effort that aims to enhance the employment relationship without court intervention, implement

---

[239] Walmart Appearance Policy *https://www.algrim.co/2337-walmart-dress-code#:~:text=Generally%2C%20you%20must%20wear%20jeans,white%20shirt%20with%20your%20jeans*, accessed 23 June 2022.
[240] The Guardian 'Tickled ink: Virgin Atlantic allows cabin crew to display tattoos' (2022) *https://www.theguardian.com/business/2022/may/31/virgin-atlantic-allows-cabin-crew-to-display-tattoos*, accessed 23 June 2022.
[241] Kuhn & Pearce (note 237) 183.
[242] Ibid. See also s 6(2)*(b)* of the EEA.
[243] Kuhn & Pearce (note 237) 189.
[244] Bandsuch (note 235) 339–340.
[245] Ibid.
[246] Ibid.

reasonable accommodation, increase awareness of this form of discrimination, and facilitate anti-discrimination measures that strengthen equal opportunities and minimise social inequities in the workplace.[247]

6.3 Unmeritorious claims: Resolving the floodgates argument

Defining an inclusive approach to appearance discrimination gives rise to the fear that this could lead to a flood of frivolous claims.[248] This chapter has defined physical appearance to include both immutable and mutable characteristics. However, the concern about this definition is that these traits may be manipulated by applicants who have a subjective view of what constitutes appearance bias.[249] The issue with offering legal protection to victims of appearance discrimination is the volume of litigation that could arise. Adamitis notes that appearance discrimination may often lead to claims of over-inclusiveness which may include traits of attractiveness or unattractiveness that may be impractical to assess.[250] Furthermore, these claims may burden claimants with the difficulty of proving such claims as discriminatory treatment based on appearance may be difficult to prove.[251]

Appearance-based discrimination may be litigated on a prohibited or an unlisted ground. However, as Adamitis correctly states, this does little to fulfil the need for explicit protection.[252] Understandably, anti-discrimination law is based on the identity of a group; whether this is based on race or age, the focus is on the unfairness of the group dynamics, which exist because individuals belong to different groups.[253] As the previous section identified, protecting appearance may fall on the precipice of other intersectional grounds, which may lead to limited protection for the individual as they may be unaware of the correct category to seek relief from. Thus, the thesis promotes that to mitigate this issue there is the need for a clarified definition with a focus on physical appearance.

Additionally, the thesis showed when considering the listed protected categories of discrimination, there tends to be a practical link between each listed category, reinforcing the notion of intersectionality. For instance, if a younger male is offered a promotion over an older female with more experience in the company, the disparity could centre around gender

[247] Ibid. See also Kuhn & Pearce (note 237) 221.
[248] Rhode *The Beauty Bias* (note 4) 112–115. See also Viviers & Smith (note 162) 132.
[249] Toledano (note 231) 708–709. See also Rhode *The Beauty Bias* (note 4) 25.
[250] Adamitis (note 184) 222–223.
[251] Ibid.
[252] Ibid.
[253] Fisk (note 235) 1145. See also Taylor & Taylor (note 133) 478.

and disability. Each of these protected grounds touch on aspects of appearance, however this does not mean that neither category is worthy of protection or that appearance is irrelevant, but rather that when dealing with appearance discrimination there need to be definitive strategies for change that may strengthen and reinforce the existing categories for anti-discrimination.[254]

Chapter 4 assessed those comparators that have adopted appearance discrimination in their legislation, and based on recent reports there have been relatively few complaints and these were less or equal to other listed grounds in terms of number.[255] Rhodes notes that complaints of this nature are unlikely to bring a 'barrage of loony litigation', as USA states that have implemented appearance discrimination laws have shown that the costs of dealing with those qualifications currently built into the legal system have been less burdensome.[256] Although costs should not be a barrier to access to justice, the fear about the potential judicial challenges of these claims has proved to be unfounded.[257] This form of discrimination is still finding its place in society, but there is no indication that there is any cause for concern.[258]

Appearance discrimination should not be silently ingrained in society, not allowing for any relief because on the concern that it could unbalance the judicial system.[259] If this attitude were adopted in respect of the current prohibited listed grounds, there would be very little development of anti-discrimination law. Rhodes notes that the sentiments about how subjective and difficult it is to categorise appearance are similar to the sentiments expressed in reaction to the US Supreme Court case of *Plessy v Ferguson*.[260] In this racial segregation case, separation or rather exclusion was justified as a natural desire, and it was thought to be difficult to legislate morality on racial issues.[261] Additionally, gender, sexual orientation and disability are grounds that have all shifted from a lack of protection to empowering positive reform that has broken down the injustice suffered on these grounds.[262] Through legal reform

[254] Atrey *Intersectional Discrimination* (note 172) 161; Rhode *The Beauty Bias* (note 4) 147.
[255] Victorian Equal Opportunity & Human Rights Commission *Annual Report* (2020–2021) 158. See also Rhode *The Beauty Bias* (note 4) 113.
[256] Rhode *The Beauty Bias* (note 4) 112–115.
[257] Victorian Equal Opportunity & Human Rights Commission (note 255) 158. See also Rhode *The Beauty Bias* (note 4) 113.
[258] Ibid.
[259] Adamitis (note 184) 223.
[260] *Plessy v Ferguson* 163 US 537 (1986).
[261] Rhode *The Beauty Bias* (note 4) 113–114.
[262] Ibid.

and the recognition of cultural and societal developments legitimising appearance, anti-discrimination law can echo public values and protect them in all spheres.[263]

7. CONCLUSION

This chapter has argued that physical appearance is worthy of protection as a prohibited ground of discrimination, based on its links to dignity. An individual's dignity is fundamental to human rights, particularly in the Constitution, as well as the encompassing values that build on discrimination protection. As an overarching foundational value of protection, appearance autonomy can serve to rely on and reinforce dignity.[264] Moreover, employers must uphold employees' right to dignity where a workplace policy can humiliate or degrade an individual.[265] Dignity is a core aspect in equality jurisprudence and, as a value, can serve to defend and promote the aspirations of transformation and equality.[266]

As a foundational value, there is no doubt that dignity has achieved significant status in fundamental law and the chapter has shown that dignity informs a variety of areas and has upheld the dependencies of other rights that serve to recognise autonomy, privacy and equality.[267] Hence dignity's role, through the interdependence of fundamental rights, its value in interpreting other areas of discrimination and constitutional matters, as well as its ability to accord respect and worth for every identity serves to provide a comprehensive theoretical framework for the development of appearance autonomy.

Appearance as a listed ground of protection would reinforce the notion of merit before appearance in the workplace.[268] Additionally, dignity at the heart of this framework encourages its implementation at a fundamental level. Therefore, the thesis recommends that physical appearance should be included in anti-discrimination law under both employment and human rights laws.[269] This allows further relief for those claims that may fall outside the scope of the current fundamental freedoms, which would be a step in the right direction. This would reinforce the protection of appearance autonomy, provide clarity on the burden of proof, address intersectionality, and promote substantive equality throughout South Africa's structures.

---

[263] Ibid.
[264] Rhode 'The injustice of appearance' (note 136) 1097.
[265] Rhode *The Beauty Bias* (note 4) 113–114.
[266] Cowen (note 8) 55.
[267] Ibid.
[268] Adamitis (note 184) 223. See also Delagrave (note 3) 285.
[269] Ramachandran (note 12) 17–29.

Defining appearance in the workplace is a challenging task and it is recommended that both immutable and mutable features should be included in a definition. This encourages the development of legislation as characteristics such as height, blemishes or birthmarks are not the only factors to consider when dealing with appearance.[270] By developing a ground of appearance through the lens of intersectionality, the definition of physical appearance can give effect to substantive equality and ensure protection for all areas of appearance autonomy. Examining the advancement of society and how categories such as race and sex were once not protected grounds counters any argument that including physical appearance will lead to a flood of claims.[271] Moreover, the development of those listed grounds allows for greater legal certainty.[272] This is an aspect of the evolving concept of equality.

With regard to technical concerns that may be raised against the proposed recommendations, the thesis provides that employers have the right to defend their policies. Although the law grants a certain amount of power to employers to control aspects of their workplace, this is not a reason to abstain from questioning these aspects.[273] Both parties in an employment relationship should adopt a special interest in appearance in the workplace, and the ultimate solution lies in balancing the rights of both parties equally.[274] Additionally, having appearance as a prohibited ground will allow the employer to focus purely on the merit of the individual, whether it is a potential or current employee fulfilling the specifications of the position. A ban on appearance discrimination will foster the mindset to completely remove any form of stereotyping and stigmatising in the workplace.[275]

Moreover, implementing the specific physical appearance definition proposed will automatically prevent futile claims, and allow for a comprehensive focus on an individual's impairment. Any concern about legitimising appearance discrimination does not outweigh the need for combating irrational and unfair discrimination in the workplace.[276] Any claim will face the same procedure as the current listed protected grounds.[277] Appearance autonomy is fundamental, and therefore extending protection of appearance as a listed ground provides all

[270] Taylor & Taylor (note 133) 475–476.
[271] *Pillay* (note 4) para 107. See Rhode *The Beauty Bias* (note 4) 112–113.
[272] Viviers & Smith (note 162) 134.
[273] Adam & Collier (note 99) 91.
[274] Ibid.
[275] Adamitis (note 184) 223.
[276] Rhode *The Beauty Bias* (note 4) 112–113.
[277] Adamitis (note 184) 223.

parties in the employment relationship with many opportunities to recognise an individual's identity, thereby ensuring a safe and progressive workplace organisation.[278]

[278] Fisk (note 235) 1146.

CHAPTER 7: CONCLUSION

> Identity is not a static, immutable given, nor is it so insubstantial as to be meaningless to human existence. Identity is shaped by social norms and the law, and it is a ground from which to rally for reshaping those norms and the law.[1]

1. CONCLUDING REMARKS

The principal aim of this thesis was to determine the extent to which an employee's appearance is protected against discrimination and the limits to appearance autonomy. The thesis concludes that currently there are gaps in the protection of appearance autonomy in South African law. In certain circumstances an employee's appearance is an inherent aspect of their employment, which justifies an employer's dress policy or rule. However, this does not call for a complete relinquishing of an employee's identity.

South African legislation does not include a listed ground of appearance in its anti-discrimination measures, and this leads to uneven protection. This means that the protection of appearance autonomy must be sought by relying on multiple related grounds that may not provide adequate relief and that may result in an arduous process of dealing with differing burdens of proof. Therefore, explicitly recognising appearance autonomy will help to overcome these burdens. Furthermore, the thesis argues that there is scope for the development of appearance autonomy in employment legislation, and for the Constitution to promote transformation and support appearance autonomy.

2. SUMMARY OF CONCLUSIONS AND OBSERVATIONS

This conclusion follows from a comprehensive analysis of the concept of dignity and its evolution from a philosophy to a regulatory tool in anti-discrimination measures. Additionally, the nexus between dignity and identity was shown, particularly the role of dignity in influencing anti-discrimination law in South Africa and foreign comparators that have different approaches to upholding equality. The USA, Australia, the UK and selected EU countries were examined. Appearance and its place in the law, the workplace, and guaranteeing appearance as a right for everyone at a fundamental level were analysed. Establishing physical appearance as a listed ground, its boundaries, and the concerns about its

[1] G Ramachandran 'Freedom of dress: State and private regulation of clothing, hairstyle, jewelry, makeup, tattoos, and piercing' (2006) 66 *Maryland L Rev* 93.

protection were examined, indicating how some of these concerns mirror early sentiments about the current protected grounds.

The thesis focused on appearance autonomy, due to its evolving nature and its significance in society. Moreover, the idea that a person's appearance is closely linked to inherent worth was key in establishing the foundations of their dignity. The study of dignity in chapter 2 established its importance at a foundational level and confirmed its nature as an integral instrument in identifying individuality and worth. Dignity is a concept at the intersection of theoretical, religious and philosophical conversations. Additionally, dignity's role in the law as an influential fundamental right and crucial element of an individual's values and rights, such as equality and fairness, was ascertained. These chapters establish how closely dignity correlates with individualism, emphasising its use in resolving disputes, promoting diversity and eradicating discrimination.

Dignity was shown to be a determinative value when building anti-discrimination measures or tests, and one that assists in identifying and potentially closing the gaps for prejudice. Chapter 3 addressed the role of dignity in the legal framework and how this has led to the formation of international, constitutional and domestic instruments. Moreover, the relationship between dignity and other rights such as privacy, equality and freedom emphasises the interdependence of dignity, which strengthens and serves to reinforce other rights. The chapter examined how dignity has developed the legislative framework through its jurisprudence, especially as a value that is used to resolve disputes about competing rights and when informing the significance of individual rights. This chapter also addressed the development of dignity in the workplace through a framework that outlines the importance of upholding dignity as a right and the consideration of autonomy, freedom, respect and equal treatment. Conceptualising dignity through this framework reinforces the Kantian approach to dignity, which allows for the advancement of the workplace and creates space for those areas of law in which there may be substantial gaps.

Chapter 4 shows that anti-discrimination measures in the South African workplace rely not on dignity but also on its intrinsic role in expanding and building protected categories, whether they are listed or unlisted. Despite South Africa's historical inequalities, its development of labour laws is commendable. However, overturning a systemically unequal system requires consistent monitoring and progression, as the current means of eradicating discrimination cannot be universally applied, and certain groups of people remain

marginalised and inadequately protected. The chapter showed how individuals subject to unjust treatment based on their appearance may struggle to obtain relief. Appearance does not simply mean one's choice of accessories or dress but speaks fundamentally to individuality. Self-worth and expression are important to an individual, both inside and outside the workplace. Although anti-discrimination frameworks are useful for individuals who wish to question workplace regulation, there is no explicit listed protection for those who are subjected to discrimination based on their physical appearance.

The cases examined in the thesis have shown that the routes to relief are often arduous and burdensome. Currently, employees may seek relief through an arbitrary or unlisted ground, or they may categorise their claim under an existing protected ground. In some cases, this may prove successful; however, proving these claims is difficult and may not be successful. The thesis engaged with the anti-discrimination laws in the USA, Australia, selected countries in Europe and the UK. Comparativism is a key thread in the discussion of appearance discrimination protection. These jurisdictions were selected in order to understand how they have dealt with appearance-related discrimination in their legislative frameworks or how they have failed to acknowledge this form of discrimination.

Comparators that have implemented this category in their employment law, such as Australia, France and the USA, showcase the need to evolve jurisprudence with inclusivity, an approach that South Africa can benefit from. The comparators engaged with in the chapter share some aspects of anti-discrimination law with South Africa, whether it is their historical background or their development of substantive equality. Although the comparative references are not comprehensive, they are useful in showing the limitations associated with appearance autonomy. Hence, the comparators that were engaged with show the substantial differences and similarities in their approaches, which serves as a strong foundation for the development of South African law.

Chapter 5 assesses the adequacy of accommodating appearance through the constitutional right to privacy, freedom of religion and freedom of expression. These rights reinforce the message that appearance discrimination without legitimate justification should not be tolerated. Furthermore, the chapter illustrated the need for mutual accommodation between the employer and the employee in the implementation of dress codes. The thesis argues that the protection of appearance autonomy using the current constitutional framework remains inadequate, due to the uncertainty around differing burdens of proof and jurisdiction. This

shows that these rights can be used to validate the argument for appearance autonomy but using these rights when instituting appearance-related claims may prove laborious. Klare argues that the formation of a right to appearance autonomy may address the conventional biases about appearance and advance justice beyond the status quo.[2] Both chapters 4 and 5 demonstrate how the protection of appearance has the potential to be a protected ground in the EEA and a fundamental freedom in the Constitution, which will have a profound impact on equality.

Stigmas and stereotypes about appearance may heedlessly occur, and ignorant statements may impair an individual's dignity. However, the recognition of physical appearance in either the EEA or the Constitution can raise awareness and encourage more respectful and diverse policies that protect individuals. Rhode emphasises that this type of awareness can be raised by developing the employment relationship through a consideration of employees' opinions and discussion.[3] Workplace appearance regulation should benefit both parties. Chapters 4 and 5 conclude by acknowledging that the protection of appearance autonomy will benefit democracy and dismantle the barriers that may hinder individual progression. The thesis has therefore argued that personal appearance autonomy in the workplace must be protected, and has demonstrated dignity's role in upholding this claim.

Chapter 6 analysed the recommendations which may aid in upholding an individual's appearance autonomy and strengthen the development of the thesis's arguments. The analysis of appearance discrimination in South Africa concluded that an individual's dignity and sense of self are significant for reinforcing the notion of merit before appearance in the workplace. Dignity is the overarching foundational value which is the source of several human rights; therefore, the thesis argues that dignity has an important role in developing equality law for appearance autonomy. The recognition of dignity as the basis for appearance autonomy reinforces the need for this right and promotes other fundamental rights that are achieved through this. Hence, the thesis concludes that the recognition of physical appearance as a listed ground of discrimination at an anti-discrimination level and through a fundamental freedom could shift prevailing attitudes about appearance. This thesis proposes a specific and explicit definition that encompasses relevant traits that are currently excluded from protection in the workplace.

[2] K Klare 'Power/dressing: Regulation of employee appearance' (1992) 26 *New Eng L Rev* 1445.
[3] Ibid. See also D Rhode *The Beauty Bias: The Injustice of Appearance in Life and Law* 2 ed (2010) 152.

Furthermore, this thesis clarifies the instances where appearance regulation may be warranted. Chapter 6 addressed the concerns and mechanisms that would aid in mitigating justified discrimination by reasonably accommodating an employee's interests within the parameters of the role. Detailed work policies, discussions and consistent transparency between both the employer and the employee will ensure a safe and inclusive workplace. Additionally, employers and legislators should include immutable and mutable qualities in their definition of physical appearance; this will reinforce intersectionality and diversity in the workforce. This chapter demonstrated that the resources for inclusivity are accessible and its effects are beneficial; however, what is called for is a balance between the employee's needs and the business' requirements. Although trivial claims may arise, this thesis concludes that this is unlikely as the adoption of a specific definition will clarify the boundaries of physical appearance with both parties' interests in mind. Furthermore, concerns about the potential flood of cases should not obstruct the progression of the law.[4]

The concept of appearance discrimination protection in South African law remains limited; the thesis argues for a legal model that promotes personal individuality by recognising appearance autonomy and thus promoting substantive equality and intersectionality. The thesis argues for the recognition of personal autonomy as a freedom; this would be in line with the approach of other jurisdictions. Making legislative progress is a lengthy and slow process, but this thesis aims to contribute to this process of reform and to further research. Further issues about legislative reform and the likelihood of implementing legislation should not deter employers from addressing this subject in the workplace. Rather, this should encourage employers and lawmakers to acknowledge this area of law and make the necessary progress.

3. AREAS FOR FURTHER RESEARCH AND GENERAL REMARKS

The thesis acknowledges that whilst the above discussion assesses the position of appearance autonomy in the workplace, as well as its limitations in the law, further work is still needed in this regard. One area is the relationship between appearance and intersectionality. Whilst the judicial system has only recently engaged with intersectionality, there are some significant complexities about intersectionality and appearance autonomy that should be explored further. While intersectionality has been examined briefly in the thesis, its further development through appearance should prove to be meaningful for the promotion of

[4] *MEC for Education: Kwazulu-Natal v Pillay* 2008 (2) BCLR 99 (CC) para 107.

transformative equality. Although the thesis examines some countries that recognise the need to address appearance discrimination – Europe, the UK, the USA and Australia – the analysis could be extended to countries in Asia that have seen a rise in self-evaluations of poorer health by individuals due to concerns about appearance-based discrimination.[5] This is particularly concerning in the South Korean and Chinese labour markets, which have been impacted by the effects of suppressed industrialisation and a rise in competitive markets.[6] This has exacerbated the use of appearance as an indicator of greater success.[7]

The thesis has shown how appearance regulation in the workplace may disparately affect employees. One area of research that requires further attention is the disproportionate impact of dress codes on women in the workplace.[8] Although the thesis frequently recognised the perpetuation of stereotypes resulting from appearance discrimination, women are subject to far more stereotypical disadvantages than men.[9] Women are often required to wear clothing, accessories, makeup and shoes of a certain kind.[10] This calls for further research on the impact of appearance standards and the disadvantages faced by women who are affected by dress codes that reinforce conventional stereotypes about women.[11]

Whilst the thesis clarifies the limitations on appearance autonomy in the workplace, further research in this area could clarify the significance of autonomy in the workplace as a tool to balance the scales of power in the workplace.[12] Awareness and development are necessary steps in analysing the role of appearance in the workplace.[13] Therefore, if the necessary reform is done with respect to dignity, this type of progression can considerably neutralise employment relations.[14] The thesis has shown that appearance, like other protected

[5] X Gao 'An experiment: Hiring discrimination on appearance, especially on women' (2021) Proceedings of the 6th International Conference on Modern Management and Education Technology, 2021.
[6] H Lee et al 'Lookism hurts: Appearance discrimination and self-rated health in South Korea' (2017) 16(204) *International Journal for Equity in Health* 1–7.
[7] Ibid. See also Gao (note 5).
[8] K Bartlett 'Only girls wear barrettes: Dress and appearance standard, community norms and workplace equality' (1994) 92(8) *MLR* 2543.
[9] R Mahajan 'The naked truth: Appearance discrimination, employment and the law' (2007) 14 *Asian AM LJ* 188; S Atrey *Intersectional Discrimination* (2019) 161. Atrey expands on the greater impact of physical appearance standards, particularly for black and Muslim women. See also Klare (note 2) 1400.
[10] Mahajan (note 9) 188. See also S Malos 'Appearance-based sex discrimination and stereotyping in the workplace: Whose conduct should we regulate?' (2007) 19(2) *Employee Responsibilities and Rights Journal* 95–97.
[11] Mahajan (note 9) 182 and 188.
[12] W Corbett 'The ugly truth about appearance discrimination and the beauty of our employment discrimination law' (2007) 14 *Duke Journal of Gender Law & Policy* 166.
[13] A Mason & F Minerva 'Should the Equality Act 2010 be extended to prohibit appearance discrimination?' (2020) 70(2) *Political Studies* 436. See also Rhode (note 3) 140.
[14] Klare (note 2) 1442.

categories, is worthy of explicit legal protection. Physical appearance holds a greater space in society and employment than we sometimes realise, and appearance autonomy must be protected to achieve substantive equality.

BIBLIOGRAPHY

PRIMARY SOURCES

South African cases

Antonie v Settler's High School Governing Body 2002 (4) SA 738 (C)

Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others (2017) 38 *ILJ* 831 (CC)

Association of Professional Teachers and Another v Minister of Education [1995] 9 BLLR 29 (IC)

August and Another v Electoral Commission 1999 (3) SA 1 (CC)

Bernstein and Others v Bester NO and Others 1996 (2) SA 751 (CC)

Biggar v City of Johannesburg (2011) 32 *ILJ* 1665 (LC)

Booysen and Others v Minister of Home Affairs and Another 2001 (4) SA 485 (CC)

Brink v Kitshoff NO 1996 (4) SA 197 (CC)

Brisley v Drotsky 2002 (4) SA 1 (SCA)

Carlin Hambury v African Hide Trading Corporation Unreported (LC)

Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC)

Chamber of Mines v Council of Mining Unions (1990) 11 *ILJ* 52 (IC)

Chitsinde v Sol Plaatje University [2018] 10 BLLR 1012 (LC)

Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC)

Daniels v Campbell 2004 (5) SA 331 (CC)

Dawood and Another; Shalabi and Another; Thomas and Another v Minister of Home Affairs and Others 2000 (3) SA 936 (CC)

De Reuck v Director of Public Prosecutions 2004 (1) SA 406 (CC)

Department of Correctional Services and Another v POPCRU and Others (2011) 32 *ILJ* 2629 (LAC)

Department of Correctional Services and Another v POPCRU and Others 2013 (4) SA 176 (SCA)

Dlamini and Others v Green Four Security 2006 JOL 17853 (LC)

Dodo v The State 2001 (3) SA 382 (CC)

Ehlers v Bohler Uddenholm Africa (Pty) Ltd (2010) 31 *ILJ* 2383 (LC)

Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC)

Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others 2020 (1) SA 1 (CC)

Gcaba v Minister of Safety and Security 2010 (1) SA 238 (CC)

Harksen v Lane NO and Others 1998 (1) SA 300 (CC)

Harmse v City of Cape Town (2003) 24 *ILJ* 1130 (LC)

Hassam v Jacobs 2009 (5) SA 572 (CC)

Hoffmann v South African Airways 2000 (2) SA 628 (CC)

IMATU v City of Cape Town (2005) 26 *ILJ* 1404 (LC)

Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors 2001 (1) SA 545 (CC)

Islamic Unity Convention v Independent Broadcasting Authority and Others 2002 (4) SA 294 (CC)

Jansen van Vuuren v SA Airways (Pty) Ltd (2013) 34 ILJ 1749

Jansen v Legal Aid 2019 JOL 42192 (LC)

K v Minister of Safety and Security 2005 (6) SA 419 (CC)

Kadiaka v Amalgamated Beverage Industries (1999) 20 *ILJ* 373 (LC)

Khosa and Others v Minister of Social Development 2004 (6) SA 505 (CC)

Khumalo v Holomisa 2002 (5) SA 401 (CC)

Kievits Kroon Country Estate (Pty) Ltd v Mmoledi and Others 2014 (1) SA 585 (SCA)

Larbi-Odam and Others v MEC for Education (North-West Province) and Another 1998 (1) SA 745 (CC)

Legal Aid South Africa v Jansen (2020) 41 *ILJ* 2580 (LAC)

Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd and Others (1998) 19 *ILJ* 285 (LC)

Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another 2009 (4) SA 529 (CC)

Mahlangu and Another v Minister of Labour and Others (2021) 42 *ILJ* 269 (CC)

Mandela v Falati 1994 (4) BCLR 1 (W)

Masiya v DPP, Pretoria 2007 (5) SA 30 (CC)

Masuku and Another v South African Human Rights Commission obo South African Jewish Board of Deputies 2019 (2) SA 194 (SCA)

MEC for Education: Kwazulu-Natal v Pillay 2008 (2) BCLR 99 (CC)

Media 24 Ltd v Grobler (2005) 26 *ILJ* 1007 (SCA)

Minister of Finance and Another v Van Heerden 2004 (6) SA 121 (CC)

Minister of Health and Another v New Clicks SA (Pty) Ltd and Others 2006 (2) SA 311 (CC)

Minister of Home Affairs and Another v Fourie and Another 2006 (1) SA 524 (CC)

Minister of Justice and Constitutional Development v Prince 2018 (6) SA 393 (CC)

Naidoo and Others v Parliament of the Republic of South Africa (2020) 41 *ILJ* 1931 (LAC)

Naidoo v Minister of Safety and Security and Another [2013] 5 BLLR 490 (LC)

National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1999 (1) SA 6 (CC)

National Media Ltd and Another v Jooste 1996 (3) SA 262 (SCA)

Ndudula and Others v Metrorail (2017) 38 *ILJ* 2565 (LC)

New Way Motor & Diesel Engineering (Pty) Ltd v Marsland (2009) 30 *ILJ* 189 (LAC)

Ntsabo v Real Security (2003) 4 *ILJ* 2341 (LC)

Parry v Astral Operations Ltd [2005] 10 BLLR 989 (LC)

Philips and Another v Director of Public Prosecutions and Others 2003 (3) SA 345 (CC)

Pikitup (Soc) Limited v SAMWU and Others (2014) 35 *ILJ* 983 (LAC)

Pioneer Foods (Pty) Ltd v Workers Against Regression and Others (2016) 37 *ILJ* 2872 (LC)

Prince v President of the Law Society of the Cape of Good Hope 2002 (2) SA 794 (CC)

Radebe and Others v Principal of Leseding Technical School and Others [2013] ZAFSHC 111

Republic of South Africa v Hugo 1997 (4) SA 1 (CC)

Robinson and Another v Volks NO and Others 2004 (6) SA 288 (CC)

South African Airways (Pty) Ltd v GJJVV [2014] 8 BLLR 748

S v Makwanyane 1995 (3) SA 391 (CC)

S v Mamabolo 2001 (3) SA 409 (CC)

SACTWU v Berg River Textiles, a division of Seardel Group Trading (Pty) Ltd (2012) 33 *ILJ* 972 (LC)

September v Subramoney NO and Others (Gender Dynamix as amicus curiae) [2019] 4 All SA 927 (WCC)

Sidumo v Rustenburg Platinum Mines Ltd 2008 (2) SA 24 (CC)

Smith v The Kit Kat Group (Pty) Ltd [2016] 12 BLLR 1239 (LC)

Solidarity and Others v Department of Correctional Services and Others (Police and Prisons Civil Rights Union and Another as Amici Curiae) (2016) 37 *ILJ* 1995 (CC)

South African Police Service v Solidarity obo Barnard (2014) 35 *ILJ* 2981 (CC)

Stojce v University of KwaZulu-Natal and Another (2006) 27 *ILJ* 2696 (LC)

Stransham-Ford v Minister of Justice and Correctional Services 2015 (4) SA 50 (GP)

Taylor v Kurstag NO and Others 2005 (1) SA 362 (W)

Volks NO v Robinson and Others 2005 (5) BCLR 446 (CC)

Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC)

Zealand v Minister of Constitutional Development and Another 2008 (4) SA 458 (CC)

Foreign cases

Allen v Flood [1898] AC 1 (HL)

Anderson v City of Hermosa Beach, 621 F 3d 1051 (9th Cir 2010)

ArbG Bayreuth BB 1972, 1083

ArbG Essen BB 1966, 746

Bostock v Clayton County, Georgia 590 US (2020)

Boychuk v Symons (1977) IRLR 395 EAT

Bradley v Pizzaco of Nebraska, Inc 7 F 3d 795 (8th Cir 1993)

Brown v Board of Education of Topeka 347 US 483 (1954)

BVerfGE 1977 (46) 187

C 804/18 and C-341/19 IX and MJ v Germany (2021) ECR

Kaltoft v Municipality of Billund C-354/13 (2014) ECR

Parris v Trinity College Dublin Case C-443/15 P (2017) ICR 313 (CJEU)

C-476/99 H Lommers v Minister van Landbouw Natuurbeheer en Visserij (2002) ECR I-2891

Cass. soc., Nov. 9, 2005, no. 03-47.720, Bull. civ. V, no. 312

Cass.soc., 16 Jul. 1998, Droit social 1998

Chaplin v Royal Devon & Exeter NHS Foundation Trust 2010 (4) WLUK (ET)

City of Richmond v JA Croson Co 488 US 469 (1989)

Cloutier v Costco Wholesale Corp 390 F 3d 126 (1st Cir 2004)

Communications, Energy and Paperworkers Union of Canada v Irving Pulp & Paper Limited (2013) 2 SCR 458

Dhinsa v Serco and Another (2011) (1315002/09) (ET)

Downey v Police Service of Northern Island 2018 (4182/18IT) (NIIT)

EEOC v Papin Enterprises Inc Case No 6:07-cv-1548-Orl-28GJK (MD Fla Apr 7, 2009)

EEOC v Catastrophe Management Solutions 852 F 3d 1018 (11th Cir 2016)

EEOC v Abercrombie & Fitch Stores, Inc 575 US (2015)

Eweida v British Airways Group plc [2010] EWCA Civ 80

Eweida & Others v United Kingdom [2013] ECHR 37

Francis Coralie v Union Territory of Delhi 1981 SCR (2) 516

Griggs v Duke Power Co 401 US 424 (1971)

Griswold v Connecticut 381 US 479 (1965)

Hedum v Starbucks Corp 546 F Supp 2d 1017 (D Or 2008)

Jamieson v Benalla Golf Club Inc (2000) VCAT 1849

Jespersen v Harrah's Operating Co 444 F 3d 1104 (9th Cir 2006)

Kara v United Kingdom No 36528/97, ECommHR (First Chamber), 22 October 1998

Korematsu v United States 323 US 214 (1944)

Lawrence v Texas 539 US 588 (2003)

Lorenzana v Citigroup Inc No 116382/09 (NY Sup Ct filed Nov 20, 2009)

Mangold v Rudiger Helm 2005 Case C-144/04 (European Court of Justice)

Plessy v Ferguson 163 US 537 (1896)

Price Waterhouse v Hopkins 490 US 228 (1989)

Primmer v Mayflower Kebabs Ltd (2007) (Employment Tribunal) unreported

Re Yamashita 327 US 1 (1946)

Riggs v City of Fort Worth 229 F Supp 2d 572 (ND Tex 2002)

Rochin v California 342 US 165 (1952)

Roe v Wade 410 US 113 (1973)

Rogers v American Airlines 527 F Supp 229 (SDNY 1981)

S.A.S. v France, 2014 Application No 43835/11, 695 (ECHR)

Screws v United States 325 US 91 (1945)

Von Colson v Land Nordrhein-Westfalen 1984 (153) ECLI:EU:C: 1984:153

Wackenheim v France, Comm. No. 854/1999, U.N. Doc. A/57/40, Vol. II, at 363 (HRC 2002)

Woolworths Limited (t/as Safeway) v Brown (2005) 145 IR 285

South African legislation, Bills and legislative instruments

Basic Conditions of Employment Act 75 of 1997

Broad-Based Black Economic Empowerment Act 53 of 2003

Code of Good Practice on Employment of Persons with Disabilities, Employment Equity Act 1998

Code of Good Practice on the Handling of Sexual Harassment, Schedule 8 to the Labour Relations Act 1995

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Constitution of the Republic of South Africa, 1996

Drugs and Drug Trafficking Act 1994

Employment Equity Act 55 of 1998

Employment Equity Amendment Act 47 of 2013

Insolvency Act 24 of 1936

Interim Constitution 1993

Intestate Succession Act 81 of 1987

Labour Relations Act 66 of 1995

Labour Relations Amendment Act 83 of 1988

Maintenance of Surviving Spouses Act 27 of 1990

Medicines and Related Substances Control Act 101 of 1965

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

Foreign and international legislation, Bills and legislative instruments

Age Discrimination Act 2004

Age Discrimination in Employment Act 1967

Americans with Disabilities Act 1990

Amsterdam Treaty 1999

Australian Human Rights Commission Act 1986

BetrVG (Works Constitution Act) 1972

Binghamton Human Rights Law

C104 (Shelved) Abolition of Penal Sanctions (Indigenous Workers) Convention, 1955

C107 Indigenous and Tribal Populations Convention, 1957

C111 Discrimination (Employment and Occupation) Convention, 1958

C122 Employment Policy Convention, 1964

C156 Workers with Family Responsibilities Convention, 1981

Charter of Fundamental Rights of the European Union (2007/C 303/01)

Charter of the United Nations, 26 June 1945, 59 Stat 1031, UNTS 993

Civil Rights Act 1964

Constitution of Finland 2000

Constitution of Ireland 1937

Constitution of Portugal 1933

Constitution of Portugal 1976

Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Council of Europe)

Convention on the Rights of Children (1989)

Convention on the Rights of Migrant Workers (1990)

CROWN (Create a Respectful and Open Workplace for Natural Hair) Act (SB 188) of 2019

Disability Discrimination Act 1992

District of Columbia Human Rights Act 1977

Elliott-Larsen Civil Rights Act 1976

Employment Equality Framework Directive Council Directive 2000/78/EC

Employment Opportunity Act 2010

Equal Opportunity Act (Vic) 1995

Equal Opportunity Act 2010

Equal Remuneration Convention 1951

Equality Act 2006

Equality Act 2010

Equality Framework Directive 2000 *Official Journal L 303* 2000/78/EC

EU Charter of Fundamental Rights 2000

European Convention for the Protection of Human Rights and Fundamental Freedoms 1953

European Union (Withdrawal) Act 2018

EU-UK Trade and Cooperation Agreement 2020

Fair Employment and Housing Act 2010

Fair Work Act 2009

Framework Equality Directive 2000/78/EC

French Constitution of 1946

French Constitution of 1958

French Labour Code (Code du Travail) 1973 *Journal Officiel*

French Law Act No 2010-1192 2010

General Equal Treatment Act (Allgemeiner Gleichbehandlungsgrundsatz) 2006

German Civil Code (*Bürgerliches Gesetzbuch*) 2002

German Constitution (Basic Law) 1949

Howard County MD Code

Human Rights Act 1998

International Covenant on Civil and Political Rights (ICCPR), GA Res 2200A (XXI), 21 UN GAOR Supp (No 16), at 52, UN Doc A/6316 (1966)

International Covenant on Economic, Social and Cultural Rights (ICESCR), GA Res 2200A (XXI), 21 UN GAOR Supp (No 16), at 49, UN Doc A/6316 (1966)

International Labour Organisation (ILO) Convention 100 of 1951

International Labour Organisation (ILO) Convention 111 of 1958

International Labour Organisation (ILO) Convention 158 of 1982

International Labour Organisation (ILO) Declaration on Social Justice for a Fair Globalisation 2008

International Labour Organisation (ILO) General Survey on the Fundamental Conventions Concerning Rights at Work (2012)

International Labour Organisation (ILO) Observation (CEACR) (2016)

International Labour Organization (ILO) ILO Declaration on Fundamental Principles and Rights at Work (1998)

Labour Code of French Polynesia 2021

Law No. 2001-1066 2001 *Journal officiel*

Law No. 2004-1486 2004 *Journal officiel*

Law on the Prohibition of Discrimination in the Republic of Serbia (Official Gazette of the Republic of Serbia No 22/2009) 2009

Legislative Scrutiny: Equality Bill 2009

Lisbon Treaty 2009

Madison Equal Opportunities Ordinance

Native Labour Regulations Act 1911

New York State Human Rights Law NY Exec L

Pregnancy Discrimination Act 1978

Protection against Forced Disappearance, and the Rights of Disabled Persons (2007)

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2000)

Race Equality Directive 2000 *Official Journal L 180* 2000/43/EC

Race Equality Directive 2000/43/EC

Race Relations Act 1976

Racial Discrimination Act 1975

Reich Labour Court (Reichsarbeitsgericht) 1938 *ARS 33*

San Francisco Discrimination Prohibition Ordinance

Santa Cruz Municipal Code Chapter 9.83 of the Municipal Code

Sex Discrimination Act 1975

Sex Discrimination Act 1984

Sex Disqualification (Removal) Act 1919

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and practices Similar to Slavery 1956, 226 UNTS 3

Title VII of the Civil Rights Act 1964

Treaty of the European Union 2008

Treaty on the Functioning of the European Union 1957

UK/EU and EAEC: Trade and Cooperation Agreement TS No. 8/2021

UN Educational, Scientific and Cultural Organization (UNESCO), adopted in London on 16 Nov 1945

Universal Declaration of Human Rights, GA Res 217A (III), UN Doc A/810, at 71 (1948)

Urbana Human Rights Ordinance, Chapter 12-104 of the City Codes

SECONDARY SOURCES

Books and chapters in books

Ackermann, L *Human Dignity: Lodestar for Equality in South Africa* (Juta 2012)

Albertyn, C 'Constitutional equality in South Africa' in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (Juta 2009)

Allison, H *Kant's Groundwork of the Metaphysics of Morals A Commentary* (OUP 2011)

Allsop, G et al *Constitutional Law for Students* (UCT Libraries (Open Access) 2020)

Atrey, S *Intersectional Discrimination* (OUP 2019)

Bal, M *Dignity in the Workplace: New Theoretical Perspectives* (Palgrave Macmillan 2017)

Berlin, I *Four Essays on Liberty* (OUP 1969)

Bell, M *Anti-discrimination Law and the European Union* (OUP 2002)

Beyleveld, B & Brownsword, R *Human Dignity and the New Bioethics: Human Dignity and Constraint* (OUP 2001)

Blanpain, R et al *New Developments in Employment Discrimination Law* (Kluwer Law 2008)

Blanpain R et al *The Global Workplace: International and Comparative Employment law* (CUP 2007)

Bockenforde, E-W *Recht, Staat, Freiheit* (Suhrkamp 2006)

Botha, C *Statutory Interpretation: An Introduction for Students* 5 ed (Juta 2012)

Brassey, M *Employment and Labour Law* (Juta 2000)

Bronstein, A *International and Comparative Labour Law* (Palgrave Macmillan 2009)

Collier, D & Fergus, D et al *Labour law in South Africa: Context and Principles* (OUP 2019)

Connolly, M *Discrimination Law* (Sweet & Maxwell 2006)

Cornell, D et al *The Dignity Jurisprudence of the Constitutional Court of South Africa: Cases and Materials* (Fordham University Press 2013)

Cornell, D *Law and Revolution in South Africa: uBuntu, Dignity, and the Struggle for Constitutional Transformation* (Fordham University Press 2014)

Currie, I & De Waal, J *The Bill of Rights Handbook* 5 ed (Juta 2005)

Davey, R & Dahms-Jansen, L *Social Media in the Workplace* (Lexis Nexis 2017)

De Vos, P & Freedman, W *South African Constitutional Law in Context* (OUP 2014)

Du Toit, D & Potgieter, M *Unfair Discrimination in the Workplace* (Juta 2014)

Du Toit, D 'The prohibition of unfair discrimination: Applying s 3(d) of the Employment Equity Act 55 of 1998' in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (Juta 2009)

Dupper, O & Garbers, C *Equality in the Workplace: Reflections from South Africa and Beyond* (Juta 2009)

Dupper, O et al *Essential Employment Discrimination Law* (Juta 2004)

Dworkin R *Taking Rights Seriously* (Harvard University Press 1997)

Eckert, J 'Legal roots of human dignity in German law' in D Kretzmer & E Klein (eds) *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002)

Ellis, E & Watson, P *EU Anti-Discrimination Law* (OUP 2012)

Fagan, A ‘Human dignity in South African law’ in M Duwell et al *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (CUP 2014)

Finkin, M & Mundlak, G *Comparative Labor Law* (Edward Elgar 2015)

Fredman, S *Discrimination Law* 2 ed (OUP 2012)

Gearty, C *Principles of Human Rights Adjudication* (OUP 2004)

Godfrey, S, Du Toit, D, Cooper, C et al *Labour Relations Law: A Comprehensive Guide* 6 ed (Juta 2015)

Govindjee, A ‘Freedom of religion, belief and opinion’ in A Govindjee (ed) *Introduction to Human Rights* (LexisNexis 2016)

Grogan, J *Workplace Law* 13 ed (Juta 2014)

Hatfield, E & Sprecher, S *Mirror, Mirror … The Importance of Looks in Everyday Life* (State University of New York Press 1986)

Henkin, L ‘Human dignity and constitutional rights’ in MJ Meyer & WA Parent (eds) *The Constitution of Rights: Human Dignity and American Values* (Cornell University Press 1992)

Hepple, B ‘The aims and limits of equality laws’ in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (Juta 2009)

Hill, T ‘Kantian perspectives on the rational basis of human’ in M Düwell et al (eds) *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (CUP 2014)

Huber, W *Violence: The Unrelenting Assault on Human Dignity* (Fortress Press 1996)

Kant, I *Groundwork of the Metaphysics of Morals* (translated and edited by Allen Wood) (Yale University Press 2002)

Kaufmann, P et al *Humiliation, Degradation, Dehumanization: Human Dignity Violated* (Springer Science and Business Media 2011)

Le Moli, G ‘Human dignity in human rights law’ in *Human Dignity in International Law* (ASIL Studies in International Legal Theory CUP 2021)

Le Moli, G ‘The principle of human dignity in international law’ in *General Principles and the Coherence of International Law* (Springer 2019)

Leatt, A *The State of Secularism: Religion, Tradition and Democracy in South Africa* (Wits University Press 2017)

Lorberbaum, Y ‘Blood and the image of God: On the sacrifice of life in biblical and early rabbinical law, myth and ritual’ in D Kretzmer & E Klein (eds) *The Concept of Human Dignity in Human Rights Discourse* (Kluwer International 2002)

May, V *Pursuing Intersectionality: Unsettling Dominant Imaginaries* (Routledge 2015)

Milo, D et al ‘Freedom of expression’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed Original Service (Juta 2003)

Neethling, J et al *Law of Personality* (Butterworths 2005)

Nicolas, MJ *Introdução à Suma Teológica. In Suma Teológica* 2 ed (Loyola 2003)

Patzer, GL ‘Determinants of physical attractiveness’ in *The Physical Attractiveness Phenomena* (Springer 1985)

Polish D ‘Judaism and human rights’ in A Swidler (ed) Human Rights in Religious Traditions (1982)

Pretorius, JL et al ‘Employment equity law’ in *Labour Law* (Lexis Nexis 2013)

Rabenhorst, ER *Dignidade Humana e Moralidade Democrática* (Brasília Jurídica 2001)

Rhode, D *The Beauty Bias: The Injustice of Appearance in Life and Law* 2 ed (OUP 2010)

Rosen, M *Dignity: Its History and Meaning* (HUP 2012)

Rousseau J, ‘The Basic Political Writings,’ (1987), in Cress D. (trans. and ed.), Hackett Publishing

Sontag, S *Against Interpretation, and Other Essays* (Strauss & Giroux 1966)

Starck, C 'The religious and philosophical background of human dignity and its place in modern constitutions' in D Kretzmer & E Klein (eds) *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002)

Swindler, A *Human Rights in Religious Traditions* (Pilgrim Press 1982)

Van der Westhuizen, J 'Freedom of expression' in J Dugard, D van Wyk, B de Villiers & D Davis (eds) *Rights and Constitutionalism* (Juta 2003)

Van Niekerk, A *Law@Work* 2 ed (LexisNexis 2012)

Viviers, D & Smit, D *Vulnerable Employees* (Juta 2017)

Waddington, L et al 'Reasonable accommodation' in *Cases, Materials and Text on National, Supranational and International Non-discrimination Law* (Hart Publishing 2007)

Waldron, J 'Moral autonomy and personal autonomy' in *Autonomy and the Challenges to Liberalism* (CUP 2009)

Woolman, S & Bishop, M (eds) *Constitutional Law of South Africa* 2 ed (Juta 2013)

Journal articles

Ackermann, L 'Equality and non-discrimination: Some analytical thoughts' (2006) 22 *SAJHR* 597–612

Adam, A & Collier, D 'High heels in the workplace – A health hazard or a symbol of femininity? Observations on appearance regulation in Mofokeng v CCMA & Others 2022 ZALCJHB 169' (2023) 44 *ILJ* 82–91

Adamitis, E 'Appearance matters: A proposal to prohibit appearance discrimination in employment' (2000) 75 *WLR* 195–223

Al Hibri, A 'Redefining Muslim women's rights' (1997) 12 *Am U J Int Law* 1–44

Albertyn, C 'Substantive equality and transformation in South Africa' (2007) 23 *SAJHR* 252–276

Albertyn, C & Fredman, S 'Equality beyond dignity: Multi-dimensional equality and Justice Langa's judgments' 2015 *Acta Juridica* 430–455

Alston, K 'Freedom of expression and school dress codes: South African and international perspectives' (2006) 11 *Australia & New Zealand Journal of Law & Education* 1–374

An-Naim, AA 'Religious minorities under Islamic law and the limits of cultural relativism' (1987) 9 *HRQ* 1–18

Atrey, S 'Beyond discrimination: Mahlangu and the use of intersectionality as a general theory of constitutional interpretation' (2021) 21(2) *International Journal of Discrimination and the Law* 168–178

Bandsuch, M 'Dressing up Title VII's analysis of workplace appearance policies' (2009) 40 *Colum Hum Rts L Rev* 287–342

Barroso, L 'Here, there, and everywhere: Human dignity in contemporary law and in the transnational discourse' (2012) 35 *BC Int'l & Comp L Rev* 331–393

Bartlett, K 'Only girls wear barrettes: Dress and appearance standard, community norms and workplace equality' (1994) 92(8) *MLR* 2541–2582

Bass, T 'Freedom, morality and self-love? Reinterpreting Rousseau's amour-propre as fundamental for the virtuous citizen, Reinvention' (2013) 6 *An International Journal of Undergraduate Research*

Belavusau, U & Henrard, K 'A bird's eye view on EU Anti-Discrimination: The impact of the 2000 Equality Directives' (2019) 20 *German Law Journal* 614–636

Bell, M 'Advancing EU anti discrimination law: The European Commission's 2008 proposal for a new directive' (2009) 3 *The Equal Rights Review* 7–18

Bernard, R 'Reasonable accommodation in the workplace: To be or not to be?' (2014) 17 *PER/PELJ* 2870–2891

Botha, H 'Equality, plurality and structural power' (2009) 25 *South African Journal on Human Rights* 1–37

Botha, H 'Human dignity in comparative perspective' (2009) 20 *Stell LR* 171–220

Bowers, J ‘Accommodating difference; How is religious freedom protected when it clashes with other rights; Is reasonable accommodation the key to levelling the field?’ 2021 *Oxford Journal of Law and Religion* 275–297

Burgess, M & Clark, L ‘Do “savage origins” of tattoos cast a prejudicial shadow on contemporary tattooed individuals?’ (2010) 40 *J App Soc Psych* 746–764

Cavico, F et al ‘Appearance discrimination in employment: Legal and ethical implications of “lookism” and “lookphobia”’ (2012) 32 *Equality, Diversity and Inclusion: An International Journal* 83–119

Cho, S et al ‘Toward a field of intersectionality studies: Theory, applications, and Praxis’ (2013) 38 *SIGNS* 785–810

Cooper, C ‘The application of the Promotion of Quality and Prevention of Unfair Discrimination Act and the Employment Equity Act’ (2001) 22 *ILJ* 1532–1545

Corbett, W ‘Hotness discrimination: Appearance discrimination as a mirror for reflecting on the body of employment-discrimination law’ (2011) 60 *Cath U L Rev* 617–660

Corbett, W ‘The ugly truth about appearance discrimination and the beauty of our employment discrimination law’ (2007) 14 *Duke Journal of Gender Law & Policy* 153–178

Cowen, S ‘Can dignity guide South Africa’s equality jurisprudence?’ (2001) 17 *South African Journal on Human Rights* 34–58

Crenshaw, K ‘Demarginalizing the intersection of race and sex: A black feminist critique of anti-discrimination doctrine, feminist theory and anti-racist policies’ (1989) 4 *University of Chicago Legal Forum* 785–810

Crow, SM & Payne, D ‘Affirmative action for a face only a mother could love?’ (1992) 11 *Journal of Business Ethics* 869–875

De Waal, E et al ‘Religious and cultural dress at school: A comparative perspective’ (2011) 14 *PER/PELJ* 62–95

Deane, T ‘Understanding the need for anti-discrimination legislation in South Africa’ (2005) 1 *Fundamina* 2–11

Desir, J ‘Lookism: Pushing the frontier of equality by looking beyond the law’ (2010) 2 *University of Illinois Law Review* 629–653

Dion, K et al ‘What is beautiful is good’ (1972) 24 *Journal of Personality and Social Psychology* 285–290

Doroszewska, K ‘Human dignity in judicial reasoning: Study of national and international law’ (2020) 43 *Rev Eur & Comp L* 119–137

Du Toit, D ‘Protection against unfair discrimination in the workplace: Are the courts getting it right?’ (2007) 85 *Law, Democracy and Development* 1–15

Du Toit, D ‘Protection against unfair discrimination: Cleaning up the Act?’ (2014) 35 *ILJ* 2623–2636

Du Toit, D ‘The evolution of the concept of “unfair discrimination” in South African labour law’ (2006) 27 *ILJ* 1311–1340

Dupper, O & Garbers, C ‘The prohibition of unfair discrimination and the pursuit of affirmative action in the South African workplace’ 2012 *Acta Juridica* 244–269

During, G ‘Der Grundrechtssatz von der Menschenwurde’ (1956) 81 *AoR* 117–157

Eberle, EJ ‘Human dignity, privacy and personality in German and American law’ 1997 *Utah L Rev* 964–1048

Ebrahim, S ‘The employee’s right to freedom of religion versus the employer’s workplace needs: An ongoing battle: TDF Network Africa (Pty) Ltd v Faris (2019) 40 *ILJ* 326 (LAC)’ (2021) 24 *PER/PELJ* 1–24

Fagan, A ‘Dignity and unfair discrimination: A value misplaced and a right misunderstood’ 1998 *SAJHR* 401–406

Fergus, E ‘Towards unity – Reconciling fairness and rationality in affirmative action disputes’ (2015) 36 *ILJ* 40–69

Fessha, Y & Dessalegn, B 'Freedom of religion and minority rights in South Africa' (2021) 12 *Religions* 902–911

Filip, H 'Human dignity in legal argumentation: A functional perspective' (2022) 18 *European Constitutional Law Review* 237–263

Finkin, M 'Employee privacy, American values and the law' (1998) 72 *Chi-Kent L Rev* 222–269

Finkin, M 'Menschenbild: The conception of the employee as a person in Western law' (2002) 23 *Comp Lab L & Pol'y J* 577–638

Fisk, C 'Privacy, power and humiliation at work: Re-examining appearance regulation as an invasion of privacy' (2006) 66 *Louisiana Law Rev* 1112–1146

Fletcher, GP 'Human dignity as a constitutional value' (1984) *UWO L Rev* 171–182

Fredman, S 'Changing the norm: Positive duties in equal treatment legislation' (2005) 12 *Maastricht Journal of European and Comparative Law* 369–398

Fredman, S 'Providing equality: Substantive equality and the positive duty to provide' (2005) 21 *SAJHR* 163–190

Fredman, S 'Redistribution and recognition: Reconciling inequalities' (2007) 23 *South African Journal on Human Rights* 214–234

Fredman, S 'Substantive equality revisited' (2016) 14 *International Journal of Constitutional Law* 712–738

Fredman, S 'Double trouble: Multiple discrimination and EU law' (2005) 2 *European Anti-Discrimination Law Review* 13–18

Gaedupe, M & Rapatsa, M 'Dignity and ubuntu: Epitome of South Africa's socio-economic transformation' (2016) 5 *Socioeconomica – The Scientific Journal for Theory and Practice of Socio-economic Development* 65–76

Garbers, C & Le Roux, P 'Employment discrimination into the future' (2018) 2 *Stell LR* 237–269

Goodsell E, ‘Constitution, Custom, and Creed: Balancing Human Rights Concerns with Cultural and Religious Freedom in Today’s South Africa’ (2007) 21(1) Brigham Young University Journal of Public Law 111–154.

Govindjee, A ‘Of nose studs, beards and issues of discrimination’ (2007) 28(2) *Obiter* 357–373

Grant, E ‘Dignity and equality’ (2007) 7 *HRLR* 299–329

Guyette, F ‘Thomas Aquinas and recent questions about human dignity’ (2013) 38 *Diametros* 113–127

Harpur, P et al ‘Australia’s Fair Work Act and the transformation of workplace disability discrimination law’ (2012) 30 *Wis Int’l J* 1–40

Henrard, K ‘Duties of reasonable accommodation in relation to religion and the European Court of Human Rights: A closer look at the prohibition of discrimination, the freedom of religion and related duties of state neutrality’ (2012) 5 *Erasmus L Rev* 60–77

Hepple, B ‘Negotiating social change in the shadow the law’ (2012) 129 *SALJ* 248–273

Hepple, B ‘The new single Equality Act in Britain’ (2010) 5 *The Equal Rights Review* 11–24

Hernandez, T ‘Employment discrimination in the ethnically diverse workplace’ (2010) 49 *Judges J* 33–37

Hewitt, A ‘Can a theoretical consideration of Australia’s Anti-Discrimination Law inform law reform?’ (2013) 41 *Fed L Rev* 35–70

Hicks, D ‘A culture of indignity and the failure of leadership’ (2016) 1(1) *Humanistic Management Journal* 113–124

Hodson, R et al ‘Chaos and the abuse of power: Workplace bullying in organizational and interactional context’ (2006) 33 *Work and Occupations* 382–416

Hoffman, S ‘The importance of immutability in employment discrimination law’ (2011) 52 *Wm & Mary L Rev* 1487–1544

Hosoda, M et al 'The effects of physical attractiveness on job related outcomes: A meta-analysis of experimental studies' (2003) 56 *Personnel Psychol* 431–462

Jackson, V 'Constitutional dialogue and human dignity: States and transnational constitutional discourse' (2004) 65 *Mont L Rev* 15–40

Jagwanth, S 'South Africa: The inequality challenge' (2000) 15(3) *Southern African Report* 31

James, H 'If you are attractive and you know it, please apply: Appearance-based discrimination and employers' discretion' (2008) 42 *Val U L Rev* 629–674

Johnson, S et al 'Physical attractiveness biases in ratings of employment suitability: Tracking down the "beauty is beastly" effect' (2010) 150 *The Journal of Social Psychology* 301–318

Kahn, J 'Privacy as a legal principle of identity maintenance' (2003) 33 *Seton Hall Law Review* 371–410

Kamali, M 'The dignity of man: An Islamic perspective' (2002) 6 *Journal of Qur'anic Studies* 94–95

Kelly, E 'Accommodating religious expression in the workplace' 2008 *Employee Responsibilities and Rights Journal* 45–56

Kirchschlaeger, P 'Human dignity and human rights: Fostering and protecting pluralism and particularity' (2020) 5 *Interdisciplinary Journal for Religion and Transformation in Contemporary Society* 90–106

Klare, K 'Power/dressing: Regulation of employee appearance' (1992) 26 *New Eng L Rev* 1396–1451

Klare, K 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146–188

Kok, A 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Proposals for legislative reform' (2008) 24 *SAJHR* 445–471

Kuhn, D & Pearce, J 'The legality of using employee appearance policies to promote organisational culture' (2007) 24 *Hofstra Labor and Employment Law Journal* 181–219

Langa, P 'Transformative constitutionalism' (2006) 3 *Stell LR* 351–360

Lee, H et al ‘Lookism hurts: Appearance discrimination and self-rated health in South Korea’ (2017) 16(204) *International Journal for Equity in Health* 1–7

Lenta, P ‘Muslim headscarves in the workplace and in schools’ (2007) 124 *SALJ* 296–319

Levin, A ‘Dignity in the workplace: An enquiry into the conceptual foundation of workplace privacy protection worldwide’ (2009) 11 *ALSB* 63–103

Liebenberg, S & Goldblatt, B ‘The interrelationship between equality and socio-economic rights under South Africa’s transformative Constitution’ (2007) 23 *SAJHR* 335–361

Liebenberg, S “The value of human dignity in interpreting socio-economic rights’ (2005) 21 *SAJHR* 1–31

Loenen, T ‘The equality clause in the South African Constitution: Some remarks from a comparative perspective’ (1997) 13 *South African Journal on Human Rights* 401–429

Louw A ‘Language discrimination in the context of South African Workplace Discrimination Law’ (2022) 25 *PER/PELJ* 2–37

Mahajan, R ‘The naked truth: Appearance discrimination, employment and the law’ (2007) 14 *Asian American Law Journal* 165–203

Maimela, C ‘The reasonable accommodation of employees with cancer and their right to privacy in the workplace’ (2018) 21 *PER/PELJ* 1–31

Malleson, K ‘Equality law and the protected characteristic’ (2018) 81 *MLR* 598–621

Malos, S ‘Appearance-based sex discrimination and stereotyping in the workplace: Whose conduct should we regulate?’ (2007) 19(2) *Employee Responsibilities and Rights Journal* 95–97

Marshall, J ‘Human rights and the legal regulation of dress’ (2016) 25 *Nottingham LJ* 73–85

Mason, A ‘What’s wrong with everyday lookism?’ (2021) 20 *Politics, Philosophy and Economics* 315–335

Mason, A & Minerva, F ‘Should the Equality Act 2010 be extended to prohibit appearance discrimination? (2020) 70(2) *Political Studies* 425–442

Mattson, D & Clark, S 'Human dignity in concept and practice' (2011) 44 *Policy Sciences* 303–319

McCrudden, C 'Human dignity and judicial interpretation of human rights' 2008 *EJIL* 655–724

McGregor, M & Germishuys, W 'The taxonomy of an unspecified ground in discrimination law' (2014) 35 *Obiter* 94–107

Melé, D 'The challenge of humanistic management' (2003) 44 *Journal of Business Ethics* 77–88

Melé D 'Human Quality Treatment: Five Organizational Levels' (2003) 120(4) Journal of Business Ethics 462–468

Metz, T 'Ubuntu as a moral theory and human rights in South Africa' (2011) 11 *African Human Rights Law Journal* 532–559

Middlemiss, S 'Protection against discrimination on the ground of looks' (2007) 80 *Employment Law* 5

Mott Machado, M & Mendes Teixeira, M 'Dignity in the context of organizations: A look beyond modernity' (2017) 18 *Revista de Administração Mackenzie* 80–103

Moyn, S 'The secret history of constitutional dignity' (2014) 17 *Yale Hum Rts & Dev LJ* 39–73

Murcott, M & Van der Westhuizen, W 'The ebb and flow of the application of the principle of subsidiarity – critical reflections on *Motau* and *My Vote Counts*' (2015) 7 *CCR* 43–67

Gal-Or, N 'Is the law empowering or patronizing women? The dilemma in the French burqa decision as the tip of the secular law iceberg' (2011) 6(3) *Religion & Human Rights* 315–333

Nattrass, N 'A South African variety of capitalism' (2014) 19 *New Political Economy* 56–78

Nelson, R et al 'Perceiving discrimination: Race, gender, and sexual orientation in the legal workplace' (2019) 44 *Law & Social Inquiry* 1051–1082

Neves-Silva, P et al 'Human rights' interdependence and indivisibility: A glance over the human rights to water and sanitation' (2019) 19 *BMC Int Health Hum Rights* 1–8

O'Cinneide, C 'The uncertain foundations of contemporary anti-discrimination law' (2011) 11 *Int'l J Discrimination & L* 7–28

O'Cinneide, C & Liu, K 'Defining the limits of discrimination to the United Kingdom: Principle and pragmatism in tension' (2015) 15 *Intl'l J Discrimination & L* 80–100

O'Connell, R 'The role of dignity in equality law: Lessons from Canada and South Africa' (2008) 6(2) *International Journal of Constitutional Law* 267–286

O'Regan, C 'Equality at work and the limits of the law: Symmetry and individualism in anti-discrimination legislation' 1994 *Acta Juridica* 64–83

Pagliarini, T 'It can't get that ugly: Why employers should be able to take aesthetics into consideration' (2014) 19 *Rogers Williams University Law Review* 277–315

Palm, E 'Securing privacy at work: The importance of contextualized consent' (2009) 11 *Ethics and Information Technology* 233–241

Quane, H 'A further dimension to the interdependence and indivisibility of human rights: Recent developments concerning the rights of indigenous peoples' (2012) 25 *Harv Hum Rts J* 49–83

Ramachandran, G 'Freedom of dress: State and private regulation of clothing, hairstyle, jewelry, makeup, tattoos and piercing' (2006) 66 *Maryland L Rev* 11–93

Ramachandran, G 'Intersectionality as "Catch 22": Why identity performance demands are neither harmless nor reasonable' (2005) 69 *Alb L Rev* 299–340

Rao, M 'Three concepts of dignity in constitutional law' (2013) 86 *Notre Dame Law Review*183–272

Reis, R et al 'Dignity promoted or violated: How does the deaf person included perceive it?' (2017) 18 *Revista de Administração Mackenzie* 179–202

Resnick, J & Suk, J 'Adding insult to injury: Questioning the role of dignity in conceptions of sovereignty' (2003) 55 *Stan L Rev* 1921–1962

Rhode, D 'The injustice of appearance' (2009) 61 *Stan L Rev* 1034–1101

Riley, S 'Human dignity: Comparative and conceptual debates' (2010) 6 *International Journal of Law in Context* 117–138

Rima, W 'The human body: The canvas for tattoos; the public workplace: An exhibit for a new form of art?' (2018) 66 *Drake L Rev* 706–730

Rycroft, A ‘Accommodating religious or cultural beliefs in the workplace: Kievits Kroon Country Estate v CCMA; Dlamini v Green Four Security; POPCRU v Department of Correctional Services’ (2011) 23 *South African Mercantile Law Journal* 106–113

Rycroft, A ‘Inherent requirements of the job’ (2015) 36 *ILJ* 900–906

Rycroft, A ‘Privacy in the workplace’ (2018) 39 *ILJ* 725–748

Sachs-Durand, C ‘Analyza rapide du dernier rapport de la HALDE: Des pratiques pour l’egalite des chances: que repondent les entreprises a la Halde?’ 2007 *Revue de droit du travail* 3–93

Schachter, O ‘Human dignity as a normative concept’ (1983) 77 *ALJ* 848–854

Schroeter, U & Nemeczek, H ‘The (uncertain) impact of Brexit on the United Kingdom’s membership in the European Economic Area’ (2016) 27 *European Business Law Review* 921–958

Scott, C ‘Interdependence and permeability of human rights norms: Towards a partial fusion of the International Covenants on Human Rights’ (1989) 27 *Osgoode Hall Law Journal* 769–878

Seekings, J ‘The continuing salience of race: Discrimination and diversity in South Africa’ (2008) 26 *Journal of Contemporary African Studies* 1–25

Sensen, O ‘Human dignity in historical perspective: The contemporary and traditional paradigms’ (2011) 10(1) *EJPL* 71–91

Sheppard, C ‘Mapping anti-discrimination law onto inequality at work: Expanding the meaning of equality in international labour law’ (2012) 151 *Int’l Lab Rev* 1–19

Smith, B ‘Fair and equal in the world of work: Two significant federal developments in discrimination law’ (2010) 23 *Australian Journal of Labour Law* 199–219

Smith, B ‘Intersectional discrimination and substantive equality: A comparative and theoretical perspective’ (2016) 16 *The Equal Rights Review* 73–102

Snyder, J ‘Exploitation and sweatshop labor: Perspectives and issues’ (2010) 20(2) *Business Ethics Quarterly* 187–213

Squelch, J ‘Religious symbols and clothing in the workplace: Balancing the respective rights of employees and employers’ (2013) 20(2) *Murdoch University Law Review* 38–57

Steadman, A ‘Is it discriminatory to require hospital staff to be clean shaven to facilitate the effective wearing of personal protective equipment’ (2021) 89 *Medico-Legal Journal* 67–149

Steinmann, AC ‘The core meaning of human dignity’ (2016) 19(1) *PER*/*PELJ* 1–32

Tameshnie, D ‘Understanding the need for anti-discrimination legislation in South Africa’ (2005) 11 *Fundamina: A Journal of Legal History* 2–11

Taylor, A & Taylor, J ‘The place of tattoos, beards and hairstyles in discrimination law’ (2020) 26 *Australian Journal of Human Rights* 468–485

Tietje, L & Cresap, S ‘Is lookism unjust? The ethics of aesthetics and public policy implications’ (2005) 19 *Journal of Libertarian Studies* 31–50

Toledano, E ‘The looking glass ceiling: Appearance-based discrimination in the workplace’ (2013) 19 *Cardozo Journal of Law & Gender* 683–714

Van der Bank, CM ‘The right to privacy – South African and comparative perspectives’ (2012) 1 *EJBSS* 77–86

Van der Schyff, G ‘The legal definition of religion and its application’ (2002) 119 *African Law Journal* 288–294

Vettori, S ‘The role of human dignity in the assessment of fair compensation for unfair dismissals’ (2012) 15(5) *PER/PELJ* 102–123

Vice, S ‘Dignity and equality in *Barnard*’ (2015) 7 *Constitutional Court Review* 135–162

Viviers, DJ 'Dress codes, grooming standards and South African employment law: Comparative insights on workplace discrimination based on mutable appearance characteristics’ (2016) 133 *SALJ* 897–930

Vo, L ‘A more attractive look at physical appearance-based discrimination: Filling the gap in appearance-based antidiscrimination law’ (2002) 26 *S Ill U L J* 339–359

Warren, J & Brandeis, M ‘The right to privacy’ (1980) 4(5) *Harvard Law Review* 193–220

Yates, J et al ‘Good looks and good practices: The attitudes of career practitioners to attractiveness and appearance’ (2017) 45 *British Journal of Guidance & Counselling* 1–20

Zakrzewski, K ‘The prevalence of lookism in hiring decisions: How federal law should be amended to prevent appearance discrimination in the workplace’ (2005) 7(2) *University of Pennsylvania Journal of Labor and Employment Law* 431–461

Zawadzki, M ‘Dignity in the workplace: The perspective of humanistic management’ (2018) 26 *JMBA* 171–188

Research papers, theses, conference papers, lectures and reports

Alston, K *The Constitutional Right to Freedom of Expression: An Exploration of its Relevance to the South African School Community* (University of the Free State 2002)

Delagrave, A *The Regulation of Physical Appearance in the Canadian Workplace as a Human Rights Issue* (2020)

Department of Labour *22nd Commission for Employment Equity Annual Report* (2021–2022)

Farrell, AT *Lookism: The Silent Discrimination* (University of South Florida St. Petersburg 2007)

Fredman, S *Anti-discrimination Laws and Work in the Developing World: A Thematic Overview* (World Development Report 2013)

Fredman, S *Comparative Study of Anti-discrimination and Equality Laws of the US, Canada, South Africa and India* (European Commission, Director-General for Justice 2012)

Ganty, S & Sanchez, J *Expanding the List of Protected Grounds within Anti-discrimination Law in the EU* (Equinet European Network of Equality Bodies 2021)

Gao, X ‘An experiment: Hiring discrimination on appearance, especially on women’ (2021) Proceedings of the 2021 6th International Conference on Modern Management and Education Technology

Gaze, B & Chapman, A *Bringing the Human Right to Non-discrimination into Workplace Law: Towards Substantive Equality at Work in Australia* (UPF Barcelona 2013)

Gondwe, M *The Protection of Privacy in the Workplace: A Comparative Study* (Stellenbosch University 2011)

Henrico, R *Religious Discrimination in the South African Workplace* (NWU 2016)

Huber, W *The Dignity of the Different: Towards a Christian Ethic for Pluralistic Societies* (2010)

Kroeze, I *Human Dignity in Constitutional Law in South Africa* (1998)

Meagher, L 'Should physical features discrimination be prohibited?' (2019) *Minerva Access at the University of Melbourne*

Neethling, J *Die Reg op Privaatheid* (1976)

Steinmann, AC *The Legal Significance of Human Dignity* (NWU 2016)

Tshawane, N *The Rainbow Nation: A Critical Analysis of the Notions of Community in the Thinking of Desmond Tutu* (UNISA 2009)

Victorian Equal Opportunity & Human Rights Commission *Annual Report* (2020–2021)

Viviers, DJ *A Comparative Labour Law Perspective on Categories of Appearance-based Prejudice in Employment* (University of the Free State 2014)

Internet

Capstan, A 'Tackling discrimination based on looks guidance from France' *https://iuslaboris.com/insights/tackling-discrimination-based-on-looks-guidance-from-france*, accessed 25 March 2023

Livingstone, E & Mann, J 'What will change in UK employment law as a result of Brexit?' *https://www.shrm.org/resourcesandtools/hr-topics/global-hr/pages/uk-employment-law-brexit.aspx*, accessed 25 March 2023

Masweneng, K 'Muslim SANDF major allowed to wear headscarf – under set restrictions' *https://www.timeslive.co.za/news/south-africa/2020-01-22-muslim-sandf-major-allowed-to-wear-headscarf-under-set-restrictions*, accessed 25 March 2023

Michon, C 'Physical appearance and discrimination at work' (2019) *https://cms-lawnow.com/en/ealerts/2019/12/physical-appearance-and-discrimination-at-work*, accessed 2 April 2023

Ngema, T 'Durban's trendy Instagram cop in hot water over tattoo' *https://www.iol.co.za/dailynews/news/durbans-trendy-instagram-cop-in-hot-water-over-tattoo-17700279*, accessed 25 March 2023

Parliament UK 'House of Commons Petitions Committee and Woman and Equalities Committee: High heels and workplace dress codes' *https://publications.parliament.uk/pa/cm201617/cmselect/cmpetitions/291/29104.htm*, accessed 12 September 2021

Pienaar, H et al 'Think before you ink: How your tattoos could affect your employment' *https://www.cliffedekkerhofmeyr.com/en/news/publications/2022/Practice/Employment/employment-law-alert-22-august-Think-before-you-ink-How-your-tattoos-could-affect-your-employment.html*, accessed 25 March 2023

SALC Litigation Manual Series 'Freedom of expression: Litigating cases of limitations to the exercise of freedom of speech and opinion' *https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Freedom-of-Expression-Manual.pdf*, accessed 25 March 2023

South African Government 'Facts on South African European Relations' *https://www.gov.za/facts-south-africa-european-union-sa-eu-relations*, accessed 2 April 2023

The Guardian 'Tickled ink: Virgin Atlantic allows cabin crew to display tattoos' *https://www.theguardian.com/business/2022/may/31/virgin-atlantic-allows-cabin-crew-to-display-tattoos*, accessed 24 March 2023

Walmart Appearance Policy *https://www.algrim.co/2337-walmart-dresscode#:~:text=Generally%2C%20you%20must%20wear%20jeans,white%20shirt%20with%20your%20jeans*, accessed 24 March 2023