# Protecting dignity under common law and the Constitution: The significance of *crimen iniuria*[1] in South African criminal law

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## 1 Introduction

Implicitly or explicitly, the core of the protection of fundamental human rights can be found in the value of individual dignity – in the sense of the self-worth, uniqueness, identity, autonomy, privacy and freedom of all human beings. This concept of dignity lies at the heart of equal respect for human worth (equality) that underpins all human rights ideologies.

A significant facet of the South African Constitution of 1996 is that the Bill of Rights (Chapter 2) explicitly, not just impliedly, respects and protects such human dignity.[2] Furthermore, it is important to bear in mind that the South African concept of dignity, in its constitutional, civil and criminal setting, is not completely comparable with that in the German Basic Law. Under South African law, dignity is of fundamental worth, but it is not *inviolable* – it can be *limited* and, as will be seen, for convincing reasons.

South African criminal theory is founded on the premise that State intervention in the form of criminal conviction and sanction must respect and protect this inherent individual dignity of all. Thus, individual dignity, autonomy and freedom, constitute both the foundation of the

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1 According to Wikipedia, the term *crimen injuria* seems to involve a misunderstanding of the Latin phrase *crimen iniuriae*, which should mean 'accusation of abusive behaviour'; apparently, the word '*crimen*' never means crime *per se*. However, South African courts have used the term *crimen iniuria* to describe the crime of *iniuria*. In this article, the spelling '*iniuria*' is preferred to that of '*injuria*' as the former spelling reflects the original Latin. However, it is acknowledged that the South African courts have, for many years, used the anglicised spelling of '*injuria*'.

2 In s 10 of the Constitution of South Africa of 1996. L Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2012) 115 reminds us that the German Basic Law protects dignity (*menschenwürde*) and H Botha 'Human dignity in comparative perspective' (2009) 20 *Stell LR* 171 at 175 points out that dignity is central in other constitutions, such as those of Greece, Portugal, Spain, Namibia, the Russian Federation and Poland.

essential elements of criminality[3] and the precision of their definition.[4] Furthermore, respect for fundamental rights must not only underlie the definition of criminality, but also the entire criminal process[5] and indeed the sentencing phase as well.[6] Respect for human dignity must, and does, permeate all stages of criminal prosecution.

The manifestation of respect for, and protection of, human dignity in the South African, post-constitutional criminal trial has been examined by Shannon Hoctor,[7] and so will not be canvassed in this article. The focus of this piece is more on a specific, unique feature of substantive criminal law in South Africa – the crime of *crimen iniuria* that provides the source of the actual protection of human dignity in criminal prosecutions.

After brief mention of the origin of this *crimen iniuria* and its development by the courts, a clearer meaning of the concept of dignity in the criminal law should begin to emerge. Furthermore, the compelling justification for the specific protection of dignity in the criminal law – not just in the common law of crime, but also in the South African statutory criminal law that only some twenty years ago emerged from an apartheid system premised on the comprehensive denial of human worth – will also become apparent. This paper will then turn to *crimen iniuria*'s special potential as a means of protecting human dignity within criminal theory.

Given the fundamental role of dignity in the criminal trial, it is perhaps surprising that only the South African criminal law, unlike the criminal law of other countries, contains a description of a specific, non-statutory *crime* encompassing the unlawful and intentional

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3 The element of voluntariness of conduct, causation, criminal capacity (especially in its form of conative capacity) and intention are based on free will or autonomy: see J Burchell *Principles of Criminal Law* 4ed (2013) 67-8, 92, 247-50, 344-5 respectively.

4 Under the principle of legality, on which see Burchell op cit (n3) 33-44.

5 See section 35 of the Constitution of South Africa, 1996, for these due process rights. The fundamental presumption of innocence and the right to a fair trial clearly reflect this emphasis on the human dignity of all: S Hoctor 'Dignity, criminal law, and the bill of rights' (2004) 121 *SALJ* 304 at 307-8.

6 The dignity of all individuals lies at the heart of the prohibition on 'cruel, inhuman and degrading' punishment and poses a fundamental challenge to the utilitarian-based approaches to punishment, such as that of general deterrence: Hoctor op cit (n5) 308. Sentencing principles based on proportionality (just deserts), rehabilitation (reformation) or restorative justice would be more compatible with the imperatives of human dignity.

7 Op cit (n5).

impairment of dignity[8] or privacy.[9] The Roman and South African criminal theory contains such a crime known as *crimen iniuria*. Like the *actio iniuriarum* in the civil law of delict,[10] *crimen iniuria* in the South African criminal law contains considerable potential for protecting dignity in its various forms.[11] In the process of analysing this uniquely South African concept of *crimen iniuria,* comment on another closely-related crime against personality (criminal defamation) will be inevitable.

## 2 Origins of *crimen iniuria*

The concept of infringement of *dignitas*[12] was developed in Roman law as a form of unlawful conduct called *iniuria* and probably punished in that system and Roman-Dutch law as a crime.[13]

The lack of similar protection of dignity, as such, under the English law prevailing in South Africa during the 19th century, seems to have accounted for the dearth of judicial authority in the South African courts on *crimen iniuria* during this period.[14]

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8 As opposed to the protection of reputation achieved by a crime of defamation.

9 The concept of *crimen iniuria* in South African jurisprudence includes protection of privacy as part of dignity. Some countries, like the United States of America, use a concept of 'privacy' essentially to perform the role of 'dignity', but any remedy for invasion of privacy is restricted in that country to private law: J Burchell *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (1998) 367-8.

10 J Burchell 'Beyond the glass bead game: human dignity in the law of delict' (1988) 4 *SAJHR* 1; J Burchell 'Personality Rights in South Africa: Reaffirming Dignity' in Whitty, NR & Zimmermann, R *Rights of Personality in Scots Law – A Comparative Perspective* (2009) 349-81; J Burchell 'Retraction, Apology and Reply as Responses to *Iniuria*' in Descheemaeker, E and Scott, H (eds) *Iniuria and the Common Law* (2013) 197-214. Pickering J in *Ryan v Petrus* 2010 (1) SACR 274 (ECG) commented, in passing, that the elements of '*injuria*' are the same whether under the civil law of delict or the criminal law 'although every insult to dignity which is serious enough to found a civil action will not necessarily be serious enough to warrant criminal prosecution'. For a fuller consideration of an element of seriousness for a criminal prosecution, see section 5 below.

11 On the potential for protection of dignity in private law, see especially J Burchell *Rights of Personality in Scots Law – A Comparative Perspective* op cit (n10). Governmental crime statistics for 2011-12 revealed that reported incidents of *crimen iniuria* in the Western Cape rose by 11% from 7 337 in 2010/11 to 8 185. The use of racially-offensive language often forms the bulk of reported incidents.

12 Although the Roman concept of *dignitas* may, originally, have been linked to an idea of rank or status (see E Descheemaeker 'Solatium and Injury to Feelings: Roman Law, English Law and Modern Tort Theory' in Descheemaeker, E and Scott, H (eds) *Iniuria and the Common Law* op cit (n10) 94), *dignitas* has been used by the South African courts in a sense extending well beyond status and, ultimately, approaching a concept similar to self-worth and autonomy.

13 See J van der Berg 'The criminal act of violation of *dignitas*' (1988) 1 *SACJ* 351-376.

14 See J van der Berg *Personality in Criminal Law* LLM (Natal) (1987) 246-7.

However, in 1908 in *R v Umfaan*,[15] Innes CJ clearly acknowledged that serious *iniuriae* were, in principle, criminal under South African law. In 1912 in *R v Kobi*[16] (a case of indecent exposure) the Transvaal court rejected an argument that *crimen iniuria* had become obsolete and in 1914 in *R v Jacob*[17] a 'peeping Tom' was convicted of *crimen iniuria* or *crimen extraordinarium* by a Transvaal court. In 1915 in *R v M*,[18] the Cape court followed the Transvaal court in holding that indecent exposure in private was punishable as *crimen iniuria*. Thereafter *crimen iniuria* became well established as a crime in South African criminal law.

Although the punishment of private indecent exposure was part of the formative development of *crimen iniuria* in South Africa, the establishment of *crimen iniuria* was by no means confined to indecent exposure, whether private or public, and was applied by the courts to invasions of privacy (peeping Toms)[19] and, in later years, to insulting words.[20]

Arguably, the common-law crime of public indecency (unlawfully, intentionally and publicly committing an act which tends to deprave the morals of others or which outrages the public's sense of decency and propriety)[21] infringes the *ius certum* aspect of the principle of legality. Notions of 'depraving morals' and 'decency' are too slippery to define. If public or private indecency is to be punished, it is best that the elected representatives of the people define the boundaries of indecency in sufficient detail to comply with the constraints of legality. This is, in effect, what the legislature has done in sections 9, 10, 19, 22 and 25 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.[22]

Shorn of its nebulous public indecency origins, the remaining concept of dignity covering not just the uttering of insulting words

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15 1908 TS 62 at 67.

16 1912 TPD 1106.

17 1914 JS § 29 (T).

18 1915 CPD 334.

19 The name is said to be that of the citizen of the town of Coventry who peeped at the legendary Lady Godiva as she rode naked through the streets to protest high taxes.

20 See section 3 below.

21 See *Q v Marais* (1889) 6 SC 367 and the Scottish High Court of Judiciary in *Webster v Dominick* 2003 SLT 975; 2003 SCCR 525 holding that the crime of 'shameless indecency' is too vaguely defined as not to have an independent existence in Scots law, but reaffirming the crime of public indecency by analogy with South African law; see J Burchell and C Gane 'Shamelessness scotched: the domain of decency in Scots law' (2004) 8 *Edin LR* 231-248.

22 The sections (9 and 22) prohibiting 'flashing' appear to be restricted to the *real* exposure or display of the *actual* genitals, anus or breasts of an actual person as opposed to an artistic *depiction* or *simulation* of these body parts: see Burchell *Principles* op cit (n3) 765-6.

and the invasion of another's privacy but also the broader protection of identity, equality and freedom forms the focal point of this article.

## 3 Judicial development of the scope of *dignitas* or dignity

The most frequent prosecution for *crimen iniuria* has been to punish disrespectful words and invasions of privacy:

### 3.1 Abusive, insulting[23] or degrading communications[24] and other conduct

South African case law reveals that vulgar abuse,[25] gross impertinence,[26] insults[27] and humiliation[28] may lead to a conviction of *crimen iniuria*.

In *S v Sharp*[29] the accused had called a policewoman a 'bitch' in the presence of her colleagues. Although the high court did hold that the

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[23] In the civil law, the courts have recognised that the remedy for impairment of dignity is not confined to insult (*contumelia*): Burchell *Personality Rights* op cit (n9) 331-2.

[24] Section 16(2)*(c)* of the Constitution of the Republic of South Africa, 1996, states that the right to freedom of expression does not extend to 'advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm'. Section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 goes further than s 16(2) of the Constitution by protecting 'hurtful' not just 'hateful' speech.

[25] As in *R v Dibden* 1967 (1) PH H137 (RA).

[26] As in *R v Walton* 1958 (3) SA 693 (SR) (X convicted when, asked to stop making a noise by a mother so that her child could sleep, he said to her 'Come here lady and I will give you another').

[27] *S v M* 1979 (2) SA 25 (A) ('white bitch'); *S v Bugwandeen* 1987 (1) SA 787 (N) ('black bastard'). The epithet 'kaffir' has become regarded as self-evidently an *iniuria* (*Ciliza v Minister of Police* 1976 (4) SA 243 (N); *S v Puluza* 1983 (2) PH H150 (E); *S v Steenberg* 1999 (1) SACR 594 (N)); *Ryan v Petrus* 2010 (1) SACR 274 (ECG) where the words 'teef' ('bitch'), 'naaier' ('fornicator'), 'hoer' ('whore') and 'kaffir' were held to constitute a serious impairment of the dignity of a woman, despite the fact that she was, at the time the words were directed at her, committing adultery; and *S v Henning* (ECJ 2004/008) [2004] ZAECCHC 14 (28 May 2004). Addressing a person by using the word 'hotnot' amounts to an insult to dignity, assessed both subjectively and objectively: *S v Steyn* (A480/2011) [2012] ZAWCHC 106 (10 February 2012) at para [16]. See also B Jennings 'Towards a new era of racial politeness?' (1972–6) 1 *Natal Univ LR* 241.

[28] *R v Sethuntsa* 1945 EDL 128 (complainant forced to carry his own excrement in his hands through the streets of a town); *S v Brereton* 1971 (1) SA 489 (RA) (X, a farmer who had found some women stealing maize, made them strip to the waist before they walked home so as to punish them by humiliating them before his farm labourers): *R v Chipo* 1953 (4) SA 573 (A) (falsely reporting to the police that an employer had shot at his employees with a firearm) and *S v Van der Merwe* 2011 (2) SACR 509 (FB) (subjecting black personnel at a university to humiliating treatment and videoing their response). See also the protection of dignity under s 10 of the Constitution of the Republic of South Africa, 1996.

[29] 2002 (1) SACR 360 (Ck).

charge of *crimen iniuria* was defective in that it had not been alleged that dignity had been impaired, it was nevertheless also stated by the court that '[b]y the very nature of her work as inspector in the SA Police Services it is more than likely that she had been exposed to situations previously where individuals had used rude or abusive language in her presence and probably even directed at her'.[30] Furthermore, the court was of the view that the word 'bitch' is now part of everyday parlance and scarcely raises an eyebrow in conversations.[31] The same conclusion, however, does not apply to the epithet 'kaffir' used to insult a black policeman as in *S v Henning*.[32]

A number of cases involving swearing at the police in Scotland (a country with a 'mixed' legal system based on a Roman law heritage) have been dealt with under the ragbag offence of breach of the peace.[33] At times the Scottish courts have regarded swearing at the police as constituting a breach of the peace[34] and at times they have refused to do so.[35] Although in principle extreme cases of abusive behaviour directed at the police could constitute breaches of the peace in Scotland, the dominant approach seems to be epitomised in the High Court of Justiciary judgment in *Smith v Donnelly*,[36] one of the leading cases on breach of the peace in that country. In *Smith v Donnelly* the court was of the view that a refusal to co-operate with the police, even if truculently stated, is not likely to constitute a breach of the peace and that the court must always bear in mind the demands of freedom of expression.

The decision in the South African case of *Sharp*,[37] emphasising that the police should be sufficiently battle-hardened to be able to cope with certain vulgar epithets directed at them, is compatible both with the tenor of the *Smith* approach and the decision in *Logan v Jessup*[38] in Scotland. However, it seems that the racial slur implicit in calling

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30 *Sharp* supra (n29) at 372D.

31 *Sharp* supra (n29) at 372*f–g*.

32 Supra (n27), (a judgment of Pickering J in the Eastern Cape Division of the High Court).

33 For instance, *Logan v Jessup* 1987 SCCR 604 (where the court held that swearing at the police is not reasonably expected to cause harm as the police are to some extent battle-hardened not to be affected by such conduct); *Niven v Macleod* 1988 SCCR 572; *MacMillan v Normand* 1989 SCCR 269; *Mackay v Heywood* 1998 SCCR 210; *Kinnaird v Higson* 2001 SCCR 427.

34 *Niven*; *MacMillan*; *Mackay* supra (n33).

35 *Logan*; *Kinnaird* supra (n33).

36 *Smith v Donnelly* 2001 SCCR 800.

37 *Sharp* supra (n29).

38 *Logan* supra (n33).

a police officer a 'kaffir' in South Africa continues to be regarded as serious enough to warrant proceedings for impairment of dignity.[39]

## 3.2 Invasions of privacy

Privacy is now generally recognised as an important aspect of personality and enjoys the protection of the South African law of delict.[40] In appropriate cases an invasion of privacy may amount to *crimen iniuria*.[41] Voyeuristic peeping is one manifestation of this crime.[42] Similarly, eavesdropping, telephone tapping, 'bugging' and various other forms of electronic surveillance may constitute an actionable invasion of privacy.[43]

In 'peeping Tom' cases, it seems that the crime is committed by the peeping; it is not necessary that the victim should be aware that she or he is being observed.[44]

## 3.3 Identity[45] as a facet of human dignity

The German constitutional court in the *Eppler* case[46] recognised that the general right to personality includes the right 'to one's own image and spoken word … the right not to have false statements attributed to oneself'.

In *Grütter v Lombard*[47] the South African Supreme Court of Appeal affirmed the right to personal identity, including a person's likeness

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39 For a brief discussion of the appropriate sentence, see section 5 below.

40 DJ McQuoid-Mason *The Law of Privacy in South Africa* (1978); J Burchell *Personality Rights* op cit (n9) ch 28; J Neethling, J M Potgieter and P J Visser *Law of Delict* 6ed (2010) ch 10 para 4.2 and J Neethling, J M Potgieter and P J Visser *Neethling's Law of Personality* 2ed (2005) chs 8 and 10; and J Burchell 'The legal protection of privacy in South Africa: a transplantable hybrid' (2009) 13 *Electronic J Comp Law* (for the civil and Constitutional jurisprudence on privacy).

41 Van der Berg 'The criminal act of violation of dignitas' op cit (n13) 367ff.

42 See 'peeping Toms' above (n19).

43 Compare *S v A* 1971 (2) SA 293 (T); *S v I* 1976 (1) SA 781 (RAD).

44 See *R v Holliday* 1927 CPD 395.

45 Neethling, Potgieter and Visser *Delict* op cit (n40) 350 define the concept as:

> 'Identity is that uniqueness which identifies each person as a particular individual and as such distinguishes him from others. Identity manifests itself in various *indicia* by which the person involved can be recognised: ie, facets of his personality which are distinctive of or peculiar to him, eg his life history, his character, his name, his creditworthiness, his voice, his handwriting, his outward shape, etc. Identity is thus infringed if *indicia* thereof are used in a way that does not reflect the person's true (own) personality image.'

This definition was quoted with approval by Nugent JA in *Grütter* infra (n47) at para [8].

46 BVerfGE 54 at 153.

47 (628/05) [2007] ZASCA 2 (20 February 2007) at paras [8]-[13].

and name. Endorsing the statement of O'Regan J in *Khumalo v Holomisa*[48] that no 'sharp lines' can be drawn between various facets of personality rights 'in giving effect to the value of human dignity in our Constitution', Nugent JA in *Grütter* concluded that the right to identity, subject of course to any defences based on legal policy,[49] is protected under South African law.[50]

A person's identity is intricately linked to personal information relating to his or her race, gender, marital status, nationality, ethnic origin, sexual orientation, age, health, religion, beliefs, language, physical address, telephone number and medical, financial, criminal and employment history. In fact, in an electronic age his or her e-mail address, location information or online identifier become intimately linked to a person's identity and the confidentiality of the last-mentioned electronic facets of identity become central to preventing what has become the modern version of what is loosely called 'identity theft'.

The newly enacted Protection of Personal Information Act[51] will play its part in providing remedies (both civil and criminal) for the unlawful collection, retention, dissemination and use of such personal information.[52]

However, greater protection against 'identity theft' is needed in South Africa. Where the traditional perception of theft as the appropriation of tangible rather than intangible property prevails, it is evident how important the availability of a charge of *crimen iniuria* for the unlawful and intentional appropriation of another's identity would be. If the common law already protects individual identity under the concept of dignity, then there can be no fundamental legality objection to using existing remedies (both civil and criminal) for impairment of such dignity. The matter of identity theft is discussed more fully below.[53]

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48 (2002) 5 SA 401 (CC).

49 See para [13].

50 See also Davis J in *Wells v Atoll Media (Pty) Ltd* (11961/2006) [2009] ZAWCHC 173; [2010] 4 All SA 548 (WCC) (9 November 2009).

51 4 of 2013, which was assented to on 19 November 2013. Certain sections of this Act came into operation on 11 April 2014 in terms of Proc R25 *GG* 37544. On informational privacy, see also *Mistry v Interim Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC).

52 See especially the eight conditions for lawful processing of personal information under ch 3 of the Act.

53 Section 6 below.

## 4 The test for determining dignity developed by the common-law courts

In *De Lange v Costa*[54] the Appellate Division authoritatively laid down the general test for determining dignity:

*(a)* The plaintiff's self-esteem must have been actually impaired; and
*(b)* A person of ordinary sensibilities would have regarded the conduct as offensive (tested by the general criterion of unlawfulness or objective unreasonableness).

Thus the ultimate criterion for determining an impairment of dignity is not the sensibility of the plaintiff or complainant, nor that of the hypersensitive individual, but that of the reasonable person.

As a general rule, the victim must have been subjectively aware of the insulting or disrespectful conduct, otherwise there will not be a claim for damages or a criminal prosecution. So in *Aphane v S*,[55] the subjective aspect of the test for dignity was not satisfied because the complainant did not say how she understood the statements. In fact, the charge will be defective if it does not contain an allegation that dignity has been impaired.[56] If the victim, on becoming aware of the conduct, does not feel his or her dignity impaired by the conduct then, even though objectively the conduct is insulting, it would seem in *general* that *crimen iniuria* is not committed. However, there may be *exceptional* situations.

Is the crime committed if the victim remains unaware of the insulting or disrespectful conduct? There is authority for the view that the crime is committed where the victim is a young child or mentally defective and is thus incapable of understanding the nature of the conduct.[57] So too, 'peeping Toms' have been convicted even though the person peeped at was unaware of what was happening or the invasion of privacy did not reveal any embarrassing information about

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[54] 1989 (2) SA 857 (A) at 862 (a civil case).

[55] Unreported judgment of Southwood J in the North and South Gauteng High Court (A621/2007) [2009] ZAGPPHC 264 (10 September 2009). It is enlightening that the judge held that the objective test was also not satisfied because the words 'I want to take you home for the night' were '[o]bjectively, at face value, …innocuous and do not refer to any sexual activity. If the complainant was offended by the statements alone she was unreasonable'.

While the outcome in this case would seem to be correct (perhaps a prosecutor should have declined to prosecute such a matter in the criminal courts or the prosecution should have failed as a result of the 'seriousness' element being absent (see below section 5)), it is nevertheless somewhat ingenuous of the judge to claim that the words carry no sexual innuendo.

[56] *S v Sharp* supra (n29).

[57] Compare *R v M* supra (n18) at 342; *R v Holliday* supra (n44) at 401.

the complainant.[58] An explanation of these cases may be that the impairment of dignity is evident from the conduct itself,[59] even in the absence of comprehension.[60]

## 5 The test for determining dignity developed by the Constitutional Court

In defining dignity for the purpose of civil or constitutional proceedings, the Constitutional Court has emphasised the individual autonomy[61] facet of dignity. I have discussed this constitutional concept of dignity, its relationship with a common-law idea of dignity, and the symbosis between the constitutional and common-law jurisprudence on the meaning of dignity, elsewhere.[62] The constitutional analysis of dignity will also supplement the common-law concept of dignity for the purpose of determining the scope of *crimen iniuria*.

It has also been argued[63] that the central and over-arching concept of human dignity in human rights ideology, and explicitly in the constitutional order in South Africa, provides a perfect catalyst for developing protection of this fundamental human right in the civil or private law. Although the principle of legality in criminal law operates as an appropriate restriction on an overly expansive definition of *crimen iniuria*, the constitutional injunction on South African courts to develop the common law in ways that are compatible with constitutional values[64] and the realisation that clarity in definition of the scope of criminality does not necessarily preclude accommodating novel factual predicaments within hallowed legal definitions, will give added relevance and vibrancy to the protection of dignity within the offence of *crimen iniuria*. Some potential new vistas for the well-recognised offence of *crimen iniuria* that will enhance the Constitutional and the common-law protection of dignity are explored later in this article.[65]

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58 See *S v A* supra (n43).

59 Such as the use of a bugging device in *S v A* supra (n43).

60 See Van der Berg 'The criminal act of violation of dignitas' op cit (n13) 362–3.

61 Referring to privacy as 'autonomous identity' in *Bernstein v Bester NNO* 1996 (2) SA 751 (CC) at paras [65] and [67]; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at para [32].

62 See the works and chapters cited above (n10).

63 See the works and chapters cited above (n10).

64 Sections 8(3)(*a*) and 39(2) of the Constitution of South Africa, 1996.

65 Below sections 9 and 10.

## 6 Must the infringement of dignity be of a serious nature in order to lead to a successful criminal prosecution?

The Supreme Court of Appeal in *S v Hoho*,[66] while rejecting a requirement of seriousness for the crime of defamation, assumed (rather than deciding) that an element of seriousness was required for *crimen iniuria*.[67]

Of course, it is always possible that the prosecutor might regard a prosecution for *crimen iniuria* as inappropriate because of the perceived triviality of the offending conduct or words.[68] If, however, a prosecutor does instigate a prosecution for what many might consider a relatively trivial form of impairment of dignity, the objective standard of whether a reasonable person would have felt that his or her dignity had been impaired would still operate as a filtering mechanism.

So one could argue that a labour court judge was correct when he recently held that a businessman who asked a female colleague if she wanted a 'lover for the night' and when she said 'no', added: 'If you change your mind during the night come to my room' was not demanding sex, but was rather simply 'trying his luck'. According to the judge, these words uttered by the businessman were inappropriate, but they did not justify dismissal.[69] One could add that, even though the female colleague to whom the words were uttered may have felt subjectively insulted by the words, their use was not objectively unreasonable.

The fundamental reason behind the objective aspect of the test for dignity is to ensure that not every situation where a person is offended by words or conduct will result in a successful prosecution, or even civil suit.

There has been considerable debate on whether criminal defamation and/or *crimen iniuria* need be 'serious' in nature in order to be punishable under the criminal law. The view that criminal *defamation* need not be 'serious' to be punishable under the criminal law has apparently won the day in the recent judgment in *S v Hoho*.[70] The Supreme Court of Appeal in this case assumed, but did not decide that an element of seriousness was required for *crimen iniuria*.[71]

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66 2009 (1) SACR 276 (SCA).

67 At para [22].

68 See, for instance, *Mke v Minister of Safety and Security*: http://www.seri-sa.org/index.php/litigation-9/cases/19-litigation/case-entries/128-mke.

69 L Wagner '"Trying his luck" was not sexual harassment, court finds' *Business Day Live*, 5 June 2014, available at *www.bdlive.co.za/national/2014/06/05/ trying-his-luck-was-not-sexual-harassment,* accessed on 22 July 2014.

70 Supra (n66).

71 Factors that South African courts have regarded as pointing towards the seriousness of the infringement of dignity or privacy are listed in Burchell *Principles* op cit (n3) 635-7.

In *S v Bugwandeen*,[72] a 'seriousness' requirement for *crimen iniuria* was rejected as imprecise and nebulous.[73]

The criminal law does not *in principle* distinguish between serious and non-serious criminality, although naturally the degree of seriousness of the offence is highly relevant to sentence, as opposed to verdict or conviction. In fact, much of the debate surrounding whether some special crimes should require this nebulous element of seriousness has been rendered unnecessary by the clear recognition in *De Lange v Costa*[74] that the true standard for determining dignity is that of a reasonable person. An objective criterion of reasonableness in fact provides a test that serves to limit liability to those instances perceived (at least by the judiciary) to involve objectively unreasonable conduct. The seriousness of the words used or the conduct perpetrated by the accused is a factor in the total inquiry into reasonableness. A value judgment based on a hallowed standard of the reasonable person (although also not totally immune from a challenge of vagueness) is nevertheless judicially familiar and sufficiently predictable in generating a reliable and just result in each case.

## 7 *Mens rea* for *crimen iniuria*

In South African criminal law, *dolus eventualis* is sufficient *mens rea* for all intention-based crimes and *crimen iniuria* is no exception.[75] Knowledge (or at least foresight) of unlawfulness is, according to general principles, a part of intention.[76]

## 8 Expansively interpreting the common law from a dignity perspective in preference to the enactment of a criminal statutory provision prohibiting specific impairments of dignity

The existence of a common-law crime of *crimen iniuria,* including a broad (yet sufficiently demarcated) protection of the various facets of human dignity or privacy, offers considerable advantages over the introduction of complex criminal statutory provisions. Here are a few examples:

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[72] 1987 (1) SA 787 (N).

[73] A gravity element is also rejected by J Van der Berg 'Is gravity really an element of *crimen iniuria* and criminal defamation in our law?' (1988) 51 *THRHR* 54-73 and J Van der Berg 'The criminal act of violation of dignitas' op cit (n13) 375.

[74] Supra (n54).

[75] *S v Steenberg* 1999 (1) SACR 594 (N).

[76] As a result of the decision of the Appellate Division in *S v De Blom* 1977 (3) SA 513 (A).

### *(i) The boundaries of theft*

Traditionally the common-law crime of theft has involved appropriation of tangible[77] property. Although the South African courts have extended the definition of theft to include the appropriation of credit,[78] the courts have (so far, at least) not included 'ideas' as capable of being criminally stolen, preferring to use intellectual property law or the recent protection of information legislation[79] to regulate this area.

However, a fertile ground for criminal prosecution in this electronic age surely lies in the area of what is called 'identity theft'. Naturally, identity is part of dignity and so appropriating another's identity would constitute *crimen iniuria*, whether in the guise of an impairment of dignity or an infringement of privacy.

Of course, if the conduct takes the form of a fraudulent misrepresentation, then a conviction of fraud would also be available. The South African definition of fraud includes not just the causing of actual prejudice by means of misrepresentation, but also potential prejudice, so the possibility of a successful conviction of *attempted* fraud is thereby reduced. Thus, conduct such as 'phishing' might constitute actual, rather than attempted, fraud in South African law. However, 'phishing' could also constitute *crimen iniuria* or attempted *crimen iniuria* by invading another's private sphere or usurping his or her identity or trying to do so.

It is submitted that the current definition of *crimen iniuria* is sufficiently well established and clear and that the inclusion of novel factual circumstances can be accommodated within this established definition of *crimen iniuria* without any infringement of the principle of legality.[80]

Invoking the common-law of theft and arguing that this definition should be extended to cover theft of ideas would be more problematic because the jurisprudence on the ambit of the crime of theft appears, at least at the moment, specifically to preclude the appropriation of intangibles, such as ideas. Using the judicial recognition of theft of credit some forty years ago to try to open a door to punishing appropriations of other intangible commodities (which may also have an economic equivalent or value) might, at first sight, seem to provide an arguable route to criminalising identity appropriation under the

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[77] Ie corporeal. See the debate on the characteristics of electricity in *S v Mintoor* 1996 (1) SACR 514 (C) and *S v Ndebele* 2012 (1) SACR 245 (GSJ), discussed in Burchell *Principles* op cit (n3) at 37-8.

[78] See *S v Graham* 1975 (3) SA 569 (A) at 575H and Burchell *Principles* op cit (n3) 42 and 690-1.

[79] See (n51).

[80] K Phelps 'A dangerous precedent indeed – A response to CR Snyman's note on *Masiya*' (2008) 125 *SALJ* 648 at 651.

common law. However, the use of the common law of theft in this way could well run up against fundamental challenges to the principle of legality. This line of reasoning might evoke the legitimate criticism that the definition of the crime of theft is being extended beyond its original scope and purpose. The legislature, expressing the will of the elected representatives of the people, rather than the courts expressing the view of judges might be regarded as a more appropriate forum for developing the law of theft, if the courts were to decide not to include identity appropriation under *crimen iniuria*.

However, it is suggested that a charge of *crimen iniuria* (combined, of course, with a charge of fraud) would provide already available common-law redress for 'identity theft', without any need to enact time-consuming, complex legislative provisions governing 'identity theft'.

### *(ii) Liability of a police trap*

A police trap that unfairly induces Y to commit a crime that he or she was not predisposed to commit, would clearly interfere with the dignity of Y by treating him or her simply as a means to the end of crime control rather than treating him or her as an autonomous individual.[81]

Regarding the impermissible trapping of an individual as an impairment of the dignity of the person entrapped could form the basis of the future development of a constitutional defence of entrapment operating in tandem with s 252A of the Criminal Procedure Act that provides for the inadmissibility of evidence obtained by a trap in certain circumstances.

Furthermore, the fundamental presumption of innocence, which quite clearly underscores the dignity and autonomy of the arrested person (by not treating that person merely as a means to an end) would demand that Wallis AJA's prima facie view[82] in *S v Kotzè*[83] was correct. Wallis JA took the view that merely placing an onus of proof on a balance of probabilities on the state to justify the use of the trap[84] would be incompatible with the Constitution – the state should bear the general onus of proof beyond reasonable doubt.

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[81] I H Dennis 'Restructuring the law of criminal evidence' (1989) 42 *Current Legal Problems* 21, esp at 35ff; C Hoexter 'Administrative justice and dishonesty' (1994) 111 *SALJ* 700 at 717 (who specifically mentions that trapping may infringe the right to a fair trial but she also mentions, in the same context, the rights to equality and dignity); and Hoctor op cit (n5) at 315.

[82] In the absence of argument in the case.

[83] 2010 (1) SACR 100 (SCA) at para [20].

[84] As was suggested by Bozalek J in *S v Reeding* 2005 (2) SACR 631 (C) at 639-40.

### *(iii) Sexual offences*

The suppleness of *crimen iniuria* provides a potential and viable means of enhancing the quality of human relationships by punishing unacceptable behaviour such as sexual harassment and sexual 'grooming' of children.[85]

The Supreme Court of Appeal in *Mugridge v S*[86] confirmed the conviction and sentence of 18 months' imprisonment of the appellant for *crimen iniuria* relating to sexual abuse of the complainant (who was, at the time the abuse started, his 14-year-old adopted daughter). The appellant's conviction for rape with a sentence of 15 years' imprisonment and indecent assault with a sentence of 18 months' imprisonment were also confirmed by the Supreme Court of Appeal.[87] Although it is not entirely clear from the judgment what precise manifestations of sexual abuse in this case amounted to *crimen iniuria*, it seems reasonably clear from the following passage of the judgment that 'sexual grooming' was the essence of the *crimen iniuria* conviction. After referring to the concept of 'sexual grooming', Erasmus JA said:

> '[The appellant] … had manipulated the complainant's fragile state and his stature in the community to his advantage, slowly inviting her to acquiesce to his advances[88] [and he] went out of his way to entice the complainant's consent by effectively subduing her ability to give consent freely and voluntarily.'

This conduct on the part of the appellant would undoubtedly amount to a serious affront to the complainant's dignity and so constitute *crimen iniuria*.

The Supreme Court of Appeal rejected the appellant's contention that the complainant had consented to any of this (or any other sexual behaviour by him towards her) or of 'perceived acquiescence or submission' on his [the appellant's] part.[89]

The common law on *crimen iniuria,* facilitated by the notion of attempted *crimen iniuria*, is clearly broad enough to include sexual grooming of the type that the complainant experienced in *M's* case.

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[85] See Burchell *Principles* op cit (n3) at 639 and *Mugridge v S* (657/12) [2013] ZASCA 43 (28 March 2013) where, on facts arising before the introduction of a statutory definition of sexual grooming (sections 18 and 24 of the Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007) came into operation (16 December 2007, the Supreme Court of Appeal nevertheless regarded sexual grooming of young persons as criminal.

[86] Supra (n85).

[87] The appellants' convictions and sentences for fraud and contravening certain statutory provisions punishing possession of drugs and child pornography were not appealed.

[88] At para [52].

[89] At para [53].

The legislature has, however, seen fit to criminalise sexual grooming of children and mentally incapable persons under ss 18 and 24 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007.[90] The complex wording of this statutory intervention regarding sexual grooming has yet to be tested in the courts. It is, nevertheless, arguable that the common law of *crimen iniuria*, which has thankfully not been specifically repealed by the sexual offences legislation, can still operate as a back-up charge if the legislation is ultimately seen as inadequate or overly complex.

In general, failed prosecutions for rape under the sexual offences legislation (where, for instance, sexual penetration cannot be established) or other sexual offences falling short of actual sexual violation might well still result in successful prosecutions for *crimen iniuria* where the complainant's dignity has nevertheless been impaired by the accused's conduct.

### *(iv) Harassment and stalking*

Although the crime of *crimen injuria* is clearly broad enough to include conduct such as harassment and stalking (as constituting both a serious impairment of the dignity and/or invasion of privacy of the person stalked), the legislature has similarly preferred to criminalise harassment and stalking by statute under the Protection from Harassment Act of 2011.[91]

In instances (i) to (iv) above, it might be argued that parliament is the most appropriate forum for any development of the scope of criminality and that, in terms of the fundamental principle of legality, courts of law should refrain from this task, leaving the list of common definitions of crime closed. This argument is, however, most persuasive where the common law clearly contains no definition of criminality of the conduct requiring proscription or specifically precludes criminality.

In the case of *crimen iniuria* a reasonable precise definition of criminality already exists and no judgment precludes *crimen iniuria* covering sexual grooming or stalking. Furthermore, the traditional approach to legality[92] is most compelling in countries that do not have either an over-arching Bills of Rights or where the Bill of Rights does

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[90] Which came into operation on 16 December 2007.

[91] 17 of 2011, which came into operation on 27 April 2013.

[92] As argued by CR Snyman 'Extending the scope of rape – A dangerous precedent: note' (2007) 124 *SALJ* 677 at 677-8.

not include a specific injunction to courts to develop the criminal law in accordance with the Bill of Rights.[93]

## 9 Limiting the scope of common-law principles using a dignity perspective

### 9.1 Compelled killing of another

In terms of common-law principles the decision in *S v Goliath*[94] that compulsion (human threats from another) can, in principle, constitute a complete defence to the killing of an innocent person – a principle that seems to have been accepted as part of the edifice of the South African criminal law – could, for instance, be re-assessed within a constitutional 'dignity imperative' that presupposes that all lives are equal. Is a person entitled (in a situation where there is no self-defence or war-time predicament) to take the life of another or others as a means of saving his or her own life or others, without fundamentally compromising this imperative?

If such a constitutional challenge were mounted against the *Goliath* judgments that make the defence of compulsion available in principle against all crimes, including murder, the Constitutional Court might well conclude that all lives are of equal value and so compulsion cannot now amount to a ground of justification for the murder of an innocent person, although it might constitute a personal excuse, either in the German sense [95] or as a putative defence[96] in the South African setting.

If the court focused more on the specific facets of the *dignity* of both the accused and the victim identified in this article, it could perhaps conclude that the inherent and equal human *worth* of the innocent victim should not necessarily be sacrificed on the altar of the compelled accused's compromised *autonomy* or that it would constitute unfair discrimination to elevate the accused's predicament above those of the victim.

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[93] See K Phelps op cit (n80). The South African Constitution of 1996 specifically requires a court, in giving effect to a right in the Bill of Rights, to *develop*, where necessary, 'the common law to the extent that legislation does not give effect to that right' (s 8(3)(*a*)) and obliges the courts when '*developing* the common law or customary law' to 'promote the spirit, purport and objects of the Bill of Rights' (s 39(2)). See *Masiya v Director of Public Prosecutions, Pretoria (Centre for Applied Legal Studies, Amici Curiae)* 2007 (5) SA 30 (CC), discussed in Burchell *Principles* op cit (n3) 39-42.

[94] 1972 (3) SA 1 (A).

[95] See Burchell *Principles* op cit (n3) 179-80.

[96] Op cit (n3) 127 and 399-405.

### 9.2 Killing in defence of property

The controversial judgment of the Appellate Division in *Ex parte Die Minister van Justisie: In re S v Van Wyk*[97] (accepting, in principle, the defence of killing in defence of property in special circumstances) may also be successfully challenged as undermining the fundamental emphasis on the right to life – and also the right to dignity – under the South African Constitution.[98] The *Van Wyk* judgments on legal principle would lead to the constitutionally unacceptable conclusion that the right to property could (albeit only in very special circumstances) trump the right to life.

Recent versions of s 49 of the Criminal Procedure Act, regulating the use of force (including lethal force) by state officials in affecting an arrest or in apprehending a fleeing suspect have clearly been confined to the threat of serious physical violence (not just a threat to property) to arrestor or others[99] and the law should also confine the use of force in defence of property to the use of non-lethal force.

## 10 Potential future development of the concept of dignity

Development of 'dignity' beyond the judicially-recognised concepts of 'disrespectful words', 'privacy' (or 'autonomy') and identity to include unlawful infringements, 'equality' and 'freedom' would, it is submitted, serve to unlock the true potential of the civil[100] *and* the criminal remedy for impairment of dignity.

### 10.1 Equality as a facet of dignity[101]

The concept of indignity, it could be argued, is broad enough to cover aspects of unlawful discrimination[102] by virtue of the constitutional protection of *equal* worth of everyone.[103]

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97 1967 (1) SA 488 (A).

98 See further, Burchell *Principles* op cit (n3) at 135-8.

99 See further op cit (n3) at 147-8.

100 An argument for the development of the concept of 'dignity' in the civil law is developed by the present author in *Rights of Personality in Scots Law: A Comparative Perspective* op cit (n10).

101 On the broad nature of the debate on equality and dignity, see *Rights of Personality in Scots Law* op cit (n10) 360-2; A Fagan 'Dignity and unfair discrimination: a value misplaced and a right misunderstood' (1998) 14 *SAJHR* 220-247; C Albertyn and B Goldblatt 'Facing the challenge of transformation; difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *SAJHR* 248-276; D Davis 'Equality: the majesty of Legoland jurisprudence' (1999) 116 *SALJ* 398-414; and S Cowen 'Can "dignity" guide South Africa's equality jurisprudence' (2001) 17 *SAJHR* 34 at 55.

102 JM Burchell 'Beyond the glass bead game' op cit (n10) 17 and *Rights of Personality in Scots Law* op cit (n10) 361-3.

103 See Ackermann's discussion of the inherent link between dignity and equality in the writing of Immanuel Kant (op cit (n2) 554-62, esp 56).

Of course, the Equality Court can, in terms of s 21 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, determine that a person has unfairly discriminated against another person or persons on grounds of race or any other ground recognised by the Constitution. However, it is unclear whether such unlawful conduct can, under the statute, amount to a crime. If the suggested approach of giving a wide meaning to dignity is followed, the discriminatory conduct in question could nevertheless amount to *crimen iniuria*.

### 10.2 Freedom as a facet of dignity

As Ackermann has convincingly argued, human dignity must also include freedom:

> 'If … an important aspect of human dignity is the capacity to exercise one's own judgment, to shape oneself, to develop one's personality and to strive for self-fulfilment…then freedom is essential for the exercise of these capacities, forms an integral part of these capacities, and indeed constitutes a capacity of this nature.' [104]

For instance, the individual's right to die with dignity, at least under limited and controlled circumstances,[105] involves the exercise of an individual's freedom. Freedom and autonomy are intimately related.

## 11 The argument against overloading the concept of dignity

Some have argued that dignity is difficult enough to define, even in its most limited form, and that it is virtually impossible to describe dignity if it is seen as including not just individual worth, autonomy and identity, but also freedom and equality.[106] Perhaps specifically identifying the sub-category of dignity that is being weighed in the balance,[107] will help to reduce risk of confusion and the possibility of internal contradictions – a pursuit of clarity of definition that is, of course, needed to repel any challenge under the *ius certum* aspect of the principle of legality. In the furtherance of clarity in expression, it

[104] Op cit (n2) at 103. Ackermann finds this conclusion compatible with Kantian ethics; 'For Kant, *autonomy or freedom* is not only a pre-condition for dignity, but also a *necessary element of dignity* (Ackermann's emphasis).

[105] See Burchell *Principles* op cit (n3) at 207-13.

[106] It could be argued that the development of a concept of privacy in the United States from the right to be let alone to its inclusion of manifestations of individual choice relating to procreation and education in fact extends the meaning of privacy to breaking point: see Burchell *Personality Rights and Freedom of Expression* op cit (n9) 367-8.

[107] See 3.1 – 3.3 above.

might be useful to think about dignity as the *genus* and self-worth, autonomy, privacy, equality, freedom and identity (including self-fulfilment) as the *species* within this *genus*.

Even if this clarity of definition is not achieved, Henk Botha has convincingly argued that dignity's very 'ambiguity' and 'paradoxical nature' might indicate its significance in guiding and constraining constitutional interpretation:

> 'Perhaps, then, the capacity of dignity to guide and structure constitutional discourse lies in the way in which it suspends legal decision making between the universal and the particular, between the transcendental and the contingent. Dignity demands unwavering commitment to the inviolability of each human person. And yet, it can only be honoured through careful engagement with the particularity of local contexts. Dignity requires respect for the constitutive role of culture, religion, family and community. At the same time, however, it insists on the capacity of individuals to transcend the strictures of their own background and helps to infuse egalitarian norms into these spheres.'[108]

It might appear to involve an internal contradiction or paradox that, in determining the scope of *crimen iniuria*, my dignity (in the form of freedom of expression) must in law be balanced against your dignity not to be insulted by my words or conduct. If one distinguishes between the true facets of dignity (as outlined in this article), contradiction or inconsistency can be avoided. My *autonomy* is not necessarily coextensive or inevitably self-destructive of your *self-worth*. A court can, and must, balance these two differing facets of dignity and determine, in the circumstances, which facet is to be given pre-eminence.

A major advantage of this suggested approach of identifying the *specific* facets of dignity, is that it should encourage tighter, rather than looser, legal reasoning. For instance, Hoctor has argued that the common purpose principle of imputed criminal liability could perhaps be rationalised as a manifestation of dignity in the form of individual autonomy – presumably on the basis that joining or not joining a criminal venture is a manifestation of individual choice and criminal consequences may appropriately be attached to this exercise of choice.[109] An individual clearly has the choice to engage in joint criminal activity or refrain from such a course of conduct. However, imposing on X what amounts to a principle of 'guilt by association' by *automatically imputing* the legal consequences of the conduct of another member of the criminal enterprise (Y) to X and so finding X liable as a *co-perpetrator* in Y's crime is undoubtedly treating X

[108] Botha op cit (n2) 219.
[109] Hoctor op cit (n5) 316n87.

as a means to the end[110] of crime control, so denying his intrinsic worth and identity, not to mention unfairly discriminating between him (for the purposes of causal attribution) and a person accused of committing the same consequence crime as the actual perpetrator and who is not a member of any common criminal purpose.

## 12 Penalty for *crimen iniuria*

Currently, one of the most serious forms of verbal *crimen iniuria* would seem to be the use of the word 'kaffir'. However, even in a case where the complainant to whom this obnoxious term was used was singled out as the only black police officer present, the high court (on appeal) reduced the sentence of 4 months' imprisonment for *crimen iniuria* imposed by the magistrate to a sentence of a fine (to wit R3 000 or 6 months' in prison, with half of the fine and half of the period of imprisonment suspended for 5 years).

The extent of the penalty for impairment of dignity arising out of the use of such offensive words should not, however, lead us to conclude that *crimen iniuria* does not fall into the category of particularly serious offences. If *crimen iniuria* takes the form of a sexual offence (short of provable rape), stalking or 'identity theft' as opposed to speech, conviction could result in punishment that might well include a period of imprisonment.

## 13 Conclusion

If we take human rights seriously and acknowledge that, in the end, humanitarian justice must fulfil the idealistic promises of constitutional justice, we should use all the legal means available to us to protect this precious and pivotal right to dignity.

South Africa has recently emerged from an oppressive political era where dignity was trampled on, but we have now fashioned a sophisticated Constitution that will stand as a bulwark against future debasing of the fundamental right of all to dignity.

A dignity-centred *ideology* is already in place. We must now translate this right to dignity into *practice*. The crime of *crimen iniuria* (like its private law counterpart, the remedy for impairment of dignity and privacy under the modern *actio iniuriarum*) constitutes a potent legal and educational method, based firmly in Roman law and developed both in case law and the Constitution, for translating our commitment to the cause of dignity into practical reality. The existing concept of dignity in the South African jurisprudence already embraces ideas

[110] In Kantian terms.

of autonomy, uniqueness, self-worth, identity and privacy. Now is a timely opportunity for courts to consolidate and affirm these existing attributes of dignity by utilising the current definition of, and jurisprudence on, *crimen iniuria* and also to include the protection of freedom and equality within the meaning of dignity potentially protected by the scope of *crimen iniuria*. The same process of consolidation, affirmation and inclusion should also apply to the civil-law remedy for impairment of dignity under the Roman-inspired *actio iniuriarum*.[111]

In this way, symmetry between the values set out in the Constitution and the values underlying the criminal (and civil) law will be established and courts will fulfil their obligation to develop the South African common law to reflect fundamental rights protected in our Constitution. Most importantly, we will begin to translate the promises of constitutional justice into the reality of humanitarian justice.

[111] See the literature cited above (n10).