THE ROLE AND MIGRATION OF HUMAN DIGNITY IN AFRICAN CONSTITUTIONAL ORDERS: A COMPARATIVE STUDY OF SOUTH AFRICA, KENYA AND UGANDA

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Declaration

This dissertation contains no materials accepted for any other degrees in any other institution; and no material previously written and/or published by another person, except where appropriate acknowledgments are made in the form of bibliographical reference.

s/Tsega Andualem Gelaye

ABSTRACT

This thesis focuses on human dignity, which became one of the most important concepts in constitutional law in the years following the end of the Second World War. It has also attracted huge scholarly interest. Yet, two gaps are notable in the existing literature dealing with human dignity as a constitutional concept. First, with the exception of South Africa most publications on the subject have focused on western constitutional systems. As such, little or nothing is known about how human dignity is understood in African constitutional orders and its role in adjudication of fundamental rights. Second, little or no research is conducted on the actual or potential migration of the interpretation given to human dignity into African constitutional orders and its interplay with local values and traditions. Research in this area is critical because the protection and enforcement of constitutional rights is a big challenge in many African constitutional systems. Accordingly, this thesis analyzes the role and migration of human dignity in three African constitutional orders namely South Africa, Kenya and Uganda. The research is primarily based on comparative and doctrinal research methodologies to address these two gaps in the literature the research questions. As such, the national constitutions of the selected countries, relevant legislation, court cases as well as relevant international and regional human rights instruments are examined. Existing scholarly articles and books relevant to the topic are also used as an input for the analysis.

The finding of the research shows that human dignity is playing an important role in transforming the protection of fundamental rights in the South African and Kenyan constitutional order. Yet, in comparative terms its impact could be considered as strong in South Africa and intermediate in Kenya for a number of reasons. In contrast, human dignity seems to have a very limited role in

Ugandan constitutional jurisprudence which has contributed its share for weak interpretation and state of protection constitutional rights. Further, the Constitutional Court of South Africa developed a rich human dignity jurisprudence by combining insights from history and indigenous values with progressive ideas obtained from engagement with comparative law. Both Kenyan and Ugandan courts have limitations in this regard. In order to improve this, the two jurisdictions need to learn from the experience of South Africa by adopting a human dignity centered interpretation of rights that is founded on the three core elements of human dignity i.e. respect for human life and integrity, equal worth and concern and respect for autonomy. In addition, it is also important to indigenize the ideals of dignity by relying on local cultural values like *ubuntu* which contributes for the greater legitimacy of their decisions and better entrenchment of fundamental rights. Furthermore, these two systems should engage with comparative law in a meaningful manner by adopting a dialogical and critical approach. The dialogue should also involve the African Commission and judicial bodies within the African human rights system which could also play their share in developing and circulating a dignity centered interpretation of rights in the continent.

Dedication

I would like to dedicate this work to my beloved mother Wubalem Melaku Yeshanew for all the sacrifice she made for me to be where I am today.

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List of Abbreviations

ACHPR-African Charter on Human and Peoples Rights

African Commission- African Commission on Human and Peoples Rights

CCSA- Constitutional Court of South Africa

CCU- Constitutional Court of Uganda

ECtHR- European Court on Human Rights

ICCPR- The International Covenant on Civil and Political Rights

KHC-Kenya High Court

UDHR -Universal Declaration of Human Rights

Introduction

Human dignity became one of the core concepts in constitutional law in the years following the completion of the Second World War. Its centrality is derived from the utility of human dignity as a foundation for constitutional rights and as a source of guidance to courts in determining their substance as well as their limitation.[1] The concept initially was an abstract idea that proclaims the 'intrinsic worth' of human beings without specifying what is meant by it in concrete terms. Over time, due to the continuous effort exerted by courts and scholars the core aspects of human dignity as a constitutional concept started to crystallize. Now human dignity at its core seeks to safeguard the respect human life and integrity, equal worth and autonomy of all human beings as creatures of special value or status.

Human dignity as a constitutional concept has attracted huge scholarly interest over the years. A considerable number of researchers have devoted their energy to explicating the genesis, historical development, meaning and utility of human dignity.[2] Yet, two gaps are notable in the existing literature dealing with human dignity as a constitutional concept. First, literature written on the subject by and large has focused on western constitutional systems, with the exception of South Africa. Hence, little or nothing is known on how human dignity is

[1] Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge University Press 2015) 103-113.

[2] Dieter Grimm et al (eds) *Human Dignity in Context* (Hart Publishing, 2018),Christopher McCrudden(eds) *Understanding Human Dignity*(Oxford: British Academy 2014), Marcus Düwell and Others (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press 2014), Becchi, Paolo, Mathis, Klaus (eds), *Handbook of Human Dignity in Europe* (Springer 2019), Matthias Mahlmann, 'The Good Sense of Dignity: Six antidotes to dignity fatigue in law and Ethics' in Christopher McCrudden(eds), *Understanding Human Dignity* (Oxford: British Academy 2014), Matthias Mahlmann, 'Human Dignity and Autonomy on Modern Constitutional Orders' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012), Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge University Press 2015) Erin Daly, *Dignity Rights Courts, Constitutions, and the Worth of the Human Person*, (University of Pennsylvania Press 2013), Henk Botha, 'Human Dignity in Comparative Perspective' (2009) 2 STELL LR 171 171-220 , P. Carozza, 'Human Dignity and Judicial Interpretation of Human Rights: A Reply' (2008) (19(5) The European Journal of International Law 931, 931-944, Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) EJIL 655, 655-724.

understood in African constitutional orders and its role in adjudication of fundamental rights. More importantly, it is not clear whether the conception of human dignity in other constitutional systems radically differs from the African understanding of the concept. This is an interesting area to explore because some African scholars challenge/reject the existing interpretation given to human dignity alleging western cultural bias. [3] Further, the transformative potential of the concept witnessed in other systems with regard to enhancing the protection of human rights is not explored in the African context. Research in this area is critical as the protection and enforcement of constitutional rights is a big challenge in many African constitutional systems.

Second, little or no research is conducted on the actual or potential migration of the interpretation given to human dignity in other constitutional systems to African constitutional orders. The interplay between local and 'foreign' conception of human dignity is also not explored in-depth. Thus, the extent of migration, the place and aspect of human dignity that migrated is unknown. This thesis will contribute its part in filling these gaps in the literature by exploring the meaning, role and migration of human dignity in three African constitutional systems, in South Africa, Kenya and Uganda primarily. Additionally, it also looks at the human dignity jurisprudence of the African Commission on Human and People's right at the supra-national level to provide a complete picture.

As such, the nature of the research conducted in this dissertation is primarily exploratory. Its main objective is to undertake an in-depth study of the role human dignity plays in three African constitutional orders and its extent of migration within these systems. Additionally, based on the findings of the research, it will argue for human dignity centered interpretations of fundamental rights in Africa at national and supra-national levels and suggests an approach to

[3] Makua Mutua, 'Savages, Victims and Saviors: The Metaphor of Human Rights' (2001) 42(1) Harvard International Law Journal 201, 206-207.

be followed in this regard. Having these objectives in mind, the dissertation seeks to answer the following key research questions: What is the constitutional status of human dignity in South Africa, Kenya and Uganda? What role is human dignity playing or could it play in ensuring the respect and protection of constitutional rights in these jurisdictions? What is the constitutional meaning of human dignity in the selected African constitutional orders? To what extent is the constitutional meaning of human dignity compatible with the cultural and indigenous values of the studied jurisdictions? To what extent did the understanding of human dignity migrate within the African constitutional orders? Which aspect of human dignity migrated where?

The three jurisdictions are primarily selected because they have certain similarities and differences which make a legitimate/valid comparative study possible. The relative geographical proximity of the jurisdictions, their common colonial past with its unique features in South Africa, their closeness in terms of culture and nature of legal system could be mentioned on the side of similarities. In addition, human dignity is explicitly present in all three constitutions and considerable case law is found in each of them where it is invoked. On the side of differences, the status and formulation of human dignity in the constitutions of these jurisdictions, its extent of actual use in constitutional interpretation, the aspect of human dignity recognized in these systems, the use of indigenous values in shaping the meaning of human dignity and its extent of migration varies from one system to another. In addition to the justification of comparability, the jurisdictions were chosen because of the availability of a considerable number of legal texts and court cases in English.

Comparative and doctrinal research methodologies are primarily employed to answer the research questions. As such, the national constitutions of the selected countries, relevant statutes or legislations, case law of the Constitutional Court of South Africa, as well as decisions of other chosen African courts, relevant international and regional human right

instruments will be examined. The existing scholarly articles and books relevant to the topic will also be used as an input for the analysis. Three aspects will be compared in the selected jurisdictions: their constitutional text, case law and their respective context. With respect to the research method, no single method is utilized given the diverse nature of the questions asked. Rather, a 'toolbox' containing various methods will be in use to address each question. Accordingly, functional, law in context, analytical, socio-legal and historical methods will be utilized considering the nature of the research question addressed.

With respect to scope, the thesis will mainly focus on the role and migration of human dignity in the studied constitutional orders beginning from 1995 since it marks the adoption of their current constitutions with the exception of the 2010 Kenyan constitution. Further, the jurisdictions also started to become state parties to international and regional human rights instruments founded on human dignity around the same time. Concerning the geographical area covered, the thesis will focus on three African constitutional orders namely South Africa, Kenya and Uganda. The role of local cultural values and traditions in shaping the meaning of human dignity in these systems is also considered. However, the dissertation does not explore in depth the cultural and religious traditions of each system. Rather, the focus will be on examining the presence or absence of the idea of human dignity in sub-Saharan Africa indigenous cultural and religious value systems which are widely believed to be shared in the region. The degree of impact of these value systems in determining the constitutional meaning of human dignity in each of these jurisdictions will be examined. For this, the work relies heavily on the sociological and anthropological studies conducted by other researchers.

Structurally, the dissertation is organized in five chapters. The first chapter lays down the conceptual and theoretical groundwork of the thesis for the subsequent chapters. As such, it traces the evolution of human dignity as a religious, philosophical, cultural and legal concept. More importantly, the focus will be on analyzing the development of human dignity as a

constitutional value and right over the years focusing on non- African constitutional systems, as well as its role in the interpretation of fundamental rights and its migration. Following the analysis, the chapter finishes with three grand conclusions. First, human dignity is a key constitutional concept with a widespread support in the religious, philosophical and cultural views of various communities across the globe. Its three core dimensions, respect for human life and integrity, equal worth and autonomy are also relatively concretized in major constitutional systems. Second, human dignity plays an irreplaceable role in grounding fundamental rights in constitutions as well as in ensuring their adequate interpretation. Third, to ensure a rich conception and application of human dignity in the interpretation of fundamental rights, active engagement and dialogue with other systems - besides looking within one's own cultural values - were seen to be essential.

Chapters Two to Four, examine to what degree the general trends observed from the examination of the existing literature and constitutional jurisprudence is shared in African constitutional orders. The chapters are structured on a country by country basis each chapter dealing with the role and migration of human dignity in one constitutional order. Here, it is important to bear in mind that there is no one single way of organizing chapters and each method organization has its own merits and demerits. For this research, a country by country organization of some the chapters is preferable than thematic way of organizing for the following reasons. First, as noted earlier this research is primarily exploratory in nature as it deals with an area which is little known. This requires an in-depth study of each system independently to appreciate its peculiar features before comparing with each other. Thematic organization may not allow a similar in-depth investigation.

Second, country-based organization of the chapters also contributes to better understanding of the subject in a coherent manner. This is because it would be difficult to meaningfully discuss the role of human dignity, its concretized aspects in a certain jurisdiction, the role of local

values in shaping content and the nature of migration if it is separated from the particular historical and constitutional context of the country. In the view of the author, these provide a complete picture of the subject of the study and reduce distraction. It also does not undermine the analytical and nature of the dissertation as an in-depth examination of the text and case law of each jurisdiction is made in each of the chapters. In addition, the last chapter of the dissertation which combines the findings of all the chapters and suggests the way forward is designed on a thematic basis.

The logic behind the ordering of the country-based chapters is based on the strength of the role of human dignity in the constitutional system and its extent of migration or the openness of the system for dialogue. Accordingly, the second chapter extensively deals with South Africa because it has one of the most advanced human dignity jurisprudences in the world. The indigenous human dignity jurisprudence of South Africa is also impressive. Moreover, the role of human dignity as well as its extent of migration is strong. The third chapter examines the Kenyan constitutional order, where human dignity plays an important but intermediate role in the interpretation of constitutional rights. It further analyzes the degree of concretization of the various aspects of human dignity, extent of migration and some limitations in this regard. The fourth chapter focuses on Uganda where human dignity seems to have a weaker/limited role compared to South Africa and Kenya. It also explains what factors contributed for this state of affairs. In addition, the chapter analyzes the unique manner of engagement of Ugandan courts with foreign jurisprudence and its contribution to the relatively closed nature of the system.

The fifth and final chapter of the dissertation brings together and compares, the findings from each country based chapters regarding the role and migration of human dignity. It will demonstrate the similarities and differences regarding the status of human dignity as a constitutional concept, its role and migration in each constitutional system. It further assesses the degree of convergence and divergence among these orders with their possible explanations.

In addition, the chapter comparatively analyzes the state of indigenous human dignity jurisprudence in the jurisdictions of the study. The reasons behind the relative success or failure of indigenous dignity jurisprudence in the studied systems will also be explored. Based on the lessons from the comparative study, some measures for reform will be suggested to advance and entrench human dignity centered interpretation of rights in Africa.

More importantly, this chapter also brings an additional supra-national dimension to the work by examining the role of human dignity in jurisprudence of the African Commission on Human and People's Rights. This is important because regional human rights treaties such as the African Charter on Human and Peoples Rights are part of the constitutional systems of the jurisdictions studied in the project either directly or indirectly. As such, studying the individual constitutional systems in isolation and ignoring the interaction they have with regional institutions would not give a complete picture. In addition, these supranational bodies could play a prominent role in developing the notion of human dignity in Africa and could also serve as sites of migration of the concept to national constitutional systems.

Chapter 1 – Evolution of Human Dignity as a Constitutional Concept

Introduction

The core objective of this chapter is to lay down the conceptual and theoretical groundwork of the thesis. As such, it traces the evolution of human dignity as a religious, philosophical, cultural and legal concept. More importantly, the focus will be on analyzing development of human dignity as a constitutional value and right over the years, as well as its role in the interpretation of fundamental rights and its migration. The chapter is divided in to three parts. The first section examines the religious and philosophical roots of the concept. In addition, the place of human dignity in African culture and traditions will also be addressed in this part including debates of cultural relativism and universalism. The second section of the chapter is allotted for a deeper examination of human dignity as a constitutional concept. Accordingly, after providing a brief historical account of the factors that led to the recognition of human dignity in international treaties and national constitutions, its role in the interpretation of fundamental rights will be analyzed in a greater depth by bringing examples from various jurisdictions. Further, this part briefly discusses the three concretized dimensions of human dignity as a constitutional concept i.e. dignity as respect for human life and integrity, dignity as equal worth and dignity as autonomy.

Finally, the third section of the chapter will dwell on migration constitutional ideas in general with a particular focus on human dignity. Accordingly, it begins by engaging with debates surrounding the use of terminologies like ‘legal transplant’, ‘borrowing’ and ‘migration’. The justification for choosing ‘migration’ for the purpose of this thesis will also be provided. After doing so, issues concerning the rationale, manner and stages of migration will be addressed. At

last, the section deals with the peculiarities of migration of human dignity as a constitutional concept and the contribution of this process for its development in certain jurisdictions.

1.1 Human Dignity as a Religious, Philosophical and Cultural Concept

Before the emergence of human dignity as a legal concept embodied in international treaties and national constitutions, the idea had been long recognized as an important subject in religious and philosophical discourse.[4] All major religions in the world including Christianity and Islam accept the superior worth and dignity of the human person compared to other creatures. Similarly, the works of renowned philosophers like the Cicero and Immanuel Kant demonstrate the same belief. Although, religious scholars and philosophers agree on the dignity of human beings, they differ in tracing its source. While religious scholars attribute the dignity of the human person to God or divine power, philosophers mainly focus on the unique attributes of human beings that distinguishes them from other creatures such as the capacity to reason.

1.1.1 Religious Foundations of Human Dignity

Human dignity is a central concept in many religions. In Christianity, human beings are believed to be superior to all other creatures as they are molded in the 'image of God'.[5] Particularly, the unique nature of Jesus Christ as God and human being at the same time is invoked as further manifestations of this belief. In addition, some religious scholars mention the fact that in creating human beings God has bestowed upon humans unique abilities such as reason and free will.[6] In their view, these attributes are the reason why human beings are dignified. This belief however is not accepted across the board. Some theologians argue that

[4] Barak (n1) 3-34.
[5] Jammes Hanvey, 'Dignity, Person and Image Trinitatis', in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford: British Academy 2014) 209-229.
[6] ibid

the dignity of human beings has nothing to do with their unique abilities and they have no superior nature as such. Rather, they assert that it is the love of God for humans that entitles them to be treated with dignity and respect.[7] Based on this belief, harm to humans amounts to harm to God.

One important thing to note here is that there are differing viewpoints on whether the dignity of human beings is permanent or conditional. Some religious scholars argue that human beings will not lose their superior worth by wrongdoing as their dignity is absolute and the love of God for them is unconditional.[8] Contrary to this, others argue that human beings are dignified as long as they live according to the wishes of God and refrain from committing sin. If human beings live disregarding the commands of God and engage in sin, they would lose their dignity and possess the image of the devil rather than God.[9] Further, in relation to creation all human beings are believed to originate from common ancestors Adam and Eve irrespective of their race, ethnicity, language or color. This fact is mentioned by religious scholars to assert the equal dignity of all human beings and the absence of superiority and inferiority among them as they are all the children of common ancestors.[10]

Like Christianity, the idea of human dignity has also a strong basis in Islam and Islamic teachings. Yet, the claim of human dignity is not founded on the resemblance between human beings and God. Rather, human dignity is something to be acquired by human beings by following the commandments of Allah revealed in the Quran. Accordingly, 'persons obeying Allah's commandments are elevated to the rank of His representatives (khulafa¯') on Earth (Belhaj).[11] This clearly demonstrates that the Islamic conception of human dignity is not

[7] ibid 211.
[8] ibid.
[9] Janet Soskice, 'Human Dignity and the Image of God' in Christopher McCrudden (eds), *Understanding Human Dignity* (Oxford: British Academy 2014) 229-243.
[10] ibid.
[11] Lars Kirkhusmo Pharo – 'Human dignity in the Islamic world' in Marcus Düwell and Others (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press 2014) 155-162.

something inherent or intrinsic. In contrast, it depends on one's good deeds or observance of religious duties. As such, only those following religious commands have dignity and worth, which is similar to the position of some Christian theologians.

Two main criticisms are raised against the religious conception of human dignity mentioned above. First, these beliefs are not appealing to those who do not subscribe to any religion.[12] As such, the force of these claims of human dignity are confined only to religious believers and cannot serve as a universal source of human dignity. The second criticism concerns the exclusionary nature of these conceptions of human dignity. As mentioned in previous paragraphs, human dignity seems to be a status given to those who comply with dictates of religious texts and perform good deeds. This basically undermines the dignity of those who failed up to live up to the stated religious standards.

1.2.2 Philosophical Foundations of Human Dignity

In the sphere of philosophy also the idea of human dignity is important. Many philosophers have dealt with the notion for centuries but for the sake of space and relevance this sub- section focuses on two western philosophers Cicero and Immanuel Kant. The reason for this is that their conception of human dignity is relatively closer to the present understanding of the concept. Here, it would be vital to say a few things about the traditional conception of human dignity in the Roman times *dignitas.* This term is used to refer to people superior in status either because they assume public offices, born from royal family or because they are wealthy.[13] As such, it is a status ascribed to only few people who met these criteria. All others are ordinary people with no special status. In other words, *dignitas* is not something intrinsic that is possessed by all human beings. It is rather merited and external to the person.[14] This means for

[12] Matthias Mahlmann, 'The Good Sense of Dignity: Six Antidotes to Dignity Fatigue in Law and Ethics' in Christopher McCrudden(eds), *Understanding Human Dignity* (Oxford: British Academy 2014) 593-614.
[13] Oliver Sensen, 'Human Dignity in Historical Perspectives: The Contemporary and Traditional Paradigms' (2011) 10 European Journal of Political Theory 71, 71-91.
[14] Miriam Griffin, *Dignity in Roman and Stoic Thought in Remy Debes* (eds) *Dignity: A History* (Oxford University Press 2017) 48-66.

the individual to be worthy of respect or *dignitas* he needs to accomplish something remarkable or behave in a certain way. It is also the society that determines whether someone has a *dignittas* or not up on the fulfillment of certain conditions.[15] The *dignitas* of a person is not also permanent. It is rather something which a person could lose or forfeit if he fails to display a character worthy of respect in the eyes of the society.[16]

In his work, Cicero departed from this dominant thinking to a certain extent. He argued that human dignity is an attribute equally shared by human beings because they have rational faculties.[17] He also contrasted human beings and other animals to demonstrate the specialness of humans. Accordingly, he noted while animals are guided by satisfaction of a certain desire in acting, human beings are guided by reason.[18] This in his view makes human beings superior creatures. In doing so, he seems to make *dignitas* an innate property of human beings by virtue of their rational nature. However, Cicero also requires human beings to refrain from pursuing pleasure and to act in a rational manner since failure to do so makes human beings akin to an animal. In relation to this he said, 'some are men, not in fact, but in name only'.[19] This shows that his conception of *dignitas* is not purely innate rather conditional on the exercise of rational faculties. As such, his conception of dignity is not completely detached from the traditional understanding of *digitas* and it oscillates between the two. Further, Cicero invokes *dignitas* mainly not to confer rights on individuals but impose duties, which is not the primary function of human dignity in its modern sense.

The most notable contribution to the development of a modern conception of human dignity came from the renowned German philosopher Immanuel Kant. His philosophy has also shaped the meaning of human dignity in many constitutional systems today. Kant considers human

[15] ibid
[16] ibid
[17] Sensen (n13) 76-78.
[18] ibid
[19] Griffin (n14) 55.

beings as a 'class or community of moral agents'.[20] The source of their moral agency is their capacity for reason and their ability to set ends for themselves. By virtue of these attributes human beings possess special worth or dignity that is 'intrinsic, absolute and objective'. [21] The intrinsic nature of dignity of humans shows that it is not something that is granted by divine power, state or community. This understanding is different from the religious conception of dignity discussed in previous paragraphs. For Kant, human dignity is also not an attribute that is conditional on the good or bad deeds of a person. As such, a person would not lose his/her dignity due to improper conduct or degree of usefulness to the society. Here, Kant contrasts the status of humans with things. In his view, things only have exterior and conditional value. Their worth is dependent on their usefulness or desirability.[22] In contrast to this, the worth of a human being does not depend on his utility to anyone including the society. The mere fact of existing as human being suffices to possess human dignity without anything additional. Further, human dignity is not something that varies from one person to the other. Rather all human beings have this status equally regardless of their race, color, ethnicity or social status.[23] Besides recognizing the intrinsic worth or dignity of human beings, Kant also sought to identify how human beings should treat each other as moral agents or as members of a moral community. In his work, he articulated certain supreme moral principles which he called categorical imperatives which are universalizable.[24] The core objective of these imperatives is to determine whether the action of someone is morally worthy or not which is determined by reasoning. Accordingly, one of these categorical imperatives concerns the duty of respecting human dignity of oneself as well as others. In relation to this, Kant noted that 'act in such a

[20] Thomas E. Hill, 'Kantian Perspectives on the Rational Basis of Human Dignity' in Marcus Duwell (eds), *The Cambridge Handbook on Human Dignity Interdisciplinary Perspectives* (Cambridge University Press 2015) 215-221.
[21] ibid.
[22] John Victor Enslin, *Kant on Human Dignity: A Conversation among Scholars* (PhD Dissertation, Boston College 2014) 37-52.
[23] ibid.
[24] Immanuel Kant, *Groundwork of the Metaphysics of Morals in Immanuel Kant:* Practical Philosophy, trans. Mary Gregor (Cambridge 1998) xi-xviii, 14-15.

way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end, but always at the same time as an end'.[25]

This position of Kant dictates that since human beings are creatures of immense and absolute worth, they should never be treated as mere instruments or tools for achieving a certain goal. To illustrate his point concretely, it may suffice to take slavery as an example. In this relationship, the slave master is owns the slave as an object or property. The slave has no other purpose in life other than fulfilling the wishes or obeying the command of the slave owner. If we follow Kant's categorical imperative slavery would be a morally reprehensible act since it treats human beings, creatures of absolute and intrinsic worth as mere objects/tools of others. Such treatment also undermines their autonomy and capacity to set ends. Here, it is important to bear in mind that what Kant does not approve is treatment as 'mere means'. Thus, the interdependent nature of human life and the existence of individual human beings within the framework of society, justifies some degree of instrumentalization in fulfilling each other's needs.[26] The position of Kant on human dignity is also contrary to the utilitarian philosophy which measures the rightfulness of a certain action by its contribution to the general societal welfare or happiness. In utilitarian thinking, it may be justified to treat a human being as a tool as long as it is beneficial to many or the community at large.[27] Such view is incompatible with the Kantian conception of dignity and his categorical imperatives.

Like its religious counterpart, the philosophical understanding of human dignity briefly outlined in the previous paragraphs is not free from criticism. One of the most common criticisms concerns the inability of this conception of dignity to encompass human beings with limited cognitive or underdeveloped rational capacities such as children and mentally

[25] ibid 37.
[26] Enslin (n22) 39.
[27] Lawrence Haworth, 'Autonomy and Utility'(Oct., 1984) 95 Ethics 5, 5-19, H. L. A. Hart, 'Shell Foundation Lectures, 1978-1979, Utilitarianism and Natural Rights' (1978-1979) 53 Tul. L. Rev. 663,663-680, Simon A Brooks, 'Dignity and Cost-Effectiveness: A Rejection of the Utilitarian Approach to Death' (1984) 10 Journal of Medical Ethics 148, 148-151.

disabled.[28] The core argument is that since the source for having dignity is the ability to reason, these categories of human beings may be perceived as lacking dignity or worth. In response to this criticism, some argue that capacity for reason is something that is attributable to the human race or the entire species of humans.[29] As such, dignity is status possessed by all irrespective of their degree of their rational abilities and this includes both infants and mentally ill. The other critique which is often associated with the philosophical articulation of dignity is that in the name of dignity it imposes more of a duty than a right on individual human beings.[30] As noted above, Cicero states the moral obligation of human beings not to behave like animals and pursue pleasure. Likewise, the second categorical imperative of Kant requires all human beings to treat themselves as well as others as ends and refrain from instrumentalization. Clearly, both philosophers advocate for moral restraints on human action. This however does not mean that only duties could be derived from their understanding of dignity. Rather, their approach seems to view rights and duties as correlatives. While acknowledging the special worth of human beings and their right to be treated with respect, they also oblige human beings to do the same to their fellow beings since it is the corollary their status. Further, considering the fact that human beings live in a community, the exercise of rights without certain duties is unimaginable as long as they are justified.

1.3.3 Human Dignity as an African Cultural Concept

The essence of human dignity is attribution of respect to a human person and the recognition of his/her superior value in comparison to other creatures. This idea is commonly believed to have originated from the teachings of Christianity or the exposition of European philosophers such as Immanuel Kant.[31] In contrast, the idea is portrayed as unknown and alien to the African

[28] Samuel J. Krestein, 'Kantian dignity: a critique' in Marcus Duwell (eds) *The Cambridge handbook on Human Dignity Interdisciplinary Perspectives* (Cambridge University Press 2015) 222-228.
[29] ibid.
[30] Sensen (n13) 71-91.
[31] M.D Cohen, 'A Concept of Dignity', (2011) 44 *Isr. L. Rev.* 9, 11-17.

continent and its inhabitants. This is partly due to the writings of philosophers such as Hegel who seem to have a very condescending view of Africa and the capacity of its people, which seems to have contributed a great deal to the general misconception about the continent for generations to come.[32] Hegel describes Africa as 'land of childhood' and underscores the uncivilized status of the African people by noting that 'the Negro exhibits the natural man in his completely wild and untamed state'.[33] It does not take much effort to infer from these statements his equation of an African person with that of a child in his thinking and behavior, not having any manner or rules for conducting his relationship with others. He also emphasizes the 'wildness' and 'savagery' of the African people which necessitates their domestication/taming by the higher beings (the Europeans). If what Hegel is saying is taken on its face, it might seem plausible to contend that human dignity has no roots in Africa (a wholly foreign concept that Africans need to learn from others for its goodness), because its very inhabitants are savages having neither the capacity nor the time to contemplate about it.

Further, it was assumed that Africans are not capable of entertaining any abstract thought and their state of mental development does not allow them to think about how they should treat each other and treat their fellow beings with respect.[34] Their ability to entertain ideas of God and religion is accordingly limited. Beside the account of European philosophers, Christian missionaries who sought to spread Christianity to Africa also contributed their part for the labeling/characterization of African tradition and culture as barbaric devoid of any notion of human dignity in it.[35] Hence, the dominant (pre) colonial narrative about Africa and Africans

[32] Babacar Camara, 'The Falsity of Hegel's Theses on Africa' (2005) 36 Journal of Black Studies, 82-96; Makua Mutua, 'Savages, Victims and Saviors: The Metaphor of Human Rights' (2001) 42(1) Harvard International Law Journal 201, 202, Ok. Steve Nwosu, 'Morality in African Traditional Society' 26 (2) New Political Science 205, 205-229.
[33] Georg Wilhelm Friedrich Hegel, *The Philosophy of History* (Batoche Books Kitchener 2001) 109.
[34] Nkem Emeghara, 'The Dignity of the Human Person in African Belief' (1992-1993) 14 Theology Annual 126, 126-137.
[35] ibid.

in the past was that they are ‘brutes’, ‘cannibalistic’, ‘crude', ‘primitive’, ‘dark’, ‘savages’, ‘pagan’, ‘ignorant’ with no contribution for human history or civilization.[36]

Here, it might help to inquire why this line of thought/picture of Africa and Africans was propagated. Discovering the reason for such characterization of Africa is not sophisticated. It is chiefly to provide a justification/ an excuse for the colonization of African by the West and all the evils that happened the name of ‘civilizing’ or ‘humanizing’ Africans. Hence, in order to subjugate Africans to control by the Europeans, their portrayal as beasts and savages is crucial because it gives the impression that the colonizers are doing Africans a favor by controlling and guiding them because Africans lack the intelligence to govern themselves. In contrast, if the African culture and its people are considered to be civilized and their value system acceptable, the West would lack the ground for controlling them other than for the sheer greedy/selfish desire of looting resources which are not its own. Beside the issue of resources, painting the African traditional religion and belief system as savage and ridiculous, also gives advantage to religious such as Christianity and Islam to get followers in Africa. One of the most effective strategies to make people abandon a certain value system /faith is to depict it as evil and barbarous. This seems to be what the missionaries did to traditional African religions and succeeded in making the people believe what they say is true and win them over.

The next important issue worthy of examination is whether what people like Hegel and the missionaries are saying about Africa and African is plausible? More specifically, whether the claim that Africans are alien to the ideals of human dignity is indeed true or it is something that is based on sheer misconception and ignorance about African way of life. Before analyzing this subject, it is important to raise one important concern with respect to how one should approach the genealogy of dignity in different cultural traditions. A person may follow different

[36] ibid.

methodologies in an attempt to discover the presence or absence of human dignity in a certain community. The most common approach is to look for the word 'human dignity' in written texts and laws of the community.[37] If one follows this narrow approach of finding human dignity, he/she may be led to the conclusion that dignity is alien to the society simply because the word is absent from written documents. This is particularly relevant for the study of African history and value systems since most of the written pieces were destroyed by the colonizers and the African people largely relied on oral tradition and practice of cultures which might not be easily visible or traceable for the outsider.[38] A person genuinely interested in the discovery of the notion of human dignity in Africa must be sensitive to this reality.

This in turn requires a more nuanced method of discovery which is not merely confined to searching for the word 'dignity' in written forms. Instead, it looks into whether a given society has the ideal of treating human beings as creatures of special worth/value and looks for manifestations of such ideas in the right places.[39] These places include oral traditions, songs, their way of life, conception of religion and its practice, manners of treating individuals, as well as the duty and privileges of individuals in the community among others. In general, a holistic consideration of the community culture and value system must be considered to arrive at a sound conclusion. The adoption of such approach in my view, will affirm the idea that human dignity is not an alien concept to Africa and its marks found in different cultures of African pre-colonial communities. In subsequent paragraphs of the thesis, I will attempt to demonstrate this fact by examining the anthropological and philosophical studies conducted on three indigenous African people i.e. the Igbo, the Akan and the Bantu people.

[37] Mahlmann (n12) 595.
[38] Kwasi Wiredu, 'An Oral Philosophy of Personhood: Comments on Philosophy and Orality' (2009) 40 Research in African Literatures 8, 8-10.
[39] Mahlmann (n12) 595.

a) The Igbo & Human Dignity

The Igbo people are one of Africa's indigenous peoples in the present-day Nigeria. According to a study by Emehgera, a closer look at their conception of human creation, mode of worship and community life provides ample evidence to the respect traditional African societies had for human person which lies at the center of the modern notion of human dignity.[40] To begin with their view of human origin, they believe that every human being is the work of Chekwedu (God). What makes human beings more valuable than any other creature is the possession of chi (soul) which they believe is an imprint of God nature. As such, they believe that God is within every human person through his *Chi*.[41] This view of human beings and their worth is akin to the Christian conception of *imago dei* that ascribes dignity to human beings because they were made God's image. However, the Igbo also identified other factors which may trigger respect for human beings beside their creation by God. The understanding of human beings as spiritual beings and recognition of their volition could be mentioned as an example in this regard.[42] To begin with spirituality, the Igbo believe that human life continues in a spiritual form and it is not extinguished at death. Hence, the immortality of human soul/spirit may be interpreted as a conception of a special value of human beings that make them stand out from others. This may also explain the ascription of an important status to the dead members of the community commonly known as ancestors whose implicit presence is recognized and respected. Further, the possession of free will and volition in human heart/nature is also believed by the Igbo as distinguishing marks of a human being. As such, the capacity in human heart to do good and evil is recognized. This understanding of the Igbo resembles the position

[40] Emeghara (n34) 126-137.
[41] ibid.
[42] ibid.

of some European philosophers like Kant emphasizing the unique limited properties of human beings as a justification for bestowing dignity on them.

A closer look at the manner of worship and way of life in Igbo community also displays the respect they have for human life and human person. According to Obasola life 'is a primary value and highly esteemed among the Africans'.[43] The community manifests its concern for human life in the names it gives for children and in the manner it seeks to protect human life. For instance, names like '*Ndubuisi* (life is the primary value)', and *Nduka* (life is the greatest thing) are common in Igbo people.[44] Several beliefs and rules of the Igbo community also demonstrate the respect they have for human life from their perspective. To illustrate, one can mention the absolute prohibition of taking one's own life. The community shows its disdain against such practice by not burying and mourning for the person who committed suicide.[45] This shows the modern debates about assisted suicide and its controversies are not new to the African mind and culture. Further, the community respects the value of human life even at its earliest stage of development. This could be seen from the way the Igbo handle the death of pregnant women in the past. When such incident happens, the Igbo conduct a surgery on the women to extract the fetus and arrange a separate burial for both.[46] This may be interpreted as a barbaric and absurd practice with no logical justification. But from the other side, it could also be interpreted to show how the Igbo respect human person in a fetus form by their attempt to value it through a separate burial. Moreover, respect for human life and its value is always present in Igbo prayers.[47]

[43] Kehinde E. Obasola, **'**Ethical Perspective of Human Life in Relation to Human Rights in African Indigenous Societies' (2014) 8 International Review of Social Sciences and Humanities 29, 29-35.
[44] ibid.
[45] ibid.
[46] ibid.
[47] Ok. Steve Nwosu, 'Morality in African Traditional Society' (2004) 26 (2) New Political Science 205, 205-229.

The most visible manifestation of the Igbo respect for human dignity is found in their communal life, manner of treating each other and their value system.[48] Like for many African communities, communal way of life and the duty of the individual to further the common good of the community is a cherished matter. More specifically, the central prescription of Igbo community is the requirement for every individual to show respect for other members by displaying hospitality, supporting the unfortunate/the weak and displaying solidarity.[49] At the core of these practices lies respect for a human person and recognition of his unique worth. To show hospitality and friendly treatment to another human being is nothing but affirmation of his special value. It is also a complete opposite of hatred and unfriendly treatment that denies the value of certain human beings. Thus, one does need to find a detailed philosophical account about dignity in a written form to appreciate the existence of notion of human dignity in a certain community. The way it treats its fellow beings gives an enough testimony to a person with an open eye to see if human dignity is there. Likewise, support for the weak and the fortunate, underscore the belief of the community of according equal concern and appreciation of the value for human beings irrespective of their status or circumstances. Hence, the Igbo had a notion of human dignity.

b) The Dinka and Human Dignity

The Dinka are African indigenous people living in the present day of South Sudan, the eastern part of Africa. Like the Igbo, one can find the traces of notion of human dignity in the Dinka culture and value system. Francis Deng, an anthropologist and lawyer has spent a considerable time and energy in studying the Dinka way of life and its relation to the modern conception of human rights that is primarily grounded on the notion of human dignity. His study reveals one of the misconceptions about societies in pre-colonial Africa. Commonly, African communities

[48] Emergha (n34) 126-137.
[49] ibid.

are perceived as having no value system for ordering their society and all one can find is endless chaos and war. The falsity of this assumption could be seen if one examines the culture of the Dinka.

According to Deng, the Dinka have a moral ideal/vision of a society they want to create and maintain. These notions are embodied in the Dinka concept called *Cieng* which embodies 'values of dignity, respect, loyalty and care for human person among others. [50] The *Cieng* is a moral code of conduct that every member of the Dinka community must adhere to and observe. As noted above, its ultimate aim is ensuring respect for human a person through the prescription of treatment that goes with it. As such, for the Dinka an ideal society is one where the dignity of every member of the community is valued. The *Cieng* also imposes a duty on each member of the community to care for the wellbeing of others. These moral prescriptions preserve the essence of human dignity as we understand it today. Hence, the ideals of human dignity are not foreign to the Dinka and one could infer this from their moral code of conduct and its prescription.

The strength of their commitment to the *Cieng* is demonstrated by the consequences attached to the violation of the moral law. Like the Igbo, the Dinka also believe that the ancestors are the guardian of the Dinka moral order.[51] Thus, an individual who breached the *Cieng* will be punished by them. Beside their central moral code of conduct, the *Cieng*, other traditions and practices of the Dinka also affirm the recognition of human dignity and human worth. For instance, in making a decision or taking a certain course of action that affects the community, the Dinka give priority for persuasion over the use of force or violence or coercion.[52] This practice could be interpreted to indicate the value the Dinka give for the opinion of every person

[50] Francis Mading Deng, *The Dinka of the Sudan Case Studies in Cultural Anthropology*, (Yale University 1972)14-24, Francis Deng *et al*, *Human Rights: Southern Voices* in William Twininng (eds.) (Cambridge University Press 2009) 4-15.
[51] ibid.
[52]Francis M Deng, *Identity, Diversity and Constitutionalism in Africa* (United States Institute of Peace 2008) 77-100.

and the degrading nature of getting something done by forcing or compelling someone against his free will. Such an interpretation approximates the modern understanding of human dignity that demands the treatment of every person as an end not as a means.

Further, one can also infer the war ethics of the Dinka and see their attempt to ensure respect for a human being irrespective of the fact that he is an enemy. According to the Dinka culture, a wounded enemy fighter must be treated and taken care of by the women.[53] Such gesture towards the enemy could be inferred as having its source in respect for humanity or the human person. Another interesting practice in Dinka tradition is the *dheeg*.[54] Although exact translation of the practice to English is a challenge, it basically refers to social dignity of a person in the Dinka community. According to Deng, individuals could attain the respect of the community in three ways.[55] The first is the acquisition of dignity by birth or marriage. As such, a person will assume an elevated status in the community if he is born out of a class esteemed by the community or joins such family by means of marriage. But this is not the only way of acquiring societal respect in the Dinka. An individual also earns his respect in the community, if he owns cattle which is the most revered thing for the Dinkas or conforms to the moral prescription of the *Cieng*.[56] Thus, a poor person is treated with respect in the community if he is an adherent to the requirements of the *Cieng* and displays a friendly and respectful behavior towards other members of the community. Finally, social dignity could also be ascribed in a person by virtue of his physical appearance or beauty.[57] Beauty and the body of the human person are treasured in the belief of the Dinka.

[53] ibid.
[54] ibid.
[55] ibid.
[56] ibid.
[57] ibid.

c) The Bantu conception of Human Dignity: *Ubuntu*

One of the most widely known indigenous African value systems (in relative terms) that is often associated with the notion of human dignity is the *ubuntu* tradition of African people of Bantu descent. These people mainly live in Southern and Eastern parts of Africa and *ubuntu* is central to their societal organization and day to day life. It is difficult to capture the whole essence of *ubuntu* with one single definition. But at its core lies the idea '*Umuntu Ngumuntu Ngabantu'*, which can be translated as "a person is a person because of or through others".[58] The centrality of society in the definition of personhood is evident from this statement. As such, an African world view of individual and his/her link to the community is different from that of the West. In western philosophical discourse, the status of the individual and his/her humanity is found internally/located within the person himself/herself (inheres within).[59] Hence, the role of the community in the acquisition of personhood or humanity is not often emphasized. As such, interaction with the community seems not to add anything to the human quality of the individual nor diminish it. Hence, personhood or humanity is rather internal than external.

The view of humanity and personhood in *ubuntu* thought is the complete opposite of this thinking. As such, a person acquires personhood or humanity only through his/her relation with his/her peers and the community.[60] A corollary of this belief is that what makes the person a human is not his mental or bodily attributes or features. Rather, it is his/her friendly and cooperative interaction with others that leads to his transformation to state of a human being. Some authors contend that for an African, personhood is something which a person may not

[58] Drucilla Cornell and Nyoko Muvangua, *Ubuntu and the Law African Ideals and Post Apartheid Jurisprudence* (Fordham University Press 2012) 5.

[59] Ifeanyi A. Menkiti, "Person and Community in African Traditional Thought", in. Richard A. Wright (ed.), African Philosophy. An Introduction. (Lanham Maryland 1984), 171-181; James E. Lassiter, 'African Culture and Personality: Bad Social Science, Effective Social Activism, or a Call to Reinvent Ethnology?' (2000) 3(3) African Studies Quarterly, 1-15.

[60] Thaddeus Metz, 'African Conceptions of Human Dignity: Vitality and Community as the Ground of Human Rights' (2012) 13 Hum Rights Rev 19, 19-37, Thaddeus Metz, 'Human Dignity, Capital Punishment, and an African Moral Theory: Toward a New Philosophy of Human Rights' (2010) 9 Journal of Human Rights, 81-99.

succeed in achieving.[61] This means unless a person receives the assistance of others he/she will not be able to develop to a full human being by his/her own effort and will. Further, depending on the degree of interaction and good relation with others a person may become more or less of a person.[62] As such, when he/she shows respect and concern for others and strives for their wellbeing a person is regarded as having an *ubuntu*. In contrast, he/she will be considered as lacking *ubuntu* when he attempts to promote his wellbeing at the expense or in disregard of the interest of others.

As the previous paragraphs demonstrate, interdependence is a supreme good in the philosophy of *ubuntu*. Hence, an individual is expected to flourish as a person by receiving the support of others and has the duty to do the same for others to flourish or develop.[63] Thus, the person relies on others for his/her development and others can rely on him/her to achieve their destiny or wellbeing. Beside the emphasis on interdependence and community centered personhood, *ubuntu* sets certain standards /guidelines on how individuals should treat each other or relate. The core prescription in this regard is treating every person with respect, concern and friendliness.[64] It is only such kind of treatment that conforms to the *ubuntu* philosophy and leads to personal and communal development. Unfriendly treatment of others and lack of concern for their wellbeing is contrary to the value of *ubuntu*.

The other point which requires further analysis is the similarity of *ubuntu* with the understanding of human dignity in western philosophical thought. Some writers warn us of the danger of conflating human dignity and *ubuntu*, for the reason that such approach deprives us the opportunity to benefit/appreciate the unique features/addition of ubuntu.[65] One difference

[61] ibid.
[62] ibid.
[63] ibid.
[64] ibid.
[65] Drucilla Cornell, "A Call for a Nuanced Constitutional Jurisprudence: South Africa, *Ubuntu*, Dignity, and Reconciliation" in Drucilla Cornell and Nyoko Muvangua ,*Ubuntu and the Law African Ideals and Post-Apartheid Jurisprudence* (Fordham University Press 2012) 324-333.

that is often noted in the *ubuntu* scholarship is the focus of Kantian understanding of dignity on the autonomy of the individual contrary to the relationship centered view of humanity in *ubuntu*.[66] As such, it is argued that what is central about the human person in Kant's philosophy is the autonomy or the ability of the individual to make free choice. This does not seem to be the emphasis in *ubuntu* which seems to value friendly relationship between individuals more than individual capacity for choice.[67] However, since Kant talks about freedom under moral law, the complete differentiation of his thought with that of *ubuntu* should not be over emphasized.

These findings also demonstrate that non-western cultural traditions are not always incompatible with the basis conception of human dignity and human rights as it is often perceived. Rather the essence of these values is also present in the cultural traditions of various African communities.[68] Thus, no particular culture has a monopoly or ownership over human dignity. Respect for human dignity at a basic level is rather a value shared by all societies and there is a wide range of cross-cultural consensus on it. This also means that radical universalistic understanding of human dignity is problematic because it completely dismisses the relevance of cultural values in validating and shaping conceptions of human dignity.[69] Such position is incompatible with the reality and it may not also aid the cause of human rights. The better approach is to use cultural values to further promote and legitimize respect for human dignity instead of rejecting them in their entirety. However, radical cultural relativist approaches, which makes culture the sole determinant of any value and reject the existence of

[66] T. Metz ., 'Dignity in the Ubuntu tradition' in Marcus Düwell and others (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press 2014) 310-317.
[67] ibid.
[68] Francis M.Deng, 'A Cultural Approach to Human Rights Among the Dinka' in Abdulahu Ahmed An-na'im and Francis M. Deng (eds), *Human Rights in Africa Cross Cultural Perspectives* (The Brookings Institution 1990) 261-289.
[69] Jack Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6(4) Human Rights Quarterly400, 400-419, Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press 2013)108-110.

any universal value at any level are also problematic.[70] They may also serve to justify gross violations of human dignity by invoking their compatibility with the conception of human dignity accepted in a particular cultural tradition. The challenge here is to strike a delicate balance between the universal and local understanding of human dignity, without one completely eliminating the other. As long as the culture of a certain community upholds basic respect for human dignity shared at universal level, it may be legitimate to allow to add its own conceptions/variation of human dignity. This would further enrich human dignity and entrench respect for it at a deeper level instead of undermining it. To illustrate, in many African societies communal interaction and harmony is an important value. Such way of thinking must not be necessarily identical to the western approach that gives central place for individual autonomy. Further, such variation in itself it is not a violation or danger for respect for human dignity, as long as the respect for communal life does not destroy or eliminate the autonomy of the individual.

1.2 Human Dignity as a Legal Concept, Constitutional Value and Right

1.2.1 Historical Context: Nazi Holocaust

Though human dignity has a long history in religious and philosophical discourse its emergence as a legal concept is mainly associated with particular historical incidents such as the Holocaust and the Second World War.[71] These historical events necessitated the recognition of human dignity in international treaties and national constitutions. For this reason, it would be difficult to appreciate the development of human dignity as a legal concept and its immense importance without knowing the historical context that the led to its recognition. Over the years, a lot has

[70] ibid.
[71] David Hollenbatch, 'Human Dignity Experience and History, Practical Experience' in Christopher McCrudden (eds), *Understanding Human Dignity* (Oxford University Press 2014) 123-139.

been written on the Holocaust and the Second World War in different disciplines from various perspectives. My goal here is mainly to analyze these historical incidents in relation to human dignity. As discussed in the previous section of the chapter, the special worth and dignity of all human beings is an idea recognized/generally accepted in various religious, philosophical and cultural worldviews. However, this beliefs in the inherent dignity of a human person and his/her entitlement to be treated with respect was utterly rejected with the coming into power of the Nazi party in Germany. The Nazis had three main objectives they sought to accomplish i.e. avenging the defeat and humiliation of Germany in the First World War, acquiring lost territories in the war and creating a racially pure society.[72] Among these goals the formation of a racially pure society was particularly interesting because it is responsible for the destruction millions of human lives at the time and gross suffering of many.

The underlying assumption behind this objective is thinking that there are inferior and superior races in Germany. The Aryan race is regarded as superior and all the rest are considered inferior.[73] This way of thinking is absolutely incompatible with the idea of equal dignity of all human beings regardless of race. The Nazis particularly targeted German Jews and took several measures to eliminate them from Germany and the whole Europe. At the beginning the Nazis demonized the Jews in every possible way and blamed them for being responsible to every problem that occurred in Germany.[74] This resulted hatred towards them and their exclusion from public life. Subsequently, the Nazis stripped German citizenship from Jews precluded them from certain professions and later deported them.[75] These were some of the initial solutions adopted by the Nazis to deal with the Jewish question and problem in Europe. However, they later adopted a more ruthless final solution that aimed at killing and complete

[72] William L. Shirer, *The Rise And Fall of the Third Reich A History of Nazi Germany* (Simon and Schuster 1960)
[73] ibid.
[74] Adolf Hitler, *Mein Kampf*, (Houghton Mifflin Company, 1939) Dieter D. Hartmann, Anti-Semitism and the Appeal of Nazism (1984) 5 (4) Political Psychology 635, 635-642.
[75] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Classics 1964) 38-55,67.

eradication of Jews.[76] These plans were executed step by step. Initially, killing of Jews was conducted through shooting squads and many thousand Jews died this way. However, the Nazis were not satisfied with the efficiency of this strategy. This is because as a result of the occupation of new territories in Europe, the Jewish population within their control increased massively. As such, killing them through shooting will not produce the desired result quickly.[77] For this reason, they devised more sophisticated killing machinery using the latest technology and science at the time. This involved the opening of concentration camps in various territories occupied by the Nazi with inbuilt mechanisms for swift and massive elimination of Jews such as gas chambers.[78]

These operations were undertaken in a very organized and systematic manner. Jews from all territories controlled by the Nazis were deported and sent to concentration camps. Those with physical strength and skill were forced to work in the camps under extremely difficult conditions.[79] Those physically weak, disabled, children and mentally ill were immediately gassed because they were considered as worthless. Here, it is important to note that the assignment of different value to human beings based on their utility or productivity contradicts the thinking that every human being has equal value and dignity.[80] It also utterly violates Kantian categorical imperative that demands the treatment of human beings as ends in themselves rather than instruments for achieving a certain end as noted in the previous section of this chapter. However, the Nazis did not care about human dignity at all and for them Jews were inferior form of human beings or sub human. This led to the massacre of millions of Jews in various gas chambers and concentration camps within a very short period time.

[76] ibid 83-111.
[77] Shirer (n72) 864-865.
[78] ibid 870-880.
[79] Donal P O Mathuna, 'Human Dignity in the Nazi Era: implications for Contemporary Bioethics' (2006) 7(2) BMC Medical Ethics 1-12.
[80] ibid.

Besides killing Jews in gas chambers, the Nazis also subjected them to horrific scientific and medical experiments. According to Mathuna, the Nazi era was a period where the difference between human beings and animals was blurred contrary to long held religious and philosophical beliefs.[81] As such, Jews were used as objects for testing the efficiency and harmful effect of newly developed drugs. They were also killed on purpose as tools for acquiring new knowledge about human anatomy with utter disregard for their humanity or human dignity.[82] To illustrate this point, it might help to detail some of this inhumane experiments conducted by Nazi doctors and scientists at the time. '*At various times between September 1939 and April 1945 experiments were conducted at Sachsenhausen, Natzweiler, and other concentration camps for the benefit of the German Armed Forces to investigate the most effective treatment of wounds caused by Lost gas. Lost is a poison gas which is commonly known as mustard gas. Wounds deliberately inflicted on the subjects were infected with Lost. Some of the subjects died as a result of these experiments and others suffered intense pain and injury'*.[83] Likewise, *'one hundred twelve Jews were selected for the purpose of completing a skeleton collection for the Reich University of Strasbourg. Their photographs and anthropological measurements were taken. Then they were killed. Thereafter, comparison tests, anatomical research, studies regarding race, pathological features of the body, form and size of the brain, and other tests were made. The bodies were sent to Strasbourg and defleshed'.*[84] It is out of these horrific experiences of humanity that respect for the human dignity of a person emerged as a legal concept.

Here, it might be necessary to say few things about the role of law and courts at this time when all this evil was committed. One of the most disturbing things about this era is the fact that all

[81] Mathuna (n79) 7.
[82] The Doctors' Trial, *The United States of America vs. Karl Brandt et al. US Military Tribunal Nuremberg*, Judgment of 19 July 1947.
[83] ibid 175 (D).
[84] ibid 178 (7).

horrors perpetrated against the Jews and other persecuted groups had some sort of legal backing or support.[85] The dominant theory of law followed at the time was positivism. This school conceives law as something that is given by the state/sovereign and completely distinct from moral rules, values and principles.[86] As such, the only test for validity of a law is whether it is enacted by the appropriate authority following the prescribed procedural rules. If this is requirement is met the content of the law or its incompatibility with core moral percepts is irrelevant. With this twisted and dangerous understanding of the law, German courts applied various laws that stripped the Jews of their basic human dignity which ultimately led to unimaginable suffering.[87] The lesson learned from this tragic incident led to the rejection or at least the taming, of the positivist legal thinking after the Second World War. Now there is at least a widespread consensus that the content of the law and its conformity to basic fundamental moral norms is essential to its very validity.[88] A good example in this regard is the German Constitutional Court which follows a value-oriented interpretation of legal and constitutional norms centered on the value of human dignity.

1.2.2 Human Dignity in the UN Charter and International Human Rights Treaties

The massive destruction of human life as well as the violation of the dignity of the human person in the Nazi Holocaust and the Second World War had a very shocking impact on the conscience of mankind which created a 'never again' mentality. [89] This is reflected in several international treaties adopted after the end of the war. To begin with the Charter of the United Nations, it states that one of its core missions is 'to save succeeding generations from the

[85] Ingo Müller, *Hitler's Justice: the courts of the Third Reich*, translated by Deborah Lucas Schneid (Harvard University Press 1991) 68-127.
[86] ibid
[87] ibid.
[88] Dieter Grimm, *The Basic Law at 60 - Identity and Change* (2010) 11 German L.J. 33, 33-46.
[89] Daniel Levy and Natan Sznai, 'Institutionalization of Cosmopolitan Morality: The Holocaust And Human Rights' (2004) 3(2) Journal Of Human Rights 143, 143–157.

scourge of war, which twice in our lifetime has *brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women* and of nations large and small.[90] This statement nicely summarizes the gross damage done to the dignity of human beings during this period. It also attests the fact that it was a time where the intrinsic value of human life was rejected and millions were killed. In this dark period, human beings were treated as mere objects or animals possessing no intrinsic or special value. In addition, the horrific acts committed during this period fundamentally undermined the belief in the dignity of human beings and their entitlement to be treated with respect. The UN sought to 'reaffirm' and reassure this fundamental believe once again after a gross assault.[91]

Along this line, the UN member states at the time further decided to establish a particular area of law devoted for safeguarding human dignity which is international human rights law. This began with the adoption of Universal Declaration of Human Rights (UDHR) which states that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'.[92] The statement contains several key messages. First, it unequivocally proclaims the intrinsic dignity of human beings that is shared among all humans equally. It also conceives human beings as members of the same human family. This way of thinking is clearly the opposite of the narrative prevalent in the Nazi era which establishes classes among human beings based on their race and treats some as superior others as inferior. Second, the declaration also noted that without respecting the dignity of human beings it is impossible to ensure sustainable peace. When human beings are deprived of their human dignity they will resort to violence to regain it and this will lead to war. In addition, the declaration further provides 'All human beings are born

[90] The Charter of the United Nations 26 June 1945.
[91] ibid.
[92] The Universal Declaration of Human Rights (1948) preamble.

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'. [93] As such, besides recognizing the equal right and dignity of every human being, it also imposes a duty to respect one another. It further indirectly highlights that our right to dignity and our duty to respect each other is founded upon our faculty of reason and conscience that distinguishes us from other creatures. More importantly other binding human rights treaties establish a clear link between human dignity and human rights. For instance, the International Covenant on Civil and Political Rights (ICCPR) explicitly states that human rights 'derive from the inherent dignity of the human person'.[94] This clearly shows the founding or grounding role of human dignity in international human rights treaties. Regional human rights conventions such as the American Convention on Human Rights, the African Charter on Human and Peoples Rights and the Charter on Fundamental Rights of the EU also take human dignity as foundation for human rights as well as a right of its own kind.[95]

Two crucial but interrelated questions must be addressed here. The first is why do we need foundations for human rights in the first place? The second is why human dignity in particular is chosen as foundation? For those who accept the idea human beings have special worth or dignity, the derivation of human rights from human dignity is perfectly legitimate even natural. But there are scholars who oppose the need for having foundations for human rights. Among them is Micheal Ignatieff who argues that grounding human rights on intrinsic dignity of human beings is problematic because such claims are either false or contestable.[96] In his view, there is no agreement on the issue whether human beings have inherent dignity or not. Thus, basing human rights on such claims invites endless debates and undermines their legitimacy.

[93] ibid art1.
[94] The International Covenant on Civil and Political Rights (ICCPR) 1966, preamble.
[95] Barak (1) 44-48.
[96] Michael Ignatieff, *Human Rights as Politics and Idolatry*, (Princeton University Press 2001) 3-100.

In addition, other scholars who propagate similar views contend that the idea of human dignity is not a 'trans-cultural moral fact'.[97] Rather it is context specific and a culturally contingent idea. As such, it could not serve as foundation for human rights. In their view, the source of human rights is not human dignity but discourse and agreement among states because they are essential for human welfare.[98] Thus, instead of focusing on normative claims and wasting time, it is wise to focus on the pragmatic justifications of human rights.

However, these views are very difficult to accept for the following reasons. First according to Schaefer, foundationless theories of human rights are not as foundationless as they appear; they are rather based on implicit normative foundations.[99] To illustrate this point, if you ask scholars who attack normative foundations of human rights why we should respect the right to life of another human being or why we should respect human rights in general they would give two kinds of response. They would either say that everyone agrees on the importance of human life and its protection or they would argue that human rights must be respected because they protect human agency or autonomy.[100] The first response is not true in reality since many people do not agree to the fact that the life of every human being is equally worthy and must be preserved. If this is the case, we will not see arbitrary and purposive deprivation of human life every day. Further, for certain people it is totally okay to kill those who commit serious crimes. Thus, appeal to human dignity is the only means to convince or persuade such people to change their mind.[101] The invocation of human agency as justification for human right is itself based on a certain normative claim and it is not actually foundationless.

[97] Adeno Addis, 'The Role of Human Dignity in the World of Plural Values and Ethical Commitments' (2013) 31 (4) Netherlands Quarterly of Human Rights 403, 403-444.
[98] ibid.
[99] Brian Schaefer, 'Human Rights: Problems with the Foundationless Approach' (2005) 31(1) Social Theory and Practice 27, 27-50.
[100] ibid.
[101] ibid.

Second, the argument that there is no transcendental moral fact which could serve as a foundation for human rights is not true. As the drafting history of the UDHR testifies, human dignity was chosen as a foundation of human rights because there was a general consensus among states representing diverse cultural and religious believes about the special worth and dignity of the human being.[102] As such, human dignity is a morally transcendental value at least at a very high level of abstraction which enabled agreement on human rights. The religious, philosophical and cultural conception of human dignity discussed in the first section of this chapter also demonstrates this fact. Third, although discourse and agreement is essential for widespread recognition of human rights, such dialogue could not happen without a common frame of reference.[103] Human dignity could serve to facilitate dialogue which further promotes and ensures respect for human rights. In addition, human rights must not be completely left for agreement between states. This is because what is given by agreement could be taken by agreement and this would weaken the status of human rights. Thus, there should be certain normative values which these agreements are based on and constrained by, such as the respect for the dignity of the human person. Fourth, although it is important to consider the pragmatic justification of human rights, they must not be equated with protection of 'essential interest'. According to Tasiloulas the basic difference between rights and interests is that the former resist trade off and the latter could easily be ignored to preserve other interests.[104] The association of human rights with inherent human dignity makes them resistant to tradeoff or arbitrary limitations.

[102] K.Dicke, 'The Founding functions of Human dignity in the Universal Declaration of Human Rights', David Kretzemer and Eckart Klein , *The concept of human dignity in human rights discourse* (Kluwer law international 2002) 111-120.
[103] Schaefer (n99) 27-50.
[104] J.Tasioulas, 'Human dignity and the Foundation of Human Rights' in Christopher McCrudden (eds), *Understanding Human Dignity* (Oxford: British 2014) 291-312.

Before concluding this sub section, it would be proper to say few things about the general state respect for human dignity and human rights today. As noted earlier, it was a 'never again' mentality that led to the recognition of human dignity as founding value of core human rights treaties. Yet, the violation of human dignity continued even after their adoption. The miserable destruction of human life under Communism, the state enforced racial segregation and Apartheid in South Africa and the ongoing conflicts in different parts of the world are few manifestations of this fact. Although we are living in a relatively better world in terms of protection of human rights and human dignity compared to the past many challenges remain. [105] Thus, the struggle for respect for human dignity is not a war fought and won once. It is rather a continuous and never-ending fight until the dignity of every human being in every part of the world is guaranteed.

1.2.3 Human Dignity as a Constitutional Value and Right

The next stage in the development of human dignity as a legal concept is marked by its incorporation in national constitutions, whether explicitly or implicitly. Before the Second World War only very few constitutions made reference to human dignity such as the Irish Constitution. [106] Thus, the Second World War is a turning point in the emergence of human dignity as a constitutional concept and the German basic law was a pioneer in this regard. In subsequent years, the idea of human dignity as a constitutional concept spread to various countries of the world. At the moment, it is very rare to find a constitution that does not embody human dignity in its provisions.[107] Several historical incidents have contributed their part for widespread recognition of human dignity in different jurisdictions. One of these incidents is

[105] Kathryn Sikkink, *Evidence for Hope: Making Human Rights Work in the 21st Century* (Princeton University Press 2017) 9-16.
[106] Barak (n1) 49-50.
[107] E. Daly, *Dignity Rights: Courts, Constitutions, and the Worth of the Human Person* (University of Pennsylvania Press 2013) 16-53.

the end of Communism.[108] Many countries included human dignity in their constitution as a marker of new beginning and as symbol of rejecting their unpleasant past.

In these constitutions human dignity is recognized as a value or a right or both in some jurisdictions. The status of human dignity as a value and right is one of the controversial issues in the existing debates. Before engaging with that it might help to attempt to clarify the difference between the two conceptions and their practical implications. In the literal sense of the term 'value' connotes something that is really important or valuable. When the adjective 'constitutional' added to it, the term is qualified and it acquires a different meaning. A closer examination of the literature on 'constitutional values' shows two main conceptions of the phrase. The first is a text-oriented articulation that links values to the text of the constitution. As such, constitutional values are nothing but 'values represented, expressed or integrated in the constitution'.[109] The genera of the values could be moral, cultural, social or legal. Their explicit presence in the constitution attests the 'special status' or importance [110]of such value for a given community as the constitution is the bedrock of the entire normative order.

The other understanding of 'constitutional values' is a purpose-oriented conception. This approach emphasizes the purpose values are intended to achieve as constitutive element of their very definition. To illustrate, it may suffice to consider the definition of constitutional values as set of 'requirements for the appropriate or *desired interpretation, application and operationalization of the constitution* and everything dependent thereupon'.[111] This conception views constitutional values as indispensable tools, without which neither the understanding nor the implementation of constitutional norms is possible. They could also be regarded

[108] Barak (n1) 56-58.
[109] Andras Szigeti, 'Constitutionalism and value theory' in Andras Sajo and Renata Uitz (eds.) Constitutional Topography: Values and Constitutions' (Eleven International Publishing 2010) 41-42.
[110] ibid.
[111] Francois Venter, 'Utilizing Constitutional Values in Constitutional Comparison' (2001) 4 Potchefstroom Elec. L.J.1, 6.

constitutional compass whose prime role is ensuring that we are sailing in the right direction. In other words, constitutional values give life and guidance to abstract constitutional norms in the process of constitutional interpretation. Further, constitutional values could also be regarded as threads, which link constitutional norms to the actual reality on the ground thereby saving the norm from becoming outdated.[112] As such, they serve as point of entry for relevant 'extra-constitutional norms', which are imperative not only for adapting the constitution to the prevalent reality but also to shape the existing reality according to their prescription. This in turn assists the constitution to remain resilient and responsive to new developments at once. In other words, constitutional values ensure the existence of the constitution as a living document'.[113]

In his seminal work on human dignity, Ahron Barak makes some distinctions between human dignity as a constitutional value and right. One of his arguments regarding their difference is scope.[114] He argues dignity as a constitutional value is broader than dignity as a right. His other argument is an instrumental understanding of human dignity as a right, which exists for the realization of the value of human dignity.[115] The assumption here seems to be non-enforceability of constitutional values *per se*. Another prominent constitutional theorist Alexy makes his own general distinction between rights and values/principles. At the center of Alexy's theory is the conception of constitutional rights as norms and principles at the same time. For him, the main distinction between rules and principles is as follows. '*Principles are norms that require something be realized to the greatest extent possible in law and fact; they are optimization requirements. Rules, on the other hand, are norms that occupy fixed points in*

[112] Lech Garlicki, 'Constitutional Values and the Strasbourg Court' (2009-2010) 4 Acta Societatis Martensis 13, 24.
[113] ibid.
[114] Barak (n1) 12-14.
[115] ibid 148.

the field of the legally and factually possible; they are always either fulfilled or not'.[116] Following Alexy's approach, it may be possible to conceive of the value of human dignity as a principle and right to dignity as a rule.

1.2.4 Concretized Aspects of Human Dignity as a Constitutional Value and Right

Initially human dignity was an abstract idea that proclaims the 'intrinsic worth' of human beings without specifying what it means by that in concrete terms. Over time, due to the continuous effort exerted by courts and scholars, the core aspects of human dignity as a constitutional concept started to crystallize.[117] Now human dignity at its center seeks to safeguard three core aspects i.e. human life and integrity, equal worth and autonomy of all human beings as creatures of special value or status.

a) Human Dignity as respect for Human Life and Integrity

One element of human dignity that became relatively concretized over the years in different constitutional systems is respect for human life which is often invoked in cases concerning the abolition of death penalty, abortion and assisted suicide.[118] The idea also has religious as well as secular justifications. Many religions recognize the intrinsic value of human life and prohibit its destruction as it is gift of the divine.[119] Human life is also regarded by many philosophers

[116] Kai Möller, 'Balancing and the structure of constitutional rights' (2007) 5(3) International Journal of Constitutional Law 453, 459.
[117] Matthias Mahlmann, 'Human Dignity and Autonomy on Modern Constitutional Orders' in Michel Rosenfeld and András Sajó (eds) , *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012)379-383, Edward J.Berle, *Dignity and Liberty Constitutional Visions in Germany and the United States*, (Praeger, 2002) 50 ff, Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge University Press 2015) 124-132.
[118] *Cruzan v Director Missouri Department of Health* 497 U.S. 261 (1990), *S v. Makwanyane*, 1995 (3) SA 391 CC, *Stransham-Ford v. Minister of Justice and Correctional Services and Others* (27401/15) [2015] Decision No. 23/1990 (X.31.) AB of the (Hungarian) Constitutional Court (George Feher trans.) Aviation Security Act Case 1 BvR 357/05.
[119] Matthew P. Previn, 'Assisted Suicide and Religion: Conflicting Conceptions of the Sanctity of Human Life', (1996) 84 Geo. L.J. 589, 589-616.

as sacred. Dworkin for instance advocates the idea of intrinsic value of human life based on the unique contribution of each human life and the investment made in it.[120] Yet, there is no single conception of what the intrinsic value of human life means. According to Previn, the idea of sanctity of human life constitutes two core elements i.e. 'the absolute inviolability of human life and the equal value of all human life'.[121] As such, the principle requires the protection of human life from destruction. It also unequivocally affirms the equal worth of every human life irrespective of circumstances. This view radically departs from the view that ascribes different value to human life based on racial identity, religion, physical and mental fitness or contribution to the society prevalent in Nazi era.

The above conception of sanctity of human beings may be construed as absolute because it promotes the preservation of human life in all circumstances. There are however scholars who associate sanctity of human life with quality of life. They argue that what sanctifies human life is 'not mere pulse and breath' but rather qualities like 'capacity to exercise free will, to direct one's life through rational and moral choices'.[122] In the absence of this qualities human life would become impoverished and loses its sanctity. Based on this view, they argue that in limited circumstances claims for assisted suicide should be allowed based on the full consent of the patients and must not be forced to live a life deprived of its qualities.[123] This debate is not settled and different jurisdictions address the issue differently. In addition, there is also a difference regarding the point where human life starts to become valuable or to get protection from the state. This is particularly notable in the debates concerning abortion.

[120] Ronald Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (Alfred A. Knopf 1993)11-13., Eric Rakowski, 'The Sanctity of Human Life' (1994) 103 Yale L.J. 2049, 2049-2118.
[121] Previn (n119) 598.
[122] ibid.
[123] ibid.

A related aspect of human dignity that is widely recognized in different jurisdictions concerns the respect for integrity of the human person. Integrity conveys the idea that 'a human person should be respected as an integrated whole i.e. what is human must not be hurt, damaged and altered'.[124] It protects the different components of a human person physical, mental and emotional which is central to preserve human dignity. In relation to this Barak contends that 'human dignity rests on the recognition of person's physical and intellectual wholeness, one's humanity, one's value as a person-all without any connection to the extent of utility for others'.[125] The physical integrity aspect of human dignity often invoked in cases concerning torture and other acts that cause severe bodily harm to a human being.[126] Mental and emotional integrity is often raised in connection with inhuman, degrading, and humiliating treatments. In addition, this aspect of human dignity also seeks to affirm human worth by serving as a wall against humiliation.[127] Human beings are moral beings. A corollary of this nature of human beings is their sensitivity to the actions and thoughts of others about them. Hence, the respect they will have for themselves and their self-worth will diminish or flourish depending on the kind of treatment they receive from others.[128]

b) Human Dignity as Respect for Equal Worth and Concern

Another aspect of human dignity which concretized in many jurisdictions is the recognition of equal value and worth of human beings. The core idea behind it this 'All humans have an equal basic moral status. They possess the same fundamental rights, and the comparable interests of each person should count the same in calculations that determine social policy. Neither

[124] Antonio Barbosa da Silva, 'Autonomy, Dignity, and Integrity in Health Care Ethics-A Moral Philosophical Perspective' in Henriette Sinding Aasen (eds), *Human Rights, Dignity and Autonomy in Health Care and Social Services: Nordic Perspectives 1st Edition*, (Intersentia 2009)13-52.
[125] Daly (n107) x.
[126] Edward J. Berle, *Dignity and Liberty Constitutional Visions in Germany and the United States*, (Praeger 2002) 50-51.
[127] Daniel Statman, 'Humiliation, Dignity and Self respect' in David Kretzemer and Eckart Klein (eds) *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International 2002) 209-227.
[128] ibid.

supposed racial differences, nor skin color, sex, sexual orientation, ethnicity, intelligence, nor any other differences among humans negate their fundamental equal worth and dignity'.[129] As such, no one is superior or inferior in their quality as a human being. Any treatment that conveys the inferiority of some individuals or groups in their humanity is not acceptable. In addition, the old thinking that only a certain category of human beings deserve respect and recognition in exclusion of others, such as women, has also lost its currency.[130] Now human dignity is understood as something which inheres in each and every member of the human family irrespective of their place or status in the society by the sole fact of their humanity. Further, by its policies, law and measures the state is expected to demonstrate its commitment to human dignity by showing 'equal concern' and 'respect' for all human beings.[131] Here equality has two dimensions, positive and negative, which are crucial to ensure respect for human dignity. The negative aspect of equality bans discriminatory treatments that are antithetical to the respect human beings deserve as dignified creatures.[132] The grounds of discrimination could be race, sex, gender, disability, age or any other similar ground. However, to achieve true equality outlawing unjustified discrimination alone is not sufficient. Rather other crucial factors such as socio-economic conditions which contributed for the status of inequality need to be addressed through positive actions if we take human dignity seriously.[133]

Yet, even today some challenge the idea of equal dignity or moral worth of human beings. The main ground of these claims is that human beings differ significantly in their physical and intellectual capacities.[134] Some are more talented, productive and autonomous. Other human

[129] Richard J. Arneson, 'What, If Anything, Renders All Humans Morally EQUAL?' in Dale Jamieson (eds) *Peter Singer and His Critics* (Blackwell 1999) 103-128.
[130] P. Carroza, 'Human dignity in Constitutional Adjudication' in T. Ginsburg & R. Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Pub 2011) 459-473.
[131] Laurie Ackerman, *Dignity the loadstar for equality in South Africa* (JUTA 2012) 182-183.
[132] ibid.
[133] S. Liebenberg, 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 South African Journal on Human Rights 1, 1-31
[134] George Sher, 'Why We Are Moral Equals'in Uwe Steinhoff (eds), *Do All Persons Have Equal Moral Worth?: On "Basic Equality" and Equal Respect and Concern* (Oxford University Press 2015) 17-29.

beings are the exact opposites. Considering this they argue that since all humans do not have an identical level of capacities and abilities, it is not appropriate to ascribe equal dignity and worth on all on equal basis. Rather they advocate hierarchy among humans as super-human, average and herd having different worth and rights accordingly.[135] There are a number of responses to these claims. One of them is that, the mere fact of being a human person suffices to be equal in dignity and worth.[136] As such, differences among human beings in talent or abilities are irrelevant considerations in assessing their worth. This is called the species or 'common humanity' based argument.[137] The other response is based on the philosophy of Immanuel Kant. According to Kant, 'the basis of human equality is the dignity that each human person possesses in virtue of the capacity for autonomy'.[138] This partly answers the critique that not all human beings are rational and autonomous. Here, what is required is neither actual exercise of autonomy nor appropriate utilization of one's rational abilities. Since every human being possesses this capacity to a certain degree ascribing equal dignity to all seems justified. Along similar line, the former justice of the Constitutional Court of South Africa, Ackerman argues that in the debate concerning the equality of humans there is one question that is often neglected 'in what aspect are they equal?'. [139] In his view, human beings may differ in several aspects and they may be unequal in that respect. But to say they are equal or unequal we need to identify the standard for comparison first, otherwise the whole exercise would be futile. Accordingly, he argues all humans are equal in one aspect in their dignity or worth which 'is the capacity for and the right to respect as a human being'.[140] Like Kant, Ackerman also

[135] James Wilson, Nietzsche and equality, In Gudrun von Tevenar (ed.), *Nietzsche and Ethics* (Peter Lang 2007) 211-227.
[136] Arneson (n129) 103-128.
[137] ibid.
[138] ibid.
[139] Ackerman (n 131) 21-25.
[140] ibid.

invokes the 'moral' and 'intellectual' capacities of humans as the source of their special worth and dignity.

c) Human Dignity as Respect for Autonomy

The third aspect of human dignity with a widespread recognition in various systems is respect for autonomy. It is often raised in relation to cases concerning abortion, development of personality and assisted suicide. Compared to the two other core aspects of human dignity, autonomy seems to be more controversial. There are different conceptions and meanings attached to the word autonomy.[141] As such, it is difficult to come up with a precise definition of the concept in precise terms. According to Lõhmus, there are three main variations of autonomy as it is used in courts i.e. individual autonomy, Kantian autonomy and caring autonomy.[142] In her book, she discusses these aspects in relation to the autonomy jurisprudence of the European Court of Human Rights. This dimension however also appears in autonomy related cases of various constitutional courts in different parts of the world.

The individual conception of autonomy links the human dignity of the person with his ability to make choice and determine his life's destiny.[143] It refers to the freedom of every human being to pursue their own destiny or life goals in a manner they think is right without any outside intervention. To decide what is good or bad for oneself and to be one's own master.[144] The recognition of human autonomy as an aspect of human dignity requires negative and positive actions. In the negative sense it prevents anyone including the state from interfering in

[141] António Barbosa da Silva, 'Autonomy Dignity and Integrity in Health Care Ethics- A Moral Philosophical Perspective' in Henriette Sinding Aasen *et al* (eds), *Rights, Dignity and Autonomy in Health Care and Social Services: Nordic Perspectives*, (Intersentia 2009) 13-52, Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press 1988) 3-20.
[142] Katri Lõhmus, *Caring Autonomy, European Human Rights Law and the Challenge of Individualism*, (Cambridge University Press 2015) 15-44.
[143] ibid.
[144] Donrich W Jordaan, 'Autonomy as an Element of Human Dignity in South African Case Law' (2009) 9 The Journal of Philosophy, Science & Law 1, 1-15, Erin Daly, *Dignity Rights Courts, Constitutions, and the Worth of the Human Person*, (University of Pennsylvania Press 2013) 97.

the life decisions of individuals without justifiable/concrete reason. In the positive sense, a state would be required to show its respect for human dignity by creating enabling conditions for human beings to exercise their autonomy. This may include taking measures that would improve their socio-economic status without which respect for human dignity would be unrealistic. This understanding of autonomy seems to be the most accepted in different constitutional systems. Yet, there are concerns to the extent of protection of individual autonomy. The issue here is whether or not an individual should be allowed to do something that is harmful to them or violate the moral standard of the society in the name of exercising his/her autonomy. Such concerns were raised in cases concerning consensual commercial sex, dwarf tossing and sadomasochistic practices.[145] For some, as long as there is consent the choice of these individuals should be respected. For others, the fact that individual human beings live within a community justify some restrictions to their autonomy.[146]

The Kantian conception of autonomy is somewhat different from the individual one as it demands the exercise of autonomy under the restraint of moral law.[147] For Kant the very basis of the autonomy of individuals is their capacity for reason. In other words, human beings are self-governing moral agents because they 'possess moral law within' which obviate the need for outside law to govern their action.[148] This means the kind of autonomy that Kant talks about is not autonomy without any restraint. Rather the kind of autonomy that will be protected is the one which is reasonable and compatible with moral values.[149] This also raises a concern because if autonomy is interpreted as such, individual choice to engage in prostitution or dwarf tossing may not be protected because it could be regarded as unreasonable exercise of autonomy or immoral. Finally, there is also another understanding of autonomy which is caring

[145] C. O'Mahony C, 'There is No Such Thing as a Right to Dignity' (2012) 10 I.CON 551, 551-574.
[146] ibid.
[147] Lõhmus (n142) 15-44.
[148] ibid.
[149] ibid.

autonomy which seems to balance individual autonomy with interdependence of human beings.[150] This understanding of autonomy rejects atomistic conception of human beings. It rather emphasizes the importance of human interdependence and trust as a basis for exercising and developing one's own autonomy.

For the purpose of this dissertation human dignity is understood as a constitutional value and right composed of these three core aspects discussed above i.e. respect for human life and integrity, equal worth and autonomy. Yet, there are scholars who consider human dignity as extremely complex, indeterminate and useless concept.[151] The question here is if human dignity is such a complex and fuzzy concept what should we do with it? The easy way is to discard the utilization of human dignity from the discourse of constitutional rights and rely on more 'settled' notions. But the question remains, on what ground will we entrench constitutional rights and what will guide us in clarifying their content and limit? Is there an alternative concept which can do the same job human dignity is doing with the same power? There seems to be no persuasive answer on the part of those who challenge the utility of the concept in constitutional law. Further, this approach is dangerous and does more harm than good because it will leave constitutional rights without a strong grounding and expose them to violation. Further, it will leave us with no guiding means in resolving complex conflict of values.

It is also important to bear in mind that without human dignity, as the foundation stone for human rights, one cannot effectively interpret the content, scope and limitation of human rights in the constitution. If judges are expected to meaningfully and wisely resolve a dispute

[150] ibid.
[151] Ruth Macklin, 'Dignity Is A Useless Concept: It Means No More Than Respect For Persons Or Their Autonomy' (2003) 327 (7429) BMJ: British Medical Journal 1419-1420, C. McConnachie, "Human Dignity, 'Unfair Discrimination' and Guidance," (2014) 34(3) Oxford Journal of Legal Studies 609, 609–629, Neomi Rao, On the Use and Abuse of Dignity in Constitutional Law (2007-2008) 14 Colum. J. Eur. L. 201, 201-255.

concerning constitutional rights, understanding their foundation is imperative. In addition, human rights would lose their leverage when they are distanced or alienated from their foundation, which is human dignity. Given the powerful appeal the concept has, any claim that is linked to it is difficult to easily ignore.[152] As such, the State would be expected to provide a serious justification for its action or inaction if it violates human dignity or the intrinsic worth of human beings by doing or failing to do something. In addition, there exists a direct correlation between the denial of human dignity and the violation of human rights. The denial of human dignity could happen in an explicit or implicit manner. When it is explicit the perpetrators of human rights violations often attempt to deprive the human quality or dignity of a certain individual or group victims. Such perpetrators consider them as a lower class of human beings or as sub- humans not deserving any kind of respect or recognition because they are not humans. When denial of dignity happens implicitly it takes the form of not paying attention and of not granting equal consideration to a certain category of individuals group. For instance, we may take the situation of homeless people. Considering all this, taking human dignity out of constitutional rights discourse seems impossible.

If this is the case, the alternative way of dealing with human dignity is recognizing its importance. This approach begins by accepting the irreplaceable nature of human dignity in constitutional rights discourse since no concept has the power and richness human dignity possesses. Thus, instead of discarding the concept which does more harm than good to the protection of constitutional rights, this approach seeks further clarification and understanding with the aim of arriving at a greater consensus and predictability to the meaning of the concept in due course. On this point, Barak argues the novelty of human dignity will pass overtime and its meaning, role and justification will be solidified as time goes by.[153] Further, human dignity

[152] Stephen Riley, 'The Function of Dignity' (2013) 5(2) Amsterdam Law Forum 90, 90-106.
[153] Barak (n 1) 10-12.

is also a reflection of the complex nature of human beings. Carozza also supports the desirability of making human dignity more 'workable' and understandable instead of excluding it. [154] This thesis is part of this venture. Further, many constitutional systems have chosen to use, interpret and apply human dignity despite its richness and complexity.[155] In addition, the principle of proportionality or balancing could be useful in resolving conflicts between the various aspects of human dignity.[156]

1.2.5 Human Dignity and Approaches of Constitutional Interpretation

Before concluding this section it would be pertinent to address one last issue concerning approaches of constitutional interpretation. In the existing literature and constitutional practice, there are three main theories regarding how a constitution should be construed and what things must be considered by judges. The first approach is what is usually refereed as 'originalist' which gives prominent place to the intent of the drafters of the constitution at the time of its making.[157] According to this theory, the primary factor that should guide a judge in giving meaning to abstract rules embodied in the constitution is the intent of the framers which could be inferred from documents containing the drafting history and debates. The second approach is called a 'textualist' theory of constitutional interpretation.[158] In determining the meaning of abstract constitutional norms, it requires judges to give a particular emphasis to the ordinary

[154] Paulo G. Carozza, 'Human Rights, Human Dignity and Human Experience' in Christopher McCrudden (eds), *Understanding Human Dignity* (Oxford : British Academy 2014). 620-629.
[155] Horst Dreier, 'Human dignity in German Law' in Marcus Duwell (eds), *The Cambridge handbook on Human Dignity Interdisciplinary Perspectives* (Cambridge university Press 2015) 375-384, Eberle E.J , 'Human Dignity, Privacy, and Personality in German and American Constitutional Law' (1997) 4 Utah Law Review 963, 963-1056, Tamar Hostovsky Brande , 'Human Dignity as a Central Pillar in Constitutional Rights Jurisprudence in Israel: Definitions and Parameters' in Gideon Sapir, Daphne Barak-Erez, and Aharon Barak, (eds.), *Israeli Constitutional Law in the Making* (Hart Publishing 2013) 267-284, Ariel L. Bendor and Michael Sach , 'The Constitutional Status of Human Dignity in Germany and Israel' (2011) 44 (25) Israel Law Review 25, 25-61, Porat I., 'The Use of Foreign Law in Israeli Constitutional Adjudication' in Gideon Sapir, Daphne Barak-Erez, and Aharon Barak, (eds.), *Israeli Constitutional Law in the Making* (Hart Publishing 2013) 151-171, M. Goodman, 'Human Dignity in Supreme Court Constitutional Jurisprudence' (2005) 84 Neb. L. Rev. 740 740-794, N. Rao , 'Three Concepts of Dignity in Constitutional Law'(2013) 86 Notre Dame L. Rev. 183, 183-271.
[156] Barak (n 1) 164-167.
[157] Barak (n1) 69-73; see Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press 2005)
[158] ibid.

meaning of words and phrases of the constitutional text beside its structure. As such, meaning is constructed by applying the literal meaning of the text without taking in to account other considerations.

The third approach of constitutional interpretation is referred as 'value oriented' 'moral reading' or 'purposive' constitutional interpretation.[159] It claims to address the limitations of 'originalist' and 'textualist' approaches of constitutional interpretation. Originalist theory of interpretation is heavily criticized as backward looking as it mainly focuses on the intent of the makers without considering new developments.[160] This makes a constitution static and unresponsive to changes. Critics of this theory contend that a constitution is a 'living tree' and it must grow over time and adapt itself to changing circumstances.[161] Otherwise, it would become outdated and useless. The major critique against the textualist approach of constitutional interpretation is that it excludes the historical, political, social and moral consideration that shape the meaning of a certain constitutional norm[162] It also presumes that legal texts are value neutral and have no link to morality. According to Dworkin, constitution itself expresses 'moral values' in different forms.[163] As such, perceiving it as a value free and neutral document is not appropriate. Based on this, he proposes what he calls a 'moral reading' of the constitution.[164] This approach requires judges to closely look values that underpin the constitutional text in interpreting it. Yet, he argues that this does not give judges the discretion to put their own conception of what the constitutional value requires.[165] Rather they should consider other factors such as constitutional history, tradition and previous precedents in

[159] ibid.
[160] Ronald Dworkin, 'The Moral Reading of the Constitution', The New York review of Books, March 21, 1996 issue <https://www.nybooks.com/articles/1996/03/21/the-moral-reading-of-the-constitution/> Accessed 8 July 2019 & see Ronald Dworkin, *Freedom's Law The Moral Reading of the American Constitution*, (Harvard University Press 1997)7-19.
[161] ibid.
[162] ibid.
[163] ibid.
[164] ibid.
[165] ibid.

constructing meaning. In my view, Dworkin's theory is not clear enough in showing how the moral reading of a constitution is conducted and what the crucial considerations are in doing so.

The 'purposive' interpretation theory of Ahron Barak provides a better explanation with its particular focus on human dignity. According to Barak, in conducting constitutional interpretation, the primary guidance for judges should be the purpose that a certain constitutional provision was intended to serve.[166] This is not the same as the intent of the drafters in the originalist theory. Barak, divides the purpose that constitutional text serves as 'subjective' and 'objective'. Under a constitution's objective purpose, he includes factors like history, drafter's intent, text, structure and language.[167] These factors however are not sufficient or determinative of the meaning. They must rather be complimented with the subjective purposes of the text which include the intent of the system, comparative jurisprudence and international law.[168] These considerations are also necessary to prevent or constrain judges from arbitrary exercise of interpretive discretion. In my view, among the three approaches of constitutional interpretation discussed so far the soundest theory for construing meaning of human dignity embodied in a constitutional text is the purposive approach. This is because this theory is the most comprehensive one as it takes in to account various factors which contributes to the richness of interpretation including the use of foreign precedent or comparative law. In addition, the purposive approach also ensures the responsiveness of the constitution to emerging developments and its continuous validity instead of amending the constitution every time.

[166] Barak (n1) 67-100.
[167] ibid.
[168] ibid.

1.3 Migration of Constitutional Ideas: Human Dignity

1.3.1 The Terminology of 'Migration' and Debates

The transfer of legal norms from one system to the other is an age-old phenomenon. Various terminologies are used over the years to refer to it, including 'legal borrowing', 'legal transplant', 'cross fertilization' and 'migration'.[169] These terms are often used as synonym referring to the same thing. Yet, there is a debate among scholars regarding the propriety of using these terminologies. For instances, Choudhry advocates the use of the term 'migration' instead of terms like 'legal borrowing' or 'constitutional borrowing'. His core argument is that 'borrowing' or 'transplant' have certain problematic connotations. They convey the message that one system has ownership over a certain legal norm and controls its application. [170] But in reality, this is not the case and legal norms may travel even without the knowledge of the jurisdiction they originated from. Further, borrowing and transplant may imply that what is taken from one system is applied as it is without any change or modification. Yet, often legal norms received from one system are altered in the process of transfer and adapted to fit the local context.[171] He also raises the fact that borrowing implies return and what is transplanted is always positive, which is not the case actually.

In the place of constitutional borrowing or transplant, Choudhry prefers the use of the relatively new terminology 'migration' which 'refers to all movements across systems, overt or covert, episodic or incremental, planned or evolved, initiated by the giver or the receiver, accepted or rejected, adopted or adapted or, concerned with the substantive doctrine or with institutional design, some more abstract or intangible, constitutional sensibility or ethos'.[172] For the purpose

[169] S. Choudhry, 'Migration as a new Metaphor in Comparative Constitutional Law' Choudhry (eds), The Migration of Constitutional Ideas, (Cambridge University Press 2006) 1-35.
[170] ibid.
[171] ibid.
[172] ibid.

of this dissertation, this definition will be used discuss the movement of human dignity as a constitutional concept between various jurisdictions at both national and supra-national levels. The main reason for this is the comprehensive nature of the term as it encapsulates the transfer of norms, principles and institutions. Further, the various forms of transfer as well as their actual modification, reception or rejection of constitutional ideas in the process are nicely included in the terminology of migration. This being said, the next important issue concerns the debates on the ease or difficulty of migration of legal norms.

Two names that are often mentioned in the literature concerning this matter Alan Watson and Pierre Legrand. According to Watson, the transfer of legal rules and norms is something which could be done without much difficulty.[173] The reason for this is the absence of deeply imbedded connection between law and society. As such, the legal rules in one system can be transplanted as well as effectively work in another system. He argues the 'history of law is history of legal borrowing and it is the driving force of legal development in several systems'.[174] To support his claim, he demonstrates how private law developed in Europe/England as a result of transplant or borrowing. Here, it is important to bear in mind that the conclusion of Watson is mainly based on the analysis of the development of private law. As such, his argument may not work for public law with the same degree of force or logic.

In contrast to Watson, Legrand argues that the successful transfer of legal rules from one system to the other is very difficult or nearly impossible.[175] The reason for this is that legal rules have strong bonds or ties with the history and culture of a certain community. In his view, law itself is a 'cultural fabric' shaped and molded by it.[176] As such, the law governing relations in one

[173] A. Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press 1993) 1-30.
[174] ibid.
[175] P. Legrand, 'The Same and Different' in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (Cambridge University Press 2003) 240-311.
[176] ibid.

society cannot be transplanted to another society with a different historical and cultural context. In addition, Legrand is also critical of the focus on the part of comparative law scholars on transplants, identifying similarities and convergence.[177] In his view, legal norms in two legal systems are only similar on the surface. Hence, comparative law study must be conducted with the object of showing and explaining differences of the meaning attributed to legal norms in various legal orders rather than similarity.

Between these two extremes there is a third theory developed by Günter Frankenberg which he called the IKEA theory.[178] According to him, the debate over the transfer of legal norms has been dominated by Watson and Legrand for many years. Instead of arguing in favor or against legal transplants, Frankenberg tried to analyze the different stages involved in the transfer of legal norms from one system to another in the context of constitutional norms and principles and challenges associated with it. His work was inspired by the 'travelling theory' of Edward Said. [179] These stages are the initial phase, standardization and de-contextualization, inclusion in the global constitutional reservoir and re-contextualization.[180] A constitutional norm starts traveling from a certain 'point of origin' which he calls the initial phase of transfer.[181] Yet, it may be difficult to precisely locate or trace the origin of a certain concept as it may be influenced by different factors or have presence in different places in various forms. The second stage of transfer is what he calls 'de-contextualization'.[182] In the place where the concept originated, there is a specific social, political and cultural context. To make the constitutional norm ready for transfer, it will be detached from its context and standardized.[183]

[177] ibid.
[178] G.Frankenberg ,'Constitutions as commodities: notes on a theory of transfer' in Günter Frankenberg (eds.) *Order from Transfer: Comparative Constitutional Design and Legal Culture* (Edward Elgar Pub 2013). 1-26
[179] Günter Frankenberg , 'Constitutional transfer: The IKEA theory Revisited' (2010) 8(3) International Journal of Constitutional Law, 563–579.
[180] Frankenberg (n 178) 8.
[181] ibid 8-26.
[182] ibid.
[183] ibid.

This facilitates the transfer of the constitutional item to what he calls the global constitutional reservoir.

Frankenberg uses the analogy of IKEA to describe the global constitutional reservoir which is basically a place where standardized constitutional items which originated from different places are stored and displayed for sale.[184] The customers which purchase these constitutional items are those involved in constitution making and interpretation. The fourth stage of travelling is called re-contextualization which is a complicated one compared to the others.[185] It is a stage where a certain constitutional norms/concepts or institutions transfer from the global market to a particular country. The actors involved in the process are primarily constitutional drafters and judges. This process is sophisticated because it requires these actors to adapt the concept to the societal and cultural context of the country. It is also a stage where the meaning of the concept is unpacked and applied to resolve concrete cases. Various outcomes may ensue from this process. The original meaning of the concept may remain intact, it could be completely changed or modified, or it could be rejected or misapplied depending on circumstances.[186]

All these theories concerning the transfer and migration of legal norms/concepts offer useful insights to understand the process. However, it is not necessary to take extreme position either in approving transplants without any qualification or rejecting them entirely. Whether we like it or not the migration of constitutional norms and principles is happening. It is also undeniably contributing for constitutional development either in making or interpretation. Yet, it is also important to be sensitive to political, historical and social context while studying the migration of constitutional concepts. This is particularly true in the case of constitutional law which is

[184] ibid.
[185] ibid.
[186] Frankenberg (n 178) 19-24.

very much affected by historical and political context of the country.[187] As such, it is only when we consider contexts seriously that we would have a deeper understanding of the phenomena of migration. Further, the focus should not be merely showing similarities or differences between different legal orders rather explaining the reason behind as well as the possible points of intersection.

1.3.2 Justification/Rationale for Migration of Constitutional Ideas

Several studies demonstrate that there is an increasing trend of migration of constitutional ideas both at the stages of constitution making and interpretation.[188] The phenomena of globalization, development of information technology and globalization of legal education are some of the factors often associated with this development. Relatively speaking some constitutional systems are more open to migration of constitutional norms and principles.[189] South Africa is a good example in this regard. Other systems are relatively closed and they do not usually refer to the jurisprudence of other courts. The Constitutional Court of the Federal Republic of Germany could be mentioned in this category.[190] While some courts openly engage with other courts others use foreign jurisprudence without any acknowledgement. Further, the type of the legal system a country follows also partly determines the extent of migration of constitutional ideas. Saunders argues that the extent of migration and use of foreign jurisprudence is higher in the common law systems compared to their civil law counterparts.[191] The main reason is that the precedent based reasoning and the adversarial nature of the procedure gives the judges more opportunity to engage with comparative law. Further, the adversarial nature of the proceeding

[187] C. Saunders, 'Judicial Engagement with Comparative Law', in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Pub 2011) 571-598.
[188] ibid.
[189] ibid.
[190] ibid.
[191] ibid.

also enables parties to bring relevant foreign jurisprudence to the attention of the court.[192] Yet, the increasing migration of constitutional ideas from one system to another is seen as problematic by some legal scholars and judges. For instance, the late justice of the US Supreme Court Scalia is one of the critical voices.[193] In his view, referring to the constitutional systems of another jurisdiction is only appropriate for the task of constitution making. In the case of constitutional interpretation judges must only focus on their own systems and its peculiar underlying values.[194] Scalia provides several justifications for his position the core among them is fear of judicial activism and illegitimacy of courts. In his view courts derive their legitimacy from interpreting their own constitution which is the manifestation of the sovereign power of the people.[195] When courts refer to a foreign constitution to interpret their own, they undermine the sovereignty of the people as well as the very basis of their legitimacy. Further, the use of foreign constitutional jurisprudence also opens the door for judicial activism and manipulation.[196] His fear is that if judges are allowed to invoke foreign authorities in the process of constitutional interpretation, they could justify their own policy preferences in judicial language which is not appropriate.

In contrast to Scalia, an overwhelming number of scholars and judges accept the importance of migration of constitutional ideas including the use of foreign case law and precedents in constitutional interpretation. For instance, Justice Breyer of the US Supreme Court strongly supports reference to the decision of other constitutional systems with the 'objective of to learn something' from them.[197] The assumption here is that the constitutional problems one system is facing may have been dealt with by another one. Thus, studying other systems either helps

[192] ibid.
[193] Norman Dorsen, 'The Relevance of Foreign Legal Materials in U.S. Constitutional cases: A conversation between Justice Antonin Scalia and Justice Stephen Breyer' (2005) 3(4) I·CON, 519–541.
[194] ibid.
[195] ibid.
[196] ibid.
[197] ibid.

in understanding the problem further or in finding solutions. Further, Breyer also does not accept the idea that by referring to jurisprudence of other jurisdictions, US courts are eroding the sovereignty of the people. This is because the decisions referred have no binding or authoritative effect.[198] Thus, considering them in no way undermines the legitimacy of courts in interpreting the Constitution.

Other scholars also underscore the importance of migration of constitutional ideas for a number of reasons. First, in those jurisdictions with underdeveloped constitutional systems, learning from the experience of other systems both in designing their constitution and interpreting it is extremely crucial to develop their own.[199] In addition, opening the door for migration of constitutional ideas also has a pragmatic justification. This is because rather than 'reinventing the wheel' from the scratch it makes more sense to consider the experience of other systems in how they dealt with a certain constitutional problem and the solution they provide for it which is also tested in practice.[200] Doing so may also be efficient from a cost and time perspective.

The other important issue in relation to migration of constitutional ideas concerns the methodological approaches on the use and application of comparative law. According to Choudhry, there are three main perspectives i.e. universalist, genealogical and dialogical.[201] These perspectives offer a different account of why legal norms migrate and what justify the use of foreign case law or jurisprudence. The Universalist point of view provides that legal rules and principles are transcendental in essence rather than particular and context specific.[202] It also downplays the differences in doctrines and specific legal rules in different legal systems. The focus is rather on the similar actual functions different legal rules and doctrines perform

[198] ibid.
[199] G. Halmai , 'The Use of foreign law in constitutional interpretation' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law (*Oxford University Press 2012) 1328-1347.
[200] ibid.
[201] S. Choudhry, 'Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1999) 73 ¾ Indiana Law Journal 820, 820-892.
[202] ibid.

and the underlying principles that are shared.[203] Further, Universalist approach assumes that the legal rules have a universal underlying aim or purpose. This is usually associated with fundamental rights recognized in national constitutions.[204] The argument here is that fundamental rights recognized under various constitutions essentially serve the same purpose. For this reason, it is perfectly legitimate to consider the jurisprudence of other constitutional systems and learn from them since they are pursuing a purpose that is universal in nature.[205] This approach makes sense to a certain extent particularly in relation to human rights since they are presumed to be universal and applicable to all. Yet, completely ignoring contextual factors such as history and culture even in relation to human rights is problematic. For this reason, this approach may not be appealing to all constitutional systems specifically in those areas which are morally and culturally sensitive.

The second perspective which Choudhry analyzes in his article is the genealogical approach.[206] Unlike its universalist counterpart, it does not consider that legal problems and solutions as essentially universal which gives courts in a particular system the liberty to learn from any system, they think is advanced in a certain area of law. In contrast, migration of constitutional idea is justified on the basis of 'genealogical relationship' between two or more systems.[207] As such, it is only appropriate for judges to refer to a constitutional system from which their own system is influenced by or derived from. This position is similar to Justice Scalia's with respect to US constitution. The strong side of this approach is that it enables courts to have to have a deeper understanding of their own system by studying its roots or origin. They may also learn something from the source system. The core limitation of this perspective is that it narrows down the interpretive choices available to judges to few sources. These exclude other systems

[203] ibid.
[204] ibid.
[205] ibid.
[206] ibid.
[207] ibid.

which may offer useful insights on the issue the court is dealing with. It may also be difficult to trace the origin of a certain legal concept, as migration of constitutional ideals could occur without notice.

The third methodological approach concerning the justification and manner of using comparative law is dialogical.[208] Compared to the two approaches discussed above the dialogical perspective does not primarily aim at discovering one best universal solution to a particular legal problem. Instead, it accepts that the solution different systems offer to a certain legal problem may vary depending on context. It also does not restrict judges to refer only to jurisdictions which have historical attachment with their own. According to Choudhry, the dialogical approach rather aims at better understanding the normative foundations and underlying values of one's own system through the lens of others.[209] Thus, a dialogical perspective enables self-reflection and self-understanding. In doing so, judges will identify what makes their system unique and what attributes it shares in common with others. This in turn provides courts a justification for adopting the solutions adopted by others in case of similarity or rejecting them based on sufficient explanation in case of differences in fundamental assumptions.[210] The dialogical perspectives address the concern in Universalist approach that gives insufficient attention to contextual factors and possible differences between constitutional systems. The focus rather is on explaining their cause through dialogue. Based on the dialogue, courts in one system will have the option to either endorse or reject interpretation by giving justifications. It also does not restrain judges from considering systems which have no historical relationship with their own which expands range of options for

[208] ibid.
[209] ibid.
[210] ibid.

comparison. For these reasons, the dialogical methodological approach to comparative law seems more sound or appealing.

The other controversial matter related to use of comparative law or foreign precedents in judicial reasoning concerns the criteria for selection. According to Justice Scalia, the idea of using foreign precedents in constitutional interpretation lends itself to manipulation because judges will 'cherry pick' a decision form a jurisdiction which support or favor their decision/position while ignoring contrary precedents.[211] This is a valid concern and some scholars have attempted to study this problem in depth. However, there is no universally applicable criteria which courts in various jurisdictions use as a basis for selecting a particular decision for engagement and dialogue.

Even in some cases judges do not bother at all to explain or justify their choice or why they relied on a certain judgment from other systems. This makes their selection arbitrary and problematic. Yet, there are some common explanations offered as justifications for picking a legal rule or precedent from a particular jurisdiction. These include similarity in language, legal system, underlying constitutional assumptions, culture, level of economic development as well as the prestige of the other system.[212] The important thing worth nothing here is that ideally it would be is important for judges to always provide a concrete justification for why they have relied on a particular decision from a particular jurisdiction. In the absence of this they could not escape the charge of arbitrariness which undermines their legitimacy.

[211] Dorsen (n 193) 519–541.
[212] Saunders (n 187) 571-598.

1.3.3 Migration of Human Dignity

Like many others concepts human dignity as constitutional idea travelled across space and time. Three historical incidents have massive contribution in this regard i.e. the Holocaust, the end of the Second World War and the collapse of communism.[213] A common thread that connects all these historical incidents are gross violations of human dignity. As symbol of rejection of these tragic eras human dignity started to acquire increasing recognition both international treaties as well as domestic constitutions.[214] In the sphere of constitutional law, the German Basic Law is a pioneer in granting human dignity a central place as a core organizing principle and foundation of the entire legal order. It has also influenced several constitutions including South Africa in the design and interpretation.[215]

Human dignity as a constitutional concept has also certain peculiar features which makes it an interesting subject in relation to the migration of constitutional ideas. This is mainly because the concept has a universal and contextual nature at the same time.[216] What makes it universal is its appeal to all systems regardless of differences in history and cultural context. It is also present in constitutions of almost all nations in the globe explicitly or implicitly.[217] This universal dimension of human dignity and its presence in all constitutions has given judges the justification to look and learn from how other courts have interpreted and applied the notion because it is a concept that is assumed to belong to all at a very high level of abstraction. In other words, it is serving as a constitutional *ius commune* or common language or terminology

[213] Barak (n1) 49-65.
[214] Catherine Dupre, 'Constructing the meaning of Human dignity: four question' in Christopher McCrudden (eds.), *Understanding Human Dignity* (Oxford: British Academy 2014) 113-121.
[215] H. Botha., 'Human Dignity in Comparative Perspective' (2009) 2 STELL LR 171 171-220.
[216] H. Botha, "Human dignity: constitutional right, absolute ideal, or contested value?" in M Jovanovic and I Krstic (eds) *Human rights today – 60 years of the Universal Declaration* (Eleven International Publishing 2010) 195-210.
[217] Barak (n1) 49-65.

for courts to engage and dialogue with one another.[218] This universal dimension of human dignity facilitates its migration from one system to another.

Human dignity is also understood as a concept that is partly context dependent. [219] This means although it has a universal meaning at a higher level of abstraction, applying it to concrete cases require adapting to the historical and cultural context of the country. This also facilitates constitutional dialogue and mutual learning because courts will engage in a justifying exercise to demonstrate whether their particular context merits a different understanding of human dignity compared to other systems. This dialogue could happen at both horizontal level between constitutional courts of various jurisdictions or between supra-national bodies and domestic courts. In this exercise human dignity serves as a common frame of reference or terminology for dialogue and engagement.

Despite the interesting nature of migration of human dignity as a constitutional concept and its immense importance only few studies have been conducted on it so far and there exists a significant gap in existing literature. One of these studies was done by Catherine Dupré on the importation of the German conception of human dignity to Hungary. [220] This work extensively deals with the migration of human dignity from the German constitutional system to Hungary following the downfall of the Communist regime in the latter. Dupré also highlights factors which have contributed for the migration including the familiarity of the judges at the Hungarian Constitutional Court with German language and their legal education as some of them studies in Germany.[221]

[218] Paolo G. Carozza, "My Friend Is a Stranger": The Death Penalty and the Global *lus Commune* of Human Rights (2003) 81 Texas Law Review, 1031, P Carozza., 'Human Dignity and Judicial Interpretation of Human Rights: A Reply, 19(5) The European Journal of International Law 931, 931 – 944.
[219] Botha, 'Human Dignity in Comparative Perspective' (n 215) 171-220.
[220] C. Dupre, *Importing Law in Post Communist Transitions: The Hungarian Constitutional Court and the Right to Human Dignity* (Hart Publishing 2013) 65-104.
[221] ibid.

Besides identifying these factors this work also actually looks at the different understandings of human dignity between the two systems following transfer and explain the possible reason for it. According to Dupré, the Hungarian conception of human dignity is mainly associated with individual autonomy compared to its German counterpart which considers communal dimensions as well.[222] The reason for this divergence, according to her, is the grave suppression of individual autonomy during the communist rule in Hungary. As such, judges at the Hungarian constitutional court took the idea of human dignity from Germany and modified it to fit their historical and local context.

The other notable work on the area is done by Vicki C. Jackson who considers the role of human dignity in US state constitutions and the need for judicial dialogue.[223] Human dignity is absent from the US Constitution as an explicit concept. Some consider this fact as a possible explanation of the limited role human dignity in the American constitutional jurisprudence. Jackson's work focuses on US state constitutions such as Montana which expressly recognize human dignity.[224] Here the concept is also playing a crucial role in constitutional interpretation. According to Jackson, the main reason for this is that during the drafting of the Montana constitution, the idea human dignity was taken from the constitution of Puerto Rico.[225] Further, Montana courts also consider the human dignity jurisprudence of other courts in their judicial reasoning and this has contributed to the development of the concept and its crucial role in resolving concrete cases. Based on this, Jackson call on courts at the federal level to engage with and learn from the human dignity jurisprudence of state courts which may offer interesting insights.[226]

[222] ibid.
[223] Vicki C. Jackson, 'Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse' (2004) 65 Montana Law Review 15, 15-65.
[224] ibid.
[225] ibid.
[226] ibid.

Conclusion

This chapter has provided brief account of the evolution of human dignity as a constitutional concept, its role in major constitutional systems and its migration mainly from a theoretical point of view. One of the core conclusions of this chapter is that human dignity is a concept that occupies a central place in religious, philosophical and cultural worldviews of various societies. More importantly, the anthropological and religious study conducted on some indigenous African communities such as the Dinka, Zulu and the Igbo demonstrates that the idea of respect for human dignity is not alien to Africa. It is rather expressed and manifested in different forms. Thus, cultural values of African communities could serve as input to further enrich and entrench the idea of human dignity rather than undermine it. This is also compatible with the understanding of human dignity as a universal and culture specific concept at the same time. Though the respect for the dignity of the person is a universal value how we manifest that respect may differ to certain extent.

The second grand conclusion of this chapter is that human dignity has become an important constitutional concept over the years, and it is playing a crucial role in various constitutional systems across the globe. It was also noted that historical factors such as the Holocaust and the Second World War contributed to the emergence of human dignity as a legal concept in core international human right treaties. In these instruments, human dignity served as a foundation or source for a wide range of human rights. Its common appeal to states of diverse religious and cultural outlooks facilitated an agreement on human rights. This was followed by a widespread recognition of human dignity in national constitutions as a constitutional value and right in almost all constitutions in different parts of the world. Yet, human dignity as constitutional concept is being criticized for being vague, indeterminate and useless. In its

defense, its relative novelty as a constitutional concept, its complexity and the irreplaceable grounding and interpretive role it is playing could be mentioned.

Further, over the years its meaning as constitutional concept has also relatively concretized embodying three core dimension or aspects at its core i.e. respect for human life and integrity, equal worth/concern and autonomy. The concept is being increasingly used by judges as interpretive guide for elaborating meaning and scope of fundamental rights in several constitutional systems including Germany, Israel, Canada and United states. These systems have influenced or shaped the understanding of human dignity in other constitutional orders. It is also argued in this chapter that compared to 'originalist' and 'textualist' approaches of interpretation, purposive approach is preferable for interpreting human dignity as a constitutional value and right. This is because purposive approach considers several factors including local culture and comparative law in determining its meaning of human dignity. It also ensures adaptability of its meaning to the evolving and changing realties.

Finally, the chapter highlighted issues and debates concerning the migration of constitutional ideas in general. One of these issues concerns the appropriate metaphor or terminology for describing the transfer of norms between various systems. It was noted that migration is a better term to enunciate this phenomenon for its comprehensiveness and sensitivity to its complexity. In addition, the two extreme positions have dominated on the possibility or impossibility of effective migration of legal norms. Both approaches have their own strength and limitations. Yet, mid-way approach that accepts the importance of migration while requiring the proper contextualization of norms was advocated in the chapter. In addition, the pragmatic as well as normative justifications for using comparative jurisprudence or engaging in dialogue with other courts were discussed. One thing worth noting here is that this task is cumbersome as there are legitimacy and methodological challenges. If judges want to avoid these criticisms, they must

give adequate justification, why they picked a certain decision from a certain system and rejected others. Finally, the review of existing literature on the migration of human dignity showed that this subject still remains unexplored by and large. However, few studies conducted the issue demonstrate that migration and constitutional dialogue is essential factor for the development of human dignity in different constitutional systems.

Chapter 2 – The Role and Migration of Human Dignity in South African Constitutional Order

Introduction

The South African human dignity jurisprudence has attracted a considerable degree of scholarly attention since the adoption of the Interim Constitution in 1993 and the landmark *Makwanyane* ruling. Several books and scholarly articles have addressed the subject in different ways.[227] This is not surprising at all given the richness of the human dignity jurisprudence of the South African Constitutional Court. Accordingly, this chapter does not promise to deliver something that is entirely 'novel' or 'original'. Its prime objective is rather to conduct an in-depth examination of the existing case law and scholarly works on the subject, to understand and appreciate the development of the concept in the South African constitutional system. This in turn serves as groundwork for assessing and analyzing the role and migration of human dignity in other African constitutional orders, which have not received any scholarly attention.

In addition to this, the chapter also adds to the existing body of knowledge by incorporating latest developments in the human dignity jurisprudence of South Africa. With these objectives in mind, the chapter is structured in five parts. The first part of the chapter looks into the darkest

[227] Laurie Ackerman, *Dignity the loadstar for equality in South Africa*, (JUTA 2012), Henk Botha, 'Human Dignity in Comparative Perspective' (2009) 2 STELL LR 171, 171-220, S. Liebenberg., 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 South African Journal on Human Rights 1, 1-31 ,Drucilla Cornell and others (eds), *The Dignity Jurisprudence of the Constitutional Court of South Africa: Cases and Materials*, Volumes I (Fordham University Press 2013), Pierre De Vos, Warren Freedman, and Danie Brand (eds.), *South African Constitutional Law in Context* (Oxford University Press 2014) 417-466 , R O'Connell , 'The role of dignity in equality law: Lessons from Canada and South Africa' (2008)6(2) I•CON,267, 267–286 , D.W Jordaan, 'Autonomy as an Element of Human Dignity in South African Case Law'(2009) 9 The Journal of Philosophy, Science & Law 1, 1-15, Cornell D., *Law and Revolution in South Africa: Ubuntu, Dignity, and the Struggle for Constitutional Transformation, Just Ideas* (Fordham University Press 2014), T. Metz, 'Dignity in the Ubuntu tradition' in Marcus Düwell and others (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspective*s (Cambridge University Press 2014) 310-317, Arthur Chaskalson, 'Dignity as a Constitutional Value: A South African Perspective'(2011) 26 Am. U. Int'l L. Rev.1377, 1377-1407.

period of South African history, Apartheid. Lessons from this period have immense significance to appreciate the central role of human dignity in the Constitution of South Africa. The second part of the chapter deals with the key features of the South African Constitution relevant for the study. It also describes the mandate mission and jurisdiction of the Constitutional Court of South Africa (CCSA). The third part of the chapter investigates the status of human dignity in the text of the South African Constitution as well as its role in constitutional interpretation. This section mainly analyzes the human dignity jurisprudence of the CCSA by dividing it in to the core elements of human dignity i.e. respect for human life and integrity, equal worth and autonomy. The fourth part of the chapter is devoted to assessing the indigenous human dignity jurisprudence of the CCSA. The use of indigenous values such as *ubuntu* in construing the meaning of human dignity will be addressed in greater depth. The final section of the chapter deals with the migration of human dignity into the South African Constitutional order. The unique constitutional mandate to engage with foreign law, the form, typology and the role of such engagement in the development of the idea of human dignity will be examined. This will be followed by a short conclusion that summarizes the core findings of the chapter.

2.1 Apartheid History of South Africa and its Link to Human Dignity

In order to appreciate the unique and central place of human dignity in South African constitutional order, it is immensely important to begin with the Apartheid system that was in place prior to the adoption of the present constitution. In the literal sense, the word 'Apartheid' means 'separateness' or 'apartness'.[228] It is often used to describe the ideology or policy of the white minority government in South Africa concerning race relations. At the core of this

[228] Saul Dubow, *Apartheid 1948-1994* (Oxford University Press 2014) 10.

ideology is the division of South Africa based on race as White, Black and Colored.[229] These classification in turn determines the nature and amount of the right one can demand or seek in the polity. The origin of the ideology could be traced back to the arrival of Europeans in South Africa for the first time. In 1652 Dutch East India Company set up a 'trading post' in the Cape region with the objective of supplying food and other necessary things for ships sailing to India.[230] For this purpose, employees of the company began to conduct some agricultural activities in a small plot of land. Overtime, the intention of the new settlers changed to that of conization and possession of more land which led to a conflict with the indigenous Khoisan people. Using their advanced weaponry, the white settlers managed to defeat the Khoisan and take away large tract of land from them.[231] They also subjugated the people and used their labor for carrying out agricultural and industrial activities. Over the years, the White settlers managed to expand further and control about the 85% of South African land.[232] Further measures were taken in subsequent years ensure the segregation of the Whites and Blacks.

The key among such measures was the enactment of a law that prohibits Blacks from permanently living in the residential areas of Whites.[233] The important thing to note here is that the ban was not a total exclusion of the Blacks, because their labor was needed for various purposes. It was rather to limit their number in White areas and ensure their stay on a temporary basis. Some writers refer to this policy of the government as 'practical apartheid'.[234] In order to ensure the adequate implementation of this policy and control the flow of Blacks to White areas, the government had put in place a pass system. Accordingly, a Black person could not enter and stay in White residential areas unless he/she carried a pass that authorizes his

[229] Fran Lisa Buntman, *Robben Island and Prisoner Resistance to Apartheid*, (Cambridge University Press 2003) 14.
[230] Robert C. Cottrel, *South Africa: A State of Apartheid*, (Chelsea House Publishers 2005) 14.
[231] ibid.
[232] Dubow (n228) 11.
[233] Nigel Worden, *The Making of Modern South Africa Conquest, Apartheid, Democracy* (John Wiley & Sons Ltd 2012) 82.
[234] ibid102.

presence. This system was a good controlling mechanism for a considerable period. However, it could no longer cope up with the increasing development of urbanization and industrialization.[235] These activities greatly increased the number of Black people residing in White urban areas. For many White South Africans, this was seen as a threat to their domination and supremacy in South Africa.

It is for this reason that the radical Nationalist Party which made Apartheid its official motto won the election in 1948 and the policy of Apartheid reached its peak. In subsequent years, the party took substantial measures to further strengthen and institutionalize racial segregation in South Africa, in a manner that addresses challenges of urbanization and industrialization.[236] The primary instrument in this regard was the adoption of various statutes on different areas. Key laws include the Population Registration Act, the Native Act, the Public Amenities Act and the Voting Act.[237] In effect, they dispossessed Black South Africans extremely important rights such as the right to political participation, land ownership, the right to citizenship and the right to freedom of movement among others. Surprisingly, several attempts were made by the adherents of the Nationalist Party to justify and legitimize Apartheid. The justifications could be generally categorized as religious, scientific and anthropological.

On the religious side, the Dutch church seriously opposed the idea of equality between the Whites and Blacks.[238] The church tried to defend the Apartheid policy arguing that the mixing of races will destroy the distinct Christian tradition of the Afrikaner and ensue crisis. Some theologians of the church even mentioned the story of the 'the tower of babble' to demonstrate how the equal positioning with Blacks create serious problems.[239] Other supporters of

[235] Adrian Guelke, *Rethinking the Rise and Fall of Apartheid* (Palgrave Macmillan 2005) 4 ff.
[236] ibid.
[237] Worden (n233), 104-105.
[238] Dubow (n228) 22.
[239] ibid.

Apartheid attempted to provide scientific evidence which shows the superiority of the White race and the inferiority of the Blacks. Darwin's theory of the evolution was used or invoked to assert the superiority of the White race.[240] In contrast, Blacks were considered as savages occupying the bottom strata in the hierarchy of races. As such, they underscored the responsibility of the White Afrikaner race to civilize the African savages.

However, this justification lost its popularity across the globe following the defeat of the Nazi Germany and the end of the Second World War. For this reason, a more tricky anthropological justification was presented in defense of the Apartheid. This specific policy is often referred as 'separate development'. [241] Unlike its predecessors, it is not based on the premise that the White race and its culture is superiors and is something to be emulated by Africans. It rather assumes that Blacks and Whites have their own distinct culture and way of life which must be maintained and developed separately. As such, they argue that, city life, urbanization, democratic system of government does not suit the African way of life and culture. Thus, Africans must live in their homelands which are administered by tribal chiefs.[242] But none of these justifications make sense. The sole purpose of Apartheid was maintenance of White supremacy in South Africa and the exploitation of the Blacks.

The idea of 'separate development' may seem a sensible policy on its face since its proclaimed objective was allowing the Africans to develop their own distinct way of life in their homeland without unnecessary intervention. The supporters of the policy also emphasized the wrongfulness of assimilation policies that seek to cast Africans in the 'European mould.'[243] Some African chiefs and leaders found this reasoning of the government to be appealing. They also gave their approval for the establishment of separate homelands administered by tribal

[240] Worden (n233) 73.
[241] ibid 86 ff, 117ff.
[242] ibid.
[243] ibid.

chiefs. However, the real purpose of this arrangement seems to be excluding Black South Africans from claiming any right within the South African state. After creating native homelands, the South African government adopted a policy that only allows Blacks to have a 'homeland citizenship' which is different from South African citizenship.[244] This policy dictates that South African citizenship is something that is reserved for the Whites only. In doing so, it deprived Black South Africans their right to political participation and equal treatment on the basis of equal citizenship.

The ideology of Apartheid is utterly incompatible with the notion of human dignity. In the first place, it does not recognize the humanity of Black South Africans. They were rather considered as 'sub-humans without a soul'.[245] The system does not also accept their equal worth and value with White South Africans. The whole ideology was rather built on the premise of White supremacy and the inferiority of the Black race.[246] Based on these assumptions, Black South Africans were denied number of important rights, which were readily available for the whites. Further, the policy of Apartheid also deprived Black South Africans the opportunity to determine their destiny and develop themselves freely. Through the enactment of several legislation, the South African government controlled every sphere of their life including the place of residence, their movement, education, occupational choice and mode of administration solely on the basis of their race.[247]

This gruesome and indefensible ideology of racism in South Africa ended in 1994. Both internal and external factors have contributed to its demise. Internally, there was strong resistance movement by Black South African organizations such as the African National

[244] ibid 119-120.
[245] S. Woolman, 'The architecture of dignity' in Drucilla Cornel (eds), *The Dignity Jurisprudence of the Constitutional Court of South Africa Cases and Materials*, Vol. I (Fordham University Press 2013) 73-123.
[246] ibid.
[247] ibid.

Congress.[248] The extent of protest and violence was widespread and difficult to control. For this reason, the government of South Africa was forced to declare a state of emergency several times.[249] Internationally, the racist Apartheid policy of the state resulted a severe criticism and isolation for South Africa.[250] These factors in combination pressurized the National Party which was in power since 1948, to release political prisoners and facilitate transition to democracy.

2.2 Constitutional History of South Africa and the Constitutional Court

Prior to the 1996 Constitution, South Africa had three other constitutions. The first constitution was adopted by the British parliament in 1909 known as 'The Union of South Africa Act.[251] It followed the decision of the British government to unite several British colonies and create the Union of South Africa. These colonies were the Cape of Good Hope, Natal, the Transvaal, and the Orange River Colony. According to the Act, the unification is intended to promote 'welfare and progress of South Africa'.[252] What is striking about this constitution is the absence of any Bill of rights. Its whole concern was the manner of distribution of power between the legislature, executive and the judicial branch. Further, though the Act established various courts in the Union, the power assigned to them is very much limited. This is due to the principle of parliamentary sovereignty, which deprives courts the constitutional mandate to question or challenge the laws enacted by the parliament.[253]

[248] Worden (n233) 73.
[249] ibid.
[250] ibid.
[251] The Union of South Africa Act, 1909.
[252] ibid preamble.
[253] Heinz Klug, *The Constitution of South Africa a Contextual Analysis*, (Hart Publishing 2010) 10-13.

Not much changed in the South African Constitution of 1983 with respect to bill of rights. One interesting aspect however was the reference made to respect human dignity. As one of its objectives, the constitution promises 'to respect and to protect the human dignity, life, liberty and property of all in our midst'.[254] The presence of this statement is utterly incomprehensible considering the system of Apartheid that was in place in South Africa. Another peculiar feature of this constitution was the introduction of a tri-cameral parliament.[255] Prior to the 1983 constitution, representation in Parliament was reserved to Whites only. Blacks, Colored and Asians were completely excluded from it. However, the government of South Africa decided to change its policy. The change involved granting the colored and Asians some degree of representation in Parliament. Its main rationale was to strengthen the racist practice in South Africa by instigating division between the colored, Asians and Blacks.[256] In this arrangement, Blacks had no representation at all. In order to ensure the dominance of Whites, Parliament was divided into three houses i.e. the House of Assembly for the Whites, House of Representatives for the Asians and House of Delegates for the colored with different number. Since the number of Whites in the House of Assembly is almost twice of the other two combined, they can adopt any decision or measure without any problem.[257] As such, the representation for the colored and the Asians had a little more than symbolic value.

The third constitution of South Africa is the Interim Constitution (IC) of 1993. This constitution is the result of a negotiation between key political parties including the National Party and the African National Congress.[258] One of the most contentious issues in charting post-Apartheid South Africa was the manner of making the new constitution. Different political parties

[254] Republic of South Africa Constitution Act 110 of 1983.
[255] ibid art 37.
[256] Worden (233) 73.
[257] ibid.
[258] Hassen Ebrahim and Laurel E. Miller, 'Creating the Birth Certificate of a New South Africa Constitution Making after Apartheid' in Laurel E Miller (eds) *Framing the State in Times of Transition: Case Studies in Constitution Making* (United States Institute of Peace 2010) 111-148.

proposed different paths in accordance with their own interest. The National Party sought the adoption of a new constitution through negotiation.[259] It chose this avenue because it wanted to protect the interests of the White minority. Since Black South Africans are the majority, the adoption of the constitution by an elected assembly was thought to put Whites in a disadvantageous position. The African National Congress vehemently opposed this proposal of the National Party. It contended that the adoption of the constitution by an elected constitutional assembly is the only way of ensuring the legitimacy of the constitution.[260]

Subsequently, the two parties made a compromise and agreed to adopt the constitution in two phases. The first phase involved the adoption of an Interim Constitution with a negotiation among political parties.[261] It also embodied 35 key constitutional principles which the final constitution needed to comply with. The CCSA was mandated to check the conformity of the text of the final constitution with the general principles incorporated under the IC.[262] The second phase of the constitution making process, involved the adoption of the final constitutional by an elected constitutional assembly. Unlike the IC, the members of the assembly were determined based on the performance of the parties in the election. In the assembly, members of the ANC had the upper hand.[263] After considerable participation of the public in the different stages of the process and the certification of its content by the CCSA, the final constitution was adopted in 1996.

This Constitution has a number of peculiar features compared to its predecessors. Most important of all is its transformative character. The constitution seeks to constitute South Africa based on a new moral foundation. As such, it clearly rejects the South African past that is

[259] ibid.
[260] Klug (n253)14.
[261] ibid 23-36.
[262] ibid.
[263] Ebrahim & Miller (n258) 126-128.

'racist, authoritarian and unjust'. [264]In its place, it aspires to build a new society based on the values of human dignity, equality and liberty. Some scholars also characterize the South African Constitution as a post-liberal constitution. The reason for this is that it goes beyond preserving basic liberty and requiring the state from arbitrarily interfering with freedom. Its ultimate goal rather is creating a just and equal society, where the value and worth of every human being is recognized. [265] To attain such aim, the State is required to take positive measure as well. In addition, the Constitution also embodied a comprehensive bill of rights that includes a wide range of civil, political, economic and social rights.[266] Unlike most liberal constitutions, the South African Constitution makes all of these rights judicially enforceable. The drafters believed that without enforceable socio-economic rights and active intervention of the State, the ills of Apartheid could not be adequately redressed.

In relation to enforcement, the Constitution expressly gave the power of interpreting and applying its provisions to courts.[267] This is a big departure from the previous practice of judicial review in South Africa. Prior to the 1996 Constitution, judicial review was almost non-existent due to the doctrine of parliamentary sovereignty, which gave the legislature an unchallengeable power.[268] Courts had no power to control the constitutionality of legislation enacted by the parliament. This completely changed with the advent of the new constitution which apportioned the task of judicial review between the Constitutional Court of South Africa and other ordinary courts.[269] For many years, the CCSA was a specialized court that only entertains 'constitutional matters'. As such, matters which have nothing to do with the interpretation and

[264] Pierre De Vos, Warren Freedman and Danie Brand, *South African Constitutional Law in Context* (Oxford University Press 2014) 26-30 & Dennis Davis, 'Elegy to Transformative Constitutionalism' in in Henk Botha *et al* (eds) *Rights and Democracy in a Transformative Constitution* (Sun Press 2003) 57.
[265] Kare E. Klare, 'Legal culture and Transformative Constitutionalism'14 *S. Afr. J. on Hum. Rts*. 146, 146-188
[266] ibid 153 ff.
[267] The Constitution of the Republic of South Africa (CRSA), 1996, art 38,39,167, 169.
[268] Pierre De Vos, Warren Freedman and Danie Brand (eds), *South African Constitutional Law in Context* (Oxford University Press 2014)202-207.
[269] CRSA (n267) art 167-169.

application of the constitution were outside its jurisdiction.[270] This however seems to be changing. The 2013 Constitutional amendment on the jurisdiction of the court expanded its ambit beyond constitutional matters to include other issues of 'public importance'.[271]

The other notable change in the present Constitution of South Africa is the introduction of broad standing rules.[272]In the previous constitutions, a person is expected to demonstrate a 'direct and substantial interest' in the matter to be able to approach courts. This was a great impediment for many disadvantaged individuals and groups seeking enforcement of their rights in courts of law. Taking note of this fact, the Constitution recognized the possibility of bringing class action and public interest litigations beside individual claims.[273] This has contributed a lot to providing access to justice in South Africa, especially for the poor and marginalized. However, the recognition of a bill of rights in the constitution and the broadening of standing rules may not make a big difference if courts adopt an inappropriate approach of constitutional interpretation.

The transformative mission of the constitution will not succeed, if courts stick to the old positivist and formalist conception of law that created so many problems during Apartheid.[274] Here, it is important bear in mind that the Apartheid regime in South Africa did many of its acts through the instrument of law. Courts during this time were not willing to question the justness of those laws rather than applying them as they exist. Taking lesson from this experience, the new Constitution of South Africa requires courts to follow a value-oriented purposive constitutional interpretation.[275] These values are explicitly stated in the constitution

[270] Wessel Le Roux, 'A Descriptive Overview of the South African Constitution and Constitutional court' in Oscar Vilhena et al (eds) *Transformative Constitutionalism Comparing the Apex Courts of Brazil, India and South Africa* (PULP 2013).
[271] Constitution Seventeenth Amendment Act 2012 section 3 & Superior Courts Act of 2013.
[272] C Loots `Standing, Ripeness and Mootness' in Stu Woolman & Michael Bishop (eds), *Constitutional Law of South Africa* (JUTA 2013). Chapter 7 1-23.
[273] CRSA (n267) art 38.
[274] Klare (n265) 170 &188.
[275] CRSA (n267), art 39(1) a.

including human dignity, equality and freedom as they function in 'open and democratic society. Accordingly, in the course of giving meaning to various provisions of the constitution and their interrelation with one another, courts must always consider these values and the purposes the constitution seeks to achieve.

2.3 The Status and Role of Human Dignity in the Text of the South African Constitution

Human dignity has a unique place in the South African constitutional order. The constitution explicitly makes it one of the constitutive values of post-apartheid South Africa.[276] A number of factors have contributed to this state of affairs. First, the Constitution was adopted against the background of the Apartheid, the essence of which is an assault on the human dignity and worth of Black South Africans.[277] In seeking to constitute a new society in South Africa based on new moral foundations, the value of human dignity is immensely important, as it symbolizes a radical break from an unjust legal order. As such, it serves as a 'loadstar' for the kind of society that the constitution seeks to create.[278]

Beside the unique Apartheid history of South Africa, the status of human dignity in international human right treaties and constitutions of some democratic states has contributed its part for the centrality of the ideal, in the South African constitutional order. Here, it suffice to mention the founding role of human dignity in international treaties such as the International Covenant on Civil and Political rights (ICCPR) and the Basic law of the Federal Republic of Germany. The drafters of the constitution were inspired by this and other similar instruments

[276] Laurie Ackerman, *Dignity the Loadstar for Equality in South Africa*, (JUTA 2012) 86-111 , A. Barak , *Human Dignity the Constitutional Value and the Constitutional Right*, (Cambridge University Press 2015) 243-279, Arthur Chaskalson, 'Dignity as a Constitutional Value: A South African Perspective'(2011) 26 Am. U. Int'l L. Rev. 1377-1407 , Henk Botha, 'Human Dignity in Comparative Perspective' (2009) 2 STELL LR 171 ,171-220
[277] ibid.
[278] ibid.

in its design.[279] Further, as key constitutional value, it is considered as a source of bill of rights incorporated in the constitution, duly considered in their interpretation, limitation and application. Article 39 of the Constitution specifically provides that '*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'*.[280]

However, whether human dignity is a supreme value or just one value among many other values of the constitution is not clear. Some scholars argue that human dignity has primacy and overrides other values of the constitution in case of conflict.[281] Its appearance in the first order in the list of founding values of the constitution attests to this fact. The non-derogablity of human dignity is also presented as a supportive argument for this claim. Some justices of the South African constitutional court such as Justice Sachs consider it to be the most important value of the South African constitutional order.[282] This does not however mean that human dignity is an absolute value which is not subject to any kind of limitation. Unlike the Basic Law of Germany, human dignity is a relative value and reasonable limitations can be imposed on it depending on the circumstances.[283]

In addition to being a constitutional value, human dignity is also one of the rights recognized in the South African Constitution: 'Everyone has inherent dignity and the right to have their dignity respected and protected'.[284] Although the Constitution does not elaborate on what constitutes dignity, it regards it as an intrinsic and inseparable element of any human person.

[279] D.M Davis 'Constitutional borrowing: The influence of Legal Culture and Local History in the Reconstitution of Comparative Influence: the Experience of South Africa'(2003) 1(2) ICON 181 181-195, Jeremy Sarkin, 'The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions' (1998) 1 (2) Journal of Constitutional Law 176-204, International Covenant on Civil and Political Rights (ICCPR), 1966 , preamble and the Basic Law of the Federal Republic of Germany, 1949, art .1
[280] CRSA (n267), art 39(1) a.
[281] Barak (n1) 252-256.
[282] Drucuilla Cornell, 'Exploring Ubuntu: Tentative Reflections' (2005) 5(2) AHRLJ 2005 195-220.
[283] Barak (n1) 243-279.
[284] CRSA (n267), art.10.

Accordingly, it imposes an explicit duty on both state and non-state actors to preserve it.[285] However, the protect aspect of the duty seems to be applicable only to the State as it may require positive action and the allocation of resources. Applying this duty to individuals would be unreasonable and burdensome. The other issue worth noting here is the difficulty of determining the scope and content of the right to dignity.

Many scholars argue that unlike other rights, the scope of the right to human dignity overlaps with a number of other rights and the issue whether the right has its own specific content is controversial.[286] This is also true for the South African constitutional order where the right to human dignity usually appears in connection with claims associated with the inhuman and degrading treatment, right to life, right to equality and freedom. In most of these cases, the right to dignity seems to have a reinforcing role.[287] However, there are exceptional instances where the right to dignity was the sole ground for the court in deciding the case. A good example in this regard, is the *Dawood* case where the court derived the right to family life not explicitly protected in the South African constitution as an implicit element of the right to dignity.[288] Here, the role of the right to dignity seems to be gap filling. It is invoked when no other right covers or addresses the claim.[289]

2.4 Human Dignity Jurisprudence of South African Courts

Since the adoption of the IC of South Africa in 1993, the constitutional court and other courts of South Africa have developed a remarkable human dignity jurisprudence. Some of the decisions rendered are often cited by other courts in the course of developing their reasoning. The great scholarly interest in South African dignity jurisprudence is also indicative of the

[285] ibid.
[286] S. Woolman (n245)83-85.
[287] ibid.
[288] ibid.
[289] ibid.

importance given to the courts conception and development of the concept. Although there are numerous dignity based or inspired decisions of the various courts of South Africa, they could generally fall in to three broad categories i.e. human dignity as respect for human life and integrity (2.4.1), human dignity as equal worth (2.4.2) and human dignity as respect for autonomy (2.4.3). Each of these aspects have appeared in different cases separately or together.

2.4.1 Human Dignity as Respect for Human Life, Physical and Emotional integrity

One of the most notable contributions of the South African Courts in the area of human dignity is the vital link they established between human dignity and the importance of preserving human life, physical and emotional integrity. The courts derived these rights and defended their preservation relying on the inherent dignity or worth of a human being. The cases which will be discussed in subsequent paragraphs of the chapter will demonstrate this claim and show their reasoning.

S v Makwanyane and Another[290]

This case is one of the landmark decisions of the CCSA to date because besides addressing the controversial issue of death penalty it laid down important principles that would guide the court in subsequent years including its approach of constitutional interpretation, the use of comparative jurisprudence and indigenous values in constitutional adjudication.[291] The case also affirmed the central place of human dignity in the South African constitutional order as a founding norm and interpretive guide. It also concretized the notion further by deriving the right to protection of life in an absolute manner and prohibition of cruel and inhuman treatment

[290] *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).
[291] ibid.

from it. One thing to note here is that, the case was decided on the basis of the Interim constitution of South Africa. The drafters of this constitution deliberately left out the issue of death penalty from it because they could not agree on its prohibition during the negotiation process. They rather chose to provide an unqualified right to life provision in the constitution and left the matter to be decided by the courts. [292]

The applicants in this case challenged the constitutionality of a death sentence which is one of the punishments provided by the Criminal Procedure Code for heinous crimes. They based their claim on three rights enshrined in the IC. The first is the right to life which is stated as 'every person shall have the right to life'.[293] The second is the right to protection from cruel and inhuman treatment. It provides 'no person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment'.[294] The right to dignity is also invoked as a ground for declaring unconstitutionality of death penalty. It is recognized as 'every person shall have the right to respect for and protection of his or her dignity'.[295]

In response to these claims, the attorney general provided arguments relying on the purpose behind death penalty and public opinion. Accordingly, he contended that death sentence is a widely accepted form of punishment for deterring the commission of heinous crimes in different jurisdictions.[296] As such, it could not be considered as a cruel or inhuman punishment. The attorney general also mentioned the public approval of death penalty for individuals who commit grave crimes like murder, as a justification for its retention. Due to the complexity of the case, the CCSA had to address several issues. One of these issues was on what authority to

[292] ibid para.324.
[293] Constitution of the Republic of South Africa, Act 200 of 1993 Constitution of The Republic of South Africa, ACT 200 of 1993, art.9.
[294] ibid art.11.
[295] ibid art.10.
[296] *S v Makwanyane* (n290).

base decisions and resolve the dispute. This was necessitated because the case fell within the category of 'hard cases' where clear guidance on the resolution of the matter is absent in from the constitutional text.[297] Further, it required making value judgments about whether death penalty is inhuman or degrading. In addition, the attorney general invoked authorities like public opinion in responding to claims of the applicants.

In its decision, the CCSA mainly relied on three authorities i.e. the history of South Africa, constitutional values and rights embodied in the constitution and comparative jurisprudence. The starting premise of the court was the kind of society that the Constitution seeks to establish and its transformative mission. Accordingly, it reiterated the constitutional commitment that envisions 'a future founded on the recognition of human rights, democracy and peaceful co-existence...for all South Africans'.[298] This could be contrasted with the Apartheid era which is characterized by utter disregard for the humanity and human rights of Black South Africans. The court further noted that at the core of this new commitment is 'respect for life and dignity' of a human being, both of which are expressly recognized as rights.[299] In its reasoning, the CCSA also established a sort of hierarchy among rights, on the basis of their importance. As such, it ascribed a supreme status for the right to life and dignity. This could be seen from the statement of the court that says 'the rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter Three. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others'.[300] It further underscored the interdependence and close link between them. Accordingly, it noted 'the right to life, thus understood, incorporates the right to dignity…the right to life is more than existence, it is a right to be treated as a human being

[297] Abraham Klaasen, 'Constitutional interpretation in the so called 'hard cases': Revisiting S v. Makwanyane' (2017) De Jure 1-17.
[298] *S v Makwanyane* (n290) para.124.
[299] ibid.
[300] ibid para.144.

with dignity: without dignity, human life is substantially diminished. without life, there cannot be dignity'.[301]

After establishing, the supremacy and interdependence of the two sets of rights in the South African Constitutional order, the CCSA went on to demonstrate how death penalty is incompatible with both. For this, it relied on the unqualified nature of the right to life enshrined under the constitution. It also examined comparative jurisprudence of different jurisdictions including the United States, Canada, India, Zimbabwe and Hungary. The reference to Hungary is particularly relevant because its constitutional court declared the unconstitutionality of the death penalty irrespective of the fact that a qualified right to life is recognized in the Hungarian constitution.[302] Its conclusion is reached based on a combined reading of the right to life and human dignity. This assisted the CCSA to argue that if systems with a qualified right to life are abandoning the death penalty, then the punishment should be prohibited in South Africa for stronger reason since the right to life in the South African Constitution is unqualified. The court's use foreign case law in developing its dignity jurisprudence will be discussed in detail in the last section of this chapter.

Human dignity as a value and a right has also played a central role in determining the final outcome of the case. The CCSA noted that the recognition of the right to dignity in the IC 'is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern… this right therefore is the foundation of many of the other rights that are specifically entrenched in chapter'.[303] This premise of the court was essential in addressing the issues whether the right to dignity extends to criminals and whether death penalty amounts to inhuman and degrading treatment. One of the arguments of the

[301] ibid para.327.
[302] ibid.
[303] ibid para.328.

attorney general was that the right to life and dignity are not for those persons who have committed heinous crimes. Such persons have 'forfeited' those rights because of their conduct.[304] In other words, they are not worthy to claim the right to life and to be treated with dignity.

The court rejected the argument of the attorney general in unequivocal manner. It clearly stated that human dignity is something that is intrinsic to a human being irrespective of his/her conduct. To support its position, it cited the dissenting opinion of the Justice Brennan of the US Supreme Court in death penalty case that states 'the fatal constitutional infirmity in the punishment of death is that it treats members of the human race as nonhumans, as objects to be toyed with and discarded. [It is] thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity'.[305]

***S v. Williams and Others*[306]**

This case concerned a challenge to the constitutionality of the Criminal Procedure Act that makes whipping as one of the punishments to be prescribed by courts for juveniles guilty of committing crime. The applicants relied on two main rights stipulated under the IC i.e. the right to dignity and the right to freedom/security. Accordingly, they argued that act of 'whipping' juveniles violates their right to human dignity recognized under the IC as it results severe physical pain and humiliation. The amount of suffering on the part of those subjected to this form of punishment qualifies it to be a cruel and inhuman punishment prohibited by the South African constitution.[307] The attorney general defended the constitutionality of whipping juvenile offenders by stating the effectiveness of the punishment and its acceptability in other

[304] ibid para 331.
[305] *Furman v Georgia* 408 US 238 (1972).
[306] *S v Williams and Others* (CCT20/94) [1995] ZACC 6; 1995 (3) SA 632 ; 1995 (7) BCLR 861 (CC) (9 June 1995) .
[307] ibid para.11.

jurisdictions. He argued since the personality of the young offenders is not fully developed, applying this form of punishment helps to correct their behavior.[308] He also rejected the cruelty of the punishment, by invoking the involvement of the court in the process and the lack of arbitrariness in its execution.

In resolving this case the CCSA gave an important place for the values that underpin the South African Constitution. It particularly noted that the kind of punishment that is acceptable in the post-Apartheid South African constitution is one that comports with its core value i.e. respect of human dignity.[309] Based on this premise, the court went on to examine the nature and execution juvenile whipping to determine its compatibility with the right to dignity and security of the person enshrined under the South African Constitution. It also examined the position of both national and supra-national jurisdictions on the matter. These jurisdictions include the United State, Canada, the European Court of Human Rights and Zimbabwe among others.[310] From this observation, the court concluded that there is a general trend to abandon corporal punishment. It also noted that such approach is also compatible with the values, spirit and dictates of the South African Constitution.

The CCSA particularly examined the compatibility of juvenile whipping with the right to dignity and the right to be protected from cruel and inhuman punishment. Accordingly, it noted 'purposeful infliction of pain on another human being through the institutions of the state and the humiliating nature of its execution results a severe impairment to human dignity of the person'.[311] The damaging impact of the punishment on the physical and emotional integrity of the person was found to be sufficient enough to make it a cruel, inhuman and degrading one, prohibited by the South African IC.

[308] ibid para.46.
[309] ibid para.37.
[310] Skelton A, 'S v Williams: A Springboard for Further Debate about Corporal Punishment' (2015) 2015 Acta Juridica 336 & *S v Williams and Others* para.31-37.
[311] *S v Williams and Others* (n306).

After finding violation of the right to dignity, the CCSA considered whether such infringement on the right could be justified by the limitation clause of the constitution. The starting point for this analysis was the justification given by the State in defense of juvenile whipping. One of the argument of the attorney general was that such kind of punishments would be lessons for others and would have a general deterrence effect in the society.[312] The court dismissed this argument by observing that some of the applicants had received similar punishments in the past but it did not bring the intended deterrence. More importantly, the CCSA stated its objection against using a human being by the state as an object of teaching lesson for others. It particularly noted that the individual must not be 'sacrificed on the altar of deterrence'.[313]

Le Roux and Others v. Dey[314]

This case concerned a dispute between two high school students and their school principal. With the objective of creating something funny/amusing, one of the students downloaded a picture from gay body builder's web page, which shows two male individuals sitting and engaging in some form of sexual activity.[315] Then, he replaced the heads of the bodybuilders in the picture with that of the school principal and deputy principal covering their private parts with the school badge. Subsequently, he sent the image to his friend on the phone, which was later, distributed to many others students against his wish. The third respondent printed the picture and placed it in the school notice board. Following this, the matter was brought to the attention of the principals and they took disciplinary action against the three students. In addition, the deputy principal instituted a civil/criminal proceeding alleging defamation and violation of his dignity. The high court found in favor of the applicant and awarded him

[312] ibid para.61.
[313] ibid para.85.
[314] *Le Roux and Others v Dey* (CCT 45/10) [2011] ZACC 4; 2011 (3) SA 274 (CC) ; 2011 (6) BCLR 577 (CC) (8 March 2011)
[315] ibid 13.

compensation of 45,000 Rand for the injury he sustained. This decision was affirmed by the Supreme Court of Appeals (SCA).[316]

The applicants brought the matter before the CCSA alleging errors in the decision in respect of constitutional and other matters. Accordingly, they argued that the image in question falls within their constitutionally guaranteed right to freedom of expression.[317] The picture was intended to be a joke. As such, it should not be considered as defamatory or as something that injure his dignity. They also opposed the order of the court to pay 45,000 Rand as compensation in addition to apology. The respondent on the other hand defended the decision of the SCA, arguing that the image created by the students had tarnished his reputation in the eyes of others and injured his feelings/dignity.[318]

The CCSA decided the case by examining different issues step by step. Regarding the defense of the freedom of expression, the court stated that mere fact that certain forms of expression are intended to be a joke or humor does not result in an automatic protection. As such, a joke or humorous statement could be considered as inappropriate if it demeans or humiliate the subject or the person.[319] It also tried to examine the scope of the right to dignity in the South African constitution in the context of the present case. Accordingly, the court noted that the right to dignity protects both the reputation of the person as well as the personal sense of self-worth or self-esteem of the individual.[320] This means any expression that besmirches the good name/status of the person in the society or injure his personal feeling could be considered as a violation of the right to dignity enshrined under the South African Constitution.

After establishing these basic principles, the court went on to establish whether the image in question is defamatory or injurious to the dignity of a person. The court was divided on this

[316] ibid 2.
[317] ibid 29.
[318] ibid.
[319] ibid para.91.
[320] ibid para.138

matter, the majority members of the court constituting six judges, stated that the criteria that should be applied are 'objective meaning' and reasonable man standard.[321] Accordingly, they argued if one considers the objective meaning of the image without considering the intent of the makers or their age or the reaction of the applicant, it shows two men engaging in some kind of sexual activity. Performing such kind of activity publicly is embarrassing for anyone and against the standard of decency in the society. As such, a person who is seen in such picture is likely to be considered by the society as a person of 'low moral character'. For this reason, the majority held that, the pictures created by the children are defamatory. They further noted that even if any person could recognize that the image in the picture is something that is created through transposition of heads, there is likelihood to associate the picture with the respondents. Then, the court tackled the issue whether the picture is injurious to the dignity of the person or his feeling. For this it applied the reasonable man standard i.e. how would a reasonable person feel if he or she was in the position or the place of the principal.[322] Considering the embarrassing nature or content of the image, the majority alternatively held that, the injury to dignity or feeling claim of the respondents is legitimate. Accordingly, they upheld the decision of the SCA by reducing the amount of compensation to be paid to 25,000 Rand.

The dissenting judges on the other hand dismissed both allegation of defamation and injury to his dignity or feelings. In their opinion, the determination of the defamatory nature of the image must be made after considering all relevant factors including the age of the defendants and the maturity/authority of the principal.[323] As such, they argued that considering the immaturity of children, acts like this are expected to happen and they should not be harshly punished. Since the applicants have received disciplinary penalty for their misdeeds that should be enough in this case. Further, they argued that the reaction of the deputy principal to the incident/image is

[321] ibid para 143.
[322] ibid para.212-213.
[323] ibid.

unreasonable. Considering the immaturity of the children and his experience as a teacher for many years, he should not have been so much offended with their action. In the view of the minority, a reasonable person would have been sensitive to the children and would not take the matter seriously. They also argued that in creating the image the children are targeting the authority of the principal rather than his personality. [324] Thus, it could not be considered as infringement to his personality/dignity.

This decision of the CCSA is important for a number of reasons. First, it explicitly recognized protection from humiliation and preservation of self-respect/self –esteem, as one of the entitlements that flow from the right to human dignity. Secondly, it also shows the significant impact of the constitutional values such as human dignity on the development and interpretation of private law. Thirdly, the case provided criteria for determining the severity or extent to injury to dignity/feeling. This is important because different people may react to a certain matter differently. Some may easily be offended and for others it may mean nothing. The tests used by the court i.e. objective meaning and reasonable man standard may help in assessing the degree of damage to dignity or one's own self-respect.

2.4.2 Human Dignity as Recognition of Equal Worth & Concern

The policy of Apartheid in South Africa was founded on denial of basic human equality. It particularly affected Black South Africans who were marginalized in political, social and economic spheres and created one of the most unequal societies in the world.[325] The new South African constitution sought to address this problematic legacy of Apartheid and build a society on the foundation of equal worth and dignity of every person. This commitment is explicitly

[324] ibid para.65.

[325] Arthur Chaskalson, 'Equality and Dignity in South Africa' (2002) 5 The Green Bag an Entertaining Journal of Law 189-197, Catherine Albertyn, 'Substantive Equality and Transformation in South Africa' (2007) 23 S.Afr. J. in Hum. Rts 253-256, Pierre De Vos, Warren Freedman, and Danie Brand (eds), *South African Constitutional Law in Context* (Oxford University Press 2014) 417-466.

stated in the very first provision of the constitution which lists its founding values 'human dignity, the achievement of equality and the advancement of human rights and freedoms'.[326]

The constitution also contains a very comprehensive and progressive clause that recognize the right to equality. On the level of formal equality, it says 'everyone is equal before the law and has the right to equal protection and benefit of the law'.[327] This guarantee is a clear break from the era of Apartheid where different law applied to a person depending on his racial origin. Further, the constitution provides an open-ended list of prohibited grounds of discrimination.[328] To treat persons differently on these grounds is presumed to be unjust discrimination on its face unless it is proven otherwise by the State. The drafters of the South African also took note of the fact that proclaiming the equality of persons by law *per se* is not going to be enough to address the gross problem of inequality in South Africa.

To tackle this challenge effectively and ensure actual equality, there is a need to look at the social, political and economic factors that contributed for inequality and address them appropriately.[329] It is for this very reason that the constitution requires the State to take measures that would ensure the 'equal enjoyment of rights by everyone'.[330] This may involve the adoption and implementation of affirmative action aimed at remedying the systemic disadvantage some groups faced in the past. Such kinds of differential treatments are not considered as unjust discrimination or the violation of equal treatment clause of the constitution.[331] Further, under the South African Constitution, both direct and indirect discrimination are prohibited. A discrimination becomes direct when the differential treatment

[326] CRSA (n267), art 1(a).
[327] ibid art 9.
[328] ibid.
[329] Catherine Albertyn, 'Substantive Equality and Transformation in South Africa' (2007) 23 S.Afr. J. in Hum. Rts 253-256.
[330] CRSA (n267) art 9(2).
[331] Pierre De Vos, Warren Freedman, and Danie Brand (eds), *South African Constitutional Law in Context* (Oxford University Press 2014) 417-456.

is explicitly undertaken based on specified ground such as gender, sex, race etc... In contrast, indirect discrimination is subtle and more nuanced. On its face the legislation or the act of the government seems to be neutral to everyone. However, when it is implemented it imposes a considerable burden or harm to a certain group that is already marginalized or victim of historic/systematic disadvantage in the past.[332]

The other peculiar feature of the South African equality clause and jurisprudence is its strong bond with the notion of human dignity.[333] As mentioned in different cases of South African courts, the basis for equal treatment of individuals in the Constitution is primarily their equal worth and dignity. The entire constitutional order is constructed on the assumption that every human being has intrinsic worth regardless of his identity or status in the society. [334] As such, despite his/her gender, sex, race, economic status etc…the constitution acknowledges the equal worth of everyone and demands equal concern for all. Further, human dignity is the prime parameter that courts utilize for determining whether discrimination is unfair or unjust.[335] Beside other factors courts in South Africa consider the impact of the differential treatment on the dignity of the individual. In assessing this, they take in to account the actual circumstance of the person, the status of the groups he/she belongs to the impact of the measure on his livelihood, harm to his self-esteem and potential to develop. According to Justice Sachs, this approach is extremely beneficial as it gives the court the opportunity to consider several factors and ensure substantive equality.[336] The cases which will be analyzed in the subsequent paragraphs of this part will highlight the central role of human dignity in South Africa's equality jurisprudence.

[332] ibid.
[333]E. Grant, 'Dignity and Equality' (2007) Human Rights Law Review 1 1-31, O'Connell R, 'The Role of Dignity in Equality Law: Lessons from Canada and South Africa' (2008) 6(2) I•CON 267, 267–286.
[334] Ackerman (n131)181-188.
[335] ibid.
[336] *National Coalition for Gay and Lesbian Equality and another v. Minster of Justice and others* 1999 (1) SA 6 (CC).

a. Race

City Council of Pretoria v Walker[337]

This case is one of the early cases on the issue of indirect discrimination based on race where human dignity was invoked in the reasoning of the court. The respondent in this case, the City Council of the Pretoria, was sued by Mr. Walker in the high court for applying discriminatory policies for water tariff determination and subsequent collection of payment.[338] The dispute arose following the merging of old Pretoria a White neighborhood where Mr. Walker is residing with two other Black towns. For these two parts of the city, the city council applied different policies for water fee calculation. The amount of tariff for White areas was determined based on their level of consumption as recorded in the water meter. In contrast, since the infrastructure is underdeveloped in the Black residential areas and most of them are without water meter, tariff was calculated on a flat rate basis.[339] In the case of non-payment or default, the city also applied different policies for the two areas. Further, for the predominantly White areas in case of non-payment the city institutes a legal proceeding to collect payment. The same measure is not pursued for Black residential areas. Mr. Walker opposed these policies and refused to pay for the service. A legal action was instituted by the city council against him. Subsequently, he challenged the constitutionality of the policy before the High Court alleging unfair discrimination which is prohibited by the IC of South Africa.[340] The court held in favor of Mr. Walker and the City Council appealed the decision to the CCSA.

The majority members of the CCSA affirmed the decision of the High court and found an indirect discrimination on the ground of race which they regard as unfair. They particularly

[337] *City Council of Pretoria v Walker* (CCT8/97) [1998] ZACC 1; 1998 (2) SA 363; 1998 (3) BCLR 257 (17 February 1998.
[338] ibid.
[339] ibid para.5.
[340] ibid para.6.

found the selective recovery of defaulted payment through a court proceeding problematic. Their main reasoning was that although the policy used area as basis of differentiation and seems neutral concerning race, it is not in point of fact, since the two areas are predominantly inhabited by White and Black residents.[341] As such, the policy has a particular burdensome impact on White residents of the city. Besides finding an indirect race-based discrimination, they also held that the discrimination is unfair. In arriving at this conclusion, the role of dignity based reasoning was vital. Accordingly, the majority noted that 'no members of a racial group should be made to feel that they are not deserving of equal "concern, respect and consideration" and that the law is likely to be used against them more harshly than others who belong to other race groups…the impact of such a policy on the respondent and other persons similarly placed, viewed objectively in the light of the evidence on record, would in my view have affected them in a manner which is at least comparably serious to an invasion of their dignity'.[342]

In the decision, the majority emphasized the centrality of showing 'equal concern, respect and consideration' to all and found the policy of the city to be incompatible with this constitutional dictate with respect to the treatment of the White residents. The dissenting justice in this case, Justice Sachs, vehemently opposed the verdict of the majority's holding that the policy amounts to indirect discrimination that is unjust.[343] In his view, the differential treatment is neither discriminatory nor unjust. His conclusion is partly based on his conception of indirect discrimination which is different from the majority. Sachs argued that to establish indirect discrimination showing a disproportionate burden/disadvantage alone is not enough.[344] Many laws by their very nature are going to affect certain group of people more severely than other and that is not a problem *per se*. In his view, the notion of indirect discrimination was conceived

[341] ibid para.32.
[342] ibid para.81.
[343] ibid para 113.
[344] ibid.

to capture 'situations where discrimination lay disguised behind apparently neutral criteria or where persons already adversely hit by patterns of historic subordination had their disadvantage entrenched or intensified by the impact of measures not overtly intended to prejudice them.'[345]

Mr. Walker does not belong to the group which suffered historic and systematic disadvantage in the past. Accordingly, the policy of the city could not be regarded as a disguised and indirect discrimination merely because it burdens the White residents. In addition, the actual circumstance of the applicant, the status of the group he belongs to and the actual differences between the two places in the quality of infrastructure, quality of service delivery and poverty must also be taken into account. In other words, he underlined the importance of putting 'sensible and practical limits' on the conception of indirect discrimination.[346] He further rejected the reasoning of the majority regarding the impairment of dignity and the lack of concern for White residents of Pretoria City. Sachs particularly argued that equal concern does not mean identical treatment and he conceived equality to mean 'the right to be treated as equals , which does not always mean the right to receive equal treatment'.[347] Considering the actual disparities between the two areas in infrastructure, service provision and level of income, applying the same tariff and method of collection of payment would be unrealistic or inappropriate and amounts to showing 'unequal concern' for all.

The interesting aspect of this case from a dignity perspective is that the policy of the City Council was held to be a violation of dignity by the majority while the minority sees no infringement. This begs the question what could possibly explain the different take of the judges on the same policy. In my view, the main factor that explains this is the different conception of equal worth/concern by the judges and the specific element they emphasized in

[345] ibid para 115.
[346] ibid para.108.
[347] ibid para.128.

determining the impact of the measure on human dignity. The majority seem to conceive equal worth/value as an entitlement to identical or similar treatment. They also put a particular emphasis or central importance for the feeling of the applicant about the policy in question in determining infringement of dignity. In contrast, equal concern and consideration is not regarded by the minority as a right to similar treatment. In other words, your equal worth or right to be given equal consideration does not mean that you get the exact same thing as others irrespective of your difference in position or status. For the minority, context and the actual status or condition of applicants are extremely relevant in assessing their claim on equal concern or equal dignity. As such, it goes beyond the personal feeling of the applicant and gives due regard for the broader social and historical context in determining invasion of dignity. This approach seems to me more plausible as it seeks to give equal concern of all without disregarding their actual circumstances or condition.

b. Gender

President of the Republic of South Africa and Another v Hugo [348]

The controversial matter in this case was the decision of the President of South Africa to pardon female prisoners with children under the age of 12. Mr. Hugo, a male prisoner and single father of a child below twelve years challenged the constitutionality of the act. His main contention was that the presidential pardon unfairly discriminated against him on the basis of his gender in violation of the equality clause of the IC.[349] The state defended the act of the President on the ground that it was intended to protect the interest of young children. Since mothers are the 'primary care givers' for children in the South African society, their release from prison will

[348] *President of the Republic of South Africa and Another v Hugo* (CCT11/96) [1997] ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1 (18 April 1997).
[349] ibid para.3.

advance their wellbeing and development.[350] Further, since the overwhelming majority of prisoners are male, their release under similar condition is inappropriate. The decision of the CCSA in this case was not unanimous. The majority held that there is no unjust discrimination in this case and they relied on the notion of human dignity in their reasoning.

As an initial premise, the judges reiterated the constitutional commitment to constitute 'a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular group'.[351] They further cited the statement of the Canadian Supreme Court regarding the immense importance of respecting and acknowledging the equal worth of everyone.[352] Then, they attempted to clarify what this commitment means in the context of unfair discrimination. Accordingly, they emphasized the need to 'develop a concept of unfair discrimination which recognizes that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not'.[353]

At the core of this statement lies the message that not every kind of differential treatment is considered a violation of equal worth. It might even be necessary to treat individuals differently at times in order to realize the egalitarian society the Constitution seeks to achieve. The vital consideration rather is the actual condition of people in assessing the impact of differential treatment. Given the vast difference in equality and status among different individuals and groups in society, identical treatment will not do justice to many and ensure actual equality.

[350] ibid para.6-7.
[351] ibid para.4.
[352] *Egan v Canada*, (1995) 29 CRR (2d) 79 at 104-5.
[353] *President of the Republic of South Africa and Another v Hugo* (n348).

Accordingly, the majority took the position that 'the Presidential Act may have denied them an opportunity it afforded women, but it cannot be said that it fundamentally impaired their rights of dignity or sense of equal worth'.[354] As such, it could not be regarded as unjust discrimination.

The minority judges opposed this conclusion on two grounds. The first challenge was based on the very motive of the presidential pardon. As mentioned above, the act singled out female prisoners with young children on the assumption that they are the one responsible for the upbringing/ child rearing. The argument here is that the presidential act reinforces the societal stereotype that women are primarily fit for this kind of tasks, which is responsible for their exclusion from other spheres of life.[355] The judges particularly noted that the beneficiaries of this decision are few women and the losers are many. The second challenge is based on the impact of the measure on the dignity or worth of fathers who are in a similar position with the women.[356] The argument here is that the pardon disregards the worth of fathers as a caring and responsible parent.

Human dignity was handy in this case in the determination of whether the discrimination is just/unjust. After due consideration of the societal status and actual role of the beneficiaries of the presidential pardon, the majority held that its impact on the dignity or equal worth of fathers is minimal or negligible. On the contrary, some of the judges in the minority regarded the measure as affront on the dignity of the fathers and a clear case of unjust discrimination on the basis of gender. In my view, the reasoning of the majority is more sensible as it is unrealistic or inappropriate to talk about the equal treatment of women and men in abstract without actually considering their role or status. Further, the impact of the measure on the individual

[354] ibid para.47.
[355] ibid para.80.
[356] ibid para.92.

dignity or equal worth of fathers is not undermined by the act, since their condition could be reviewed on a case by case basis.

S v Jordan and Others[357]

This case is one of the most widely known decisions of the CCSA. It concerns a challenge of constitutionality to the Sexual Offences Act of 1957 that criminalizes 'sex for reward'. Prostitution and brothel keeping are the activities primarily targeted by the statute. The applicants in this case, alleged that the act violates several fundamental rights enshrined in the South African Constitution including the right to equality, dignity, privacy and economic freedom.[358] Due to issues of relevance and scope, my focus will be mainly on their claim of equality and dignity.

The core argument of the applicants with respect to equality was that, the act discriminates unjustly on the ground of gender as it criminalizes prostitutes while leaving the clients who are equally involved in the activity unpunished. In support of their claim, the applicants noted that the overwhelming majority of prostitutes are female and the clients are male. Considering this and the particular burden it imposes on women, the selective prosecution prostitutes amounts to unjust discrimination.[359] The State opposed this claim and argued that the client is also prosecuted in other laws for such conduct. It particularly mentioned a provision of the riotous assembly act and other common law rules to this effect.

In resolving this issue, the CCSA was divided. The majority dismissed the claim of unjust discrimination based on three reasons.[360] First, they argued that the statute is formulated in a

[357] *S v Jordan and Others* (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae (CCT31/01) [2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117 (9 October 2002).
[358] ibid para.1.
[359] ibid para.19
[360] ibid para.8-11 &15.

gender neutral fashion prohibiting sex for reward. In their view, this equally applies to male and female sex workers and is not discriminatory. Second, they held that there is a reasonable distinction between a sex worker who provides the service in a regular manner and a client who engages in the conduct irregularly. As such, the legislator is justified targeting the sexual service provider more seriously.[361] Third, they chose to defer to the assessment of the legislature regarding the evils of commercial sex or prostitution. Some of these included drug use, violence, child trafficking and HIV.[362]

On the contrary, the minority viewed the criminalization of prostitutes as unjust discrimination. In the course of their reasoning they relied on two considerations. First, despite the absence of any reference to gender in the statute, the reality is that majority of sex workers are female, and they are the primary victims of the statute. This in their view is a clear instance of indirect discrimination on the basis of gender.[363] Second, the minority considered the actual status of the prostitutes and stereotypes associated with them. In relation to this they noted that 'the female prostitute has been the social outcast the male patron has been accepted or ignored. She is visible and denounced, her existence tainted by her activity. He is faceless, a mere ingredient in her offence rather than a criminal in his own right, who returns to respectability after the encounter'.[364] They also noted that majority of the women engage in this activity primarily because they lack other opportunity and live in poverty. Here they severely criticized the double standard the society applies for judging sexuality for men and women irrespective of the similarity of the conduct which the statute is founded on. In addition, they reasoned that by selectively prosecuting the prostitutes and perpetuating the stereotype against them, the statute

[361] ibid.
[362] ibid para.25-26.
[363] ibid para.59-64.
[364] ibid para.66.

entrenches unfair discrimination which 'has the potential to impair the fundamental human dignity and personhood of women'.[365]

The other interesting ruling of the court in this case concerns the right to dignity. The applicants argued that the criminalization of prostitution reinforces the societal stereotype against them and degrades/devalues their equal worth.[366] As such, it is incompatible with their right to be treated with respect and dignity. Interestingly, the CCSA was unanimous in rejecting this argument of the applicants and finding no violation of dignity. The core reasoning was that 'our Constitution values human dignity which inheres in various aspects of what it means to be a human being. One of these aspects is the fundamental dignity of the human body which is not simply organic. Neither is it something to be commodified. Our Constitution requires that it be respected. We do not believe that section 20(1)(a) can be said to be the cause of any limitation on the dignity of the prostitute. To the extent that the dignity of prostitutes is diminished, the diminution arises from the character of prostitution itself. The very nature of prostitution is the commodification of one's body'.[367] The CCSA also rejected arguments of the applicants which are based on the right to privacy, autonomy to make decision about ones intimate life and economic /occupational freedom to engage in such activities.

In my view, the decision of the majority is problematic from the perspective of human dignity. This is because it mainly defined human dignity in a narrow manner focusing on the dignity of human body while disregarding other entitlements that flows from it such equal worth/consideration and autonomy to make personal decisions. Concerning equal worth, the majority did not pay much attention to the actual condition of the prostitutes and its systemic

[365] ibid. para.65.
[366] ibid para.74.
[367] ibid

causes.[368] In doing so, they failed to accord equal worth/show equal concern to prostitutes which are subjects of great deal of stereotype. Further, one core element of human dignity is autonomy to make decisions about one's life to the extent that it does not harm others. The majority ruling violates this aspect of dignity by failing to respect their choice. Furthermore, even the commodification of human body reasoning is not that much plausible. Though at the core of respect of human dignity lies respect for human bodily integrity, I do not view acts like prostitution violate it.

In relation to this case and the human dignity-based approach of the CCSA interpreting equality, Prof. Botha has written an interesting piece. In his view South African Apartheid history, influence of international law, the 'empty' nature of equality as well the desire on the part of the court to ground its judgment on neutral principles are some of the possible justifications for the reliance of the court on human dignity for understanding equality.[369]Among these justifications, the most plausible for him is the last one. After making these observations, he inquires whether the human dignity-based approach is responsible for the decision arrived by the majority. On this point he argues that the human dignity centered approach is, 'at least partly to blame for the moralism, individualistic conception of power and disregard for systemic inequality characterising the majority judgment in *Jordan* – even if this approach is flexible enough to allow for a more transformative jurisprudence, as is evidenced by the minority judgment'.[370]

His main concern here seems so be the emphasis the majority gave for moral harm in assessing the claim of violation of dignity by the applicants. As noted above, the court held that the prostitutes are degraded or devalued because of the very characters of the activity they are

[368] Lee Stone, 'Two Decades of Jurisprudence on Substantive Gender Equality: What Constitutional Court got Right and Wrong' (2016) 30 (1) Agenda 10-15.
[369] Henk Botha, 'Equality, dignity, and the politics of interpretation' in W le Roux and K van Marle (eds) Post-apartheid fragments: Law, politics and critique (University of (South Africa Press 2007) 148 – 176.
[370] ibid 744.

undertaking. This shows the moral disapproval on the part of the judges of prostitution and their reliance on dignity-based reasoning to advance their views. Further, he argues that their focus on moral harm also made the majority insensitive to the systemic inequality, powerlessness and economic disadvantage of prostitutes which are predominantly women.[371] To address this problem, he proposes a richer conceptualization of dignity and equality which takes into account all these elements in the assessment and sensitive to context.

In my view the concerns raised by him are legitimate and dignity-based approach could sometimes result disappointing decisions like *Jordan*. However, I do not think that the dignity centered interpretation of equality is inherently problematic, and it always result a judgment that pays no attention to systemic inequality and context. It is rather possible to use the equal worth/value dimension of human dignity in a context sensitive manner considering not only moral harm but other disadvantages as well. In addition, by and large human dignity centered approach of interpreting equality has brought more positive outcomes than problems as we will see in some of the cased discussed below. This view is also shared by Prof. Botha despite some of the questions he raised in relation to the dignity centered interpretation of equality.[372] To sum up, two things could be said about the role of human dignity in the gender equality jurisprudence of the CCSA. First, human dignity is used by the court as an standard for differentiating just from unjust discrimination. Second, the court is not consistent in its use of the concept and it is very difficult to establish a pattern.

[371] ibid.
[372] ibid 747.

c. Sexual Orientation

National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others[373]

This case was first litigated before the High Court of South Africa. It concerned a constitutional challenge to various laws in South Africa that criminalize same sex conduct/sodomy between men. The applicants principally relied on the right to equal protection, the right to dignity and privacy. With respect to the right to equality, they argued that anti-sodomy laws unfairly discriminate both on the basis of gender and sexual orientation. While the law penalizes sodomy between men, it does nothing when it is committed between women or heterosexuals.[374] As to the right to dignity, they contended that the practice of criminalizing sodomy is incompatible with the equal intrinsic worth of every human being enshrined under the South African Constitution as it devalues their worth and demeans their existence.[375]

The CCSA was unanimous in declaring the unconstitutionality of laws that penalize sodomy on the ground of unjust discrimination and violation of their right to dignity. As a starting premise, it noted that sexual orientation is a prohibited ground of discrimination under the South African Constitution and any differentiation based on it presumed to be unfair or unjust. However, it did not stop at this presumption. Rather, they considered the status of homosexuals in the South African society and the impact of laws that criminalize sodomy on their right to dignity. Accordingly, it noted that homosexuals are a permanent minority in South Africa and the bill of rights is their only guarantee that safeguards their interest.[376] Beside their vulnerability as such, the judges also considered their social status in South African society. Their finding was that homosexuals were persecuted for who they are and occupy a

[373] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998).
[374] ibid.
[375] ibid para.28.
[376] ibid para.25

marginalized position. As a result of the criminal liability imposed by several laws, they are forced to hide their identity and live in state of constant fear.[377] This in their view is unacceptable as it further entrenches the stereotypical attitude of the society towards them and prevents their inclusion on equal basis.

The damage done to their dignity and self-worth is also immense and incompatible with the core dictates of the Constitution. Accordingly, the judges reasoned that 'the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society… there can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution'.[378] The CCSA could not also find any legitimate justification for maintaining these laws. Hence, although their conduct could be unacceptable according to the moral and religious views of some people, that is not a are not sufficient rationale to deprive them their constitutional rights.

In his concurring opinion Justice Sachs emphasized the important role of human dignity in interpreting the equality clause of the South African constitution. This became an issue because one of the amicus briefs submitted to the court stated that the right to equality is not there to protect the right to dignity.[379] As such, it requested the court to address the issue of equality independently without bringing in dignity consideration as the right to dignity is protected by another provision. In response to this claim, Justice Sachs stated that considering the impact of the discriminatory treatment on the dignity of the individual is immensely important to ensure substantive equality. He further argued that 'the focus on dignity results in emphasis being placed simultaneously on context, impact and the point of view of the affected persons. Such

[377] ibid para 23.
[378] ibid para.28.
[379] ibid.

focus is in fact the guarantor of substantive as opposed to formal equality'.[380] The importance of a human dignity centered approach in ensuring a better interpretation of equality claims is also shared by other scholars for its prime emphasis on 'impact and context'.[381]

Minister of Home Affairs and Another v Fourie and Another[382]

This case concerns a challenge to the definition of marriage under the South African common law and Marriage act. The applicant Ms. Fourie and Ms. Bonthuys, were in a relationship for many years and they wanted to formally celebrate their union in marriage. However, South African law defines marriage as 'a union of one man with one woman'.[383] The applicants contended that this definition of marriage violates the South African Constitution as it unfairly discriminates on the ground of sexual orientation and prevents same sex couples from getting married as well as enjoying the rights and responsibilities of marriage. In response, the State defended the constitutionality of the definition by arguing that the only defect with the existing laws is its failure to provide alternative mechanism for recognizing or celebrating the partnership between same sex couples.[384] It further argued that procreation is a key element of traditional marriage and the law is justified in making the distinction same sex relationships which do not meet this requirement. In addition, the state argued that defining marriage in a manner that includes same sex relationships goes against the religious view of many South Africans. Hence, requiring religious institutions to recognize same sex marriage by law, amounts to violation of the right to freedom of religion and beliefs.[385]

[380] ibid. para.126.
[381] Saras Jawanth and Christina Murray, ''No Nation Can be free When one half of it is Enslaved' Constitutional Equality for Women in South Africa' Beverely Baines & Ruth Rubio-Marin (eds), *The Gender of Constitutional Jurisprudence* (Cambridge University Press 2010) 230-255.
Lee Stone, 'Two Decades of Jurisprudence on Substantive Gender Equality: What Constitutional Court got Right and Wrong' (2016) 30 (1) Agenda, 10-15.
[382] *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005).
[383] ibid para.3.
[384] ibid para.83.
[385] ibid para.84.

The CCSA found the definition of marriage under South African common law and marriage act unconstitutional for being discriminatory. Human dignity was an important consideration for the court's reasoning. The first thing the CCSA did was to look at the status of persons in same sex relationships in the South African society. Accordingly, it established their vulnerable status as a minority and noted the unjust treatment they received for many years.[386] Considering this, the reliance of the applicants on the bill of rights as the sole guarantor of their rights is appropriate. Then, it assessed the impact of exclusion from marriage for same sex couples and the message it transmits about their status. Regarding this, it stated 'the sting of past and continuing discrimination against both gays and lesbians was the clear message that it conveyed, namely, that they, whether viewed as individuals or in their same-sex relationships, did not have the inherent dignity and were not worthy of the human respect possessed by and accorded to heterosexuals and their relationships'.[387] Such thinking is incompatible with the South African Constitution founded on equal worth and dignity of every human being.

The court also held that there is no sufficient justification for excluding same sex couples from the institution of marriage. The State's argument regarding procreation and the right to religious freedom were rejected. The court outlined that the conception of marriage and family has evolved in the South African society.[388] As such, the law is expected to reflect this development. Further, inability to procreate is not a bar for marriage and constituting families. Individuals may not have children due to a natural cause or their own personal choices. Hence, correlating procreation with marriage and denying the right to marry for same sex couples is unjustified. Further, same sex couples are 'as capable as heterosexual spouses of expressing and sharing love'.[389] Concerning the religious freedom argument, the court noted that the recognition of same sex marriage by law in no way violates the religious freedom of others.

[386] ibid para.59.
[387] ibid para.50.
[388] ibid.
[389] ibid para.15.

This is because it does not require any religious institution to recognize same sex marriage contrary to its beliefs or doctrine.[390]

Concerning remedy, the majority members of the CCSA decided to put on hold 'the order of invalidity' until Parliament to comes up with a solution to rectify the defects with the existing law.[391] This was justified on the basis of the need to solidify the remedy and ensure its enforceability considering the controversial nature of the matter. However, the court did not give Parliament a free hand to do whatever it wishes whenever it wants. It rather required Parliament to come up with a measure that recognize the equal worth of same sex couples and their right to enter in to marriage within one year. In case of failure on part of Parliament, the court decided to read in the word 'or spouses' in the marriage act.[392] The dissenting judge preferred this remedy instead of suspending the invalidity order.

To sum up, the role of human dignity in the sexual orientation cases seems to be affirming the humanity and the equal worth of persons in same sex relationships.[393] This is important because the root cause of the discrimination against them is the belief that they are not normal human beings worthy of respect merely because they deviate from the sexual norms of the society. In proclaiming, their equal dignity irrespective of their difference with others, the court was able to justify their claim of protection and equal treatment.

[390] ibid para.91-97.
[391] ibid para.123.
[392] ibid para.159. The parliament subsequently adopted a statute that recognize the civil union of same sex couples registered by way of marriage or civil partnership.
[393] K. O'Regan , 'Undoing Humiliation, Fostering Equal Citizenship: Human Dignity in South Africa's Sexual Orientation Equality Jurisprudence.' (2013) 37(1) NYU Rev L & Soc Change 307, 307-314.
Ella Sheepers and Ishtar Lakhani, Somewhere over the rainbow: the continued struggle for the realization of lesbian and Gay rights in south Africa, Sylvie Namwase & Adrian Jjuujo (eds), *Protecting the Human Rights of Sexual Minorities in Contemporary Africa* (PULP 2017) 109-127.

d. Socio-Economic Rights

***Government of the Republic of South Africa and Others v Grootboom and Others*[394]**

The applicants in this case were mainly women and children whose informal dwellings were demolished by the state and evicted for unlawfully occupying a private land. Subsequent to the eviction, they were made to settle in sport stadium without shelter, food and water. Further, the cold winter season made their condition even worse. In their application, they asserted that the right to adequate housing under the South African Constitution entities them or impose a duty on the government of South Africa to provide them 'basic shelter' until they get a permanent dwelling. Further, they invoked the obligation of South Africa under the UN Covenant on Economic and Social rights (CESCR) to ensure the right to adequate housing to its inhabitants. For this they relied on the General Comment of the Committee on ESCR regarding the 'minimum core obligation' of every state to fulfill the essential or core content of each right immediately.[395]

In its decision the CCSA did not accept their right to get basic shelter immediately and the minimum core obligations. For this, it cited the textual difference between the CESCR and the Constitution of South Africa regarding the formulation of the right to housing.[396] Further, it noted that the court lacks sufficient information to determine the minimum core content of the right to housing in the South African context as it depends on a number of factors including the availability of resources. However, the court found the policy of the State with respect to applicants unreasonable.[397] The role of dignity was decisive in the reasoning of the court and its decision. As a starting premise, the CCSA underscored the importance of socio-economic rights for living a dignified life. This could be inferred from the statement of the court which

[394] *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000).
[395] ibid para.29.
[396] ibid para.28-33.
[397] ibid 39-44.

says ‘there can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter’.[398] As such, the court emphasized the equal importance of these set of right for preserving the dignity of the person and adequately exercise other fundamental rights.

More importantly, human dignity was used by the CCSA as a yardstick for assessing the reasonableness of the state’s policy. The Court reasoned that ‘it is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings’.[399] If the action taken by the State is found to disregard the human dignity of the affected person or group of persons, it will be constitutionally unacceptable. In addition, the CCSA went further and elaborated what it means to be treated with dignity in the context of the South African constitution. Accordingly, it noted that the ‘constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test’.[400] Here, the phrase ‘treatment with care and concern’ is immensely important, as it makes any policy that leaves behind or pays no attention to a certain category people unreasonable for its failure to respect their equal worth or dignity.

In relation to this Liebenberg argues that human dignity inspired interpretation of socio-economic rights adopted by the Constitutional Court of South Africa is positive and it can strengthen its jurisprudence.[401] She mentions three core reasons why this is the case. Her first point relates to the appeal of human dignity-based reasoning to justify resource claims for the realization of socio-economic rights.[402] This is because the fulfillment of these category of rights require significant investment of resources on the part of the state and the latter is often

[398] ibid para.23.
[399] ibid para.44.
[400] ibid.
[401] Liebenberg (n133) 12-14.
[402] ibid.

reluctant to do so. When these set of rights are linked to their importance for ensuring the human dignity of every person and enhance his/her development as a human being, it will serve as a powerful argument or justification for the state to intervene and do something to improve the lives of people living in extreme poverty.[403] Failure to do so on the part of the state will be incompatible with the constitutional command to respect and protect the intrinsic worth and value of each human being. Her second point is related to the emphasis on 'equal respect and concern' for every human being in human dignity centered reasoning. This in her view is crucial to ensure the consideration the actual circumstance and needs of each person.[404] If such consideration is absent, the peculiarity and urgency of needs of some individuals will be neglected. Her final point dwells on the importance of human dignity for gauging the adequacy or inadequacy of state response.[405] Thus, sufficiency and reasonableness of state action with respect to socio-economic rights is measured based on its sensitivity to the human dignity of the affected persons.

***Port Elizabeth Municipality v Various Occupiers*[406]**

This case concerned a decision of Port Elizabeth Municipality to evict the applicants from the private land they were occupying unlawfully at the request of the land owners. The applicants did not oppose the eviction order *per se* rather its manner of execution. Their core argument was that the municipality should provide them a temporary shelter where they can stay after the eviction until they find a permanent place to settle.[407] In response, the municipality argued that it has no obligation to provide housing for these people. Its policy is to distribute houses according to the order of registered house seekers and they have to wait for their turn. To give

[403] ibid
[404] ibid
[405] ibid
[406] *Port Elizabeth Municipality v Various Occupiers* (CCT 53/03) [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (1 October 2004).
[407] ibid para.2.

a house to such people distorts the housing program of the municipality and amounts to a preferential treatment.[408]

In its decision, the CCSA held in favor of the applicants and the role of dignity was central to its reasoning. As a background, the court reflected on access to land and housing for Black South Africans during Apartheid and the treatment of the unlawful occupants. It noted that due to the policy of the then government, Black South Africans had no access to land or housing. Due to this reason, a considerable number of Black South Africans live in informal settlements. Further, unlawful occupants were harshly treated with no regard to their dignity. The eviction orders back then were summarily executed; houses immediately demolished and the persons were held liable for criminal offences.[409] Such form of treatment is unacceptable in the present constitutional setup of South Africa. Eviction order needs to be carried out in a humane manner ensuring the dignity of the people affected. In connection with this the court noted that 'while awaiting access to new housing development programmes, such homeless people had to be treated with dignity and respect'.[410]

Most importantly, the CCSA relied on the idea of *ubuntu* and the kind of society envisioned by the constitution to emphasize rightfulness of showing concern for the condition homeless individuals. Accordingly, it noted the necessity of striking adequate balance between the right to property of the land owners on the one hand and the interests of homeless persons occupying the land on the other hand to realize 'constitutional vision of a caring society based on good neighborliness and shared concern'.[411] The CCSA conception of a 'caring society' seems to be one where the concerns and interest of everyone is recognized and attended. Such society also expects the commitment of its members to the fulfilment of this noble goal. In addition, the CCSA asserted that homeless people are not 'faceless and anonymous squatters

[408] ibid para.3.
[409] ibid.
[410] ibid para.13.
[411] ibid para.37.

automatically to be expelled as obnoxious social nuisances'.[412] This statement is very crucial because often 'unlawful occupants' are considered as individuals merely violating the law with no legitimate right whatsoever. Their humanity and their right to be treated with respect is forgotten. If one adopts such mindset, he/she would not care that much about what happens to them after eviction from their shelters. In contrast, if they are considered as dignified and bearers of rights irrespective of their status, their claim or interests would be seriously considered. It is for this reason the CCSA reasoned that 'justice and equity require that everyone is to be treated as an individual bearer of rights entitled to respect for his or her dignity'.[413] Based on the above reasoning, the court held that the policy of the eviction policy municipality is unreasonable as it failed to sufficiently address the need of individuals occupying the land. As an appropriate solution, the court proposed a mediation and dialogues between the land owners, occupants and the municipality to arrive at a mutually beneficial solution.

2.4.3 Human Dignity as Protection of Autonomy & Self determination

The third aspect of human dignity as respect for individual autonomy and self-determination began to gain ground in the jurisprudence of CCSA and other South African courts relatively late. In the beginning courts were generally reluctant to base their decision on the notion of autonomy and the right of individuals to make choices which are central to their life. This was mainly justified due to the absence of an explicit textual basis for individual autonomy in the text of the South African Constitution.[414] Further, the South African constitution unlike that of the US Constitution is not a liberty-based constitution founded on individual autonomy and self-determination. Rather, it intends to create an egalitarian society by a balancing individual

[412] ibid para.41.
[413] ibid.
[414] D.W Jordaan , 'Autonomy as an Element of Human Dignity in South African Case Law', (2009) 9 The Journal of Philosophy, Science & Law 1 , 1-15.

and communitarian interest through concepts like *ubuntu*. This mindset may partly explain the reservation of courts towards autonomy-based reasoning. However, over the years courts in South Africa seem to become more open, giving important place to individual autonomy as a constitutive element of human dignity. The various decisions concerning abortion, reproductive choices, assisted suicide and adultery reflect this pattern. These cases will be examined in detail in the subsequent paragraphs.

Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others[415]

This is one of the earliest decisions of the CCSA where the autonomy/respect for choice aspect of human dignity was introduced into South Africa constitutional jurisprudence by the reasoning of justice Ackerman. The case was a constitutional challenge to the section 417 of the Companies Act, No. 61 of 1973 which compels individual working in leadership positions of a company to provide all the necessary information to a court needed for undertaking a liquidation process.[416] The information that is obtained from them in this process could also be later used against them if a criminal proceeding is instituted. This section was challenged by the applicants for violating two provisions of the Interim Constitution. The first is the right not to incriminate oneself which as an aspect of the right to fair trial.[417] The applicants argued that the act violated this protection by requiring them to give a self-incriminating information. The second ground they relied on was the provision protecting freedom and security of a person.[418] Their argument here is that the law undermines their fundamental freedom by forcing them to testify or provide information against their will.

[415] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* (CT5/95) [1996] ZACC 27; 1996 (2) SA 621 (CC); 1996 (4) BCLR 441 (CC) (19 March 1996).
[416] ibid.
[417] ibid.
[418] ibid.

Justice Ackerman ruled in their favor by providing a very long and detailed reasoning. However, he did not accept their claim that the act violates their right to be protected from self-incrimination. In his view this right is only available for persons accused of a crime in the context of a trial.[419] The applicants in this case were neither charged for a crime nor undergoing a trial. As such, he stated that they do not have the standing to challenge the act on this ground. Nonetheless, he found merit in the second argument of the applicants relying on the right to freedom and security.[420] In his detailed reasoning Justice Ackerman analyzed the link between human dignity and freedom, its meaning, scope and legitimate limitations on it.

With respect to the relationship between human dignity and freedom he noted that '*human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their "humanness" to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity'*.[421] This quotation nicely summarizes the relationship between human dignity and freedom. Ackerman seems to view freedom as a means and dignity as an end. In doing so, he demonstrates the centrality of respecting the autonomy and choice of individuals as it is essential for preserving their dignity. He also clearly underlines how human dignity and a person's potential for development is impoverished if he/she is denied of freedom.

[419] ibid.
[420] ibid.
[421] ibid para.49 ff.

After making this correlation clear, Ackerman tried to give a meaning and content to freedom irrespective of the arduous nature of doing so. As such, he defines freedom as 'right of individuals not to have obstacles to possible choices and activities' by the state.[422][423] This is a very broad conception of freedom with no visible qualification. His approach was to define the freedom as broadly as possible in the first stage and apply limitation analysis in the second stage. The justification he gives for this is the constitutional requirement of interpreting rights in a manner acceptable in 'open and democratic society'.[424] The hallmark of such society is the respect it gives for individual freedom that enables them to fulfil their potential and development as a human being. Ackerman also referred to the past Apartheid history of South Africa which grossly undermined the freedom of Black South Africans placing restrictions on every aspect of their life to justify a broader and robust conception of freedom.[425] With this understanding, he went on to examine the scope of the right to freedom. This was because many other freedom related rights were explicitly recognized in the constitution. However, Ackerman argues the list of freedoms listed in the constitution are not-exhaustive. Rather other 'residual freedoms' are protected by the general right to freedom.[426] The limitation on these 'residual freedoms' or choices individual make must also be adequately justified for them to be acceptable.

Based on this analysis Ackerman held that 'section 417(2)(b) of the Companies Act, which require an examinee summoned under sub-section (1) to answer, under pain of fine or imprisonment, or both, any question put to the examinee, notwithstanding that the answer might tend to incriminate the examinee and notwithstanding that any answer to any such question may thereafter be used in evidence against the examinee, infringe the examinee's

[422] ibid
[423] ibid
[424] ibid
[425] ibid
[426] ibid

section 11(1) right to freedom, more particularly the residual section 11(1) right of an examinee at a section 417 enquiry not to be compelled to incriminate himself or herself'.[427] However, it is important to note that although other judges of the court also agreed with his final conclusion regarding the unconstitutionality of the act , they disagreed with his reliance on the notion of individual freedom. For instance, Justice Chalkson argued that the right to freedom and security under the South African Constitution is 'primary' designed to protect 'physical integrity' of a person from arbitrary detention.[428] Further, he argued that if this provision is interpreted to recognize a general right to freedom it should only protect those freedoms which are 'fundamental'.[429] Based on this he argued that, the right against self-incrimination is a better constitutional ground for invalidating the act. Most judges of the court concurred with his argument. Yet, many scholars consider the argument of justice Ackerman crucial in establishing an important connection between human dignity, choice and individual autonomy. For instance, Michelman argues that although Ackerman lost the battle in this case, he did win the war in the sense that this reasoning of Ackerman and the important connection he made between dignity and freedom was accepted in the subsequent jurisprudence of the court. [430] The following cases decided by South African courts discussed in the subsequent paragraphs of the chapter also support this conclusion.

Christian Lawyers' Association v. National Minister of Health and Others Case[431]

This case was a challenge to the abortion law of South Africa that legalized abortion provided the woman gives her informed consent. This is the only condition attached to abortion for adults as well as minors. The plaintiff in this case questioned the constitutionality applying the

[427] ibid.
[428] ibid.
[429] ibid.
[430] Frank I. Michelman, 'Freedom by Any Other Name: A Comparative Note on Losing Battles While Winning Wars' (2008) ACTA JURIDICA 91, 91-111.
[431] *Christian Lawyers' Association v National Minister of Health and Others* Case No:7728/2000 High Court, Transvaal Provincial Division 2004 (10) BCLR 1086 (T) 24/05/2004.

informed consent requirement for girls below the age of 18 who seek to undertake abortion.[432] Their argument is that such condition is inappropriate to ensure the best interest of the child, since the girl is not in a position to give her informed consent about abortion at that age. In addition, they claimed that abortion must be allowed in such cases only after securing the consent of parents. The High Court rejected the application and upheld the constitutionality of the statute.

In its reasoning, the court began its analysis on the unique provision of South African Constitution that recognizes the right to control over one's body and the right to make reproductive choices.[433] It noted that this right is the basis for requiring informed consent of women in decisions regarding abortion. Further, besides this provision, the general right to dignity enshrined under the South African Constitution also protects and reinforces her right to make choice.[434] The next issue the court addressed was the possibility of imposing limitations. Although, the right to make choice is subjected to limitation like many other rights such limitation must be proportional.[435] Hence, requiring parental consent for undertaking abortion is a disproportionate restriction on the exercise of the right. Further, it is not justifiable to assume that all women below the age of 18 are incapable to make informed decisions. This has to be determined on a case by case basis considering the unique circumstances of the person in each case. It is also for this very reason that the law encourages minors to secure parental consent/consult for conducting abortion. To sum up, the court ruled in favor abortion with informed consent regardless of age relying on the notion of individual autonomy which is a constitutive element of the right to dignity.

[432] ibid.
[433] ibid.
[434] ibid.
[435] ibid.

Stransham-Ford v Minister of Justice and Correctional Services and Others[436]

The applicant in this case was a practicing lawyer suffering from a stage four cancer who sought to end his life through medical assistance. Although the South African law allows a person to decide for termination of medical treatment, food or any other life sustain care, he or she is not entitled to undertake medically assisted suicide. Further, the medical professional who provided such kind of assistance will be held criminally responsible. The applicant contended that this prohibition infringed his right to die with dignity as he is enduring a great deal of suffering from his illness which is irreversible.[437] He also requested the court to exonerate people who assist others in ending their suffering from any kind of liability. In its judgment, the court tried to balance the respect for a person's right to life on the one hand and the dignity or the right to self-determination on the other hand.

As the starting premise, the High Court underscored the importance of the right to life under the South African Constitution as a source of all other rights.[438] It also attempted to define or qualify the meaning of the right by relating it to the notion of human dignity. Accordingly, it noted that 'the right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity'.[439] The court particularly emphasized the feeling and perspective of the applicant, who stated that his condition is deteriorating day by day and suffering excessive amount of pain and sought to die a dignified death with the assistance of a physician. It also underscored the need to recognize the autonomy of the applicant to make decisions about his life which is an aspect of his right to dignity. Regarding this the High Court noted that 'a decision of a person

[436] *Stransham-Ford v Minister of Justice and Correctional Services and Others* (27401/15) [2015] ZAGPPHC 230; 2015 (4) SA 50 (GP); [2015] 3 All SA 109 (GP); 2015 (6) BCLR 737 (GP) (4 May 2015).
[437] ibid para.3.
[438] ibid para.12
[439] ibid.

on how to cease to live was in many instances a decision very important to their own sense of dignity and personal integrity, and that was consistent with their lifelong values and that reflected their life's experience'.[440] The court supported its reasoning with the decision of Canadian Supreme Court on a similar case.[441] Then, it went on to consider the justification of the state for banning assisted suicide and the proportionality of the limitation.

With respect to justification, the court stated that by prohibiting assisted suicide the law aims at preserving the sanctity of human life.[442] Further, if assisted suicide is allowed without any pre-condition or proper regulation it may have a detrimental impact on some individuals. Particularly persons with mental or psychological problems are vulnerable or prone to the harm.[443] This however does not justify a blanket ban on assisted suicide. Rather, it should be decided on a case by case basis considering the particular circumstances of the individual.[444] In doing so the mental, psychological and physical state of the individual should be seriously considered in order to establish the accuracy of the decision. In the case at hand, the applicant condition was deteriorating due to a cancer which had reached stage four. Further, psychologists and physicians have confirmed his mental and psychological conditions allow him to make sound decision. Considering these factors, the applicant in this case should be allowed to end his life with assistance of a physician.

Interestingly this order of the High Court was issued two hours after the death of the applicant and it was later overruled by the Supreme Court of Appeal (SCA). In reversing the ruling, the SCA relied on a number of grounds. First, it noted that since the applicant died before the

[440] ibid para.18.
[441] *Carter vs Canada* (Attorney General) 2015 SCC5.
[442] ibid.
[443] ibid para.17.
[444] ibid para.18.

decision, the case is moot and the High Court should not have given the order.[445] Second, on the substantive level the court emphasized the distinction between active and passive euthanasia which in its view was neglected by the High Court. It noted that under the existing South African law and jurisprudence; only passive euthanasia is allowed based on autonomy and dignity.[446] Physician assisted suicide is still a criminal offense and it is not up to the court to change that on individual/case by case basis. Third, the SCA criticized the ruling of the High Court on the ground of separation of powers. It stated that 'issues engaging profound moral questions beyond the remit of judges to determine, should be decided by the representatives of the people of the country as a whole'.[447] Finally, the SCA appeal criticized the manner the High Court relied on foreign jurisprudence. Its main objection was that it failed to consider the South African context both in cultural and regulatory sphere.[448] To sum up, despite the disagreement between the High Court and the SCA regarding the constitutionality of euthanasia, both seem to agree that respect for individual autonomy is an important aspect of dignity and courts must give it adequate consideration in resolving cases.

AB and Another v Minister of Social Development[449]

This case was brought to the CCSA by a women who could neither contribute her own gamete nor carry a fertilized egg/embryo in her womb. In order to get a child , she had received several fertility treatments but none of them succeeded in bringing a result. Her marriage also ended with a divorce. As a last resort, she sought to enter in to a surrogacy agreement with someone who is willing to carry a child for her. The challenge however was that, section 297 of the

[445] *Minister of Justice and Correctional Services and Others v Estate Late James Stransham-Ford and Others* (531/2015) [2016] ZASCA 197; [2017] 1 All SA 354 (SCA); 2017 (3) BCLR 364 (SCA); 2017 (3) SA 152 (SCA) (6 December 2016) para.21-22.
[446] ibid para.31.
[447] ibid para.102.
[448] ibid para.58ff.
[449] *AB and Another v Minister of Social Development* (CCT155/15) [2016] ZACC 43; 2017 (3) BCLR 267 (CC); 2017 (3) SA 570 (CC)• (29 November 2016).

Children Act requires the gamete of one of the commissioning parents to enter into a valid surrogacy agreement.[450] Since the applicant cannot produce gamete and she is single, the law prevents her from entering into surrogacy. Accordingly, the applicant challenged the constitutionality of this law relying mainly on the ground of equality, her right to dignity and physical integrity.

Concerning equality, she argued that the law makes an unfair distinction between those who are conception fertile and infertile.[451] While it allows surrogacy as a means of having a child for those who can donate gametes, it denies the same for those who cannot produce gamete or are single. Further, she argued that the law also violates her constitutional right to dignity and her right to make reproductive choices that fit her condition.[452] In response to this, the State mainly argued on the basis of the best interest of the child. It noted that, the conditions for surrogacy are required because 'genetic link' with the parents is important to ensure the best interest of the child and protect his/her right to dignity.[453] The absence of such a link may create both psychological and emotional problem for a child who wants to know his identity. Further, if surrogacy is allowed without 'genetic link' it will encourage commercial surrogacy and 'designer babies'.[454] The very purpose of the law is to prevent this danger.

The CCSA was divided in its final decision. The majority ruled in favor of the applicant and found a violation of her right to equal protection, autonomy and dignity. Their reasoning heavily relied on two constitutional values i.e. freedom and dignity as guides of constitutional interpretation. They also elaborated on the link between the two values by noting that 'what animates the value of freedom is the recognition of each person's distinctive aptitude to

[450] ibid para.18.
[451] ibid para.20.
[452] ibid para.21
[453] ibid para.26.
[454] ibid para.13.

understand and act on their own desires and beliefs. The value recognizes the inherent worth of our capacity to assess our own socially-rooted situations, and make decisions on this basis. By exercising this capacity, we define our natures, give meaning and coherence to our lives, and take responsibility for the kind of people that we are'.[455]

In their view the ability to make a decision is a defining feature of our humanity or dignity that needs adequate protection. They further argued that 'it is only by accepting that the opinions and decisions of each individual should be respected and encouraged that dignity is ensured. The right to dignity "requires us to acknowledge the value and worth of all individuals in a society".[456] Contrary to these values, the Children Act requirement of 'genetic link' for surrogacy prevents/deprives individuals who are pregnancy and conception infertile, the right to make reproductive choices.[457] In doing so it treats them as having less worth and violates their right to dignity. Further, the distinction the law makes between the two class of individuals is also unfair. The Children Act allows persons who are pregnancy fertile to conclude a valid surrogacy agreement and have children. In contrast, it denies this opportunity to those who are both conception and pregnancy infertile. The severe impact of the differentiation on the dignity and psychological integrity of the excluded class makes the discrimination unjust.[458] In South African society, there is a negative stereotype against those women who are infertile. In fear of social exclusion, women with fertility problems usually hide their condition or status. By preventing infertile women from using available technologies and having children, the law reinforces their marginalization and suffering.

The minority dissented on three major grounds. First, they argued that the Children Act requirement of genetic link serves a legitimate purpose as it creates a bond between the parent

[455] ibid para.52.
[456] ibid para.108.
[457] ibid para.70-76.
[458] ibid para.105-107.

and the child.[459] Second, they underlined the existence of a material difference between double donor IVF and surrogacy. In their view, even if there is no genetic link between the child and parents in double donor IVF, the bond between the mother and the child is created because the embryo grows in her womb.[460] Hence, the differentiation the law makes between the two is legitimate. Third, they noted that adoption or entry to a relationship with a person that can donate gamete are options available for people who are conception and pregnancy infertile. If they are not willing to consider these options, they 'have to live with their choices'.[461] Third, they opposed an expansive interpretation of the right to reproductive choice and autonomy. In their view the right to reproductive choice developed in relation to the right to physical integrity and control over one's body.[462] In relation to abortion for instance, women have the right to terminate pregnancy because she is the one who carries the child. In the case at hand, the child is carried by a surrogate mother. So, the law in regulating the conditions of surrogacy does not affect neither the bodily integrity nor the reproductive choice of the commissioning parent. The right to make choice in this case belongs to the surrogate mother not the commissioning parent.[463]

DE v RH [464]

This case began as a private law dispute between MR. RH and DE in the lower court. Mr. DE sued Mr. RH for committing adultery with his wife. Alleging injury or damage to his dignity or reputation, Mr. DE sought compensation from the third party MR.RH as it is possible to do so under the existing common law. The court ruled in his favor and awarded him the damage. Aggrieved with this decision, Mr. RH approached the CCSA with a claim that challenges the

[459] ibid.
[460] ibid.
[461] ibid para.95.
[462] ibid para.306-315, 315.
[463] ibid.
[464] *DE v RH* (CCT 182/14) [2015] ZACC 18; 2015 (5) SA 83 (CC); 2015 (9) BCLR 1003 (CC) (19 June 2015)

constitutionality of common law rule that requires a third party to pay a compensation for the non-adulterous spouse.[465] He argued that the rule violates his fundamental right to dignity and autonomy. In resolving the case, the court considered the purpose of the rule and justification for its continued existence.

It noted that the primary aim of the rule is to protect the sanctity of marriage and discourage third parties from engaging in adulterous relationships that breaks it.[466] In other words, the assumption is that third parties will refrain from disturbing marital relationships in fear of the compensation they have to pay for the spouse who is non-adulterous. However, the true foundation of marriage is love, loyalty and commitment of the spouses not through punishment in the form of compensation. Thus, in the absence of trust between spouses, it is not justifiable to protect a failing marriage by the force of law.[467] The other purpose of the rule is to preserve the *dignitas* or reputation of the non-adulterous spouse. Adultery used to be considered as a shameful or embarrassing thing by the society not only for the adulterous spouse, but to the loyal one as well. However, the attitude of the society towards adultery is changing and it is no longer associated with shame or stigma. Hence, the degree of impairment to dignity is minimal.

In contrast, the common law rule that imposes damage on the third part for adultery violates his constitutional right to autonomy, dignity and privacy. It interferes with the right of every person to establish sexual/romantic relations with any person of his choice.[468] Hence, it undermines his autonomy and decision making capacity. Second, the injury to the dignity of the third party is also a significant one.[469] In the course of responding or defending a claim for compensation following adultery, the third party is expected to discuss his intimate

[465] ibid.
[466] ibid para.27.
[467] ibid para.44.
[468] ibid para.62.
[469] ibid.

relationships in court, which might be embarrassing. Hence, in relative terms the harm to the dignity and autonomy of the third party is more severe than the injury to the dignitas or reputation of the non-adulterous spouse. For this reason, the common law rule that requires payment of compensation by the third party to non-adulterous spouse is unconstitutional.

2.5 South African Indigenous Human Dignity Jurisprudence

One of the commendable things the CCSA did in the course of developing its human dignity jurisprudence is its use of the indigenous value *ubuntu* as a means of reinforcing and entrenching the idea of respect for a human person. Textually speaking, the idea of *ubuntu* was introduced for the first time in the *Postamble* of the Interim Constitution of South Africa which emphasizes 'a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimization'.[470] The CCSA used this reference as a source of inspiration and developed it further in its subsequent case laws. A landmark case in this regard is the *Makwanyane* judgment that made death penalty unconstitutional.

In this case, the court defined ubuntu as 'a culture which places some emphasis on communality and on the interdependence of the members of a community. *It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance* from the members of the community such person happens to be part of. It also entails the converse, however. The person has *a corresponding duty to give the same respect, dignity, value and acceptance* to each member of that community.'[471] The court also interpreted *ubuntu* to embrace values of love, compassion and friendliness towards others. In addition, the CCSA elevated the status of *ubuntu* to a founding value of the South African constitutional order. This could be inferred from the statement which says *ubuntu* 'is a concept that permeates the

[470] Constitution of the Republic of South Africa Act 200 of 1993 & TW Bennett, 'Ubuntu: an African Equity' (2011) 14 PER / PELJ 30-51.
[471] *S v Makwanyane* and Another (n290) para.224.

Constitution generally and more particularly Chapter Three which embodies the entrenched fundamental human right.'[472] It is this with this assumption that the CCSA uses or applies *ubuntu* as a guiding principle in interpreting the constitution.

As the dignity jurisprudence of the CCSA demonstrates, *ubuntu* is used mainly in connection with two aspects of dignity i.e. respect for human life and integrity and autonomy. In the *Makwanyane case* for instance, *ubuntu* was invoked to denote the precious value of human life and the wrongfulness of death penalty.[473] It was noted that imposition of death penalty is incompatible with the ideal of *ubuntu* that regards the life of every person as valuable. It also goes against the dictates of *ubuntu* to show love and compassion to fellow human beings. The other context where the court utilized ideals of *ubuntu* in constitutional interpretations concerns cases involving individual autonomy as an aspect of human dignity. *Ubuntu* is primarily used in these cases to define and qualify individual autonomy claims considering the interest of the community.

For instance, in a case concerning reproductive choice or autonomy, the CCSA noted that 'to be autonomous is to be socially and politically connected, rather than an agent of unfettered individual choice. This Court's repeated endorsement of *ubuntu* underscores this point'.[474] Here, the notion of *ubuntu* was used to explain that respect for individual choice or autonomy is not limit less. Rather, it must be understood and defined by surrounding social and political conditions. Further, respect for individual autonomy as an aspect of dignity is often justified for being essential in ensuring the full development of potential of a human being.[475] Reference to *ubuntu* is made to qualify and assert that such development is impossible without interacting others or the community. This could be inferred from the statement of the court which says 'an

[472] ibid.
[473] ibid.
[474] *AB and Another v Minister of Social Development* (n449) para.51.
[475] ibid.

individual human person cannot develop and achieve the fullness of his/her potential without the concrete act of relating to other individual persons'.[476] Hence, the court utilizes the concept as a means of balancing and reconciling individual and collective interests.

Relatively speaking, the use of *ubuntu* in relation to the third aspect of human dignity i.e. equal worth and concern seems to be limited. No reference to *ubuntu* was made in landmark cases of the CCSA concerning discrimination on the basis of sexual orientation or gender where dignity based reasoning was vital in the determination of the final outcome. This however does not mean that this aspect of human dignity is completely ignored by the court in its interpretation/application of *ubuntu*. In a case concerning discrimination on the ground of health/HIV status, the CCSA noted that 'people who are living with HIV must be treated with compassion and understanding. We must show *ubuntu* towards them.'[477] The use of *ubuntu* in this context could be interpreted to mean acknowledging their equal worth and showing them equal concern beside compassion. Similarly, in another case concerning eviction of unlawful occupants of a private land, the CCSA stated that ubuntu 'is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern'. [478] Considering the context where this statement is used, it could be taken as an affirmation of the equal worth of homeless persons and their right to receive an equal concern by the state in attending to their needs/conditions.

The next issue worth considering is the justification for using indigenous concepts like *ubuntu* in the interpretation of fundamental rights and human dignity in South Africa. Some scholars praise the present constitution of South Africa for being progressive and for incorporating a

[476] ibid.
[477] *Hoffmann v South African Airways* (CCT17/00) [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1211 ; [2000] 12 BLLR 1365 (CC) (28 September 2000).
[478] *Port Elizabeth Municipality v Various Occupiers* (n406) para.37

comprehensive bill of rights.[479] However, some seriously question the legitimacy of the Constitution. Their main charge against it is that the Constitution does not reflect the values and traditions of the majority of the South African people.[480] Hence, they regard the Constitution as a 'Western Constitution' shaped by Western values. The removal of the reference to *ubuntu* in the final constitution of South Africa is mentioned as a further manifestation of the 'de-africanization' of the Constitution.[481] Considering this serious charge, the use of ubuntu by the CCSA is immensely relevant. This is because it helps it to legitimize the Constitution in the eyes of the people by being sensitive to their traditions and incorporating their world view.[482] To what extent the CCSA succeeded in this regard, is difficult to determine. However, considering the handful of cases where *ubuntu* is used much needs to be done in the future.

The other justification for using *ubuntu* in constitutional interpretation is its relevance in addressing the unique context or problem of South Africa.[483] Apartheid has created a society with a massive disparity in wealth and status. In order to reduce this huge inequality and create an egalitarian society, a purely libertarian or individual right based constitutional arrangement may not be effective.[484] This is because achieving these goals and attaining social justice requires redistribution of resources and taking of affirmative action to uplift the disadvantaged. With its emphasis on interdependence between individuals, the need to show equal concern for all and values of care and compassion, *ubuntu* may be helpful to justify such measures.

Despite these justifications, there are also scholars who are very skeptical about the use of *ubuntu* in constitutional interpretation. They even consider it to be incompatible with the core

[479] Klug (n253) 131-150.
[480] Drucuilla Cornell, 'Exploring Ubuntu: Tentative Reflections', AHRLJ 5(2), 2005 195-220, C. Himonga, M. Taylor and A. Pope, 'Reflections on Judicial Views of Ubuntu', PER / PELJ 2013(16) 5, Yvonne Mokgoro, 'Ubuntu and the Law in South Africa', 4 Buff. Hum. Rts. L. Rev.15, 15-23.
[481] ibid.
[482] ibid.
[483] ibid.
[484] ibid.

founding values of the South African constitution i.e. dignity, equality and freedom.[485] In their view, instead of promoting these values, the reference to *ubuntu* undermines them. The source of their concern arises from the cultural values and norms where the constitutional value of *ubuntu* took its inspiration from. According to these scholars, *ubuntu* is founded on a culture that promotes patriarchy and inferiority of women.[486] Looking at the overall status and position of women in the society, suffice to arrive at this conclusion. In addition, rather than being inclusive and friendly to everyone, it excludes those individuals who deviate from the norms of the society and fails to recognize their equal status.[487] As such, it does not embrace sexual and other minorities. Further, due to its excessive communitarian focus, reliance on *ubuntu* destroys individual autonomy and freedom.[488] It could also be abused to justify the imposition of certain values or life style on the individual person.

In my view, neither the absolute support for *ubuntu* as flawless concept nor its complete rejection as a useless value is helpful. The significance of relying on *ubuntu* for ensuring legitimacy of the constitution and addressing unique challenges of South Africa is beyond doubt. However, some of the charge brought against it must be seriously considered by the CCSA in its future use more specifically in the area of equality and autonomy aspects of human dignity. It is only by responding to these concerns or by reconciling them in evolutive way can the court justify its use in an enduring manner. Further, it is important to accept that *ubuntu* like any other legal concept or value could be used and abused. Considering this courts must be cautious in their use of *ubuntu* and always aspire to make it compatible with the founding values of the constitution.

[485] I Keevy, 'The Constitutional Court and ubuntu's "inseparable trinity" (2009) 34(1) Journal for Juridical Science 61. 61-85 & I Keevy, 'Ubuntu Versus the Core Values of the South African Constitution' (2009) 34(2) Journal for Juridical Science 19, 19-53.
[486] ibid.
[487] ibid.
[488] C.Himonga, M. Taylor and A. Pope, 'Reflections on Judicial Views of Ubuntu' (2013) 16(5) PER / PELJ 372-429.

2.6 The Migration of Human Dignity to South Africa

The CCSA is one of the leading courts in the world in the use and engagement with comparative law in interpretation of fundamental rights enshrined under the South African constitution.[489] This is largely attributed to the peculiar provision in the constitution that gives courts the mandate to refer to the laws and jurisprudence of other nations. More specifically, the constitution stipulates that 'when interpreting the Bill of Rights, a court, tribunal or forum…may consider foreign law'.[490] Such explicit authorization to utilize foreign law is not common in many constitutional systems. However, the former justice of the South African constitutional court Laurie Ackerman, does not accept the existence of this provision, as the primary justification for the extensive use of foreign law by the CCSA.

In his view, the mixed nature of the South African legal system i.e. British common law and Roman-Dutch civil law has made it necessary for courts to look for comparative law. He argues South African courts had a long tradition of referring and engaging with foreign jurisprudence. [491] Accordingly, the provision about the use of foreign law in the constitution is nothing new or that significant. However, in my view the provision is crucial because in many systems courts are reluctant to consider foreign law due to the absence of an explicit authorization to do so. Since the Constitution of South Africa clearly permits such practice, South African courts have more freedom to engage and consider it without facing charges of undermining the sovereignty of the state or legitimacy of its decisions.

[489] Christa Rautenbach, 'Teaching an 'Old Dog' New Tricks? An Empirical Study of the Use of Foreign Precedents by the South African Constitutional Court' in Tannia Groppi and Marie –Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing 2013)185-209.
[490] CRSA (n267), art 39(1) c.
[491] Laurie W. H. Ackermann, 'Constitutional Comparativism in South Africa: A Response to Sir Basil Markesinis and Jorg Fedtke, (2005) 80 Tul. L. Rev. 169, 169-194.

Besides the unique provision incorporated in the South African Constitution with respect to foreign law and the mixed character of its legal system, the past history of South Africa has also contributed its part for the openness of its courts towards comparative law. During the Apartheid era, South Africa was isolated from the rest of the world and this has also affected its constitutional development. With the end of Apartheid and the adoption of the new constitution, there was a sense of urgency to 'catch up' with the rest of the world.[492] This has forced South African courts to engage with and consider the jurisprudence of various jurisdictions on different issues. In addition, the Constitution of South Africa dictates that in interpreting Bill of rights and limitations courts 'must promote the values that underlie an open and democratic society based on human dignity, equality and freedom'.[493] In order to discharge this constitutional duty, courts had to consider the decisions of courts in other open and democratic societies founded on the same values. It is with this premise or context that the great influence of other jurisdiction on the development of the South African dignity jurisprudence must be considered.

Accordingly, a closer examination of the human dignity case law of the CCSA and other South African courts reveals that to a varying degree all aspects human dignity migrated to the South African constitutional order from other systems. With respect to dignity as respect for human life and integrity, the decision of the German, Canadian and other African courts were significant. For instance, in the *Makwanyane* judgment concerning the prohibition of death penalty, the court cited a decision of the German Constitutional Court which states that 'respect for human dignity especially requires the prohibition of cruel, inhuman, and degrading punishments. [The state] cannot turn the offender into an object of crime prevention to the

[492] Ursula Bentel, 'Mining For Gold The Constitutional Court of South Africa's Experience With Comparative Constitutional Law' (2009) 37 GA. J. INT'L & COMP. L. 219,219-265, Andrea Lollini, 'Legal Argumentation Based on Foreign Law an Example from the Case Law of the South Africa Constitutional Rights' 2007 3(1) Utrecht Law Review, 60-74.
[493] CRSA (n267), art 39(1) a.

detriment of his constitutionally protected right to social worth and respect'.[494] This decision clearly outlines the incompatibility of death penalty with the dignity and intrinsic worth of person. It also underscores the impropriety of treating a human being as a mere object. Similarly, the CCSA relied on the decision of the Canadian Supreme Court which held 'that capital punishment constitutes a serious impairment of human dignity'.[495] Further, the dissenting opinion of Justice Brennan was also crucial in shaping the position of the court on death penalty. Justice Brennan found the death penalty to be unacceptable because it treats human as 'nonhumans, as objects to be toyed with and discarded ... [and that this is] ... thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity'.[496]

Regarding the conception of human dignity as demand to acknowledge the equal worth of everyone and show equal concern, the jurisprudence of Canadian Supreme Court had influenced its South African counterpart. In a case concerning decriminalization of sodomy and discrimination on the basis of sexual orientation, the CCSA cited a Canadian decision which held that distinction on the ground of sexual orientation 'demeans the individual and strengthens and perpetrates the view that gays and lesbians are less worthy of protection as individuals in Canada's society. The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination'.[497] In addition, the CCSA made an in-depth examination of the sexual orientation jurisprudence of the US Supreme Court to show how it is different from the South African system both in text and context.

[494] [1977] 45 BVerfGE 187, 228 (Life Imprisonment case).
[495] *Kindler v Canada*, (1992) 6 CRR (2d) 193 SC.
[496] *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)
[497] *Vriend v Alberta*, (Supreme Court of Canada, File No: 25285, delivered on 2 April 1998.

One could also find traces of migration of the third aspect of human dignity as respect for individual autonomy and decision into the South African constitutional system. In resolving a dispute concerning abortion the High Court heavily relied on the decision of the US supreme court on *Roe v Wade* which held 'few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision - with the guidance of her physician and within the limits specified in Roe - whether to end her pregnancy. A woman's right to make that choice freely is fundamental Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all.'[498] The High Court noted that this reasoning of the US Supreme Court is relevant and applies to the South African context with equal force.

In engaging with comparative jurisprudence in the area of dignity, the CCSA gives emphasis for similarity both text and context. In resolving an issue regarding unjust discrimination, the court underlined the importance of text in the following manner 'unlike the United Kingdom and Australia, Canada's Charter of Rights and Freedoms includes a comparable right against unfair discrimination to our own section 9(3). The position in Canada accordingly seems of greater comparative assistance than the position in Australia, which has no bill of rights, or the United Kingdom, which has no formal Constitution'.[499] Further, part of the reason why the CCSA rejected the early sexual orientation jurisprudence of the US Supreme Court was by invoking the textual difference between the two systems. More specifically, the CCSA noted that 'our 1996 Constitution differs so substantially, as far as the present issue is concerned, from that of the United States of America that the majority judgment in *Bowers* can really offer us no assistance in the construction and application of our own Constitution. The 1996 Constitution contains express privacy and dignity guarantees as well as an express prohibition

[498] *Roe v. Wade* 410 U.S. 113 (1973).
[499] *AB and Another v Minister of Social Development* (n449) para.136.

of unfair discrimination on the ground of sexual orientation, which the United States Constitution does not.'[500]

In addition, the CCSA also gives serious consideration for similarity of context in engaging with foreign law. For instance, in a case concerning the prohibition of death penalty the CCSA gave weigh to two decisions of African courts. In justifying its reliance on these decisions, the court noted that 'the decisions of the Supreme Courts of Namibia and of Zimbabwe are of special significance. Not only are these countries geographic neighbors, but South Africa shares with them the same English colonial experience which has had a deep influence on our law; we of course also share the Roman-Dutch legal tradition.'[501] Moreover, in overruling the decision of the High Court that allowed physician assisted suicide on autonomy and dignity consideration, the SCA emphasized the contextual difference between South Africa and the jurisdictions the court relied on . Accordingly, it ruled that 'South Africa is a very different country facing very different challenges from countries such as Canada, Switzerland, the Netherlands, Belgium and Luxembourg, and states such as Oregon, Washington, California, Vermont and Colorado in the United States. Those countries and states have sophisticated health care systems and extensive palliative care networks. Comparatively speaking they are wealthy…a court addressing these issues needs to be aware of differing cultural values and attitudes within our diverse population'.[502]

The three aspects of human dignity mainly migrated into the South African Constitution from three constitutional systems i.e. Canada, Germany and the United States. Part of the reason for this is the influence of these constitutions in the drafting of the South African bill of rights. The

[500] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others(*n373) para.55.
[501] *Stransham-Ford v Minister of Justice and Correctional Services and Others* (n436) para.100.
[502] ibid.

Canadian Charter of Rights and Freedoms is notable in this regard.[503] In addition, the normative foundations of these systems are also similar to that of the South African Constitution. The Basic Law of the Federal Republic of Germany which gives a central place to human dignity and adopted in the aftermath of the Nazi regime is important in this regard.[504] Moreover, the 'foreign clerk program' of the Constitutional Court of South Africa is another factor that facilitated the travelling of human dignity into South Africa. Many German trained lawyers have served as foreign clerks in the CCSA over the years and this has its own impact in shaping the human dignity jurisprudence of the court.[505]

In its engagement with other courts, the CCSA seems to follow the 'dialogical' approach.[506] As such, foreign or comparative jurisprudence is neither out rightly authoritative nor irrelevant. Rather, the court primarily uses foreign case law as interpretative tool with the objective of better understanding the South African context. For this reason, the court does not follow a decision of another court merely because it came from a prestigious constitutional system. It rather engages with it in a critical manner and provides a detailed reasoning as to why such should or should not be pursued in South Africa. To sum up, the role of migration in the development of the South African human dignity jurisprudence is significant in all aspects of dignity. The dialogical approach the court follows and its critical engagement with comparative law could be a good lesson for other courts, who would like to consider the dignity jurisprudence of other courts in developing their own.

[503] D.M Davis 'Constitutional borrowing: The influence of Legal Culture and Local History in the Reconstitution of Comparative Influence: the Experience of South Africa' (2003) 1(2) ICON 181 181-195, Jeremy Sarkin, 'The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions' (1998) 1 (2) Journal of Constitutional Law 176-204.
[504] Ackerman (n132) 115-157.
[505] Christa Rautenbach, 'Teaching an 'Old Dog' New Tricks? An Empirical Study of the Use of Foreign Precedents by the South African Constitutional Court' in Tannia Groppi and Marie –Claire phonteareau (eds), *The Use of Foreign Precedents by Constitutional Judges*, (Hart Publishing 2013) 200-201.
[506] S. Choudhry (n169)1-35.

Yet, there might be persons who may not fully agree with the above assessment regarding the contribution of comparative law in the development of the of the South African Human Dignity jurisprudence. For instance, in his article written in 2009, Roux argues that the impact foreign law on the dignity-based decision of Judge Ackerman is insignificant.[507] He rather attributes the strong role of human dignity in South Africa to its Apartheid history and the philosophy Kant. However, I do not think it is appropriate to belittle the contribution of comparative law in enriching South African human dignity jurisprudence. The various cases discussed above in my view sufficiently demonstrate the considerable impact of foreign jurisprudence in shaping the meaning of human dignity in south Africa. In addition, even Roux concedes that judges like Ackerman primarily rely on comparative law to see how other democratic societies have understood human dignity concretely which is shared among all.[508] The point of such exercise is I believe to learn something from them. Further, in several of his writings judge Ackerman emphasized and acknowledged the importance of comparative law for enriching South Africa constitutional jurisprudence. [509] Considering all this, Roux's stance on comparative law is not fully convincing to me.

[507] Theunis Roux, 'The Dignity of Comparative Constitutional Law', 2008 ACTA JURIDICA 185, 185-203.
[508] ibid.
[509] Ackerman (n131) 115-180.

Conclusion

The central place of human dignity in the South African constitutional order must be understood in the context of its past history of Apartheid. At its core, apartheid was a system built on the assumption of superiority of whites and inferiority of Black South Africans which the National Party sought to institutionalize and entrench through the adoption of various laws. Religious, scientific and anthropological arguments were offered in attempt to justify it. Apartheid was also an ideology that denies the basic equality of all human beings emanating from their equal worth or dignity. On this assumption, it subjected Black South Africans to a great deal of discrimination, deprived most of their fundamental rights and controlled every aspect of their life. Following the end of Apartheid, a new constitution was adopted in South Africa with transformative mission and character.

Accordingly, it sought to constitute an egalitarian society that is based on a new moral foundation of dignity, freedom and equality for all. It also incorporated a comprehensive bill of rights, broadened standing rules and bestowed upon courts a prime responsibility of safeguarding rights. In the place of the racist legal order, respect for human dignity became the crown jewel and the most important value of the new constitutional order that serves both foundational and interpretative roles. Human dignity as a right also plays a crucial complementary and reinforcing role in the interpretation and application of other rights. In issues outside the scope of other fundamental rights, the right to dignity is also serving as a ground for new claims, filling gaps existing the bill of rights of the South African constitution.

Over the years, courts in South Africa were able to develop one of the most advanced human dignity jurisprudence in the world in all aspects of human dignity i.e. respect for human life and integrity, equal worth and concern and autonomy. Human dignity reasoning was central in emphasizing the value of human life and the prohibition of the death penalty. In doing so, the

court reaffirmed the respect for the intrinsic worth every of human being, irrespective of his conduct or character. In cases outlawing corporal punishment and defamation, the court once again underscored the need to respect the physical and emotional integrity of human beings as entitlements flowing from the right to be treated with dignity. It also conveyed the message that rights such as freedom of expression could be restricted to prevent humiliation and preserve the reputation and self-esteem of a person from a grave harm.

In cases concerning discrimination and socio-economic rights, the CCSA relied on human dignity to emphasize the equal worth of everyone by virtue of their humanity and the need to show equal concern for all. Most importantly, human dignity is the standard that the court utilizes to determine whether a certain differential treatment or discrimination is unjust and assess the reasonableness of state policy in cases concerning socio-economic rights. Reliance on it in interpreting the equality clause of the constitution has also helped the court to ensure substantive equality by paying sufficient attention to the actual condition of the person, the status of the group he/she is belonging as well as the impact of the measure on his/her personal feeling or sense of worth. In addition, human dignity is invoked to affirm the equal worth of different group of persons and their entitlement to be treated with respect and concern. This is particularly notable in cases involving discrimination on the ground of sexual orientation and eviction of unlawful occupants. However, the lack of consistency by the CCSA in interpreting equal worth and the different emphasis it gives to human dignity in different discrimination claims is notable.

The protection of autonomy and individual self-determination as an aspect of human dignity is also flourishing in South African human dignity jurisprudence. Some of these cases concern reproductive rights, assisted suicide and disputes regarding the liability of third party for adultery. The common thread that connects all these cases together is that the central place

given for respecting the choices individuals make as an aspect of valuing their dignity. Further, the court also noted that the denial of the right to make fundamental choices about one's life will have a negative impact on psychological integrity and personal sense of worth of a person. In such kind of situations, the different dimensions of human dignity seem to be mutually reinforcing or supporting one another. However, as the human dignity jurisprudence of the CCSA demonstrates, the three aspects of human dignity may not always have a harmonious or complimentary relation. There are also cases where one element conflicts with another. In such cases, the court usually conducts a proportionality analysis and decides on the basis of the degree of harm or the importance of the aspect of dignity in question.

In developing the three aspects of human dignity, the CCSA admirably used the indigenous *ubuntu* notion to strengthen and reinforce its reasoning. Thus, ubuntu is invoked to affirm the value of human life and treatment of persons with respect. Most importantly, it is utilized to underscore the constitutional vision of establishing a 'caring society' which shows concern and sensitivity to the needs and circumstances every person. This is most evident in the eviction cases where the court demanded the treatment of homeless persons with dignity by showing concern for their condition. It is also important note that the CCSA is criticized on both sides for under and overuse of the concept in its jurisprudence. Thus, the court need to take in to account the concern of both sides in developing its human dignity jurisprudence in the future.

Finally, the richness of the human dignity jurisprudence of South African courts is partly attributable to the migration of the different aspect of dignity to South Africa from other jurisdictions at the stage of constitutional design and interpretation. Several factors have facilitated the smooth travelling of human dignity in to the South African constitutional order. Some of them include the unique provision in South African Constitution that allows reference to foreign law, the isolation of South Africa during Apartheid and the need catch up with the

developments in the rest world, the mixed nature of its legal system and the friendly attitude of its courts towards comparative law. In engaging with foreign jurisprudence law, the CCSA considers both text and context. Further, the most influential jurisdictions on its human dignity jurisprudence are Canada, Germany and the United States. The influence of this constitutions in the drafting process, the similarity of their normative foundations with the South African constitution and the employment of foreign law clerks from these jurisdictions may partly explain their huge influence. With respect to the manner of engagement, the CCSA mainly adopts a dialogical approach and it uses foreign jurisprudences mainly to understand the South African context. It also engages with them in a critical manner and at times reaches at a different conclusion by providing its own justifications.

Chapter 3- The Role and Migration of Human Dignity in the Kenyan Constitutional Order

Introduction

This chapter seeks to explore the role and migration of human dignity in the Kenyan constitutional order which is unchartered area in the human dignity literature to date. The chapter is organized in five sections. The first section provides a brief constitutional history of Kenya having its focus on the protection of fundamental rights over the years. In relation to this, the judicial review power of courts in Kenya, issues of jurisdiction, standing and approach of interpretation will be examined. The second section deals with the status of human dignity as a constitutional value and right in the new Kenyan constitution. Its nature and scope are also analyzed. The third section discusses the dignity case law of Kenyan courts under three themes i.e. dignity as respect for human life and integrity, equal worth and autonomy. It covers a significant portion of the chapter. The fourth section examines the state of indigenous dignity jurisprudence in Kenya. The last section deals with the migration of different elements of human dignity into Kenya from other constitutional systems at the stage of constitution making and interpretation. This will be followed by a short concluding remark

3.1 Constitutional History of Kenya and Courts

Kenya adopted its first Constitution in 1963 immediately after the end of British colonial rule. Before colonization this territory was inhabited by different ethnic communities with their own distinct social, economic and cultural identities.[510] The major ones are the Kikuyu, Luhya, Luo, Kalenjin and Kamba. According to Mobondenyi, the colonial state was 'imposed' on these

[510] Andrew Novak, 'Constitutional Reform and the Abolition of the Mandatory Death Penalty in Kenya' (2012) 45 Suffolk U. L. Rev. 285, 313-348.

communities by the British and they were brought together as such.[511] This fact is also mentioned as an explanation for the significant influence of ethnicity in Kenyan politics and constitutional history even today. Procedurally speaking, the way the independence constitution of Kenya was adopted was problematic. This is because there was a heavy involvement of Britain in the constitution making process and it even went to deciding some key controversial issues in which the negotiating parties at the time were unable to agree on.[512]

The Independence Constitution also had a big problem on many substantive matters. One of them is the weak protection afforded to fundamental rights which is important for the purpose of this thesis. According to Ghai, although the Constitution had a bill of right it was only stated in the preamble part and it does not specifically indicate to whom these rights are guaranteed for.[513] The number of rights recognized in the constitution was very small and socio-economic rights were completely excluded from it. In addition, the constitution only prohibits discrimination on limited grounds and their application is only confined to the sphere of public law.[514] As such, discriminatory treatments in the area of private law including those regulating marriage and divorce were outside its reach. More importantly, the bill of rights under the Kenyan independence Constitution is characterized by 'more limitation than rights'.[515] This is because the Constitution is full of 'claw back clauses' that justify limitations of various rights with the key requirement being enactment of a law to that effect. This has exposed fundamental rights to arbitrary limitations by the State.

[511] Morris Kiwinda Mbondenyi,'Human Rights And Democratic Governance In Post-2007 Kenya: An Introductory Appraisal' in Morris Kiwinda Mbondenyi, Evelyne Owiye Asaala, Tom Kabau and Attiya Waris (eds) , *Human rights and democratic governance in Kenya: A post-2007 appraisal* (PULP 2015) 3.
[512] Robert Maxon, 'Constitution-Making in Contemporary Kenya: Lessons from the Twentieth Century' (2009) KSR 11, 11-29.
[513] Jill Cottrell Ghai & Yash Ghai 'The Contribution of the South African Constitution to Kenya's Constitution' in Rosalind Dixon & Theunis Roux (eds) *Constitutional Triumphs, Constitutional Disappointments A Critical Assessment of the 1996 South African Constitution's Local and International Influence* (Cambridge University Press 2018) 252-293.
[514] ibid.
[515] ibid.

The end of colonial rule in Kenya and the adoption of a new Constitution did not bring democracy and protection of rights sought by its people for so long. In the post-colonial period, the individuals who were regarded as the 'father or founder' of the nation for their prominent contribution in the fight against colonialism assumed political power.[516] Unfortunately, they did not deliver the promises of democracy, rule of law and protection of human rights. Instead they worked primarily to strengthen their power and enrich themselves.[517] This was primarily done by amending the Independence Constitution several times. The main rational being accumulating excessive power in the hand of the president.[518] This measure severely weakened other branches of the government more specifically the judiciary. Further, the excessive level of respect and trust bestowed upon the 'founding fathers' by the leaders made them unquestionable and completely unaccountable.[519] Corruption, abuse of power, gross violation of human rights, land grabbing, inequality, ethnic polarization and nepotism became rampant. The one-party rule as well as the attack on political dissidents hindered Kenya's transition to democracy for so long.[520] The 2010 Constitution emerged out of the frustration of the people for decades and demand for reform.

With respect to the making process, the 2010 Constitution of Kenya significantly departed from the Independence Constitution. It was a Constitution for Kenyans by Kenyans without involvement of any foreign power.[521] More importantly, the process was very participatory, and the people were actively involved in the making stage and its final adoption. The constitutional reform began with the establishment of Constitutional Review Commission of

[516] Eric Kibet & Charles Fombad, 'Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa', (2017) 17 Afr. Hum. Rights Law J. 2, 340-366.
[517] ibid.
[518] P. L. O. Lumumba, 'A Journey through time in search for a new constitution P. L. O. Lumumba et al (eds) The Constitution of Kenya: Contemporary Readings, (Law Africa Publ. 2011) 13-43.
[519] ibid.
[520] Lumumba (n518), 13-43.
[521] ibid.

Kenya (CRCK) chaired by Yash Ghai.[522] It played a significant role in the making process together with the Committee of Experts. Several drafts were prepared and revised in the process to address the concerns of various stakeholders. Finally, it was adopted by the people through referendum.[523] In making the 2010 Constitution of Kenya the drafters were particularly inspired by the Constitution of the Republic of South Africa. This is partly because some of the drafters were involved in the making process of the South African Constitution.[524] In addition, South African experts and judges of the Constitutional Court of South Africa were also invited at different times to give lectures on various issues.

In the area of bill of rights, the 2010 Constitution of Kenya addressed several weaknesses of the Independence Constitution. To begin with, it adopted a comprehensive catalogue of rights incorporating civil, political, economic, social, cultural as well as third generation group rights.[525] The completeness of list of rights however means nothing if these rights are arbitrarily curtailed. These was the main problem of the independence constitution which is filled with claw back clauses.[526] The new Kenyan constitution addressed this critical problem and provided that 'a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.[527] It also specified in detail elements that must be fulfilled or considered before a constitutional right is limited. This is a massive achievement and very helpful to ensure the protection of rights from arbitrary limitations. The Constitution also gave a strong mandate for courts and Institutions like the

[522] Jill Cottrell Ghai & Yash Ghai (n513) 252-293.
[523] ibid.
[524] ibid.
[525] John Osogo Ambani Morris Kiwinda Mbondenyi, 'A New Era In Human Rights Promotion And Protection In Kenya? An Analysis of The Salient Features of the 2010 Constitution's Bill Of Rights' in Morris Kiwinda Mbondenyi, Evelyne Owiye Asaala, Tom Kabau and Attiya Waris (eds), *Human rights and democratic governance in Kenya: A post-2007 appraisal* (PULP 2015) 17-37.
[526] ibid.
[527] The Constitution of Kenya 2010, art 24(1).

Kenyan Human Rights Commission to safeguard Fundamental rights.[528] The role of courts in the development of constitutionalism in Kenya and their current status under the new Constitution will be addressed in the following paragraphs of the chapter.

Accordingly, not much is not known about the role of courts in pre-colonial/colonial Kenya. Before the arrival of the British colonizers, customary law was the main instrument that regulates the affairs/relationships of various communities residing at the time administered through tribal chiefs.[529] Colonialism entailed a modification of this status quo. British conception of law and justice was to a certain extent imposed on various communities.[530] During the colonial period, the court structure in Kenya like many other colonies was bifurcated into common law courts and traditional courts. Common law courts administer English law and they also have the mandate to invalidate any customary law which they think is unjust through the repugnancy clause.[531] The traditional court systems basically addresses disputes between native Kenyans and had lower status in comparison to the common law courts.

Following independence, the contribution of courts in Kenya in fostering constitutionalism and protecting human rights was insignificant.[532] Several reasons could be mentioned for this state. One among them is the overwhelming power of the executive more specifically the president.[533] As mentioned above, the unlimited power of the president crippled the judicial branch. The executive was heavily involved in the appointment of judges and usually picks those who are believed to be loyalists to the regime in power.[534] The consequence of this that courts were generally reluctant to enforce rights and hold the government accountable. In addition to this, they adopted a formalistic interpretation of the constitution often rejecting

[528] ibid art. 20, 22, & 59.
[529] Novak (n510) 316-317.
[530] ibid.
[531] ibid.
[532] Eric Kibet & Charles Fombad (n516) 340-366.
[533] ibid.
[534] ibid.

applications on mere non-fulfillment of a minor procedural rule or on a technical ground.[535] Corruption was also prevalent in the judicial system. These problems combined together damaged the trust of the Kenyan public in courts. As such, establishing a strong judiciary was among the core objectives of the 2010 Constitution.

In the constitution making process there was a debate among the drafters concerning the need establishment of separate Constitutional court in Kenya.[536] Some supported this idea arguing that constitutional interpretation requires a special knowledge and judges in the ordinary courts are not qualified to undertake this task. This proposal was not accepted in the end and a diffused model of constitutional review was chosen in Kenya.[537] Accordingly, the High Court is given the original/first instance jurisdiction to entertain constitutional matters. The Supreme Court which is the creation of the new Kenyan Constitutional has the final authority or court of appeal for both constitutional and non-constitutional matters. One peculiar feature of the Kenyan court structure is that lower courts have the power to declare a law unconstitutional. [538] For this to have effect, it does not need to be confirmed by the Supreme Court like other constitutional systems. This has created a problem of conflicting judgments by different High Courts and made the enforcement of certain decisions problematic. [539]

The new constitution has given courts a great responsibility of protecting fundamental rights. They are particularly empowered to apply and enforce the bill of rights incorporated under the constitution.[540] This is primary done to reinstate the confidence of the public in the judicial branch. In addition, the constitution provides a guideline line for courts on how to interpret fundamental rights. It specifically states that 'in applying a provision of the Bill of Rights, a

[535] ibid.
[536] Jill Cottrell Ghai & Yash Ghai (n513) 252-293.
[537] Constitution of Kenya (n527) art 162-165
[538] ibid.
[539] Jill Cottrell Ghai & Yash Ghai (n513) 252-293.
[540] Constitution of Kenya (n527) art 22 & 23.

court shall—adopt the interpretation that most favors the enforcement of a right or fundamental freedom…in interpreting the Bill of Rights, a court, tribunal or other authority shall promote—(a)the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and(b)the spirit, purport and objects of the Bill of Rights'.[541] This is very crucial to because a formalistic and technical manner of interpretation of constitution adopted by courts in the in the post-colonial period was one of the main factors that undermined the adequate protection of rights. In its place, the new Kenyan Constitution requires courts to follow a purposive and value-oriented approach of interpretation that is sensitive and right friendly.

The assignment of a strong right enforcement mandate to courts and the provision of interpretive guide however is not enough to guarantee respect for fundamental rights if courts are inaccessible for applicants due to stringent standing requirements. This is one of the issues addressed by the new Kenyan Constitution. Accordingly, the Kenyan Constitution gives a broader standing for applicants to challenge the violation of fundamental rights before court.[542] Such applications could be submitted by an individual affected whose rights are violated or threatened with violation in person. It is also possible to file a case on behalf of those person who lack capacity to institute a proceeding in their own name.[543] Further, the constitution recognizes the possibility of acting in public interest in certain case to challenge the violation of rights. It also clearly demands courts to make sure that procedural rules will not hinder access to justice. In respect to this it provides that 'formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation... the court, while observing the rules of natural justice, shall not be unreasonably restricted by

[541] ibid art. 20 (4).
[542] ibid art 22 (1) & (2).
[543] ibid.

procedural technicalities'.[544] This is a clear response/reaction to the disappointment of the public with the performance of court in the past. In addition, the constitution also recognized the importance of amicus briefs in enriching court decisions. As such, it allows 'an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court'.[545]

3.2 Status and Role of Human Dignity in the Kenyan Constitution

3.2.1 Textual basis

The new 2010 constitution of Kenya has a number of prominent features that distinguishes it from its predecessors with respect to the status human dignity. Among them is the explicit recognition of human dignity as a constitutional value and right.[546] The 1963 independence constitution of Kenya makes no mention of human dignity explicitly and courts rarely utilize the concept in constitutional adjudication prior to 2010. Yet, the absence of the term in the constitution does not necessarily indicate its irrelevance or non-recognition. As the Botswanan High Court noted, "*human dignity is the core right that informs the bill of rights of any country, whether or not that Constitution expressly provides for the right to human dignity or not. This is so because any bill of rights implicitly flows from the right to human dignity*".[547] Hence, the absence of explicit reference to human dignity may not be significant. However, the clear existence in the text of the constitution also has some benefits. When human dignity is expressly present in the text of the constitution, courts are more likely to invoke it in their reasoning and decision without worrying too much about legitimacy issues. This is particularly true in jurisdiction where 'textualist' approach of constitution interpretation is

[544] ibid art 22 (3).
[545] ibid.
[546] ibid. art 10 (2) b, 20(4) a and 28.
[547] *K v K and Others* (MAHGB-000291-14) [2015] BWHC 1 (2 February 2015).

dominant such as the United States. [548] It may also partly explain the relative reluctance of the US Supreme Court to use the concept in constitutional adjudication, compared to its counterparts like Germany and South Africa. Thus, the vivid presence of human dignity in the new constitution is a positive development.

However, the question remains, why the drafters of the new Kenyan constitution decided to put human dignity as a central organizing principle of the constitution as a well as a full-fledged constitution al right at once? There is no obvious explanation for this in documents elaborating the constitution making process. Yet, the final report of the Constitution of Kenya Review Committee (CKRC) offers some insights about the inclusion of human dignity in the new constitution.[549] One of the things noted in the report was the incomplete nature of bill of rights in the Independence Constitution, as rights such as human dignity are missing from it.

The commission noted that 'modern understanding' human rights has expanded the bill of rights and to reflect this development it recommended the inclusion of a provision, which recognizes 'the dignity of the human person'.[550] A related explanation could be the extensive reference to other constitutions in drafting the bill of rights of the Kenyan constitution. As the report highlights, a thorough comparison was conducted in designing the bill of rights including the constitution of South Africa, which makes human dignity not only a right but also a crown jewel of the entire constitutional order.[551] To ignore this fact and the increasing utilization of human dignity by domestic and international courts would have made the Kenyan Constitution to lag behind in keeping abreast with emerging developments.

[548] Barak(n1)185-188.
[549] The Constitution of Kenya Review Committee, Final report 2005.
[550] ibid 114.
[551] ibid.

In addition, the general purpose of human dignity in the design of modern constitutions may also offer an additional understanding for appreciating the explicit presence of human dignity in several provision of the new Kenyan constitution. According to Dupre, one of the common uses of human dignity is making new constitution is its symbolic role in showing the strong desire of the community 'to break with its past'.[552] The centrality of human dignity in Germany after the collapse of the Nazi regime and South Africa after the Apartheid could be mentioned as good examples in this regard. Though qualitatively different, Kenya also had a difficult past dominated by colonial rule and non-democratic governance, which its people wanted to leave behind. This objective is articulated clearly in some of the judgements of Kenyan courts. For instance, in *P N N v Z W N,* the court noted that '*it cannot be gainsaid that the people of Kenya in promulgating a new Constitution in 2010 intended a fundamental transformation of society. A society imbued with values like respect for human rights and human dignity, equality, equity, respect for the rule of law; non-discrimination'*.[553] Along the same lines, the former chief justice of the Kenyan Supreme Court justice Mutunga also reiterated the transformative role and object of the new constitution. Its main aim being '*to reject or as some may say, overthrow the existing social order and to define a new social, economic, cultural, and political order for themselves'*.[554] Thus, the explicit incorporation of human dignity in the new constitution as both a constitutional value and right might be plausibly justified as part of the big transformative constitutionalism project in Kenya.

[552] Catherine Dupre, 'Dignity, Democracy, Civilization' 33 Liverpool Law Rev263, 263–280.
[553] *P N N v Z W N* [2017] eKLR.
[554] W Mutunga, 'The 2010 Constitution of Kenya and its interpretation: Reflections from the Supreme Court's decisions' (2015) 6 SPECJU 1, 2-20.

3.2.2 Human Dignity as a Constitutional Value

As a constitutional value, human dignity appears in several provisions of the Kenyan constitution with different forms and objectives. The first mention of human dignity was made in article 10, which outlines the national values and principles of governance.[555] Here, the manner these values are formulated is also interesting as the article not only lists the values but also imposes unequivocal duty on 'all State organs, State officers, public officers and all persons' to give due regard to them whenever they are involved in in the task of constitutional 'interpretation and application'.[556] Thus, their formulation indicates a constitutional command not recommendation. Further, their relevance is not limited only to the sphere constitutional interpretation. Legislators and policy makers as well as those who are responsible for their enforcement have also a clear constitutional obligation to ensure the compatibility of their actions with the stated values.[557] Hence, these values including human dignity have a radiating effect on the entire constitutional and legal order.

Another fact, which indicates the serious place given to constitutional values incorporated in the new constitution, is the duty imposed on the state president to make annual report of the progress made in realizing these values.[558] To the best my knowledge, such level of commitment to the attainment of constitutional value is very rare in many jurisdictions and it may show the value oriented nature of the constitution. What is more, the Kenyan Human Right Commission is also mandated to submit an alternative report assessing the level of achievement in realizing different constitutional values. In its 2016 report for instance, the Commission expressed its finding on the state of achievement of each constitutional value embodied in

[555] Constitution of Kenya (n527) art 10 (2) b.
[556] ibid, 10 (1) a-c.
[557] ibid.
[558] ibid art 132.

article 10 of the constitution.[559] The alternative report resembles the shadow reporting before the international human right monitoring bodies intended to control exaggeration of achievement by state parties and get an objective information. With respect to the value human dignity, the report mentioned some instances, which may be regarded as 'threats' to realizing the human dignity of individuals and minority communities. The report included the problem of forced disappearance of individuals and the discriminatory treatment of minorities in the issuance of national identity card among others.[560] Hence, the kind of monitoring Kenyan institutions undertake with respect to constitutional values is indeed creative to say the least.

The other important place where human dignity was stated as a value in the Kenyan constitution is in the bill of right part concerning the purpose, interpretation and limits of constitutional rights incorporate within it. With respect to the object the constitution says *'the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings*'.[561] This provision is interesting on a number of accounts. First, it provided the theoretical underpinning or justification for the very inclusion of fundamental rights in the constitution. Thus, they are included not without a purpose or just because it is good to have them in the constitution. Rather it is due to their immense importance in enabling human beings individually and collectively to preserve their dignity and live in harmony with their nature. In doing so, human dignity serves as a base for the whole architecture of constitutional rights together with other values. Hence, like many other constitutions human dignity serves as a founding function in the Kenyan constitutional order.[562]

[559] Kenya National Commission on Human Rights, 'National Values & Principles of Governance' An Alternative Report of State Compliance on Obligations Under Article 132 (C) (I), Constitution of Kenya 2010 On Realization of Article 10 (2016).
[560] ibid 17.
[561] Constitution of Kenya (n527) art 10 (2) b.
[562] ibid.

Second, the provision encapsulates both collective as well as individualistic understandings/dimensions of human dignity as it says 'dignity of individuals and communities'.[563] This way of formulating dignity is interesting because there is still unresolved debate over whether dignity is a purely protective shield of the individual against intrusion coming from the community or a principle that attempts to mediate/reconcile the tension between individual and community. According to McCrudden, there are constitutional systems, which subscribe to both conceptions. US, Canada and Hungary are included in the individualist camp while Germany among those following the communitarian approach.[564] The South African position is not that much clear as it alternates between the two. Decriminalization of same sex may suggest an individualistic conception while its rich dignity-based socio-economic rights jurisprudence may suggest the other.[565]

The phrase 'dignity of individuals and communities' in the Kenyan constitution is open to interpretation though courts are yet to elaborate on it. The first way of understanding it might suggest the respect provided to individual as a human person without considering his membership in the community as well as the respect that is owed to group of individuals (communities) collectively. Communities could be ethnic, religious, or social. For instance, respecting the right of a certain ethnic community to use their language for communication may be considered as one form of showing respect for the dignity community and the right is exercised collectively or in-groups not individually. This approach separates individual from group dignity and attempts to respect both.

The other way of interpreting this phrase might be to perceive it as requiring the respect for the dignity of the individual within the community. Here, the dignity of the individual and the

[563] ibid.
[564] C McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) EJIL 625, 700.
[565] ibid.

community are integrated. They both have rights and obligations flowing from respect for each other's dignity. The individual attempts to show his respect to the dignity of the community by accepting some of the claims or rules regarded essential for the common good. In return, the community allows the individual to flourish by refraining from unnecessary interference in his way of life or decisions. A perfect balance and harmony is utopian and unachievable. However, a community guided by such conception of dignity strives to achieve or approximate itself to that ideal.

Having said this about dignity as a founding value of bill of rights, the constitution of Kenya also expressly recognizes its importance in the interpretation and limitation analysis of rights. In undertaking interpretation of constitutional rights the constitution obliges courts to be guided by 'the values that underlie an open and democratic society based on human dignity, equality, equity and freedom'.[566] This provision is a verbatim copy of the South African constitution. The purpose of human dignity here is clear. It helps the court to give meaning content or flesh to abstract constitutional norms. In the words of Ahron Barak, 'understanding of human rights is impossible without understanding dignity'.[567] Hence, it is only logical for the constitution to say so.

Further, the utility of human dignity in limitation analysis of rights is also plain in the Kenyan constitution. It provides that 'a right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.'[568] This provision is also identical to article 39 of the South African Constitution. Here, human dignity is part of the litmus tests for checking the

[566] Constitution of Kenya (n527) art 20(4) a.
[567] Barak (n1)34 104 ff.
[568] Constitution of Kenya (n527) art 24 (1).

propriety of the limitation in question. The question whether human dignity is absolute or relative value in the Kenyan constitutional order is also worthy of consideration here. Textually speaking, there is nothing in the Constitution which indicates that human dignity is absolute like the case in the German Basic Law.[569] Thus, it could be assumed that human dignity could be subjected to a limitation, which is proportional. Along this line, it could be argued that, the reference of dignity in the general limitation clause of the Kenyan constitution is intended to control limitations on all bill of rights from affecting the core or central element of human dignity, which should not be limited under any circumstance. This is also related to the supreme status human dignity has in the constitutional order as a founding value and interpretive guide as attested by the constitutional practice of courts.[570]

3.3.3 Human Dignity as a Constitutional Right

In addition to being a constitutional value, human dignity is also a constitutional right in Kenya. The constitution provides 'every person has inherent dignity and the right to have that dignity respected and protected'.[571] The provision of the constitution enshrining the right to dignity is more concrete than the value of human dignity in two senses. First, it begins with the basic assumption that every person has 'inherent dignity'.[572] This resembles the Kantian formulation of 'intrinsic worth' of all human beings.[573] Where such worth emanates from is not specified in the constitution which is not unique to the Kenya. Several human rights treaties incorporating human dignity also do not articulate exactly its origin. This is not just an omission. Rather, the

[569] Basic Law of the Federal Republic of Germany 1949, art 1, 79(3).
[570] *Kenya National Commission on Human Rights & another v Attorney General & 3 others* [2017] eKLR
[571] Constitution of Kenya (n527) art 28.
[572] ibid.
[573] M Mahlmann, 'Human Dignity and Autonomy on Modern Constitutional Orders' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 370-395.

differing views points on the roots of the idea were the main reasons for its neutral formulation in many international human right treaties and national constitutions.

For instance, during the drafting of the UDHR, different states come up with different proposals regarding the basis of the concept some invoking religious authorities others from a purely philosophical perspective.[574] At the end, a compromised formulation which does not link the concept with any authority was approved. The preamble of the UDHR provides '*recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world*'.[575] In my view, such kind of formulation is better than specifying the foundation for the following reasons. Take religion for instance; there are thousands of religions even in a single country. If right to dignity is conceived as something bestowed on humanity by a certain deity it might not represent the viewpoints of others. Even general phrases like dignity conferred by 'creator' might exclude atheists who do not accept their creation by any kind of deity.

The same is true for philosophical foundation of human dignity.[576] Some philosophers make rationality the sole justification of human dignity. Then again, others focus on the human capacity for moral action.[577] Picking one of this and founding dignity on them may also sideline others who do not possess such capacity. This is one of the criticisms against philosophical foundations of the concept.[578] Thus, the kind of right to dignity formulation envisaged in the Kenyan Constitution may for this reason be regarded as plausible. Further, the

[574] Dicke K., 'The Founding functions of human dignity in the universal declaration of Human Rights', David Kretzemer and Eckart Klein (eds), *The concept of human dignity in human rights discourse* (Kluwer law international 2002) 111-120.
[575] Universal Declaration of Human Rights (UDHR), preamble.
[576] Matthias Mahlmann, 'The Good Sense of Dignity: Six antidotes to dignity fatigue in law and Ethics' in Christopher McCrudden(eds), *Understanding Human Dignity, Reprint edition* (Oxford: British Academy 2014) 93-614.
[577] ibid.
[578] S.J Kerstein, 'Kantian dignity: a critique' in Marcus Düwell and others (eds), *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives* (Cambridge University Press 2014) 222-228.

choice to locate or found human dignity in human nature is also very meaningful and important as it sets a wall against the state which might wish to take it whenever it feels like doing so. Such formulation unequivocally affirms the status of human dignity as a right rather than a privilege.[579]

Most importantly, both the positive and negative obligations of the state arising from the recognition of the right to dignity are explicitly recognized in the constitution by the duty of the state to 'respect' and 'protect'.[580] The constitution asserts not only the inherent dignity of every person. It also provides that a duty on the state to abstain from doing something which has the potential to erode the intrinsic dignity of the person. Identifying and articulating negative duty ensuing from the right to dignity in concrete terms is left to the judicial branch to undertake it in the course of constitutional interpretation. The constitution just provides the general framework. In addition to the negative obligation, the right to dignity in the Kenyan Constitution also imposes the duty to protect, which requires action on the part of the state aiming at preserving the dignity of a human person. This duty may be interpreted as calling states to defend the individual from actions or omission of others undermining his/her dignity. It could also be extended to requiring the state to take some measures addressing socio-economic challenges preventing individuals from living a dignified life. The judicial practice in Kenya concerning these constitutional duties will be explored in depth in the next section of the chapter.

One final point worth addressing in this sub-section is the scope and the role of the right to human dignity in the Kenyan constitutional order. Demarcating the scope of the right to dignity is a very complex matter for a number of reasons.[581] First, human dignity is the moral basis for

[579] Constitution of Kenya (n527) art 28.
[580] ibid.
[581] Habermas J., 'The Concept of Human Dignity and The Realistic Utopia Of Human Rights'(2010) 41(4) Metaphilosophy 464, 464-480.

all other human rights. Thus, all other rights in the bill of rights could be conceived of as branches which grow out of the tree of human dignity. If this is the case and all other rights protect an aspect of human dignity, the question would be what exactly does the right to human dignity protect which is not addressed by other rights and its precise role in the Kenyan constitutional order. This really is a complex matter and there is no easy way out. In his book Ahron Barak, introduces the notion of mother right and daughter right of human dignity.[582] The basic difference between these two, he argues, is the extent of 'generality'.

The mother right to dignity is abroad framework right with imprecise content.[583] Daughter rights of dignity are more specific than the mother right and they may include the right to expression and privacy among others. The interesting issue here is the relation between the mother right and the daughter rights of dignity and their respective scope. His answer to these issues is also complex in the sense that he requires us to look at the entire architecture of the bill of rights, the number of rights included and omitted, as well as the reach of each right.[584] Depending on that the outcome might show different result. There could be a complimentary overlap, conflicting overlap or no overlap at all especially if the bill of rights has very few rights.[585]

When we attempt to look at the provisions of the Kenyan constitution in this lens, it is difficult to precisely state what the right to dignity protects. This is because the constitution protects a wide range of civil, political as well as social and economic rights. The comprehensiveness of the Kenyan bill of rights might make it difficult to identify the exact scope of the right to dignity. Yet, few rights such as the right to protection from humiliation and respect for reputation of the person are not clearly protected. This might lead one to the conclusion that

[582] Barak (n1) 160ff.
[583] ibid.
[584] ibid.
[585] ibid.

since all other constitutional rights overlap with the right to dignity its scope should be confined to protecting the reputation of the person and preventing his humiliation. This argument may seem plausible on its face to avoid overlap and redundancy but it is problematic in my view for the following.

First, it equates human dignity with reputation or protection from humiliation, which is a very narrow way of conceiving it. What dignity means is what it means to be human and to be treated accordingly. The respect we deserve as human beings is not something, which is closed and already known. Such assumptions are far from the reality. It is rather something that expands over time in response to change in circumstance.[586] Hence, the right to dignity seems to have a much broader scope, which is not yet encapsulated by the existing rights. Conceived in this way it might help the court to read in new rights without waiting for amending the constitution and this seems to be what other courts are doing. Further, the right to dignity also seems to have a reinforcing role in the interpretation of other rights. Thus, dignity adds further leverage and weight to other rights which they may not get alone. This seems to be the reason why Kenyan courts invoke the right to dignity when certain kinds of rights are violated.

3.3 Human Dignity Jurisprudence of Kenyan Courts

In this section of the chapter, the dignity case law of Kenyan courts will be examined. In order to do this in an orderly fashion, the cases will be grouped under three themes i.e. dignity as respect for human life and integrity, equality and autonomy. These themes represent the three concretized aspects of human dignity as a constitutional concept discussed in chapter one. The total number of cases discussed in this part is about twenty. Among these cases the majority

[586] ibid.

focus on physical integrity and equality aspects of human dignity. Only a handful of cases raise the autonomy or respect for choice element of dignity.

3.3.1 Dignity as Respect for Human Life and Integrity

As noted in the previous chapters of the thesis, respect for human life is considered as one component of human dignity in many constitutional systems. It also served as one of the main justifications for abolishing death penalty in South Africa. On this issue, the situation Kenya is different and death penalty is still a valid form of punishment for serious crimes even after the adoption of the new Kenyan constitution. Before analyzing the relevant constitutional provisions and decision of Kenyan courts in on the matter, it would be helpful to mention few things about the history of death penalty in Kenya before and during the colonial period. According to Novak, death penalty was primarily introduced into the Kenyan legal system following its colonization by the British.[587] As such, it was not a common form of punishment in the pre-colonial era in the customary laws of various ethnic communities living in the area. In these communities, the preferred mechanism of redressing serious crimes was payment pecuniary compensation in the form of cattle or other animals rather than punishing the offender by death.[588] This was because of the belief that killing the person disturbs the communal harmony and break families.

Contrary to these traditions, the British colonizers made death penalty a legitimate punishment in Kenya which was mainly intended to destroy any resistance to its colonial rule.[589] In pursuit of this goal members of the 'mau-mau' movement and other Kenyans who opposed British rule were executed. Compared to other colonies administered by British, the number of death penalty in Kenya was higher.[590] This may be due to the higher level of resistance they faced in

[587] Novak (n510) 320-323.
[588] ibid.
[589] ibid.
[590] ibid.

Kenya. Although the introduction of death penalty was strongly associated with colonialism, the practice did not end following Kenya's independence. As mentioned above death penalty is still lawful in Kenya and until very recently the only form of punishment for a certain type of crimes was execution. The issue of mandatory death penalty and its recent abolishment will be discussed in subsequent paragraphs. First let us see, some of the important provision of the 2010 Constitution of Kenya.

In the constitution making process, the issue of death penalty was one of the debated issues.[591] Yet, the drafters chose to retain it considering the wide public support. This could be contrasted with the approach of the drafters of the South African Interim Constitution where they left the right to life provision unqualified to make room for determination by courts in the future following the heated disagreement among the parties. The current right to life provision of the Kenyan Constitution provides that 'a person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law'.[592] This indicates that the right to life is qualified in Kenya up on fulfilment of certain conditions authorization by the constitution or other law. What is unclear is the phrase 'to the extent authorized by this constitution'. The constitution nowhere mentions or authorizes death sentence.[593] It is not also the place to do so. The reference to other laws may had in mind the Penal Code of Kenya which recognizes death penalty as a legitimate punishment for certain criminal offences. This provision of the constitution seems to give a little room of interpretation for judges to outlaw death penalty entirely like it South African counterpart.[594] Yet, it might still be possible to interpret the constitution in purposive and value-oriented manner to prohibit death penalty.

[591] *Godfrey Ngotho Mutiso v Republic* [2010] eKLR.
[592] Constitution of Kenya (n527) art.26(3).
[593] ibid.
[594] ibid.

Here, a human dignity centered approach might be handy. With this background, let us see the death penalty jurisprudence of Kenyan courts and the role of human dignity in their reasoning.

Godfrey Ngotho Mutiso v Republic[595]

This case was decided by the Court of Appeal of Kenya (COA) at Mombasa few months before the adoption of the 2010 Kenyan Constitution. The applicants were convicted of murder and sentenced to death by the High Court.[596] What must be noted here is that the appellants did not challenge death penalty itself as unconstitutional. They rather objected the mandatory nature of the sentence in question.[597] Under the Penal Code of Kenya, the only form of punishment prescribed for certain kinds of offences is death. For instance, the Penal Code states that 'any person who is convicted of murder *shall* be sentenced to death'.[598] In their application, the appellants relied on two major grounds to attack the decision of the High Court. First, they argued that the imposition of death penalty as an automatic punishment without considering the other circumstances makes the it inhuman and degrading.[599] Second, the noted that since death penalty is given regardless of mitigating circumstances it amounts to the arbitrary deprivation of the right to life enshrined under the Kenyan Constitution.[600]

In its ruling the COA clearly stated that this case is not about unconstitutionality of death penalty as it is a legitimate form of punishment under the Kenyan Constitutional order despite its abolition in other systems. It further reasoned that 'the abolition of the death penalty is not one of the provisions in the proposed constitution and is not a contentious issue. As the draft was arrived at through a consultative and public process, it could be safely concluded that the

[595] *Godfrey Ngotho Mutiso v Republic* [2010] eKLR.
[596] ibid.
[597] ibid.
[598] ibid.
[599] ibid.
[600] ibid.

people of Kenya, owing to their own philosophy and circumstances, have resolved to qualify the right to life and to retain the death penalty in the statute books'.[601] This suffices to show how much weight the COA has given to the widespread approval of the death sentence by the Kenyan public. Having stated this, it went on to address the issue whether mandatory death penalty is constitutional or not. The COA began its analysis by specifying its approach of constitutional interpretation. Accordingly, it endorsed a privy council decision which states 'a generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the Constitution'.[602] What must be noted here is that prior to the 2010 Constitution principles of constitutional interpretation were determined on a case by case basis. However, the 2010 constitution changed this by demanding courts to follow a purposive interpretation promoting values in open and democratic society.[603] Yet, the understanding of purposive interpretation in this case and the new constitution seems to be a somewhat different. The approach the COA followed in this case seems more restrictive than the one adopted in the new Constitution.

That being said, the court held that mandatory death penalty is contrary to the constitution as it violates the right to protection from inhuman and degrading treatment, the right to fair trial and the principle of separation of power.[604] The court argued that the imposition of death sentence on all murder cases while disregarding the personal condition of the accused, the nature of the crime and manner of commission makes it inhuman and degrading. It is also disproportionate as the accused is deprived of the chance to show why a lesser punishment is deserved.[605] The COA also based its finding on separation of power argument noting that mandatory death sentence imposed by the legislature takes away the inherent power of the

[601] ibid.
[602] ibid.
[603] ibid.
[604] ibid.
[605] ibid.

court to hear all relevant evidences in the case and decide the appropriate punishment. This reasoning was inspired by the decision of the Ugandan Supreme Court on a similar case.[606] Here, it must be noted that human dignity was not raised in the case neither by the applicants nor by the judges in their reasoning.

Joseph Njuguna Mwaura & 2 others v Republic[607]

This case was also a decision of the COA but the site of the Court this time is in Nairobi. Unlike the *Mutiso* case discussed above the appellants were convicted of the crime of armed robbery not murder.[608] Similar to murder however robbery with violence is punished with a mandatory death penalty as prescribed by the Penal Code. In this case the appellants not only challenged the mandatory nature of the punishment but also the constitutionality of death penalty itself. For this, they relied on two rights enshrined under the new Kenyan Constitution i.e. the right to life and the protection against inhuman and degrading punishment.[609] Their core argument is that death penalty is incompatible with the right to life. They also stated the disproportionate nature of the punishment without any chance of mitigation which makes it inhuman and degrading.[610] In support of their argument they relied on international law and the *Mutiso* decision of COA in Mumbasa.

The COA rejected their appeal on the following grounds. First, it noted that contrary to what the applicants claim the right to life is not absolute under the Kenyan constitution.[611] As such, limitation on it by law is acceptable. The COA further mentioned the widespread support for death penalty when the new Kenyan constitution was adopted through referendum.

[606] ibid.
[607] *Joseph Njuguna Mwaura & 2 others v Republic* [2013] eKLR.
[608] *Mutiso v Republic* (n595).
[609] *Mwaura & 2 others v Republic* (n607).
[610] ibid.
[611] ibid.

Considering this, the argument that death penalty should be abolished is contrary to the spirit and dictates of the Kenyan constitution.[612] The COA further justified this approach by invoking courts 'fidelity to the constitution'. Second, it rejected the decision of the COA in Mombasa which held mandatory death penalty as unconstitutional arguing that it was based on erroneous interpretation.

The COA in Nairobi held that the mandate of courts is to interpret and apply the law as it is rather than deciding what the law ought to be.[613] As per the Penal Code, the legislature has prescribed death sentence as the only form of punishment for certain crimes. In such cases courts cannot depart from what the legislature has provided. It specifically noted that 'look at all the provisions of the law that impose the death sentence shows that these are couched in mandatory terms, using the word 'shall'. It is not for the Judiciary to usurp the mandate of Parliament and outlaw a sentence that has been put in place by Kenyans, or purport to impose another sentence that has not been provided in law. It has no jurisdiction to do so'.[614] Thus, the COA rejected the revocation of mandatory death penalty by the COA in Mombasa considering it as an encroachment and unjustified interference on the mandate of the legislature.

In this case, the court showed too much deference to the legislature and chose to adopt a restrictive approach of interpretation rather than a purposive one. In the end it held that 'should Kenyans decide that it is time to remove the death sentence from our statute books, then they shall do so through their representatives in Parliament. In the meantime, the sentence of death shall continue'.[615] In doing so the COA totally handed over the issue of death penalty to the legislature and made it beyond the reach of courts. This does not seem to be the right approach as courts are the prime guardians of the fundamental right including the right to life. Another

[612] ibid.
[613] ibid.
[614] ibid.
[615] ibid.

interesting feature of this case was that the right to dignity was relied by the court in its reasoning. Interestingly the court found a violation of the right to dignity of the victims of the crime of robbery as they were deprived of sleep and threatened by the appellants with harm in their attempt to rob.[616] The COA used this to justify the proportionality of mandatory death sentence imposed upon them.

Francis Karioko Muruatetu & another v Republic[617]

This is the latest decision of the Kenyan Supreme Court on death penalty which is progressive in many ways. As noted in the introductory section of this chapter, one of the problems with existing court structure of Kenya is that several courts could issue conflicting decisions on similar matters as the approval of the Supreme Court is not necessary to declare the unconstitutionality of a law. As such, concerning the issue of mandatory death penalty Kenyan COA in Mombasa and Nairobi (the same hierarchy) reached at different conclusions one holding it unconstitutional and the other as constitutional. This has created a confusion and the decision of the Supreme Court was vital to resolve the matter finally. In this case, the appellants were convicted for murder in lower courts and sentenced to death which was later commuted to life imprisonment.[618] In their appeal they challenged the constitutionality of their mandatory death sentence.

One of the arguments of the applicants was based on the right to dignity.[619] Accordingly, they contended that treating all persons accused of murder identically without any consideration of their distinct circumstance and condition amounts to violation of their right to be treated with dignity. This argument was inspired by the decision of the Inter-American Court on a similar

[616] ibid.
[617] *Francis Karioko Muruatetu & another v Republic* [2017] eKLR.
[618] ibid.
[619] ibid.

matter.[620] In addition to dignity, the appellants also raised violation of their right to fair trial and hearing. They argued that mandatory death sentence provided for murder under the Kenyan Penal Code deprives them of the opportunity to present mitigating circumstances to the court.[621] In their view, a trial conducted in such a way is unfair and violates the constitution. They also challenged the punishment from the perspective of the separation of power which was also backed by the *amicus* briefs submitted to the court. [622] As such, they contended that mandatory death penalty takes away from courts the discretion to prescribe the appropriate punishment considering all relevant circumstances.

The Supreme Court ruled in favor of the applicants. It did so by outlining the key principles which guides it in the following manner 'First, the rights and fundamental freedoms belong to each individual. Second, the bill of rights applies to all law and binds all persons. Third, all persons have inherent dignity which must be respected and protected. Fourth, the State must ensure access to justice to all. Fifth, every person is entitled to a fair hearing and lastly, the right to a fair trial is non-derogable. For Section 204 of the Penal Code to stand, it must be in accord with these provision'.[623] The core message that the court wanted to convey here seems to be the fact that even person regardless of the seriousness of the crime he/she was accused of has an inherent dignity and their fundamental rights must be respected at all times. In other words, a person must not be deprived of rights like fair trial just because he/she is accused of committing a heinous crime like murder. This is more evident from the following statement of the court 'Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity protected. It is for this Court to ensure that all persons enjoy the rights to dignity. Failing to allow a Judge discretion to take into consideration the convicts'

[620] *Edwards v The Bahamas* (Report No. 48/01, 4th April 2001).
[621] *Muruatetu & another v Republic* (n617).
[622] ibid.
[623] ibid.

mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity. The dignity of the person is ignored if the death sentence, which is final and irrevocable is imposed without the individual having any chance to mitigate'.[624]

The above quotation from the judgement of the court shows the centrality of human dignity in the reasoning of the court. However, it must be noted that the conception of human dignity the court constructed in this case is different from the one adopted by the Constitutional Court of South Africa (CCSA) for instance. The CCSA outlawed death penalty by linking human dignity and respect for human life by arguing that death sentence cheapens the intrinsic value of human life and destroys it.[625] The Kenyan Supreme Court did not follow this bold approach in interpreting human dignity in such a way. This may be because doing so would make death penalty itself unconstitutional and the court was not willing to go that far. Rather, it chose to conceive human dignity in this case as entitlement to be considered individually for the purpose of assessing punishment.[626] The Supreme Court seems to be the opinion that putting all persons convicted of murder in the same category and sentence them to death without any regard to their peculiar circumstances amount to violation of their inherent dignity and their right to be treated with respect. In addition to dignity, the Supreme Court also relied on the right to equality. The core argument here is that the provision of the Penal Code that prescribe mandatory death sentence for certain crimes deprives the right to equality before law of persons convicted such crimes.[627] This is because the law gives the opportunity to present mitigating circumstances to persons convicted of other crimes while denying the same opportunity for

[624] ibid.
[625] ibid.
[626] ibid.
[627] ibid.

persons convicted of murder, robbery with violence and treason. Finally, the court found mandatory death sentence incompatible with the right to fair hearing enshrined under the Kenyan constitution.[628] It reasoned that death penalty is only acceptable if it was determined after fair hearing. Since mandatory death penalty makes hearing futile it would go against the dictates of the constitution.

In this case the approach of constitutional interpretation adopted 'generous and purposive' according to the court.[629] How purposive and generous it was is a matter for debate. In any case, compared to the other two judgments on death penalty this decision could be regarded as progressive for making mandatory death penalty unconstitutional. Human dignity also played a crucial role in the reasoning court in showing the unfairness of mandatory death penalty. Yet, the Supreme court could still be criticized for not adopting a robust conception of dignity to the extent of making death penalty itself unconstitutional. This may be a difficult thing to do considering the qualified nature of the right to life in the constitution and as some scholars say we may not see the abolishment of death penalty in Kenya soon.[630] While sharing this concern, I would not totally dismiss the possibility of outlawing death penalty in Kenya in the near future. The textual limit in the Constitution could be tamed by a bold court with a purposive, evolving and human dignity centered interpretation. This being said regarding the respect for human life aspect of human dignity, lets proceed to discussing cases dealing with physical and emotional integrity dimension.

[628] ibid.
[629] ibid.
[630] Jill Cottrell Ghai & Yash Ghai (n513) 272.

Eliud Wefwafwa Luucho & 3 others v Attorney General[631]

This case concerns four petitioners who allege the commission of torture by Kenyan police officers in the course of investigation process. All the applicants were arrested on the suspicion of their involvement on outlawed groups such as the 'February Eighteenth Revolutionary Army'.[632] With the object of securing confessions, the officers used cruel techniques that caused intense suffering to the petitioners. According to the testimony of one of the applicants, '*he was beaten all over the body, especially joints and his penis was pierced repeatedly with needles. He was badly beaten on his ribs and shoulders using a gun. His collar bone was broken. His testicles were tied using a robe in an attempt to extract a confession from him that he was a member of the February Eighteen Revolutionary Army'*.[633] During the time of their detention, the applicants were provided with insufficient amount of food and water. As a result of the torture that is inflicted on them, some of the applicants lost their vision and hearing ability. A permanent injury to other body organs also happened as confirmed by the medical report.

In its decision, the Kenyan High Court began by expressing the outrageous nature of the treatment the petitioners have received and asserted that nothing could justify such conduct. It also underscored that this kind of practices form part of the dark Kenyan past and has no place in the new transformative constitution. The court further reasoned that what happened to the petitioners in police custody strikes at the heart of human dignity. In connection with this, it noted that '*when a citizen is arrested on allegations of committing an offence as was alleged in the present case, his/her Fundamental Rights are not abrogated in toto. His dignity cannot be allowed to be comatose. The right not to be subjected to inhuman treatment enshrined in*

[631] *Eliud Wefwafwa Luucho & 3 others v Attorney General* [2017] eKLR.
[632] This is the name of a guerrilla group that works to overthrow the Kenyan government. <https://ntv.nation.co.ke/news/2720124-3084402-dtc7w2/index.html.> Accessed 8 July 2019
[633] *Eliud Wefwafwa Luucho & 3 others v Attorney General* (n631).

the Constitution, includes the right to be treated with human dignity and all that goes along with it'. [634] Here the court unequivocally affirmed that human dignity is not something that ends once a person is suspected of crime. Hence, throughout the investigation proceeding and after its completion, the dignity of the person must be preserved at all times and circumstances since it is something intrinsic or inherent. This is a very crucial statement because it challenges the dominant thinking on the part of law enforcement officers that the person is stripped of his right to be treated with respect or dignity because of his alleged conduct (the moment he does something wrong).

Besides affirming the absolute or inviolable nature of human dignity in the case at hand, the court also tried to articulate what lies at the center of it. Hence, it argued that '*there is no shadow of doubt that any treatment meted out to a citizen which causes pain, humiliation and mental trauma corrodes the concept of human dignity'*.[635] With this statement, the court affirmed the need to respect the physical and psychological integrity of person without which respect for human dignity is unimaginable. It further noted that there are certain entitlements, which inherently flow form the identification of person as a human being. The mere fact of humanity alone makes certain forms of treatment unacceptable at all times.[636] Thus, police officers are obliged to recognize and respect the humanity of the suspect at all stages of criminal proceeding by treating him in a dignified manner. This duty requires them to refrain from causing a bodily injury or a mental suffering to a human being by their conduct.

A similar issue arose in the *Lewis Wilkinson Kimani Waiyaki v. The Hon. Attorney General*.[637] The case is a claim that concerns mistreatment of the applicant at the hand of Kenyan police, which happened in late 1970's. Though it occurred in the remote past before the promulgation

[634] ibid para.45.
[635] ibid para 46.
[636] ibid.
[637] *Lewis Wilkinson Kimani Waiyaki v Hon. Attorney General* [2016] eKLR.

of the new constitution, the court was willing to consider the case since opportunities for redress on such kind of matters were not available at that time. In his application, the petitioner alleged the commission of torture by the Kenyan police while he was under custody without any charge merely because of his political outlook. He mentioned a number of facts to demonstrate the inhumanness of the treatment including the fact that he *'was stripped naked and subjected to physical exposure of his private parts/genitals and publicly taunted and humiliated on the size and characteristics thereof'*.[638]

In analyzing whether the conduct of the police amounted to violation of the right to dignity, freedom from torture, cruel and inhuman treatment, the court heavily relied on the jurisprudence of the Zimbabwe Constitutional Court, which extensively analyzed the jurisprudence of the European Court of Human Rights on the matter.[639] The judge chose to quote extensively from this case as part of his reasoning. The Zimbabwean judgment quoted summarizes the absolute nature of the prohibition against torture and the absolute incompatibility of torture with human dignity. Further, it tries to make distinction between torture, inhuman and degrading treatment by considering the level of severity of the conduct.[640] The Kenyan judge used this distinction to rule that the act of the Kenyan police in the case at hand does not meet the threshold for torture. However, it undoubtedly satisfies the threshold for inhuman treatment because of its severity and degrading treatment because it resulted in the humiliation of the applicant.[641] As such, it amounts to violation of the dignity of the person. On the issue of threshold and violation of physical integrity, another Kenyan case might be interesting to consider.

[638] ibid para 9 (v).
[639] *Jestina Mukoko v AG* (36/09) [2012] ZWSC 11 (20 March 2012), Constitutional Application No.36 of 2009.
[640] ibid.
[641] *Lewis Wilkinson Kimani Waiyaki* (n 637), para. 70-71.

Richard Dickson Ogendo & 2 others v Attorney General & 5 others[642]

The case concerns petitioners who sought to challenge the constitutionality of the 'Traffic Breathalyzer Rules' 2011, adopted by the transportation authority and its subsequent implementation. The chief objective of the rules is to prevent traffic accidents emanating from drunk driving. Some provisions of the rules give police officers the mandate to conduct breathalyzer test to determine to concentration or amount of alcohol in the blood of the driver when they have a reasonable suspicion. The provision says, when the driver '*appears to have consumed alcohol, or is likely to have alcohol in his body, the police officer may require the person to provide a specimen of breath for a breath test'*.[643] It is also a crime to drive in a drunk state. In their application, the petitioners alleged that the act of sample collection by the police officers violate their right to dignity among others. More specifically, they contended that '*in a democratic society like ours, the police cannot act in manner that violates human dignity….the police do not have the power to erect road blocks five meters to one kilometer from a motorists home and claim that the motorist is too intoxicated to drive home safely'*.[644]

The High Court rejected their claim mainly basing its reasoning on the level of threshold. It particularly noted that '*enforcement of the law that meets constitutional muster may lead to inconvenience but that by that fact alone is not a violation of a person's right to human dignity'*.[645] Here, we note two things. First, not every kind of maltreatment or inconvenience could amount to violation of the right to dignity. For it to be regarded as a violation, it must be of a certain degree of gravity. Second, the court applied proportionality analysis whether the limitation is legitimate or not. Since the prevention of traffic accident because of alcohol consumption is a legitimate aim, the collection of samples is a necessary means, the

[642] *Richard Dickson Ogendo & 2 others v Attorney General & 5 others* [2014] eKLR.
[643] ibid para. 4 (b).
[644] ibid para.44.
[645] ibid, para.45.

breathalyzer rule, and its implementation in the case at hand does not violate the right to dignity. Hence, the court seems to prevent trivialization of human dignity on minor inconveniences. Another interesting aspect of this case is that, the right to dignity is construed as 'interpretive principle' useful for interpreting right.[646] As such, this approach of the judge did not distinguish the value of human dignity from the enforceable right to dignity.

C O L & another v Resident Magistrate - Kwale Court & 4 others[647]

This case concerns individuals who were suspected of engaging in homosexual conduct prohibited under the criminal law of Kenya. The main issue in this case was the undertaking of anal examination on the applicants pursuant to the Sexual Offenses Act.[648] According to the petitioners, they were subjected to such examination without their consent in order to prove their engagement in the alleged conduct. They argued that the practice of inserting '*metal spatulas was cruel, and the presence of police officers was humiliating'* and amounted to violation of their right to human dignity under article 28 of the constitution.[649] They further asserted that human dignity is central to being human regardless of one's sexual orientation. The case seems to be a strategic litigation since the challenge is not to the provisions of the criminal code penalizing sodomy or the sexual offenses act. Rather, they challenged the inhumanness of the examination procedure from a dignity angle. Further, at the root of the case lies criminalization of sodomy, which is a sensitive and controversial issue for many people. Yet, the opinion of the judge in this case also attests to the delicateness of the issue at hand.

'*I am not a doctor, nor do I understand much biology. But this much I could be tested on. The human alimentary canal starts from the mouth, ringed with lips, teeth, tongue and salivary*

[646] ibid.
[647] *C O L & another v Resident Magistrate - Kwale Court & 4* others [2016] eKLR.
[648] ibid.
[649] ibid para.6.

glands, leading to the throat, the small intestine, large intestine the digestive system where the necessary bodily nutrients are squeezed and absorbed into the body and surplus waste is passed out through the urinary duct, for waste water and the rectum through the anus for the solid waste….that to my understanding means that neither the mouth nor the anus is a sexual organ. However if modern man and woman have discovered that these orifices may be employed or substituted for sexual organs, then medical science or the purveyors of this new knowledge will have to discover or invent new methods of accessing those other parts of the human body even if not for purposes of medical forensic evidence, but also curative medical examination.'[650]

In the end, the court decided that the procedure in question is constitutional because there is no other scientific way of confirming the commission of sodomy and such examination is not unique from examination of the relevant part for heterosexual rape cases concerning its intrusiveness. This case shows lack of consistency of the court in its understanding of inhuman and degrading treatment. In its prior cases, the court had decided that if the treatment in question is of a certain degree of severity and of humiliating, character it becomes a violation of human dignity. In the case at hand, both the nature of the examination and its undertaking in the presence of the police seems to be definitely inhuman and humiliating. If this is the case, the court should have found a violation of dignity but it did not. The possible explanation for this outcome seems to be the predisposition of the court on the matter. This decision was later overruled by the KCOA.[651]

In the KCOA, the appellants challenged the decision of the High Court on several grounds. First, they argued that anal examination undertaken against them without their consent in the

[650] ibid para. 46-47.
[651] *COI & another v Chief Magistrate Ukunda Law Courts & 4 others* [2018] eKLR.

presence of the police is inhuman and degrading and violates their constitutional court.[652] The appellants also did not give their consent with full information and they signed the necessary forms out of duress. Second, they attacked the very order of the court that forced them to undertake the anal examination invoking the Sexual Offense Act. Their core argument here is that the offence of engaging in homosexuality is not something that is included in the sexual offence act to entitle the court to order medical examination.[653] As such, they noted that its only for a crimes like rape and transmission of HIV that such power is given to courts which does not apply to the case at hand. Third, they argued that the use of the result obtained from the medical examination conducted against their will in court for prosecuting them for the crime of sodomy violates their right not to incriminate themselves.[654] The lawyer rejected that the high court approach of equating forced anal examination with the medical examination conducted on rape victims is erroneous. Her reason was that victims of rape undertake examination not to incriminate themselves but another person.[655] The respondent defended the ruling of the high court stating the presence of valid consent and court order for conducting the examination. They also rejected the self-incrimination argument by noting that such claim is only relevant for verbal and documentary evidence not results obtained from medical examination.

The KCOA started its reasoning by noting the important place given for the respect of fundamental rights in the new Kenya constitution. It also highlighted the kind of attitude courts must have towards the protection of rights in making sure that 'fundamental freedoms are to be enjoyed by everyone to the greatest extent possible'.[656] With this premise it went on to examine two interrelated issues i.e. whether the forced anal examination is reasonable and

[652] ibid.
[653] ibid.
[654] ibid.
[655] ibid.
[656] ibid.

whether it violates constitutional rights of the appellants. On both issues, the court found for the appellants and the role of human dignity in its reasoning was significant. From the very outset the COA started its reasoning by stating '*in determining whether the examination in question was lawful and/or reasonable, we have to give regard to the centrality of human dignity in recognition and protection of fundamental freedoms and rights. The same is underscored under Article 19 (2) of the Constitution which provides that:-"The purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings*'.[657] This was the guiding principle for the court in reaching its final verdict. It also mentioned similar provision in the African Charter on Human and Peoples Rights, the ICCPR and the Dawood case of the CCSA.[658]

In its analysis the KCOA held that the lower court should not have ordered the medical examination in the first place as the offence the appellants were charged for a crime that is outside the ambit of the Sexual Offence Act and is illegal. [659] Thus, the courts must respect the legal limits in exercising its discretionary power given to it by the Act. As such, the alleged consent given by the appellants for the examination by signing forms could not remedy the illegality of the order in the first place. The court further noted that there is no valid justification for conducting the medical examination. Accordingly, it found that 'the examination was not only unconstitutional but unreasonable, and totally unnecessary. Even so, we are not satisfied that the alleged consent could qualify as one which was given voluntarily by the appellants taking into account the pertaining circumstances.[660] Based on these reasoning the KCOA found violation of their right to protection from inhuman and degrading treatment, dignity, equality

[657] ibid.
[658] ibid.
[659] ibid.
[660] ibid.

and freedom. This ruling of the court could be regarded as progressive in relation to the right to sexual minorities and in protecting them from such forms grossly intrusive actions. Yet, despite the court's heavy reliance on human dignity it did not clearly show how the practice is incompatible with it. It could have done this by showing how forced medical examination violates the physical integrity and autonomy components of human dignity or its humiliating nature as it is done in the presence of the police. Also, though it found a violation of the right to equality it did not make any analysis or demonstrate how it arrived at this conclusion. Considering the argument of the lawyer of the applicants regarding the 'desperate impact' of the forced anal examination on sexual minorities, the court seems to be intending to protect them from such discriminatory actions without openly stating so. This may be understandable considering the hostility towards sexual minorities Kenya. The reasoning of the court on equality could have been stronger if it could relate it with the equal worth or dignity of every human being and their right to be protected from unjustified discriminatory actions.

P K M v Senior Principal Magistrate Children's Court at Nairobi & another[661]

This case concerns a dispute concerning DNA testing. The petitioner alleges that he was forced to undertake a DNA testing with the purpose of establishing a paternity claim and maintenance of a child. In his petition, the applicant alleged that the taking of DNA samples against his will violates his right to dignity and privacy under the Kenyan Constitution.[662] What is unique in this case is the effort of the court to balance the right to dignity of the applicant on the one hand and the right of the child to know his/her father on the other hand. This seems evident from the way the court framed the issue '*whether his unwillingness to undergo a DNA testing in*

[661] *P K M v Senior Principal Magistrate Children's Court at Nairobi &* another [2014] eKLR.
[662] ibid para.5.

furtherance of his right to dignity is sufficient to override the interests of the child who may be denied the constitutional right to parental care'.[663]

From this statement we can infer that the right to dignity is a relative right in the Kenyan constitution and it is subjected to proportionality analysis when it conflicts with other rights or interests. Along this line the court further noted that '*for the Petitioner, it would be a minor inconvenience if he attends to DNA testing once but for a child not to know its parents and benefit from their protection and care, the damage may linger for years to come. I choose to protect the baby as opposed to the Petitioner in such circumstances'*.[664] Hence, the court in this case found no violation of the right to dignity as it is necessary for the protection of the right of the child. The case could also be a good example where dignity could be placed on both side i.e. the father and the child. It also shows us that such conflicts are not as irresolvable as they appear. Rather, there are grounds for making reasonable or plausible distinctions between two dignity claims.

***Isaac Ngugi v Nairobi Hospital & 3 others*[665]**

The cases so far have dealt with dignity of a living person. This one is unique from the case discussed above as it deals with the dignity of a dead person. The fact of the case is that the mother of the petitioner was receiving a medical treatment at Nairobi hospital and she later passed away. Following her death, the hospital personnel was unwilling to discharge her dead body for burial because the applicant did not pay the medical cost of her treatment. The applicant alleged that such kind of conduct by the hospital violates the constitutional right to dignity. Before analyzing the interesting decision of the court, it might be proper to say a few things about the issue of dignity of the dead first. The question of respecting the dignity of a

[663] ibid para.15.
[664] ibid.
[665] *Isaac Ngugi v Nairobi Hospital & 3 others* [2013] eKLR.

human being even after his death might sound absurd for some people. Especially, for those of the opinion that dignity of the person ends with his death and there is no such thing called dignity after that.

But there is also a strong moral argument for respecting the dignity of the dead. In his article, Mahlmann mentions a fascinating story of Antigone who defied the order of the king for non-burial of her dead brother risking her life.[666] Her argument among other is leaving a corpse of a human being unburied is incompatible with high order of morality. Beside the issue of morality, we may also find other argument in support of extending the respect owed to human beings even after their death. There is also widespread support in law and custom '*that a cadaver had been a person, still bore a strong resemblance to that person, constituted a tangible symbol of the lifetime image/identity of that person, and therefore deserved to be treated with appropriate "human" dignity even though it was no longer a person'*.[667] Here, the image and identity elements are central as they justify the respect we show for the dead. A reflection on some of the customs associated with burial procedure also manifest the extension of human dignity to the dead. As much as possible every society makes some effort to ensure the resting of a human being in a respectful manner.[668] It is also very difficult to find a community that throws the human corpse as garbage. Further, if we look into the criminal and civil laws of many states we will find a clear prohibition against the mistreatment of the body of a dead person.[669] It is in this context that the decision of the Kenyan court on *Nugugi* case must be considered.

[666] Matthias Mahlmann, 'The Basic Law at 60 – Human Dignity and the Culture of Republicanism' 11German L. J 9,9-32.
[667] Norman L. Cantor, *After We Die: The Life and Times of the Human Cadaver* (Georgetown University Press 2010) 43.
[668] ibid.
[669] ibid.

What the Kenyan court did in this case first was addressing the issue, whether the duty to respect the right to human dignity and other constitutional rights has a horizontal effect on third parties.[670] The reason for this is that the defendant in this case is a not a government body rather a private hospital with a contractual relationship with the heir of the deceased. One of the objection raised in this case was that, constitutional rights have no business in private relationships. [671] The court rejected this argument and affirmed the applicability of constitutional rights in private dealings. Despite the absence of a clear textual basis in the constitution for expanding scope of constitutional to the private sphere, the court relied on the transformative nature of the new Kenyan constitution.[672] As such, it argued that such mission would be impossible to be attained in Kenyan society if private relations are beyond the reach of duties emanating from the recognition of constitutional rights. With this landmark judgment, the court reaffirmed the horizontal application of constitutional rights in general and the right to human dignity in particular.

After settling this issue, the court went on to determine whether there is any legal basis for the hospital to hold the dead body of the deceased as a security. On this point, the court referred to its previous ruling, which said '*with utmost respect to the hospital, that on any view it would be equally repugnant to public policy to sanction the use of dead bodies as objects in the game of commercial ping-pong. Dead bodies are for interment or cremation or other disposal without delay….it would be callous and sadistic to hold otherwise '*.[673] The Kenyan court endorsed this ruling and found the act of the hospital to be repugnant. It also held that the hospital violated the right to dignity through its action. However, in my view the reasoning of the court was weak. This is because it did not specifically explain how exactly is the right to

[670] *Isaac Ngugi v Nairobi Hospital* (665) para 18-25.
[671] ibid.
[672] ibid.
[673] *Ludindi Venant and Another v Pandya Memorial Hospital Msa* HCCC No. 63 of 1998 [1998] eKL.

dignity is violated. Had the court first acknowledged the dignity of human beings even subsequent to their death, it would have made its dignity violation ruling more understandable or plausible.

The dignity violation cases discussed in the preceding paragraphs are entirely concerned with the physical integrity aspect. This however does not mean that only mistreatments that have something to do with the body of a human person entail dignity violations. The respect owed to a human person could also be equally undermined when the soul, feeling or intangible aspect of his personality is subjected to an offending treatment. For some people, to be humiliated is regarded as a sign of weakness.[674] According to such views, no one can humiliate a person without the cooperation of the victim. In other words, what this means is that it is up to the choice of the person to be humiliated or not. Irrespective of the nature of treatment one received, it is possible for a person not to feel anything. However, such kinds of arguments in my view are utopian and unrealistic. They are also partly based on failure to appreciate human nature and the place of feelings in human constitution. The desire for respect and recognition is a universal human good.[675] Irrespective of a person's status in the society, no sane human being would enjoy disrespect and treatment conveying worthlessness. The ban on humiliation is intended to preserve this unique attribute of being human.

That being the main justification, what exactly means to be humiliated and how is it different from other emotions humans display when they are in uncomfortable state such as embarrassment and shame. The answer to this question is not simple and it is not easy to draw a clear boundary between these groups of human emotions. However, scholars like Martha Nussbaum have tried to identify the defining attributes of humiliation vis-à-vis other feelings.

[674] D. Statman, 'Humiliation, Dignity and Self Respect'in David Kretzemer and Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law international 2002) 209-227.
[675] ibid 226.

The first unique character of humiliation is intendedness.[676] Unlike embarrassment or shame, the infliction of humiliation is not accidental. Rather, the person is deliberately made to feel belittled or worthless. To illustrate, let us consider the feeling of a man who realized that he forgot his wallet when asked to pay for a service he used at a restaurant. It is not difficult to imagine his feeling of embarrassment in such kind of instance. In the same scenario, if the waiter declared loudly that the person is attempting to cheat in the presence of other customers and insulted him as a swindler, the act of the waiter would be humiliating since it was done intentionally to devalue the person.

Another distinguishing feature of humiliation is the severity of injury it inflicts on the feeling of the person. According to Nussbaum, '*humiliation typically makes the statement that the person in question is low, not on a par with others in terms of human dignity'*.[677] As such, it strikes at the heart of his humanity. In contrast, embarrassment merely hurts the feelings of the person without affecting his essence as a human being. In order to say whether the act is humiliating or not it is important to consider the context as well as the intent. The other feature of humiliation is that it targets to undermine or erode the self-respect human beings have for themselves. The value we give for ourselves however partly depends on how others consider us. According to Statman, '*it is a plain fact that their sense of personal worth is shaped to a large extent by what other human beings think about them and the treatment they receive*'.[678] At the base of humiliation is this assumption. It is only because we are sensitive to how other treat us that we get humiliated due to their improper conduct. What makes humiliation more severe is the feeling of helpless of the victim and self-betrayal. In relation to this Nussbaum says to deny a person from making choices central to his personality is a clear case of

[676] Martha C. Nussbaum, *Hiding from Humanity: Disgust, Shame, and the Law* (Princeton University Press 2004) 203-206.
[677] ibid.
[678] Stattman (n674) 209-227.

humiliation as the conduct strikes the essence of being human.[679] However, it is difficult to deny that there are individual differences in reacting to humiliating circumstances. Thus, what may be humiliating for one it may not be humiliating another. To address such problems, looking at the context and the particular circumstance of the individual might be helpful to arrive at a reasonable conclusion. With this conceptual framework, let us consider Kenyan cases where the issue of human dignity as respect for emotional integrity was raised.

Sonia Kwamboka Rasugu v Sandalwood Hotel & Resort[680]

This case concerns *Sonia Kwaboka* who was detained by a hotel for the failure of her employer to pay the cost of her stay on time. Due to the refusal of guards to let her go, she spent two more nights at the hotel. In her application, she argued that the treatment she received at the hotel because of this incident was humiliating and violated her right to dignity among others. In the course of her forced stay at the hotel she '*felt angry, humiliated and was embarrassed. She stated that her work was to train the youth on integrity yet she was placed in a situation where her own integrity was in question. The humiliation was aggravated by the fact that she remained in the hotel where she had organized the workshop and everyone looked at her as a crook and fraud'*.[681] The court ruled in her favor by arguing that '*the detention caused the petitioner distress and embarrassment. The indignity and humiliation occasioned to her in the presence of the hotel staff is not in doubt'*.[682] It also ruled that beside the humiliation, the very fact of holding a person as a hostage for a debt, which he is not accountable for, is a clear breach of human dignity. In this decision, we can see the relation between the way we are viewed by others and our sense of self-respect. What made her very uncomfortable was the

[679] Nussbaum (n 676) 203-206.
[680] *Sonia Kwamboka Rasugu v Sandalwood Hotel & Resort Limited T/A Paradise Beach Resort & Leon Muriithi Ndubai* [2013] eKLR.
[681] ibid para.11.
[682] ibid para.33.

presence of trainees at the incident and the effort of the hotel, to make her pay by attempting to humiliate and disgrace her. The court also considered the 'deliberate and intentional'[683] nature of the conduct to determine severity of injury and fix the amount compensation.

***A.N.N v Attorney General*[684]**

This case is about a person with Gender Identity Disorder (GID) who experienced a humiliating treatment by police officers. The petitioner is biologically male however, he regards himself as a female and prefers to dress accordingly. His mental health problem is also confirmed by a medical examination. The reason that led to his arrest was a suspicion that he assaulted women. During the time of his arrest, the petitioner was dressed as a woman though his physical appearance is that of a man. This created a doubt on the part of the officers. What they did next was to call the media and strip the petitioner in public with the purpose of establishing his identity.[685]The applicant alleged that, this act of the police officers was humiliating and violates his constitutional right to be treated with dignity among others. He particularly alleges that '*the police officers touched him all over his body, pulled his hair, beat him and teased him with a view to humiliating him in public and threatened him with guns in order to compel him to co-operate with them'*.[686]

After hearing the argument of both sides, the High Court ruled in favor of the applicant and the dignity reasoning was very instrumental in arriving at this conclusion. In its judgement, the court underscored the central place of human dignity in the Kenyan constitutional order as a value and right. Accordingly, it strongly condemned the act of the police and other actors by affirming the intrinsic value of every person as human being irrespective of his self-perception

[683] ibid para.35.
[684] *A.N.N v Attorney General* [2013] eKLR.
[685] ibid.
[686] ibid para.16.

about his or her gender. Further, it noted that '*it diminishes all of us, when officers of the state, members of the public and of the media, find it fitting to humiliate and degrade a person because of his mode of dress or a mental condition that he may have no control over by subjecting him to a personal, humiliating, public search'*.[687] In this case the court gave due consideration to the severity of humiliating treatment the petitioner received from the police and the media in condemning their action. It stated in unequivocal term that there is no place for humiliating searches in the new Kenyan Constitution.

Beatrice Wangechi Mwaniki v Kenya Methodist University[688]

What is peculiar about this case from other similar cases discussed above is its failure to meet the threshold requirement. The petitioner was a student at Methodist University of Kenya who finished her study with first class honor. In her application, she alleges that the university had denied her right to attend the graduation ceremony without any justification and this resulted humiliation and violation of her right to dignity. The University on its part argues that she missed the commencement program because of her failure to attend a mandatory rehearsal undertaken by the University, which is intended to ensure among others the inclusion of all graduates and the allocation of seats.[689] In this case, the court ruled in favor of the respondents after finding that there is no violation of her dignity. The court reasoned '*there is no doubt that to miss a graduation ceremony and watch your friends and their families celebrate upon the calling out of the names of her fellow graduands is traumatic, but is not torture, whether physical or psychological'*.[690] Here, the court hinted that not every discomfort amounts to a violation of the right to dignity. Dignity violation needs a certain level of severity otherwise; it will lead to trivialization and abuse of the right. This seems to be the reason for the courts

[687] ibid para.52.
[688] *Beatrice Wangechi Mwaniki v Kenya Methodist University* [2015] eKLR.
[689] ibid para.13.
[690] ibid para.43.

conclusion that the claim has 'an unreasonable purpose and harassment against the Respondent'.[691]

3.3.2 Dignity as Equal Worth and Concern for Human Beings

The other area where the Kenyan dignity jurisprudence is flourishing is in equality litigation. In this section, several cases will be examined where the role of human dignity was decisive. Most of them deal with issue of unfair discrimination. The other two demonstrate how dignity and equality feature in the Kenyan socio-economic rights decisions.

***Mary Mwaki Masinde v County Government of Vihiga*[692]**

The case concerns a dispute between the applicant and Vihga County following an advertisement for a vacancy at Vihga land commission. The recruitment procedure requires applicants to be first interviewed by a screening committee. Subsequently, the name of short listed candidates is sent to the city assembly for final approval. The petitioner applied for this position and passed the first stage. However, the Vihga assembly declined to approve her nomination for the position. Its justification was that she resides in the neighboring '*Mumias and as such she was not able to represent the interests of the people of Emuhaya*'.[693] In her petition, Mary alleged that the act of the council amounts to discrimination on the basis of her marital status and residence. She further argued that, the commission did not consider the marital status or place of abode of other applicants. It rather singled out her case and applied a different standard, which in her view violates the right to equality and dignity under the Kenyan constitution. .

The High Court in its ruling first attempted to elaborate on what constitute discrimination. For this, it heavily relied on the jurisprudence of the European Court of Human Rights (ECtHR)

[691] ibid para.
[692] *Mary Mwaki Masinde v County Government of Vihiga & 2 others* [2015] eKLR.
[693] ibid para.6.

and the Constitutional Court of South Africa (CCSA) Accordingly, it concurred with the understanding of discrimination by the ECtHR to mean '*treating differently, without any objective and reasonable justification, persons in relevantly similar situations'*.[694] Hence, it reasoned that not every distinction is problematic discrimination. It is only when the differentiation is based on an arbitrary ground that it violates the constitution. It further quoted the CCSA, which said no issue of unfair discrimination arises unless '*there is no rational relationship between the differentiation in question and the governmental purpose which is preferred to validate it'*.[695] Accordingly, the court held that the application of marital status and residence requirement on the applicant without holding other candidates to the same standard amounts to unfair discrimination. Hence, it violates the right to equality and dignity. It further underscored that the underlying goal of preventing unjust discrimination on such grounds is to uphold human dignity.[696]

***Mohammed Abduba Dida v Debate Media Limited & another*[697]**

Human dignity's role in identifying unfair discrimination is more evident in this case. The point of controversy was the 'presidential debate guideline', which was intended to set certain parameters for conducting presidential debate between candidates for the 2017 Kenyan presidential election in an orderly fashion. According to this guide, one of the criteria for being eligible to participate in the debate is getting at least beyond a 5% threshold in an online public opinion poll. The petitioner in this case was one of the candidates for the election and he met all other requirements except for the 5% threshold. In his application, he alleged that the presidential debate guidelines violates the right to equality enshrined under the Kenyan

[694] ibid para.93.
[695] ibid para.42.
[696] ibid para.39.
[697] *Mohammed Abduba Dida v Debate Media Limited & another* [2017] eKLR.

Constitution as it excluded him from the debate without sufficient justification.[698] The respondent on the other hand contended that the standards under the presidential guide are legitimate as they seek to ensure the manageability of the debates and enable the public to get sufficient information about the respective policy of candidates with reasonable potential of winning the election.[699]

Human dignity was heavily relied on by the High Court for resolving the case. In its reasoning, it tried to establish first the presence of discrimination. Then, it assessed whether the discrimination in unfair according to standards developed by other courts and prior jurisprudence of the Kenyan courts. With respect to the first issues, the High Court held that there is no issue of discrimination as the standard has a reasonable and legitimate purpose.[700] The court further expressed its view that '*unfair discrimination is differential treatment that is demeaning. This happens when law or conduct, for no good reason, treats some people as inferior or less deserving of respect than others…… no member of society should be made to feel that they are not deserving of equal concern, respect and consideration'*.[701]

This paragraph clearly shows the role of human dignity in Kenyan equality jurisprudence as it serve as a standard for assessing the acceptability or non-acceptability of differentiation from a constitutional point of view. The influence of South African constitutional jurisprudence that adopts a similar position is clearly visible in this case.[702] Based on this test, the court rejected the petition of the applicant arguing that the presidential debate guideline did not target the applicant and the ground of distinction does not pertain to his personal attributes. It is also

[698] ibid.
[699] ibid.
[700] ibid.
[701] ibid.
[702] ibid.

based on a plausible justification, which prevents a finding that it violated the right to equality of the applicant.

V M K v C U E A [703]

This case concerns an employee of Catholic University of East Africa who served in secretary position for seven years on casual basis. According to the applicant, the cause for her employment for temporary period is her HIV status. Beside the causal nature of her employment, the amount of salary and other benefits were much lower than other employees who are working in a similar position. Based on this she alleged that the treatment by her employer violates her right to equality and dignity. [704] The respondent denied any discriminatory treatment on account of her health status and attempted to justify the difference in terms of seniority and work experience.[705] The court began its decision by reaffirming that the binding nature of obligations emanating from constitutional rights on private actors including universities.

It then went on to determine whether the act of university is an instance of unfair discrimination. In doing so, it referred to the decision of the Labour Court of South Africa on a similar case, which had held '*that the denial of employment to the appellant because he was living with HIV impaired his dignity and constituted unfair discrimination*.'[706] The Industrial Court concurred with the ruling without much reasoning. The inspiration from South African dignity jurisprudence is still evident in this case. Further, the Kenyan court noted that the act of placing her on causal employment, the small benefit and salary she was provided compared

[703] *V M K v C U E A* [2013] eKLR.
[704] ibid para.24.
[705] ibid para.31-34.
[706] *Gary Shane Allpass vs. Moikloof Estate (Pty) Ltd t/a Moikloof Equistran Centre Respondent*; Labour Court of South Africa held at Johannesburg Case No. JS1 178/09.

to her colleagues combined, '*constitute gross affront on her human dignity contrary to Article 28 of the Constitution'*.[707]

The *Kenya National Commission on Human Rights & others lv The Hon. Attorney General & others*[708]

This case is one of the landmark decisions on the protection of the right to refugees. It concerns a challenge to the policy of the Kenyan government to shut down the biggest refugee camp in the world Dadhab, which mainly hosts refugees fleeing the unrest and war in its neighboring Somalia. In addition, the government issued a directive that nullified the refugee status of all refugees of Somali origin.[709] This policy of the government was proposed in response to successive attacks on Kenya by the Somali based terrorist group al-Shabaab. According to the Kenyan government, the refugee camp is used by al-Shabaab to recruit terrorists and attack Kenya.[710] Further, it invoked the absence of resources to take care of them and the failure of the international community to keep its promise of supporting Kenya in handling this crisis. The petitioners in their application to the Kenyan High Court challenged the constitutionality of these measures. More specifically, they argued that the closure policy targets Somali refugees and it is discriminatory.[711] As such, it violates their right to equality guaranteed under the Kenyan Constitution and other commitments of Kenya under international law.

In its decision the High Court dealt extensively international refugee law, which is important to assess the propriety of government conduct in this kind of circumstances. However, since it is outside the scope of the chapter, I will focus on the constitutional aspects of the decision and more specifically on how human dignity featured in this judgement. Accordingly, one of the

[707] ibid para.75.
[708] *Kenya National Commission on Human Rights & another v Attorney General & 3 others* [2017] eKLR.
[709] ibid.
[710] ibid.
[711] ibid.

issues the court considered was whether the actions of the government violate the right to dignity and equality. In assessing this, the court began by reaffirming the centrality of human dignity in the following manner '*the inherent dignity of all people is a core value under recognized in the Constitution. It is a guaranteed right under Article 28 and it constitutes the basis and the inspiration for the recognition that is given to other more specific protections that are afforded by the Bill of Rights. The rights to life and dignity are the most important of all human rights, and the source of all other personal rights*.'[712] It also indicated supremacy of the right to dignity in the Kenyan constitutional order. Besides the Kenyan Constitution, the court underlined the importance human dignity has in key international and regional human right treaties such as the UDHR and the African Charter on Human and People's Right.[713]

Then, the High Court went on to examine the discriminatory nature of the conduct in question and whether it could fall within legitimate limitations, which could be placed, on constitutional rights to protect other interests. With respect to discrimination, the court found that the revocation of refugee status of Somali nationals by Kenyan authorities is a clear case of 'racial discrimination' as they are treated less favorably on account of their racial makeup.[714] After establishing discrimination, it assessed whether the conduct of the government could be justified by the limitation clause of the Kenyan Constitution. For this purpose, it conducted a proportionality analysis putting the security concern of the government on the one hand and the constitutional right of refugees on the other hand.[715] It also examined the proportionality jurisprudence of Canadian and Zimbabwean courts for a better insight. Accordingly, the court noted the failure of the measures to meet the proportionality muster, as they are manifestly 'arbitrary' and without sufficient foundations.[716] Two recent decisions of Kenyan courts also

[712] ibid.
[713] ibid.
[714] ibid.
[715] ibid.
[716] ibid.

demonstrate the role human dignity is playing with respect to claims of discrimination on the basis of sexual orientation.

Non-Governmental Organizations Co-Ordination Board v EG & 5 others[717]

This case concerns an appeal on the decision of the Kenyan High Court (KHC) regarding the right to association of LGBT persons in the Court of Appeal. Before the High Court the respondents in the present case challenged the constitutionality of the refusal by director of the responsible agency to register an NGO that seeks to protect and promote the rights of LGBT persons in Kenya. The ground for rejection was that homosexuality is a criminal offense under the Kenyan penal code and immoral.[718] In the KHC, the respondent argued that the decision violates their right to association, dignity and equality enshrined under the Kenyan constitution. After considering the submissions on both sides, the KHC ruled that LGBT people have the right to association and the term every person includes them.[719] Further, it noted that what the penal code criminalizes is not sexual orientation but engaging in same sex conduct. Based on this it held that discrimination on the basis of sexual orientation is incompatible with the Kenyan constitution.[720] This is interesting because sexual orientation is not one of the grounds explicitly listed under article 27. The High Court rather noted that the list of grounds of discrimination is open ended as referring to the word 'includes' and it read in 'sexual orientation' into it.[721] In doing so, the court was inspired by the decision from the Constitutional Court of South Africa and other jurisdictions. The court also relied on the notion of human dignity to assert the equal rights of LGBT persons regardless of their sexual orientation.

[717] *Non-Governmental Organizations Co-Ordination Board v EG & 5 others* [2019] eKLR.
[718] ibid.
[719] ibid.
[720] ibid.
[721] ibid.

In the Kenya Court of Appeal (KCOA), the applicants attacked the decision of the High Court on several grounds. First, they argued that the invocation of human dignity to make sexual orientation a prohibited ground of discrimination is erroneous. In their view, human dignity applies/protects to something that is innate in the person rather than something that is chosen.[722] This is based on their belief that sexual orientation is a matter of choice rather than nature or gene. As such, it is not something that deserves a protection within the ambit of human dignity. Second, the applicants criticized the court for expanding the prohibited grounds of discrimination under the Kenyan constitution to include sexual orientation.[723] They argued that this ground is not explicitly recognized, and the penal code criminalizes homosexuality. Third, the applicants contended that the issue of sexual orientation was discussed in the constitution making process and it was rejected by the people.[724] Further, the Kenyan Constitution explicitly defines marriage as a union of a man and a woman. Considering this, they argued that the recognition of sexual orientation as unlawful ground of discrimination is a 'slippery slope' that paves the way for the introduction of same sex marriage.[725] Fourth, the appellants challenged the reliance by the KHC on comparative law and the recent decision of the Indian Supreme Court in the *Juhar*[726] case which was presented to the court of appeal. Their main contention here is that there is a textual and contextual difference between the constitutions of Kenya, India and South Africa.[727] As such, the KHC should have considered these facts before relying on comparative law. Finally, the appellants attacked the decision of the KHC on the basis of the religious and cultural arguments. They linked these arguments to the constitution invoking the reference to the 'Almighty God' in the preamble and the important place given to cultural

[722] ibid.
[723] ibid.
[724] ibid.
[725] ibid.
[726] Supreme Court of India Petition Number 76 of 2016 *Navtej Singh Johar & others versus Union of India* (Johar case).
[727] *Non-Governmental Organizations Co-Ordination Board v EG* (n717).

values in the constitution.[728] Accordingly, they mentioned few quotes from the bible which state that homosexuality something that is detested in the eyes of God. On the cultural side, one of the counsels for the respondents argued that 'the Kikuyu culture does not tolerate homosexuality and those found to have contravened the cultural norms were exterminated by being rolled from the hill in a bee hive as a punishment'.[729]

The KCOA was divided in its decision and affirmed the decision of the High Court with 3 votes to 2. Justice *Waki* was the presiding judge who gave the deciding vote in the case. Interestingly, he began his reasoning with a famous bible story about a prostitute and the response of Jesus to the crowds saying, 'let anyone of you who is not without sin be the first to throw a stone at her'.[730] The core message the judge wanted to convey here is that if individuals are to be judged for acts which are considered to be sins according to religious texts, only few individuals will be saved and guilt free. With this note he went to identify the principles of constitutional interpretation he would follow in resolving the case at hand. Accordingly, he stated that the constitution of Kenya demands judges to interpret the constitution in a purposive manner that advance the protection of rights in open and democratic society.[731] He also underlined the transformative nature of the Kenyan constitution. Further, he noted that although the right to association is not an absolute right it could only be subjected to a limitation that is acceptable in open and democratic society founded on human dignity, equality and freedom.[732]

Based on these principles, he went on to interpret whether the term 'every person' in the provision recognizing the right to freedom of association included LGBT people. On this issue he noted that, the literal meaning of the phrase includes everyone and the fact that they are

[728] ibid.
[729] ibid.
[730] ibid.
[731] ibid.
[732] ibid.

persons or human beings is not contested.[733] As such, LGBT persons are included, and they have the right to associate like any other persons. In addition, he emphasized that the penal code only criminalizes sexual conduct not sexual orientation.[734] Accordingly, there is nothing illegal in the objective of the NGO sought to be established for protecting the rights of the LGBT people. In his judgment, Justice Waki also noted that the sensitive and emotive nature of the matter in Kenya and concluded his decision with the following remark '*it is possible for the country to close its eyes and hearts and pretend that it has no significant share of the people described as LGBTIQ. But that would be living in denial. We are no longer a closed society, but fast moving towards the 'open and democratic society based on human dignity, equality, equity, and freedom' which our Constitution envisages. We must therefore, as a nation, look at ourselves in the mirror. It will then become apparent that the time has come for the peoples' representatives in Parliament, the Executive, County Assemblies, Religious Organizations, the media, and the general populace, to engage in honest and open discussions over these human beings. In the meantime, I will not ".. be the first to throw a stone at her [LGBTIQ]".*

Justice Komme also joined the majority in the judgment. Her reasoning mainly relies on her conception of what constitutional morality consists of, the need for tolerance and some additional religion inspired arguments. As noted in the previous paragraphs, one of the core arguments of the appellants was that allowing the registration of LGBT organizations is immoral and incompatible with the values of Kenyan society. In her decision, Justice Komme noted 'that what forms the morality of this nation is basically what is spelt out in various Articles of the Constitution especially Article 10 of the Constitution. Key of the values that are spelt out in Article 10 as National values and principles of governance are human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection

[733] ibid.
[734] ibid.

of the marginalized'.[735] As such, she emphasized that constitutional morality is different from the one that is prescribed in various religions. Rather, the guiding moral values of the constitution are respect human dignity, equality and non-discrimination.

In a passing remark, justice Koome also noted that the verses of the bible relied by the appellants in their support are also selective. To demonstrate this, she mentioned that it '*is indisputable that the same Bible categorically states that all people are created by God in His own image; His love abounds; it is unfailing and calls every individual, be they criminals, homosexuals or murderers to come to Him as they are, for they will find peace, and refuge; that one should love their neighbor as oneself, and so on. How then would the same God wish to have people He created in his own image be denied basic rights accorded to others, isolated and stigmatized*?'[736] This statement is interesting from a human dignity perspective because the judge used the Christian conception of human dignity discussed in the first part of the thesis as part of her reasoning.

Like Justice Waki, she also noted that being an LGBT is not *per se* a crime. More importantly she reasoned on the importance of tolerating difference in the Kenyan society. In relation to this, she argued that '*overturning the impugned judgment would undermine the gains made over the years in promoting, protecting and building a culture of respect and tolerance of differences that abound in the society. Allowing the appeal would be stereotyping people and expecting everybody to be the same size fits all. Like the old adage says 'we are made from the same cloth but cut in different shapes and sizes' this society is not akin to the 'Animal Farm' by George Orwell. The Constitution is the equalizer, it allows everybody to be and if some people are sinners, God will deal with them, no one can judge for Him. If others break the law, the law will take its own course against the law breakers, no one can judge them until that*

[735] ibid.
[736] ibid.

happens. The Constitution is the ultimate guide and liberator from the shackles of all kinds of discrimination.'[737] In this statement Justice Komme seem to convey the message that people with different sexual orientation must not be subjected to unfair discrimination and treatment. They should not also be required to conform to or be identical with the dictates of the society to be entitled to appropriate treatment. Rather, the constitution entitles them to respected with their uniqueness and the society must also have tolerance towards people who are different in some way.

The third judge that joined the majority in upholding the decision of the high court is Justice Makhanda. What makes his reasoning different from others is the fact that he gave littler importance to religion inspired arguments like the two preceding judges. In fact, he noted that 'I do not see how the Bible and Quran verses as well as the studies on homosexuality relied on by the appellant would help its case. Religious texts are neither a source of law in Kenya nor form the basis for denying fundamental rights and obligations'.[738] He also dismissed argument regarding whether sexual orientation is innate or a learned behavior. More importantly, he relied on human dignity centered reasoning to affirm the protection afforded to LGBT persons from discrimination. Accordingly, he noted that the *'respondent is entitled to fundamental rights and freedoms provided for in the constitution by virtue of him being a human being irrespective of his sexual orientation. His rights and freedoms can only be curtailed in accordance with the law. Indeed, world over, the sole purpose for protecting, promoting and fulfilling human rights is the acknowledgement that all human beings must be accorded respect irrespective of their membership to particular groups or other status. In the circumstances, I do not find any merit in the submission that a human being may be denied fundamental rights and freedoms because of how that person chooses to live his sexual life. It matters not which*

[737] ibid.
[738] ibid.

attributes persons have determined for themselves. *The only test is whether those attributes violate any law*.'[739] This argument of the judge seems to be a response to the conception of dignity by the respondents which link it to a protection of attributes which are inherent and not chosen by the person. It could also be interpreted to indirectly broaden the understanding of human dignity to include respect for fundamental choices people make as long as they are legal. In other words, the fact that something is chosen by a person does not make it less important or unworthy of protection. This seems to be an indirect expansion of the understating of human dignity as respect for choices people make. Finally, Justice Makhanda reiterated the call for tolerance by justice Koome noting that '*I do not understand the Bill of Rights as meant to protect only the individuals that we like and leave unprotected those we find morally objectionable or reprehensible. In any case, Article 10 of the Constitution obliges us to protect the marginaliz*e'.[740] In doing so, he acknowledged the vulnerable status of LGBT persons in Kenya and the need for a special protection.

Two dissenting Judges on the other hand, decided to set aside the decision of the High Court on the case. One of them is Justice Nambuye, who basically agreed with the purposive approach of interpretation adopted by the High Court. She also admitted the possibility of interpreting the equality provision of the Kenyan constitution to include sexual orientation as a prohibited ground of discrimination. Her difference however is that it is not the mandate of the courts to do so and it should be done by the people through referendum.[741] In support of his argument, he mentioned the rejection of sexual orientation during the drafting process of the constitution and the definition of marriage provided under article 45. Further, he emphasized the contextual difference between Kenya and other jurisdictions such as South Africa, Canada and India. For instance, he mentioned that sexual orientation is a prohibited ground of discrimination in South

[739] ibid.
[740] ibid.
[741] ibid.

Africa which is different from the Kenyan case.[742] In his view, courts have a better constitutional and legislative support for arriving at a different conclusion on similar cases.

In his dissenting opinion, Justice Musinga heavily relied on the criminalization of homosexuality in the Kenyan penal code.[743] Based on that he outrightly rejected the constitutionality of registering organizations that advocate rights of LGBT people as illegal by implication. Further, he likened the association of LGBT people with association of criminals and pedophiles.[744] In his view all this associations must not be allowed to exist as they are incompatible with the moral values of the Kenyan society protected by the constitution. Further, he referred back to the drafting history of the constitution and how the matter was rejected by the Kenyan people. He also called upon courts in Kenya to resist 'pressure' from outside that is pushing them to recognize the rights of LGBT contrary to Kenyan moral and cultural values.[745] Moreover, he justified the prohibition of registering LGBT right focused NGOs in Kenya on the ground of protecting marriage. In his view, the registration of such NGO threatens the institution of marriage as defined and protected by the Constitution.[746]

EG & 7 others v Attorney General[747]

This is the most recent decision in Kenya concerning the decriminalization of same sex conduct rendered by the High Court. The applicants attacked the constitutionality of provision of Kenya penal code that make homosexuality a crime. They argued these provisions have exposed them to gross violations of human rights including rape, physical attack discrimination on the basis of their 'actual or perceived sexual orientation'.[748] In addition, they contended that

[742] ibid.
[743] ibid.
[744] ibid.
[745] ibid.
[746] ibid.
[747] *EG & 7 others v Attorney General*; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)
[748] ibid.

criminalization of same sex conduct violates several rights in the Kenyan constitution including the right to equality , privacy, dignity and the right to health among others. Particularly with respect to their right to dignity they argued 'the provisions degrade the inherent dignity of the affected individuals by outlawing their most private and intimate means of self-expression… to criminalize one's conduct of engaging in sexual intimacy in private with another consenting adult, and in a manner which causes no harm to any third party or to the parties so engaging, amounts to a fundamental interference in the person's experience of being human and their personal dignity and privacy and amounts to degrading treatment'.[749] Here, the applicants emphasized the gross nature of the interference by the state on a matter that is highly personal, initiate and central to their existence as a human being without sufficient justification. In addition, they argued that the penal code is also discriminatory as it only targets and punishes people with sexual attraction towards a person of the same sex.[750] The criminalization of same sex conduct and the stigma associated with it also prevented LGBT people from exercising their right to health.

The respondent in this case relied on several grounds to defend the constitutionality of the provision of the penal code of Kenya criminalizing homosexuality. They began with the preamble of the Kenyan constitution that makes reference to 'supremacy of the almighty God'. Their argument here is that 'God who is the objective moral law giver and that this informed the decision to retain the impugned provisions'.[751] In addition, they also forwarded a separation of power argument to persuade courts to exercise maximum restraint in the case. In their view courts have no mandate to legalize same sex conduct or force the parliament do so.[752] It is up to the legislature to decide matters like this which also involve policy making due to its bearing

[749] ibid.
[750] ibid.
[751] ibid.
[752] ibid.

on the social and cultural fabric of the society. Further, they argued that decriminalization of same sex conduct would result the 'legalization of same sex marriage through the back door' which was rejected by the people in the constitution making process.[753]

The respondent also raised the fact that rights recognized under the Kenyan constitution are susceptible to legitimate limitations. As such, the protection of common good and morality could justify restrictions on individual liberty or privacy.[754] Finally, the respondents dismissed the argument that criminalization of same sex was introduced to Kenya by colonial powers and is incompatible with the present constitution. In relation to this, they argued as long as it is a good law its colonial origin does not matter, and it should be retained.[755] Further, they sought the court not to give too much attention to the changes that were introduced on the matter in the former British colonies like India recently with respect to the matter considering the peculiarities in Kenyan Constitution. They rather called upon the court to develop its own 'patriotic and indigenous' jurisprudence sensitive to the Kenyan context.[756]

The Judges in the High Court unanimously decided in favor of the respondents and affirmed the constitutionality of the provisions in the penal code criminalizing same sex. They started their reasoning by articulating the principles of interpretation they would follow in the case. Accordingly, they noted that although the constitution must be interpreted in a purposive manner the text must not be stretched too far. In particular, they stated that 'courts are constrained by the language used…. may not impose a meaning that the text is not reasonably capable of bearing…interpretation should not be "unduly strained" but should avoid "excessive peering at the language to be interpreted without sufficient attention to the historical contextual scene," which includes the political and constitutional history leading up to the enactment of a

[753] ibid.
[754] ibid.
[755] ibid.
[756] ibid.

particular provision'. [757] The judges also clearly mentioned their preference for literal interpretation of the challenged provision of the penal code unless it leads to an absurd outcome, which significantly determined the conclusion they arrived in the end as we will see below.

After identifying their guiding principles of interpretation as such, they addressed issues regarding the alleged lack of clarity and vagueness of the penal code in defining the offences in question which is not relevant for the purpose of this thesis. Then, they went to determine whether the criminalization of homosexuality violates the constitutional rights of the applicants i.e. their right to equality, privacy and dignity. With respect to the right to equality, the judges first elaborated the standards for determining what amounts to unfair discrimination based on Kenyan and South African case law.[758] The core point they raised here is that not every differential treatment is problematic from constitutional point of view. In their view discrimination becomes unacceptable when it is '*demeaning. This happens when a law or conduct, for no good reason, treats some people as inferior or less deserving of respect than others. It also occurs when a law or conduct perpetuates or does nothing to remedy existing disadvantages and marginalization. The principle of equality attempts to make sure that no member of society is made to feel that they are not deserving of equal concern, respect and consideration, and that the law or conduct complained of is likely to be used against them more harshly than others who belong to other group'*.[759] This analysis from the court is in line with the equality jurisprudence of Kenyan courts in the past few years which uses human dignity as a guide for assessing the fairness or unfairness of discrimination.

[757] ibid.
[758] ibid.
[759] ibid.

However, the judges did not undertake this type of analysis in this case as they did not find any discrimination in the first place. For their verdict they relied on the plain meaning of the phrases 'any person' and 'any male person' in the penal code.[760] They used these phrases to argue that the applicants are not discriminated on the basis of their sexual orientation. This could be evident from the statement that says 'language of section 162 is clear. It uses the words "Any person." A natural and literal construction of these words leaves us with no doubt that the section does not target any particular group of persons. Similarly, section 165 uses the words "Any male person." A plain reading of the section reveals that it targets male persons and not a particular group with a particular sexual orientation'. [761] This is an extremely literal interpretation which is also partly difficult to comprehend. The judges relied on the phrase 'any person' to argue that it has a neutral application and the prohibition is both on homosexuals as well as heterosexuals. However, it is evidently clear that it was primarily intended to criminalize persons who engage in same sex. These people engage in such conduct because they are sexually attracted to a person of similar sex and this is what is meant by sexual orientation. As such, the reasoning of the court that the penal code does not target persons of a certain sexual orientation is unconvincing. Leaving this issue aside, the judges also dismissed the claim that the applicants are being subject to attack because the existing law that criminalize homosexuality. The reason they gave for this is that the applicants have not sufficiently established violation of their right with sufficient evidence. As such they failed to meet the cause of action requirement.[762]

The judges then went to examine whether the challenged provision of the criminal code violate the applicants constitutional right to privacy and dignity. In their view, these two rights are most relevant rights for the case at hand and the case depend on them. After noting this, they

[760] ibid.
[761] ibid.
[762] ibid.

underscored the important place of human dignity in the Kenyan constitutional order by citing several provisions of the Kenyan Constitution as well as previous precedents.[763] They also referred to the constitutional jurisprudence of the CCSA to affirm the centrality of human dignity as a value and right. Following this, they reiterated the argument of the applicants about the unjustified and degrading interference of the state in their private sexual life without harming any person.[764] Interestingly here the judges did not dismiss the claim or the argument of the applicants. They rather chose to the link the matter to the constitutional definition of marriage which was not an issue in the case.[765] Here, it is important to bear in mind that, the applicants have made it explicit in their application that they are not calling for recognition of same sex marriage and only sought to challenge the provisions of that criminalize same sex conduct.

In spite of that, the judges reasoned that various provisions of the constitution must be construed in harmony with one another rather than in isolation. Particularly they noted that '*we have carefully examined the purport and import of sections 162 and 165 of the Penal Code vis-a-vis Articles 28 and 31 of the Constitution; we have also read the Constitution holistically. We are unable to agree with the Petitioners that the impugned provisions violate the Constitution or their rights to dignity and privacy. If we were to be persuaded that the Petitioners' rights are violated or threatened on grounds of sexual orientation, we find it difficult to rationalize this argument with the spirit, purpose and intention of Article 45(2) of Constitution. Article 45(2) only recognizes marriage between adult persons of the opposite sex. In our view, decriminalizing same sex on grounds that it is consensual and is done in private between adults, would contradict the express provisions of Article 45 (2). The Petitioners' argument that they are not seeking to be allowed to enter into same sex marriage*

[763] ibid.
[764] ibid.
[765] ibid.

is in our view, immaterial given that if allowed, it will lead to same sex persons living together as couples. Such relationships, whether in private or not, formal or not would be in violation of the tenor and spirit of the Constitution.[766]

This reasoning of the court is also unconvincing because legalization of same sex marriage is not an issue before it in the first place. Even if deciding the case in favor of the applicants leads to same sex persons living together, it is materially different from marriage in terms of legal recognition and status. To equate the two as identical does not seem to be correct approach of interpretation. In addition, the court reasoning does not conclusively show that there is no violation of the right to privacy and dignity. On the contrary, it seems to accept their argument on the matter had it not been for the definition of marriage in the constitution which is not related to the case at all, as it is the only justification it provided for dismissing the claim. In relation to this the court noted that '*unless Article 45(2) is amended to recognize same sex unions, we find it difficult to agree with the Petitioners' argument, that, we can safely nullify the impugned provisions, whose effect would be to open the door for same sex unions and without further violating Article 159 (2)(e) which enjoins this court to protect and promote the purpose and principles of the Constitution'*.[767] However, it is not entirely clear here again why the court linked the issue with same sex marriage. As quoted above, the court made decriminalization of same sex conduct conditional upon on the prior legalization of same sex marriage which is unlikely to happen soon. The choice by the court to associate the matter with same sex marriage may also be intentional to prevent future challenges on the same issue. Another important point worth nothing in this case is that the court gave central weight to opinion of the Kenyan public compared to comparative jurisprudence.[768] In relation to this it noted that the opinion of the majority is crucial in the task of constitutional interpretation. With

[766] ibid.
[767] ibid.
[768] ibid.

respect to comparative law, the court noted that they are persuasive but not binding as the Kenyan context is different.[769] More importantly, it argued courts in various jurisdictions are divided on the matter and there is no provision in any of the systems considered which resembles the Kenyan constitutional provision that defines marriage. The court used this reasoning to reject the applicants claim. That being said, the remaining paragraphs of this subsection analyze two Kenyan cases concerning eviction and the role of dignity reasoning in the courts.

***Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others*[770]**

In this case what was an issue was the decision of the Kenyan rail way corporations to evict the petitioners from its apartments leased to the applicants for many years. Some of the petitioners have lived all their lives in these buildings and the eviction decision was completely unanticipated. Further, according to the petitioners the way the corporation executed the decision was also arbitrary in a sense that it was done without them receiving an adequate notice.[771] The corporation just posted the notices on trees instead of delivering them in person. Further, the immediate termination of basic facilities such as water and sanitation as well as the demolition of the houses immediately also shows the irresponsibility and lack of concern on the part of the corporation. According to an advertisement on local newspapers, the purpose of evicting occupants was to earmark the land for construction of fancy malls and build 'high class apartments'.[772] In their petition, the applicants alleged the violation several provisions of the Kenyan constitution including their right to housing, dignity and respect.

[769] ibid.
[770] *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others* 2013.
[771] ibid para.10.
[772] ibid para.3.

A prominent human rights scholar Prof. Yash Ghai was the eleventh petitioners and his claim mainly relied on human dignity. Accordingly, he argued that '*human dignity is not something that belong only to individuals but at times it covers the entire Nation as it can also be wholly collectively'*.[773] More interestingly, he brought to the attention of the court the *ubuntu* philosophy of personhood, which gives important concern to the value of the community besides the individual referring to the famous *Makwanyane* judgment of the CCSA. He further contended that '*human dignity cannot be realized without the satisfaction of basic needs and that individuals cannot realize their full potential if they do not have the basic resources to enable them achieve it and to respect their dignity'*.[774] The argument here emphasizes the positive aspect of human dignity, as it demands the State to respond appropriately to ensure the meeting of basic needs, as they are vital for living a dignified life.

The High Court weighted the argument of the parties and concluded that the action of the corporation is in conflict with the right to housing and dignity of the applicants. The court in its reasoning fully concurred with the position of Yash Ghai that the right to housing is inseparable from the right to dignity as it aims to preserve the 'intrinsic worth of the human person'.[775] It further stated that the right to dignity is vital to property grasp the essence of constitutional rights including socio-economic rights. Thus, it is impossible to have a full understanding of the right without its light. The influence of South African socio-economic jurisprudence was still central in the resolution of the case.[776] Based on such reasoning the court found violation of the right to dignity among others and ordered the authorities to take immediate measures to address the problems the applicants encountered because of the eviction.

[773] ibid para.26.
[774] ibid, para.27.
[775] ibid para.28-30.
[776] ibid para.73.

A similar case was litigated before the Kenyan High Court, which challenged the Nairobi city policy of evicting people who were residing in informal settlements in different parts of the city.[777] According to the applicants, they were given only 12 hours to leave their premise, which was impossible for them. Further, after the expiry of the period '*their structures were demolished by an armed group of people from the City Council of Nairobi together with Administration Police'*.[778] The consequence of this action made the applicants homeless, as they had nowhere to go. Accordingly, they petitioned the court to find a violation of their several constitutional rights and order the city council to stop its unreasonable measures. The city council on its part denied the violation any right and emphasized the illegality of settlements and its duty to plan the city.[779]

In the final decision of the High Court, the role of dignity was still eminent. In its reasoning, it condemned the unreasonableness of the measure taken by the city council considering the short notice issued and the swiftness demolition action. It also noted that *'the petitioners ought to be treated with dignity as required by our Constitution….in all instances where forceful eviction has to be executed it has to be done humanely*.'[780] Here once again the centrality of dignity reasoning is vivid. The message it conveys is that it is constitutionally impermissible to throw human beings away from their dwelling as garbage. Certain reasonable procedures must be complied if they intrinsic value or worth is to be maintained. The court concurred the with the famous South African *Groothboom* judgment where the necessity of having a reasonable policy for those in desperate situation like the applicants.[781]

[777] ibid.
[778] ibid.
[779] ibid.
[780] ibid.
[781] ibid para 108.

3.3.3 Human Dignity as Respect for Individual Autonomy

The third aspect of human dignity, which is present in the Kenyan constitutional jurisprudence, is the understanding of human dignity as a respect for the choice's individuals make irrespective of its utility. Many scholars also regard self-directedness, decisional autonomy and self-responsibility, as defining attributes of being human person.[782] However, compared to the respect for integrity of the person and equal concern dimensions of dignity, the autonomy aspect seems to be less popular as only few cases are decided on its basis in Kenya. However, this is not only a Kenyan exception, some scholars are even generally skeptical about the possibility for litigants to win a case solely based on autonomy claims. The argument here is that since the claim is respect for decisions or choices, it gives courts ample room for rejecting them citing autonomy claims of other individuals or the collective interests. [783]

Beside this, the framing of human dignity in the text of the constitution and its understanding as individual or collective concept is also decisive. In some countries, like Hungary the individualistic autonomy-based conception of human dignity is dominant.[784] In such systems, it is only natural to find many cases decided on the ground of autonomy based understanding of dignity. The Kenyan context on the matter is however different. The constitution seems to create a balance between the individual and communal interest.[785] If this is the case, it may partly explain the reason for the smaller number of cases decided on the conception of dignity as respect for personal choice in Kenya. With this background, I will discuss two cases decided by Kenyan courts from the perspective of autonomy.

[782] Dworkin G., 'The concept of autonomy' in John Christman (ed), The Inner Citadel: Essays on Individual Autonomy (First Edition edition, Oxford University Press 1989) 54-62, Finberg J., 'Autonomy' in John Christman (ed), The Inner Citadel: Essays on Individual Autonomy (Oxford University Press 1989). 27-49.
[783] Renata Uitz & Orsolysa Salat, 'Individual autonomy as a constitutional value: fundamental assumptions revisited' in Andras Sajo & Renata Uitz (eds.) *Constitutional Topography: Values and Constitutions* (Eleven International Publishing 2011) 235-270.
[784] C McCrudden (n564) 700.
[785] Constitution of Kenya (n527) art 19(2).

***Republic v Kenya National Examinations Council & another*[786]**

This case concerns a challenge against the Kenya National Examinations Council's (KNEC) refusal to change the name of the applicant in Kenya Certificate of Secondary Education (KCSE) and leave the gender mark blank. According to medical documents submitted, the petitioner is suffering from a gender identity disorder and depression. He is also receiving therapy to ameliorate his condition. As part of this process, he changed his name to that of a female and sought this to be stated in all his documents including his identity card and educational certificates.[787] The respondent in this case was unwilling to do what the applicant demanded. The justification it provided is that making such changes opens the gate for fraudulent practices.[788] It may also inspire others to follow his examples and create inconvenience for the authority. The applicant challenged the constitutionality of this decision alleging the violation of his right to dignity.

The autonomy-centered understanding of human dignity was evident in the decision of the court. It analyzed human dignity as a value and right in light of the Indian Supreme Court decision on a similar manner. The court particularly quoted the reasoning, which states '*the right of a human being to choose his sex/gender identity which is integral his/her personality and is one of the most basic aspect of self-determination dignity and freedom This statement particularly support this claim'*.[789] It is important to note two things in this reasoning. First, gender is an important element in the identity of a human being. If that is the case, a human being must not be compelled to accept something, which is not congruent with his self-

[786] *Republic v Kenya National Examinations Council & another Ex-Parte Audrey Mbugua Ithibu* [2014] eKLR
[787] ibid.
[788] ibid.
[789] *National Legal Services Authority V Union Of India And Others, Civil Original Jurisdiction Writ Petition* (CIVIL) NO.400 OF 2012; WRIT PETITION (CIVIL) NO.604 OF 2013 the Supreme Court of India,

perception or understanding. In other words, this means such kind of choices must be left to the individual, as they are core to his identity and dignity. Thus, the High Court granted the request of the petitioner by recognizing the making of important choices for oneself as a central feature of being a human person.

A similar case concerning a petitioner with gender identity problem was discussed in the section dealing with dignity respect for emotional integrity and protection from humiliation.[790] In this case, the humiliating character of publicly stripping his cloth to ascertain his gender was the main reason for finding violation. However, the court also raised the importance of respecting choice of individuals as manifestation of respect of their human dignity irrespective of the validity or content of the decision. More specifically, the court noted that '*whatever his choices or his conduct in relation to his mode of dress, regardless of the fact that he perceives himself as a woman, though a man, he still retains the inherent worth and dignity to which all humans are entitled, and which our Constitution guarantees to everyone'*.[791]

From this statement, one can infer that the choice an individual makes about the way he wants to live his life or his self-conception, should not be a reason to strip him the respect he has as a human being. If the individual is made to feel lower by the choices he make, the implication is that he is not autonomous or free. In other word, when the court says his human dignity remains intact regardless of choices, it is indirectly recognizing the centrality of autonomy to the humanity of the person. The position of the court becomes more clear or unequivocal when one looks at the reference it made to the CCSA which said '*the right to dignity includes the right-bearer's entitlement to make choices and to take decisions that affect his or her life – the more significant the decision, the greater the entitlement. Autonomy and control over one's*

[790] A.N.N v Attorney General (n684).
[791] ibid para.52.

personal circumstances is a fundamental aspect of human dignity'.[792] Based on these two cases, it possible to argue that dignity as respect for choices is also gaining ground in Kenyan and it is not completely alien. However, the question remains to what extent Kenyan courts are willing to go in this direction.

3.4 The State of Indigenous Dignity Jurisprudence in Kenya

The first question that may come to one's mind when one hears indigenous dignity jurisprudence is the meaning it carries and its relevance. As noted in the previous chapter, indigenous jurisprudence could be perceived as the meaning or content the judges give to what it means to be a human being, or the respect owed to a human person by reference to the culture of the society where the court presides. On this front, the Kenyan courts do not seem as successful as the rich *ubuntu* jurisprudence of the CCSA. In the dignity case law of Kenyan courts, discussed in the previous sections of this paper, neither the judges nor the parties made an attempt to construe the intrinsic value of human beings by invoking Kenyan own culture and tradition. Yet, in one of the cases one of the petitioners referred to *ubuntu* philosophy, which is at least African.[793]

This begs another question. Why is this the case in Kenya? Is it because communities residing in Kenyan have no conception of dignity or idea of respect for a human person? The answer is a resounding no. Like any other human society, the special respect bestowed on human beings is also present in Kenya. Yet, finding ingredients of human dignity in one's own community requires a great deal of commitment and imagination. Further, it is also not only the responsibility of the judiciary to discharge this challenging task on its own. Efforts from

[792] ibid para.43.
[793] *Satrose Ayuma & 11 others v Registered Trustees* (n770) para.26

anthropologists, historians and philosophers are also needed to discover human dignity in one's backyard before looking abroad. Unfortunately, so far only very few studies have been conducted on the cultural and moral philosophy of indigenous Kenyan communities such as the Gukuyu and Massai.[794] This point makes more sense when one consider the vast amount of literature available on the *ubuntu* by historians, anthropologists, philosophers and legal scholars. If indigenous dignity jurisprudence is to flourish in Kenya further studies are necessary in this area. Further, the 2017 Supreme Court of Kenya act particularly requires judges to 'develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth'.[795]

However, why is it necessary to have indigenous dignity jurisprudence in the first place? What is the problem if courts import conceptions of dignity from elsewhere so long as they think it is plausible and useful? Well such arguments may seem plausible on their face or theoretically speaking. However, there are numerous real pragmatic concerns. Many scholars including Legrand argue that legal norms and concepts do not operate in vacuum.[796] Rather, they are applied into a society, which has its own rules, principles and viewpoints. When certain concepts are viewed as external and alien to the cultural conception of a certain community and its way of life there is a great tendency for them to be rejected. Hence, from a legitimacy and pragmatic point of views it is always ideal to make an extra effort to discover a certain norm or adapt it the cultural context of the community instead of imposing an imported concept. This also applies to human dignity and Kenyan courts need to do more to discover and entrench the value in their own society. However, this should not be a one-way street. The fact that a certain practice originates locally does not make it right or legitimate in itself. Since no society is completely self-sufficient and perfect in every sphere. It should also open its doors for better

[794] Jomo Kenyatta, *Facing Mount Kenya*, (Secker and Warburg 1938), *Being Maasai, Becoming Indigenous: Postcolonial Politics in a Neoliberal World* (Indiana University Press 2011).
[795] Supreme Court Act No. 7 of 2011, 2016.
[796] Legrand (n175) 240-311.

ideas and discourse. This is where the issue of migration of constitutional ideas and jurisprudence comes to the picture.

3.5 The Migration of Human Dignity into Kenya

One of the mechanisms where courts enrich their decision is by considering what courts of other jurisdiction have ruled on the matter. Courts of different countries use foreign jurisprudence to a varying extent from frequent use to complete disregard. Among those in the first category, the Constitutional Court of South Africa sits at the forefront. As noted in the previous chapters, the reason is partly the unique constitutional provision that allows courts to consider foreign law in the interpretation of bill of rights. [797] No similar authorization is found in the constitution of Kenya. What is surprising in this regard is that the Kenyan Constitution copied most of its bill of rights provisions of the South African including the guides for interpretation. Hence, the omission of the part dealing with foreign jurisprudence does not seem to be an accidental slip or forgetfulness rather purposeful.

However, one provision of the Kenyan constitution may be interpreted very generously to permit courts to refer to foreign jurisprudence. This sub article is found in the supremacy clause of the constitution, which provides what is, and is not part of the Kenya constitution. It specifically states that '*the general rules of international law shall form part of the law of Kenya'*.[798] The exact meaning of this phrase is controversial and different scholars interpret it differently. Some argue that what falls within it is customary international law.[799] Others contend that it may also include general principles of international law. But their conception is based on the mainstream understanding of international law. The interpretation I offer departs

[797] CRSA(n267) art 39 (1) c.
[798] Constitution of Kenya (n527) art 2(5)
[799] N.W Orago, 'The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective' (2013) 13AHRLJ 415, 415-440

from this conception and it is based on the ordinary or literal meaning of the word international. Accordingly, it may be plausible to regard a law, which is not domestic as international. If this is the case, the phrase general principle of international law may be interpreted to include the jurisprudence of courts outside the territory of Kenya.

This seems to be the only constitutional basis for the prevalent practice of Kenyan courts citing foreign decisions in the course of constitutional adjudication. In addition, this provision seems to be the one they invoke to support their engagement with comparative law.[800] If this argument is shaky, it may also be possible to justify their conduct on non-constitutional grounds. The other explanation I offer is that since Kenya is a common law country, the practice of citing precedent in constitutional decisions is the extension of this tradition. Yet, the plausibility of this argument from constitutional point of view is still problematic.

As the final report of the Constitution of Kenya Review Commission (CKRC) report suggests, in the process of drafting the new constitution an inspiration was drawn from so many constitutions both old and new especially in the bill of rights part.[801] Hence, such practice is one of the mechanisms where by the conception of human dignity in one system may travel to another. However, there is no mention of such conduct expressly in the report. Yet, from the frequent consultation made to constitutions like that of South Africa, it is very difficult to think that they have not left their imprint on the dignity clause of the Kenyan constitution. Here it might help to mention the striking similarity on how the right to dignity is stipulated in the two constitutions. For its part, the Kenyan constitution says '*every person has inherent dignity and the right to have that dignity respected and protected*'.[802] Its South African counterpart

[800] *Mwaniki v Kenya Methodist University* [2015] eKLR.
[801] CKRC Report 2005 (549)112.
[802] Constitution of Kenya (n527) art 28.

similarly provides '*everyone has inherent dignity and the right to have their dignity respected and protected*'.[803]

This great deal of resemblance was also mentioned by Kenyan courts as a justification for referring to South African dignity jurisprudence.[804] Based on this evidence, it seems reasonable to conclude that, the inclusion of human dignity in the Kenyan constitution was inspired by the South African Constitution. Given the broadness of the term migration to describe movement of norms from one system to the other both acknowledged and unacknowledged[805], the case travel of dignity in to Kenyan constitution might also be encapsulated by it.

The other widely accepted mechanism for the transfer of norms between different systems is at the time of constitutional interpretation.[806] In their efforts to resolve constitutional cases before them, courts might find it helpful to consider what their peers in other jurisdictions have said as an input for their decision. This practice is on the rise in many systems in our era of globalization.[807] Kenyan courts are no exception to this trend. As different Dignity related cases discussed in different parts of the chapter demonstrate, Kenyan courts make frequent reference to the jurisprudence of other courts.[808] The reference is visible in all aspects of dignity i.e. respect for integrity, equal concern and respect for autonomy. The reliance on comparative law is also partly responsible for some of the progressive decisions reached by Kenyan courts. Novak raises this issue in connection to the decision of the Kenyan Supreme court that made mandatory death sentence unconstitutional.[809] In this case the court acknowledged the persuasiveness of the judgments of other courts which outlawed mandatory death sentence for

[803] CRSA (n267) art 10.
[804] V M K v C U E A (n703).
[805] S. Choudry (n169) 1-35.
[806] Halmai (n199) 1328-1347.
[807] ibid.
[808] *Mary Mwaki Masinde v County Government of Vihiga & 2 others* [2015] eKLR & *Republic v Kenya National Examinations Council & another Ex-Parte Audrey Mbugua Ithibu* [2014] eKLR.
[809] A. Novak , 'The 'Judicial Dialogue' in Transnational Human Rights Litigation : Muruatetu & Anor v Republic and the Abolition of the Mandatory Death Penalty in Kenya'(2018) 18 Human Rights Law Review 771, 771–790.

certain category of crimes. In the decisions of the Kenyan high court and court of appeal which recognized the right to association of LGBT persons, the impact of comparative jurisprudence was notable.[810] However, it is important to mention here that this approach of courts was severely criticized by the applicants in some of these cases as erroneous and inappropriate. The recent decision of the Kenyan High Court which upheld the law that criminalize the same sex conduct could be mentioned as an example.[811]

Concerning the countries often refereed, South Africa and Indian courts take the leading place.[812] Yet, sporadic reference to the jurisprudence of Canada, ECtHR and Zimbabwe were also made in these cases. However, the attention the dignity jurisprudence of South African Constitutional Court received by the Kenyan judges is unparalleled. In cases ranging from physical integrity to equality and dignity-based socio- economic rights, South African cases are the main source of inspiration for their Kenyan counterparts.[813] This may beg the question why this is the case? The only plausible explanation seems to be the clear influence of the South African constitution in the making of the new Kenyan constitution as discussed in the previous sub section of the chapter. It is also the only openly admitted justification the judges gave so far in their decision.[814]

These leads to a bigger question on what criteria are Kenyan courts picking decisions for inspiration. No clear answer is given by the judges except the similarity in text, the transformative and value oriented character of both constitutions.[815] The need for having certain clear parameters of choosing precedent is still unresolved methodological issue in comparative constitutional study. Some even dismiss the whole point of referring to foreign

[810] Non-Governmental Organizations Co-Ordination Board v EG & 5 others (n 717).
[811] *EG & 7 others v Attorney General* (n747)
[812] ibid.
[813] *Satrose Ayuma & 11 others v Registered Trustees* (n770).
[814] *V M K v C U E* (n703).
[815] ibid.

jurisprudence as cherry picking and arbitrary.[816] The absence of clear parameter may expose Kenyan judges for a similar charge.

The former chief justice of the Kenyan Supreme Court remarked that '*it will not be appropriate to reach out and pick a precedent from India one day, Australia another, South Africa another, the US another, just because they seem to suit the immediate purpose'*.[817] Though the chief justice said this in the context of arguing for developing indigenous Kenyan jurisprudence, it attests to the absence of a principled basis of selecting decisions. Mutunga further stated '*the Constitution should be interpreted in a manner that promotes its purposes, values, and principles, advances the rule of law, human rights and fundamental principles and permits the development of the law and contributes to good governance; that the spirit and tenor of the Constitution must provide and permeate the process of judicial interpretation and judicial discretion'*.[818] This conception of constitutional interpretation may limit the discretion of judges in picking precedents as it puts the values and spirit of the constitution as a litmus test.

The other important issue worth considering here is the manner of engagement of Kenyan courts with dignity jurisprudence of other courts. With respect to utilizing foreign jurisprudence, it may be possible to classify constitutional systems as those which critically engage and those which merely quote other courts and decide accordingly. For instance, studies conducted on the Indian Supreme Court conclude that it falls in the first category, as it usually tries to differentiate the Indian context in its analysis of foreign law.[819] In the assessment of

[816] Choudhry (n169)1-35.
[817] Mutunga (n554).
[818] Willy Mutunga ,Developing progressive African jurisprudence: Reflections from Kenya's 2010 transformative constitution , September 10, 2017 <https://www.themastonline.com/2017/09/10/developing-progressive-african-jurisprudence-reflections-from-kenyas-2010-transformative-constitution/> Accessed 8 July 2019
[819] Scotti V.R, 'India : a critical use of foreign precedents in constitutional adjudication in Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Judges* (Hart Publishing 2014) 69-96.

the writer, the Kenyan courts fall on the second category for their failure to critically engage with foreign decision at least with the dignity case law.

In many of the cases, the judges extensively quote from decisions of other courts without making an effort to analyze and concur usually with their opinion. This view seems to be shared by the former president of the Kenyan Supreme Court Mutunga who says '*we should grow our jurisprudence out of our own needs, without uncritical deference to that of other jurisdictions and courts, however, distinguished*'.[820] He calls his practice of uncritical following of other courts as 'mechanical jurisprudence'. However, for dignity cases, the situation might also be explained by another factor. In the assessment of the author, the dignity cases decided so far are not that controversial. In the future, when dignity-based claims of legalization of same sex conduct, same sex marriage and abortion arise, it seems sound to expect a huge deal of critical engagement on the part of the Kenyan judges which seems to be happening to a certain extent.

Conclusion

The chapter has shown the flourishing of human dignity jurisprudence in the new Kenyan constitutional order both as a constitutional value and right and the important role it is playing. Given the comprehensive nature of the bill of rights in the constitution, specifying the scope of the right to dignity is particularly difficult. A narrow as well as a broader interpretation of the right is possible depending on the context or perspective. Concerning its role, human dignity seems to have both discovering and reinforcing role in Kenyan constitutional jurisprudence like many other constitutional systems. As such, it aids in the discovery of new rights without explicit existence in the constitution. It also gives content and meaning to the already existing rights stipulated under the Kenyan constitution.

[820] Willy Mutunga (n818).

The examination of human dignity case law or jurisprudence of Kenyan courts demonstrates the crystallization of three dimensions of human dignity i.e. respect for physical & emotional integrity, respect for equality & respect for autonomy to a considerable extent. The respect for physical and emotional integrity manifests itself in dignity centered decisions concerning claims of torture, inhuman and degrading treatment. This aspect was also used by the court to outlaw intrusive medical examination on sexual minorities. In each of these cases the issue of threshold was crucial to find a violation of dignity. As such, the courts made an attempt to prevent the trivialization of human dignity by confining to treatments which meets certain degree of intensity or graveness. The extension of the duty to respect to human dignity to private actors was also an interesting feature of Kenyan dignity jurisprudence. Moreover, the position of Kenyan courts that even dead human beings are entitled to be treated with dignity is also interesting as it departs from the prevalent thinking of associating/intertwining human dignity with human life. However, Kenyan courts have not yet utilized human dignity centered reasoning to completely abolish death penalty despite banning it as a mandatory sentence.

In the area of dignity as respect for equality, the ruling of Kenyan courts displays promising future. Like the Constitutional Court of South Africa, Kenyan courts utilize human dignity to distinguish between just and unjust discrimination. Further, courts in Kenyan have defined unjust discrimination in digniterian terms as a differentiation that is 'demeaning'. Beside the dignity based definition of unjust discrimination, the notion also features in the Kenyan equality jurisprudence as a principle and right imposing a positive obligation on states to ameliorate the position of those disadvantaged in the context of socio-economic rights. Dignity as equal concern for all is more evident in eviction suits brought before Kenyan courts. Here the collective dimension of dignity becomes more vivid. Like the integrity aspect of human dignity, the issue of threshold is also pivotal in dignity centered equality claims. As cases discussed in this chapter demonstrated not every differential treatment constitutes a breach of

human dignity. To reach at this level the ground of distinction must be arbitrary and pertains to personal characteristics like race, gender or health status. In some of the cases, courts also recognized sexual orientation as a prohibited ground of discrimination in relation to the right to association of LGBT persons despite its absence from the text of the Kenyan constitution. Yet, this approach was not followed in the recent decision of the High Court that upheld the law criminalizing same sex conduct.

Compared to the integrity and equality aspect, the autonomy dimension of human dignity seems to be at the level of infancy in Kenyan dignity jurisprudence. Such a conclusion can be drawn when one looks at the few number of cases where courts interpreted human dignity to mean entitlements for self -determination or self-directedness of the individual. Several factors were identified in this chapter as possible explanation for the underdeveloped conception of dignity as entitlement to autonomy including the communitarian aspect of human dignity recognized in the Kenyan constitution and the inherent controversy in autonomy based dignity claims. Yet, in few of the cases decided by Kenyan courts, respecting decision of a person on matters central to his identity or personality as a manifestation of respect for human dignity is affirmed.

On the issue of migration of human dignity in Kenyan constitutional order, the finding of this chapter shows the absence for indigenous dignity jurisprudence in Kenya unlike its South African counterpart. Instead of trying to give content and meaning to dignity jurisprudence from local ingredients i.e. culture and tradition, Kenya seems to opt for importing the concept of human dignity at the stage of constitution making and interpretation. In both stages migration, the influence of South African dignity jurisprudence is unparalleled. Textual similarity of the dignity clauses and the value oriented nature of both constitutions contributed its part for the massive migration of the concept.

What seems to be interesting in the Kenyan cases is the contrast between the absence of clear constitutional basis for drawing inspiration from foreign constitutional jurisprudence on the one hand and the massive utilization of foreign case law in constitutional adjudication on the other hand. The chapter suggested the common law legal culture of relying precedents as possible explanation of the paradox. Further, the failure of Kenyan courts to come up with clear parameters for picking decision relevant to dignity adjudication and their failure to engage critically with the dignity jurisprudence of other courts is noted as a glitch. Yet, given the relative infancy of Kenyan dignity jurisprudence what the courts have accomplished so far seems promising

Chapter 4- The Role and Migration of Human Dignity in Ugandan Constitutional Order

Introduction

This chapter explores the status, role and migration of human dignity in Ugandan constitutional system. In order to provide a context for subsequent analysis of the matter, the pre-colonial, colonial and post-colonial constitutional history of Uganda will be addressed first. This will be followed by the textual examination of human dignity in the present constitution of Uganda. In this section, issues pertaining to the status of human dignity as a value and right, its scope and application will be analyzed. The next section of the chapter explores the human dignity jurisprudence of Ugandan courts of different hierarchy. The cases are grouped under two main themes, human dignity as respect for life and integrity of a human person and equal worth. Due to the absence of any case decided in Uganda on the third dimension of human dignity i.e. respect for autonomy and self- determination, no separate section is devoted to it. Finally, the chapter addresses issues concerning the state of indigenous human dignity jurisprudence in Uganda and the extent of migration. The peculiar approach of Ugandan courts towards the migration of constitutional principles and utilization of foreign or comparative jurisprudence will be discussed in the chapter in a greater depth.

4.1 Constitutional History of Uganda and Courts

The Republic of Uganda is a country located in the Eastern part of Africa. Before it achieved its independence in 1963, it was under British colonial rule since 1884.[821] Prior to colonization, Uganda had a traditional legal system that was primarily operated by elders and tribal chiefs.

[821] George W Kanyeihamba, *Constitutional and Political History of Uganda: From 1894 to Present* (LawAfrica Publishing Ltd 2010) 1-51.

The colonial administration displaced this tradition justice system over time and entrenched the British common law tradition in the country.[822] In the sphere of constitutional law, Uganda had four written constitutions since its independence. Two of these constitutions are particularly notable for the procedure followed in their adoption. The first is the 1967 Constitution, which is also known as the 'Pigeonhole' Constitution.[823] What is peculiar about this Constitution is that it was adopted without a serious and meaningful deliberation among the representatives the people. Strangely enough, members of the parliament found the draft constitution in their pigeonhole and they were forced to adopt it later by the military forces.[824] In contrast to the Pigeonhole Constitution, the present Constitution of Uganda adopted in 1995 is often acclaimed for its adoption through active involvement and participation of the people. The drafters went a great length to accept views from different stakeholders in the society, which contributed its part for its legitimacy.[825]

Though Uganda had four constitutions to date, the country had a very unpleasant history of constitutionalism and protection of human rights. One of the troubling issues in the Ugandan history of constitutionalism is the absence of peaceful transition of power. The country had witnessed three-coup *d'etats* since independence: in 1971, 1978 and 1986.[826] Peaceful handing of power through election is still a contentious issue in Uganda. The ruling party has scrapped the two-term limit for presidents set in the Constitution with a controversial constitutional amendment in 2005. In addition, in September 2017, the party proposed another constitutional amendment that eliminates the maxim age limit for a presidential candidate provided in the

[822] ibid.
[823] Aili Mari Tripp, 'The Politics of Constitution Making in Uganda' in Laurel E. Mille (eds), *Framing the State in Times of Transition Case Studies in Constitution Making* (United States institute of Peace Press 2010), 160.
[824] ibid.
[825] Benjamin J Odoki, 'The Challenges of Constitution Making and Implementation in Uganda', in Oloka-Onyango (eds), *Constitutionalism in Africa Creating opportunities and Facing Challenges* (Fountain Publishers 2001) 267.
[826] Kanyeihamba (n 821) 105ff.

Constitution, with the intention of ensuring the presidency of Museveni for Life. [827] This caused a brawl inside the parliament, which is a manifestation frustration with this predicament. Further, multi-party democracy has also a very recent history in Uganda. It was only after 2003 that the country transited from a single party 'movement system' to that of a multi-party politics.[828] The justification given for the long delay was preserving national unity. Political parties were seen as enemies to the achievement of national unity in Uganda considering great diversity of communities in the country.[829]

In the sphere of fundamental right protection, Uganda has a very poor record of accomplishment. Especially during the dictatorial regime of Idi Amin (1971-1979) hundred thousands of Ugandans were killed and suffered grave bodily injury.[830] The atrocities and violations of human rights continued even after the collapse of the regime. According to some reports, the state of human right protection in Uganda is still disconcerting. Several bodies accuse the government of committing acts of torture and inhuman treatment.[831] In 2017, even the president of the country ordered security personnel to refrain from this form of gross violation of human rights. Thus, it is within this historical, political and constitutional context that the role and migration of human dignity in the Ugandan constitutional order must be understood.

Before addressing these issues, it is important to say few things about the role of Courts in the Ugandan Constitutional System with respect to the protection of constitutional rights. A glance

[827] Kevin Sieff, 'Uganda's parliament taken off the air after brawl breaks out between lawmakers', Washington Post, 28 September 2017. <https://www.washingtonpost.com/news/worldviews/wp/2017/09/28/ugandan-lawmakers-brawled-over-the-presidents-effort-to-extend-his-rule-now-broadcasting-parliamentary-hearings-is-illegal/?utm_term=.cba607ee7760>

[828] Erica Bussey, 'Constitutional Dialogue in Uganda' (2005) 49 Journal of African Law 1, 1

[829] ibid 10.

[830] Benjamin J. Odoki, *The Search for a National Consensus the Making of the 1995 Uganda Constitution* (Fountain publishers 2005), 314-315, Human Rights Watch, *State of Pain: Torture in Uganda*, March 2004, Vol. 16, No. 4 (A). <https://www.hrw.org/sites/default/files/reports/uganda0304.pdf> Accessed 8 July 2019.

[831] Maria Burnett , Fresh Torture Accusations Leveled Against Uganda's Police Police Units Change Name, but Abuses Continue, <https://www.hrw.org/news/2017/05/14/fresh-torture-accusations-leveled-against-ugandas-police> Accessed 8 July 2019.

at the constitutional history of Uganda show that courts were unable to play meaningful role for so long due to various reasons. During the colonial era, courts in Uganda were subservient to the colonial regime and they had no independent authority.[832] Even after the end of the colonial rule, Courts were not able to serve as guardians of rights. This is because for most of the post-post-colonial period, Uganda was ruled by military and quasi military regimes.[833] These regimes not only committed gross violation of human rights but also concentrated all powers in their hands.[834] As a result, it was completely impossible for the judiciary to hold the government accountable. Individual judges who attempted to do so were also murdered.[835] This weak system of judicial protection of rights in Uganda began to improve in Uganda slightly after the adoption of the present constitution in 1995. Taking lessons from the past, the Ugandan constitution gives an explicit mandate to courts to apply and interpret the constitution.[836]

Structurally speaking, Uganda seems to follow unique system judicial review as not all courts have the power to interpret constitutional issues like the diffused systems. These could be seen from the Constitution which states that 'any question as to the interpretation of this Constitution shall be determined by the Court of Appeal sitting as the constitutional court'.[837] As such, lower courts such as the High Court do not have the mandate to entertain constitutional disputes. Rather, whenever such disputes arise in lower courts, they are required to refer the matter for decision to the Court of Appeal/Constitutional court.[838] After resolving the constitutional question the Constitutional court would remand the case to the referring court to decide on the case based on its resolution of the constitutional matter. However, the Court of

[832] Ben Kiromba Twinomugisha, 'The Role of the Judiciary in the Promotion of Democracy in Uganda' (2009) 9 Afr. Hum. Rts. L.J. 1, 1-22.
[833] ibid.
[834] ibid.
[835] ibid.
[836] Constitution of the Republic Uganda, 1995, art. 137.
[837] ibid art. 137 (1).
[838] ibid art. 137 (5).

Appeal/Constitutional Court does not have the final mandate in interpreting the constitution. Its decision is rather appealable to the Supreme Court which gives its final decision. Regarding this issue the Constitution says that 'an appeal shall lie to the Supreme Court from such decisions of the Court of Appeal as may be prescribed by law'.[839] Thus, there is a constitutional court which has original jurisdiction on constitutional issues and it decision is appealable to a Supreme Court which is the final court of appeal for both constitutional and non-constitutional matters.

In addition to specifying the court structure, the Constitution of Uganda also defines what constitutes constitutional issues. Accordingly, it includes a challenge to 'an Act of Parliament or any other law or anything in or done under the authority of any law; or (b) any act or omission by any person or authority, is inconsistent with or in contravention of a provision of this Constitution'.[840] Thus, the scope of constitutional issues subjected to the jurisdiction of courts are broad including the alleged violation of constitutional rights. The scope of application is not only confined to state agents but also extends to private individuals horizontally. The Constitution also recognizes a broader standing rule for individuals or associations who would like to challenge the constitutionality of an act or omission. These is evident from the provision which says 'any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation….any person or organization may bring an action against the violation of another person's or group's human rights'.[841] Thus, access to courts guaranteed by the Constitution does not seem to be confined to the individual affected by the violation. Other individuals and civic societies may also submit a court case alleging the violation of a constitutional right be it individual or group.

[839] ibid art 132(3).
[840] ibid art 137(3).
[841] ibid art 50.

4.2 Status of Human dignity in the text of Ugandan Constitution

The textual formulation of human dignity is very important, as it is the basis for ascertaining its recognition as a constitutional value or right. It is also central in the interpretative exercise that is carried out by judges in the course of constitutional adjudication. Thus, the framing of dignity in the text has immense influence in determining the meaning as well as the scope of the concept. Unlike the constitutions of Kenya and South Africa, human dignity is not explicitly stated as a founding value of the Ugandan Constitution. Yet it is mentioned as one of the guiding principles embodied in the economic and cultural objectives section.[842] This section is found in the part captioned as 'Directive Principles and Objectives'. In many constitutions that incorporate a similar part, these objectives and principles, are regarded as non-binding. The Indian constitution is a good example for this.[843] Likewise, the role of these principles in the Ugandan Constitution seems to be confined to mere guiding role. This could be observed from provision which says 'the following objectives and principles *shall guide all* organs and agencies of the State, all citizens, organizations and other bodies and persons in applying or interpreting the Constitution or any other law'.[844] Clearly, the preceding statement is not formulated as a duty, and thus is not mandatory. Further, the objective and principles part is further subdivided into political, economic, cultural, and other objectives.

One of the economic objectives relevant for the purposes of this thesis provides that '*society and the State shall recognize the right of persons with disabilities to respect and human dignity'*.[845] As it is clearly stated, the targets of this provision are people with disabilities. It does not talk about the general respect and recognition of the dignity of a human person. The

[842] ibid XXIV.
[843] Constitution of India,1949, part IV.
[844] Const. of Uganda n (n836), I.
[845] ibid, XIV.

specific reference to people with disability seems to reflect the acknowledgment by the drafters of the particular challenge this category of people face in a society, including unjust discrimination. This is a positive aspect but it may also contribute to the narrow construction of human dignity as a constitutional value applying only to the disabled.

A similar formulation could be seen in the section dealing with cultural objectives. It states that 'the state shall *promote and preserve those cultural values and practices* which enhance *the dignity* and well-being of Ugandan.[846] This is a relatively broader conception of human dignity as a value applying to all Ugandans. Yet, its relevance is confined to cultural values and practices. Thus, textually speaking it is difficult to argue that a general value of human dignity that applies to everyone in every circumstance exists in the Constitution of Uganda. This however is a purely textual reading of the constitution. It may still be possible to argue that the recognition of human dignity as a general underlying value of the constitution could be implied or inferred through purposive interpretation that goes beyond the black letter law. [847]

Unlike the value of human dignity, the right to human dignity has an explicit presence in different parts of the Ugandan Constitution with unique formulations. For instance, the caption of article 24 in the bill of rights says '*respect for human dignity and protection from inhuman treatment'*.[848] The content of the article however seems to have a very narrow content. It says '*no person shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment'*.[849] Thus, the provision confines the scope of the right to only banning torture and degrading treatment. As such, the text seems to exclude other aspects of human dignity such as respect for equal worth or self-determination of individual human being. Yet, the

[846] ibid.
[847] Barak (n1) 69-100.
[848] Const. of Uganda (n 836), art.24.
[849] ibid.

constitution particularly recognizes the right to dignity of women and the disabled. It says '*women shall be accorded full and equal dignity of the person with men*'.[850]

Here the equality aspect of dignity is formulated in the narrow context of gender equality. Further, the constitution prohibits 'laws, cultures, customs or traditions which are against the *dignity,* welfare or interest of women or which undermine their status, are prohibited by this Constitution.[851] The right to dignity of people with disability is also unequivocally stated. More specifically the Constitution provides '*persons with disabilities have a right to respect and human dignity, and the State and society shall take appropriate measures to ensure that they realize their full mental and physical potential*'.[852] This provision is interesting because it recognized an important aspect of human dignity, which is the full development of personality thus potentially expanding the narrow framing of the right to dignity.

Based on the discussion in the preceding paragraphs, it could be argued that it is possible to give the right to dignity a very narrow or broad scope in the Constitution of Uganda depending on the chosen approach of interpretation. Thus, if we apply a purely textualist perspective, the right to dignity will have a narrow reach of protecting people against torture and respecting the right of women and people with disability. In contrast, if we adopt a purposive and harmonious principle of interpretation, the right will have a broader scope. As such, it is possible to see the ban on torture, recognition of the right to women and the disabled as just a manifestation of the broader right of human dignity that applies to everyone. The specific mention of this group of persons should not be construed as the exclusion of others. This would be against the spirit of the Constitution and the interpretation of its provision in harmoniously. Further, the constitution mentions women and people with disability in the context of dignity merely to reflect the great disadvantage they are facing in the society and emphasize the gravity of what

[850] ibid art .33(1).
[851] ibid art 33(6).
[852] ibid art. 35(1).

is at stake. With this line of reasoning, it may be possible to conclude that the right to dignity under Ugandan constitution would protect the physical and emotional integrity, equality and autonomy of a human being. This will not also be incompatible with the language of the Constitution, as all these aspects are found in it in a scattered form and if we interpret them harmoniously and purposively this is the most plausible conclusion, we will arrive at.

4.3 Human Dignity Jurisprudence of Ugandan Courts

4.3.1 Principles of Constitutional interpretation in Uganda

In order to appreciate the human dignity jurisprudence of Ugandan courts it might be proper to start with their approach of constitutional interpretation. This is instrumental as interpretation determines the scope, content and meaning of the concept.[853] Unlike the Kenyan Constitution, which provides a detailed instruction on the principle for interpreting the bill of rights and other parts[854], the Ugandan Constitution is silent on the matter. This allowed the judges at Ugandan courts to pick principles of constitutional interpretation that they deem appropriate on a case by case basis. Such practice may have its own advantage and disadvantages. The advantage being the flexibility it gives to judges to apply relevant principle of interpretation depending on the specific context. This could also be a problem if we look at it from another perspective. The absence of a settled approach of construing the Constitution might result uncertainty and unpredictability of judgments. It would also be difficult for judges to agree if each of them are going to apply their own preferred interpretive choice. It is difficult to imagine how a judge applying an originalism approach and a purposive theory of interpretation to arrive at the same conclusion. Further, it may also open the door for abusive interpretation of constitutional rights especially when they are sensitive politically or otherwise.

[853] Barak (n 1) 73-80.
[854] The Constitution of Kenya (n527) art.20(4), 259.

That being said, a number of approaches of constitutional interpretation are considered by Ugandan judges. For instance in Attorney *General v. Uganda law society*[855], the judges recognized a wide list of factors that would guide their interpretation based on the previous judgements of Ugandan courts as well us courts in other jurisdictions. One of the judges stated '*the interpretation should be generous rather than a legalistic one aimed at fulfilling the purpose of guarantee'.*[856] This sounds like purposive interpretation that is common in many constitutional systems including Kenya and South Africa. The judge also underlined the importance of construing constitutional provisions in a mutually reinforcing manner.[857]

Another judge in this case mentions twelve constitutional principles that guide his understanding of the Ugandan constitution. Two of these are particularly interesting due to their relevance for the interpretation of the bill of rights in general and human dignity in particular. With respect to fundamental rights it says they should be 'given dynamic progressive and liberal or flexible interpretation, keeping in mind the ideals of the people, socio- economic and political-cultural values so as to extend fully the benefit of the right'.[858] The court borrowed these principles from the decision of US court. More importantly, the judge noted that '*fundamental rights and freedoms guaranteed under the Constitution are to be interpreted having general regard to evolving standard of human dignity*.[859] This statement has a massive importance as it gives human dignity an interpretive role, which is not explicitly stated in the Constitution of Uganda. Further, the judge also underlined the importance of considering the decision of courts in other jurisdictions on constitutional matters. On this issue, it specifically stated that '*decisions from foreign jurisdictions with similar constitutional*

[855] *Uganda Law Society v Attorney General of the Republic of Uganda* (Constitutional Petition No. 18 of 2005)) [2006] UGCC 10 (30 January 2006).
[856] ibid.
[857] ibid.
[858] *South Dakota vs North Carolina*, 192, US 268 1940 LED 448.
[859] *Uganda Law Society v Attorney General of the Republic of Uganda* (n855).

provisions as ours are a useful guide in the interpretation of our own Constitution'.[860] This will be examined in depth in the final section of the chapter. That aside, the above described constitutional principles should be regarded when we analyze the human dignity jurisprudence of Ugandan courts.

4.3.2 Human Dignity as Respect Human Life and Integrity

One of the areas where the notion of human dignity has left its marks in the constitutional jurisprudence of Uganda is in matters dealing with the preservation of human life, protection from inhuman and humiliating treatment. In some of these cases, dignity-based arguments had a decisive role in determining the outcome of the case. In other cases, however, it was rejected or completely disregarded. This section explores these issues in depth by analyzing cases, which were decided by different courts of Uganda since 1997.

***Salvatori Abuki and Another v Attorney General*[861]**

This case is one of the early judgments of the Ugandan Constitutional Court two years after the adoption of the Constitution. Human dignity had a visible presence in this case and it also contains other interesting elements. The case involves a challenge to the constitutionality of Witchcraft Act.[862] According to the Act, practicing witchcraft in Uganda and possession of material for its exercise is a crime punishable with imprisonment. In addition to detention, the Act also authorizes judges to order a banishment for 10 years as an additional punishment.[863] The order practically forces the convict to leave his abode for the duration and refrain from contacting any person from his village. Both applicants were found guilty of violating the Witchcraft Act and were given 10 years of banishment order after serving their sentence. They

[860] ibid.
[861] *Salvatori Abuki and Another v Attorney General* (Constitutional Case No. 2 of 1997)) [1997] UGCC 5 (13 June 1997).
[862] ibid.
[863] ibid.

challenged the constitutionality of the order by arguing that it violates Article 24 of the Ugandan Constitution among others which prohibits inhuman and degrading treatment.[864]

In resolving this case, the judges began their reasoning by examining the relationship between Articles 23 (right to liberty) and Article 24 (right to protection from inhuman treatment). Accordingly, they stated that the right to liberty could be limited in cases where the person has committed a crime and the courts are constitutionally mandated to prescribe a punishment that they deem is appropriate.[865] In their view, such order cannot be deemed to violate Article 24 of the Constitution banning cruel punishment. Interestingly enough, the judge who wrote the decision argued that, the purpose of Article 24 is to prevent *arbitrary infliction* of cruel punishment, which was a common practice prior to the adoption of the constitution. Thus, so long as it is order by a court the cruelty of the punishment is not in itself problematic under the Constitution of Uganda. He specifically stated that in '*the Uganda of today no one, except the courts of law, may punish a person in a manner that is cruel, inhuman and degrading'.*[866] According to the judge, what makes a cruel punishment constitutionally unacceptable is not the nature of the act *per se* but from whose hand it was ordered and executed. He further argued that to interpret these provisions differently is problematic because it would raise a doubt on constitutionally recognized punishments such as death penalty and forced labor.[867] The reasoning of the judge is strange and very difficult to comprehend.

Leaving this issue aside, the Constitutional Court further examined the general limitation clause of the Ugandan Constitution. They gave a particular attention to the part which says '*any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided*

[864] ibid.
[865] ibid.
[866] ibid.
[867] ibid.

in this Constitution'.[868] In their view, this provision prohibits restrictions on constitutionally recognized rights including the right to liberty and protection from cruel treatment, which goes beyond what, is 'acceptable'. Then, they looked at the effect of the banishment order on the petitioners and attempted to assess its proportionality. Accordingly, they noted that '*the exclusion order is unconstitutional because it threatens of the petitioner's life by depriving him of the means of subsistence and deprives him of access to his property. Hence it is inhuman, as it is a threat to life, and contravenes Articles 24, 44 (a) of the Constitution*'.[869]

This finding of the Constitutional Court is interesting for a number of reasons. First, it established a clear link between life and human dignity. Thus, it broadly interpreted the right to life to incorporate the right not to be denied of means of sustaining life inspired by the ruling of the Indian court.[870] As such, to deny a person of his means of survival is a clear violation of human dignity and a human being should not be treated in such manner. The concurring opinion of one of the judges further elaborates on the agony of a person subjected to a banishment order by saying that the only means of survival for such person is 'begging which is degrading'.[871] Second, the court enforced the right to subsistence indirectly through the right to life and protection from human treatment.[872] What makes this approach interesting is that unlike its South African and Kenyan counterparts, the Ugandan Constitution does not recognize socio economic rights as justiciable. They are rather formulated as directive principles and policy objectives meant to guide state action.[873] The right to life and dignity provisions of the Constitution were vital in this judgment here in elevating the status of socio-economic rights and affirming their binding nature.

[868] Const. of Uganda (n836) 43(2) c.
[869] *Salvatori Abuki and Another v Attorney General* (n861).
[870] ibid.
[871] ibid.
[872] ibid.
[873] Const. of Uganda (n836) I.

Finally, the reference to the African conception of human dignity in this case is particularly striking.[874] One of the judges heavily relied on the concept of *ubuntu* in his reasoning. He argued *ubuntu* demands us to show care, concern and humanness to others. Accordingly, the punishment of banishment and exclusion is incompatible with *ubuntu* which is a value that is shared among other civilized nations of the world. A more detailed analysis of this would be conducted in another section of the chapter.

***Susan Kigula & 416 Ors v Attorney General*[875]**

The case concerns hundreds of prisoners who have been sentenced to death by final appellate courts many years ago. In their petition they challenged the very constitutionality of death penalty, stating its incompatibility with Article 24 of the Ugandan Constitution which seeks to preserve human dignity and outlaw inhuman treatment. Their argument is that in its very nature death penalty amounts to 'torture or cruel, inhuman or degrading treatment or punishment' which is absolutely prohibited by the Ugandan Constitution under any circumstance.[876] The lawyers for applicants cited several cases from South Africa, Tanzania and other jurisdictions to further corroborate their argument. They further linked death penalty with human dignity by arguing that '*deliberate putting to death of a human being, that human being ceases to be a human. His humanity is taken away….. Death penalty is degrading in that it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the State*'.[877]

In addition, human dignity-based arguments were also propounded by the lawyers for applicants in two additional claims of the petitioners challenging the manner of execution of death penalty and the prolonged execution of the sentence. With respect to the mode of

[874] *Salvatori Abuki and Another v Attorney General* (n861).
[875] *Susan Kigula & 416 Ors v Attorney General* (Constitutional Petition No. 6 of 2003) [2005] UGCC 8 (10 June 2005).
[876] ibid.
[877] ibid.

execution, the applicants argued that the carrying out of death sentence by 'hanging' in Uganda is an extremely cruel method of taking life, repugnant to the Constitution.[878] It also causes the convicts unimaginable degree of suffering as it sometimes fails to kill them within short duration. In support of their contention, they presented affidavits of individuals as well as reports of medical professionals. The applicants also challenged the constitutionality of the prolonged delay of execution of death sentence and its impact on the convicts. Their central argument being that implementing a death penalty on prisoners after long delay is extremely cruel, as it exposes them to a high level of anguish and emotional suffering which a human being must not endure.[879] They mentioned the fact that some individuals have lived under such state of uncertainty for about 20 years. As such, they argued for the suspension of death penalty on those whose execution is extremely delayed. The dignity argument of the applicants seems to be based on an absolute conception of human dignity, which will not be lost irrespective of the character or the conduct of the person in question.

In response to these claims, the Attorney General advanced a number of arguments in favor of constitutionality of death penalty and its mode of execution. He gave more emphasis to the unique formulation of the right to life which states '*no person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court'*.[880] The attorney general invoked the underlined part of the provision to argue that so long as the accused is provided with a trial that meet the fair trial guarantees, death penalty is a perfectly legitimate punishment under the Ugandan Constitution. He further dismissed the claim of the applicants about the cruelty of such punishment. For this the attorney general strongly relied on the intent of the framers of

[878] ibid.
[879] ibid.
[880] Const. of Uganda (n836) 22(1).

the Ugandan Constitution. He argued it would be absurd for the framers to permit death penalty under exceptional circumstances under Article 22 and completely ban it under Article 24 and 44 of the constitution.[881] In his view, the only plausible interpretation is to consider that death penalty is not within the scope of protection from torture, cruel and inhuman punishment.

The Attorney General also asserted the irrelevance of foreign court decisions such as *Makwanyane* case of the Constitutional Court of South Africa. His major argument being the right to life is unqualified right in those jurisdictions which is not the case under the Ugandan Constitution.[882] Further, he brought comparable cases from jurisdictions which recognize a qualified right to life and allow the undertaking of death penalty. Besides the formulation of the right to life, the Attorney General also relied heavily on the provision of the Ugandan Constitution which says '*Judicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people'*.[883] He argued that courts are duty bound to interpret the constitution in line with the ethos and beliefs of the Ugandan people.

As such, since the majority of Ugandans consider the death penalty as appropriate punishment for certain offences, to declare its unconstitutionality is to disregard their values. He particularly relied on this provision, to challenge the issues of death by hanging and the death row.[884] The Attorney General contended that suffering is inherent in any kind of punishment and there is nothing unique about death by hanging. He further argued, Ugandan people approve such forms of executing death penalty and the practice raises no issue of constitutionality.[885] Most interestingly, the Attorney General contended, the convicts should be

[881] *Susan Kigula & 416 Ors v Attorney General* (n875).
[882] ibid.
[883] Const. of Uganda (n 836)126(1).
[884] *Susan Kigula & 416 Ors v Attorney General* (n875).
[885] ibid.

grateful for being alive for so many years after their death sentence is passed instead of complaining about the death row syndrome. [886] He further noted that there is no mandatory rule on how soon death penalty should be executed.

The Constitutional Court of Uganda (CCU) ruled in favor of the respondents as far as constitutionality of death penalty itself and hanging as a mode of execution were concerned. However, it found mandatory death sentences and long delays of executing death sentences unconstitutional.[887] The core issue in the ruling of the court was how the different provisions of the Ugandan Constitution relevant to the matter should be interpreted. These provisions were Art 22 which allow death sentence as an exception to the right to life, article 24 which bans cruel punishment and Article 44 which makes Article 24 non-derogable. In determining the approach of interpretation, the judges underscored the importance of 'harmoniously' construing all the necessary provisions in a manner that gives effect to all.[888] They also gave a prominent weight to the intention of the framers if the Constitution, its drafting history and the attitude of the Ugandan public.

On the constitutionality of death penalty, the court reasoned that the right to life under the Ugandan Constitution is not absolute and this is clearly stipulated in the text. Accordingly, if article 22 dealing with torture, inhuman and degrading treatment is to apply to cases of death penalty, it would make the qualified right to life under Article 21 effect less. [889] The judges also referred to the drafting history of the Constitution to discover the intent of the framers on the matter. They concluded that, death penalty was seriously considered in the making of the Constitution and the framers intentionally chose to allow its continuation because the majority

[886] ibid.
[887] ibid.
[888] ibid.
[889] ibid.

of Ugandan public approves such penalty for serious crimes.[890] In the view of the judges this implies that the provision on death penalty is not intended to be covered by the provision prohibiting torture and inhuman treatment. Accordingly, they held that death penalty under the Ugandan Constitution is permissible. The judges agreed with the contention of the Attorney General that foreign cases such as *Makwanyane*, are irrelevant for the matter due to textual difference in the formulation of the right to life.[891]

The Constitutional Court also rejected the argument that death by hanging is a cruel punishment that violates the Ugandan Constitution. In its analysis, it emphasized the inevitability of suffering in any form of punishment. Justice Amos particularly noted that *'every sentence must involve pain and suffering if it is to achieve its purpose as a punishment. A death sentence is not merely designed to remove from this earth, blissfully and peacefully, those people who have committed heinous crimes like murder, genocide and crimes against humanity e.t.c. It is intended to punish them here on earth before they go. It is not a one way ticket to Sugar Candy Mountains of* ***George Orwell's*** *ANIMAL FARM'.*[892] Though death by hanging may be regarded as a cruel form of punishment in other jurisdictions, that is not relevant for Uganda. The primary basis for this position of the court is that, the Ugandan public does not view hanging as cruel method and that is what is important.[893] In other words, hanging is an acceptable method of execution since it is compatible with the Ugandan moral standard, regardless of an opposite finding in other jurisdictions.

The above two findings of the CCU on death penalty and its mode of execution seem to be less informed by human dignity reasoning compared to other jurisdictions such as South Africa. Though human dignity was one of the core arguments advanced by the lawyers for applicants

[890] ibid.
[891] ibid.
[892] ibid.
[893] ibid.

to challenge the death penalty, the CCU avoided dealing with the matter directly. Instead the whole emphasis of the reasoning was on the constitutional text regulating the right to life and intent of the framers of the Ugandan Constitution.[894] This approach of interpretation may be regarded as a perfectly legitimate if one endorses a textualist or originalist approach of interpretation. But it may be found to be a bit problematic, if one adopts a purposive approach of interpretation, recommended for understanding bill of rights, which takes into account not only the intent of the framers but also the intent of the system in a democracy.[895] Had the court followed this approach of interpretation and given more weight to the intent of the system by also looking at developments in comparative jurisprudence of other democracies, the case might have been decided differently in a dignity friendly manner. Yet some of the textual issues in the Ugandan Constitution might make this task more cumbersome.[896]

In contrast to the challenge to death penalty and its mode of execution, the CCU accepted the plea of the applicants regarding the death row phenomena. Accordingly, it ruled that a delay of execution of more than 3-5 years after the final death sentence makes the death penalty cruel and inhuman.[897] As such, it converted the penalty to life imprisonment for the death row convicts who spent more than 5 years awaiting their death. Here, human dignity seems to have a visible influence or role in the reasoning of the court. The judges seriously considered the testimony of the convicts about their circumstance. One of the applicants explained the inhumane treatment and living condition in the prison by stating that '*when prisoners on death row get sick, the hospital staff are reluctant to give us proper medicines and medical attention.*

[894] ibid.
[895] Barak (n1) 82-100.
[896] Const. of Uganda (n836) 22 & 126(1).
[897] *Susan Kigula & 416 Ors v Attorney General* (n875).

The medical staff sometimes tell us that since I and my fellow death row inmates are going to be hanged anyway, they do not need to waste the scarce drugs on us.[898]

He further noted that '*it is very degrading to human dignity for a human being to be forced to defecate or urinate in the presence of others…sometimes this takes place when I and my fellow death row inmates are eating. Then I and my fellow death row inmates have to sleep with an open bucket full of faeces and urine next to us. This is extremely inhuman and degrading treatment. Human beings were not meant to be confined in such circumstances'.*[899] The court agreed with their claim and found violations of Article 24 and 44 of the Ugandan constitution on cruel and inhuman punishment. It specifically noted that such kinds of treatments and unreasonable delay are *'not acceptable by Ugandan standard and also by the civilised international communities'*.[900] Thus, it held that death penalty could not be implemented on those convicts who have waited for 5 years and above, after exhausting all the appellate options. The Supreme Court of Uganda upheld by majority vote the ruling of the CCU on all questions involving death penalty.[901]

Mukasa and Oyo v. Attorney General[902]

This case is a civil petition submitted to the Ugandan High Court demanding compensation for the maltreatment of the two applicants in the hands of local administrator and police officers. The event, which led to the case, was disputed by the parties and both presented their own version of the story. According to the applicants, the chairman of the village's administration council and two other men forcibly entered in to the dwelling of the first applicant. At the time of the incident, she was away and the second applicant was staying at her place. The men

[898] ibid.
[899] ibid.
[900] ibid.
[901] *Susan Kigula & 416 Ors v Attorney General* (n875).
[902] *Mukasa and Oyo v. Attorney General*, High Court of Uganda at Kampala (22 December 2008).

proceeded to arresting the second applicant and took documents, CDs, books and other material belonging to the first applicant without any warrant.[903] The second applicant was first led to the office of chairman and stayed there for some time. During this period, she was denied access to the toilet and 'she had to suffer gross pain forcing her to 'pee' on herself'.[904] Then, she was taken to a police station and where she was subjected to physical investigation to establish her sex. '*Despite her saying that she is female, the OC ordered her to undress and to confirm her sex. She was forcibly undressed in the full glaze of the OC Kireka. The OC then roughly proceeded to fondle her breasts'*. [905]

The defendants provided a different narration of the incident. According to them, the two applicants were seen 'kissing in a bar' and members of the community reported this to the local administration. The justification for arresting the second applicant was done according to them so as to save the life of the applicant from people who threatened to lynch them.[906] They further denied all allegations of sexual harassment and maltreatment. The High Court examined both sides and ruled in favour of the applicants because the defendants failed to corroborate their version of the story with sufficient evidence. It also found a violation of the right to dignity by stating that 'the OC ordered the forceful undressing of the second applicant in public and fondled her breast. This is humiliating and degrading and contravened article 24 of the Constitution which militates against torture, cruel, inhuman and degrading treatment'.[907]

The most interesting aspect of this decision was the way the issue was framed by the High Court and the effort it exerted to prevent the misinterpretation of its ruling. It explicitly noted that the case 'is also not about homosexuality. This judgment is therefore strictly on human

[903] ibid.
[904] ibid.
[905] ibid.
[906] ibid.
[907] ibid.

rights.'[908] What makes this interesting is the fact that the first applicant is known for her LGBT right activism and the arrest of the second applicant was also related to that. In other words, the applicants were targeted because of their sexual orientation by the local administration. According to Prof. Onyango, this was the elephant in the room.[909] However, given the conservative attitude in Uganda concerning sexual minorities, the High Court chose not to confront the issue directly. Instead it preferred to find a general violation of human right to dignity and protection from inhuman treatment without acknowledging the fact that they were subjected to such treatment based on their sexual orientation.

***Uganda v Nabakoza Jackline and Others*[910]**

This case concerns a criminal case instituted against ten applicants six of which were women. They were found dancing on a highway street on top of a car with a very loud music while delegates for the Common Market for Central and Eastern Africa (COMESA) were passing by. The prosecution charged the applicants for being 'idle and disorderly'.[911] It also emphasized the shameful nature of their conduct and the disgrace for the nation. The court sentenced the applicants to a three-month imprisonment, and for the women only, their heads to be shaved in addition. The petitioners challenged the ruling of the court on two grounds relating to human dignity.[912] First, they argued that the forced shaving of the female petitioners is degrading and violates Article 24 of the Ugandan Constitution. The second ground relates to discrimination and the right to equality. In fact, the applicants alleged that the 'shaving' part of the sentence is discriminatory as it is only applied to the females while exonerating the men for the same

[908] ibid.
[909] Oloka-Onyango 'Debating love, human rights and identity politics in East Africa: The case of Uganda and Kenya' (2015) 15 African Human Rights Law Journal 28-57, B Kabumba 'The Mukasa judgment and gay rights in Uganda' (2009).15 East African Journal of Peace and Human Rights 221.
[910] *Uganda v Nabakoza Jackline and Others* (Criminal Revision No 8 of 2004) ((Criminal Revision No 8 of 2004)) [2004] UGHC 24 (7 September 2004).
[911] ibid.
[912] ibid

conduct. [913] Thus, sentence of the court on the female is 'harsher' compared to the male applicants and violate the equality guaranteed under the constitution.

In its ruling, the High Court granted the applicants request and found a violation of their right to dignity and equality. It emphasized the humiliating character of the shaving undertaken on the female applicants and its severity. Further, it assessed the level of humiliation by reference to dignity in the following manner: the 'test was whether the punishment would humiliate, or debase the prisoner to such an extent as to constitute an assault on his dignity and feelings as a human being'.[914] The role of human dignity in the reasoning of the High Court on both issues is clearly notable in this case. Hence, it concluded that '*the order to destroy hair weaves and clothing as well as shaving of the heads of the women in this case was quite uncalled for and constituted an assault on the dignity of the women'.*[915] It also affirmed the wrong approach of the lower court in treating the male and female applicants differently with respect to punishment. Here also we can see dignity reasoning. The court noted '*Article 33 of our constitution accords equal dignity of the person to women as it does to men. Their being subjected to a peculiar punishment thus encroached on their freedom from degrading treatment'.*[916] In this case, we can observe the overlap of two aspects of human dignity i.e. dignity as respect for integrity and as recognition of equal worth.

4.3.3 Human Dignity as Equal Worth

The right to equality is one of the fundamental rights explicitly enshrined under the constitution of Uganda. It contains a general equality clause, which guarantees everyone 'equal treatment before and under the law'.[917] Moreover, it has also provided an exhaustive list of prohibited

[913] ibid.
[914] ibid.
[915] ibid.
[916] ibid.
[917] ibid

grounds of discrimination. The grounds are 'sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability'.[918] As such, the provision does not recognize grounds like sexual orientation. It is also difficult to expand the list by interpretation because it does not incorporate the phrase 'other status', which is commonly found in equality clause of many international human right treaties and national constitution. The most interesting aspect of the right to equality in Uganda from a textual point of view is the definition of discrimination in the constitution.

Accordingly, to 'discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability'.[919] This kind of definition seems to be peculiar to Uganda .On the one hand, having a definition of discrimination in clear manner may help to avoid arbitrariness and may be seem as a positive thing. On the other hand, such definition may restrict the ability of judges to adapt the constitution to new developments and conceive discrimination in a broader manner. Here, it may help to recall the definition of discrimination in Kenya as treatment that offends human dignity.

The equality jurisprudence of Ugandan courts has many interesting elements particularly when it is assessed in relation to the role of human dignity. In the text of the Constitution human dignity and equality do not seem to have a clear correlation or connection. Human dignity was also not recognized as a guide for defining discrimination. However, the equality jurisprudence of Ugandan courts show that human dignity has some role/ relevance in understanding the right to equality. This would be evidenced in the cases that will be discussed subsequently. One thing worth nothing however is that, the link between dignity and equality in the jurisprudence is not

[918] ibid.
[919] ibid.

consistent. Sometimes the judges rely on it heavily and in other cases, they completely disregard it especially in hard cases, which involve equality claims based on sexual orientation.

***Mifumi (U) Ltd & 12 Others v Attorney General*[920]**

This case uniquely demonstrates the tension between a dignity informed conception of equality and cultural values of a certain society. The applicants in the case were 12 women and an NGO working on women's rights, challenging the constitutionality of the payment of a 'bride price', a common practice in Uganda when a customary marriage is concluded.[921] In their application they alleged that the practice violates the right to human dignity and the right to equality enshrined under the Constitution. With respect to the right to dignity, the applicants argued that the payment of a bride price reduces women to an object to be bought. As such, it '*leads men to treat their women as mere possessions from whom maximum obedience is extracted*'.[922] Such mentality in their view is responsible for the attitude of men to treat women in any manner they want as if they had bought them. Further, they also argued that such thinking is also contributing to domestic violence committed against women. The applicants adduced affidavits from several women who had gone through such terrible experiences.[923]

They further contended that the requirement of returning the bride price paid when they got married in case of divorce or of her infertility dehumanizes the women and objectifies them. They particularly noted that, '*the demand for a bride price and the demand for a refund of the bride price, amount to the buying and selling of a bride as an item for sale in a market. Such "haggling and pricing of young girls and women like commodities*" is argued to be an affront

[920] *Mifumi (U) Ltd & 12 Others v Attorney General*, Kenneth Kakuru" (Constitutional Petition No.12 Of 2007) [2010] UGCC 2 (26 March 2010).
[921] ibid.
[922] ibid.
[923] ibid.

to human dignity'.[924] They further argued that the inability of women to refund the bride price is one of the reasons that forces women to stay in abusive marriages and one factor contributing to increasing domestic violence. In addition, bride price was also challenged for violating the constitutional right to enter into marriage with full consent. According to the applicants, the payment of bride price in customary marriage interferes with the right of the women to marry whomever she prefers.[925] This is because the man of her choice may not have the resources to pay the bride price and the girl may be given to the highest bidder by her family, irrespective of her wish.

The respondents defended the constitutionality of payment of bride price on several grounds. They argued the Constitution of Uganda recognizes the right of individuals and communities to practice their culture. As such, '*every person has a right as applicable to belong to, enjoy, practise, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others*.'[926] Since individuals have the right to conclude marriage according to their cultural tradition, there is no constitutional basis to prohibit the payment of bride price, which is a constitutive part of customary marriage in many communities of Uganda. The respondents also dismissed the argument that the payment of bride price reduces the women to a chattel for sale. They strongly contended that bride price is just a symbolic way of thanking the parents of the bride for upbringing her in a good manner.[927] As such, it could not be construed as the sale of the bride by her parents to a man who wish to marry her.

In its decision, the Constitutional Court sought to strike a balance between constitutional rights of the women on the one hand and the right of individuals to exercise their cultural rights on

[924] ibid.
[925] ibid.
[926] Const. of Uganda (n836) 37.
[927] *Mifumi (U) Ltd & 12 Others v Attorney General* (n920).

the other hand. Accordingly, it underlined the importance of protecting the dignity of women and ensuring her equal status in concluding as well as dissolving marriage.[928] It also referred to the provision in the Ugandan Constitution, which requires all cultural practices to respect the dignity of women. If any cultural practice is found to offend her dignity, it will go against the clear dictates of the Constitution and become invalid. With this premise, the CCU went on to determine whether the payment of bride price violates the right to dignity. In a four to one decision, the majority upheld the constitutionality of bride price.

The first issue the majority addressed was whether the payment of bride price itself is unconstitutional. To answer this, they focused on what the purpose/rationale of the payment of the bride price is in different cultural communities of Uganda. In their view, bride price is just a 'token of gratitude' for the family of the bride. As such, they agreed with the contention of the respondents. They further rejected the argument that the practice 'commodifies women'. In their view, such thinking emanates from the failure to appreciate the purpose behind the practice and has no basis but 'misconception'.[929] One of the judges further argued that the majority of women in Uganda do not see the practice in such way and approve its exercise. Thus, '*a man and a woman have the constitutional right to so choose the bride price option as the way they wish to get married'*.[930]

The other issue addressed by the CCU was whether the payment of bride prices has contributed to the increase in violence against women. The majority did not find a convincing correlation between the practice and the incidence of violence. In their view, the thinking and acts of some individual men abusing women is insufficient to ban the payment of bride price in its entirety.[931] Then, the CCU examined whether the demand of bride price prior to marriage and

[928] ibid.
[929] ibid.
[930] ibid.
[931] ibid.

its return subsequent to dissolution violates the dignity of women. The majority reasoned that the payment of bride price must not be a mandatory requirement for entry into customary marriage. It must be completely voluntary. Further, a man must not be denied to marry a girl he loves simply because he is unable to pay the bride price. This violates the constitutional right of individuals to enter into marriage with full consent.[932] On the issue of the return of bride price, the majority ruled in favor of the applicants and found the practice unconstitutional. They particularly reasoned that the '*customary practice of the husband demanding a refund of the bride price in the event of dissolution of the marriage demeans and undermines the dignity of a woman and is in violation of Article 33(6) of the Constitution'*. [933]

The dissenting judge strongly disagreed with the finding of the majority and supported the prohibition of payment of bride price. He argued '*article 33(1) provides that women should be accorded full and equal dignity of the person with men. Yet under the custom of bride price, women are not treated as human being but as chattels. They are priced so low that they are exchanged for a cow or a few cows, a pig or a few pigs or a goat or a few goats. Their price is fixed without reference to them'*.[934] As evidenced in the quoted sentence the dissenting judge heavily relied on the concept of human dignity to challenge the constitutionality of bride price. He further illustrated how the practice could be an obstacle for men and women form marrying a person of their choice.

In addition, the judge approached the issue form the angle of equality. He argued the '*bride price helps to perpetuate a belief in society that a man is superior to a woman, that once he buys a woman, he can batter her, humiliate her and treat her as he likes'*.[935] This in his opinion contravenes article 21 of the Ugandan constitution, which enshrines the right to equality. He

[932] ibid.
[933] ibid.
[934] ibid.
[935] ibid.

further strongly condemned the practice of bride price in relation to its link to domestic violence. The judge heavily relied on the affidavit of women who had to endure extreme abuse and violence because of their inability to refund what is paid to their families. In his view, '*the requirement that bride price must be refunded is in my view the worst aspect of the bride price regime. Whenever bride price is paid in money or animals, it is not kept in banks or kraals to await the event that the marriage may fail so that a refund of the bride price can be made'*.[936] Considering this, the customary practice of demanding a refund in case of divorce is incompatible with the rights of women enshrined under the Ugandan constitution.

However, the decision of the majority was upheld later in Ugandan Supreme Court. Furthermore, a similar case involving refund of dowry was decided by the Ugandan High Court in 2014. This case involved a civil dispute over acquisition of land given as a dowry when the respondent married the applicant's sister. At the time of the action, the applicant was in possession of the land and the respondent demanded to take back the property as the marriage was dissolved. The High Court ruled along the same line of Miufumi and held that '*dowry refund is one such custom that offends the human dignity of women as it equates a woman to a chattel*.'[937] As such, it found a violation of Article 33 of the Ugandan Constitution, which protects the dignity of women from all harmful cultural practices.

***Carolyne Turyatemba & 4 Ors Vs Attorney General & anor*[938]**

The case involves a dispute over the transfer of land neighboring the church of Uganda, which is alleged to violate the right to equality guaranteed under the Ugandan Constitution. What makes this case peculiar is the utilization of human dignity as criterion for distinguishing

[936] ibid.
[937] *Ochom v Okwap* (CIVIL APPEAL NO. 11 OF 2012) [2014] UGHCCD 66 (7 May 2014).
[938] *Carolyne Turyatemba & 4 Ors Vs Attorney General & anor* (CONST PETITION NO 15 OF 2006) [2011] UGCA 6 (8 August 2011).

between fair and unfair discrimination for the first time. According to the church, despite repeatedly requesting the authorities for acquiring the neighboring lands for the purpose of expansion and development, the authorities ignored its interest and transferred the land to third parties through a lease arrangement. [939] This in the applicants view amounts to discriminatory treatment against the church on economic grounds. In its judgment, the Constitutional Court heavily relied on the notion of human dignity to define what amounts to unacceptable discrimination and referred to the jurisprudence of other courts such as the ECtHR. Accordingly, it noted that '*the prohibition against discriminatory conduct is based upon the universal principle of equality before the law. The human race as a family is characterized by the attribute of oneness in dignity and worthiness as human beings*.'[940] This in the court's view prohibits treating of humans neither as inferior nor as superior.

With this general premise, the CCU went on to state that not all discriminatory treatments are problematic from a constitutional point of view. It further provided the parameter for identifying the problematic one in the following statement, '*not all differences in treatment are in themselves offensive to human dignity*'.[941] Here, we can clearly see that the court used human dignity as a test for determining the constitutional legitimacy of discriminatory treatment. Yet it is difficult to see, how dignity-based equality analysis could help in such cases, the applicant being church, which is an institution. Further, the alleged ground of discrimination is economic one, which is not a suspect class. In any event, the CCU held that the transfer of land '*was not discriminatory and therefore not inconsistent with Article 21(1) and (2) of the Constitution*'.[942] It stated that since the church did not follow the proper procedure to seek transfer of the land, its claim of discrimination is unfounded. Considering

[939] ibid.
[940] ibid.
[941] ibid.
[942] ibid.

the central place given to dignity, in the initial reasoning of the court, it would have made more sense for the court to clearly articulate how the reference to dignity is helpful in resolving such kinds of equality claims.

***Nabagesera & 3 Ors v Attorney General & Anor*[943]**

In this case, the constitutionality of the measure taken by the Ugandan Ministry of Moral and Integrity was at issue. According to the applicants, they were conducting a human right advocacy and leadership training in a hotel located in Entebbe Uganda before they were forced to stop the gathering by the respondents.[944] They alleged the violation of their right to freedom of expression, freedom of assembly and equal protection. Since other conferences, which were being held in the same venue, were not dispersed, the act of the ministry in their view constitutes a discrimination repugnant to the Ugandan Constitution. The respondents on the other hand argued that the conference had an illegal agenda, which is the 'promotion of homosexual practices'.[945] They claimed that the promoting such practice is an offense punishable under the Ugandan penal law. Further, the applicants were all members of an LGBT organization, carrying out illegal activities at the time of the action. These allegations by the respondent were not rebutted by the applicants.

The High Court examined the argument of both sides and ruled in favor of the respondents. In its decision, it emphasized that rights like freedom of expression are subjected to limitation under the Ugandan Constitution and other international human rights treaties.[946] It particularly noted that protection of the 'public interest' and morality is a legitimate ground to place a limit on fundamental rights. It further noted that rights must be exercised within the limit set by

[943] *Nabagesera & 3 ors v Attorney General & Anor* (MISC. CAUSE NO.O33 OF 2012) [2014] UGHCCD 85 (24 June 2014).
[944] ibid.
[945] ibid.
[946] ibid.

law.[947] As such, since the Penal Code of Uganda unequivocally prohibits the promotion of homosexual practices, the applicants could not claim protection of their constitutional rights as they are doing something which is illegal or outside the confines of the law. The High Court also distinguished between the conferences organized by the applicants and other gatherings in the same hotel to dismiss their equal treatment claim. It noted that the conferences are different in terms of the legality of their agenda as well as the character of the participants and deserve differential treatment.[948] Unlike what it did in its previous equality related cases, the court did not utilize human dignity in its reasoning. As such, dignity disappeared in the reasoning of cases involving sexual minorities. The same pattern is observed in next case involving a challenge to a 2014 Anti-Homosexuality Act.

Oloka-Onyango & 9 Ors v Attorney General[949]

The case was submitted to the Constitutional Court of Uganda following the adoption of the Anti-Homosexuality Act by the Ugandan Parliament. The constitutionality of the Act was challenged on both procedural and substantive grounds. On the procedural side, the applicants argued that the Act was passed by the parliament in violation of the clear constitutional rule that requires a quorum in the legislative decision-making.[950] According to the petitioners, the number of lawmakers who voted on the bill was below the constitutional requirement, which is intended to safeguard the integrity of Parliament. The applicants also raised substantive grounds to challenge the constitutionality of the Act. This mainly involved the incompatibility of the content of the Act with fundamental rights enshrined under the Constitution.

Accordingly, they argued the criminalization of '*consensual same sex conduct in private*' is discriminatory and violates the constitutional right to equality.[951] Further, the prosecution of

[947] ibid.
[948] ibid.
[949] *Oloka-Onyango & 9 Ors v Attorney General* (CONSTITUTIONAL PETITION N0. 08 OF 2014.) [2014] UGCC 14 (1 August 2014).
[950] ibid.
[951] ibid.

such conduct also propagates hatred and violates the dignity of these persons. Moreover, the penalty provided for aggravated same sex conduct is life imprisonment, this in the view of the applicants amount to 'disproportionate' punishment, unacceptable under the Ugandan Constitution.[952] Interestingly enough, the CCU did not address any of the substantive arguments made by the applicants. Instead, it chose to invalidate the Act for its failure to meet the quorum requirement provided under the Constitution and the procedural rules of the parliament.[953] This clearly shows the reluctance of Ugandan courts to address or confront the issues concerning the rights of sexual minorities directly. The strategy for the court seems to be avoiding such controversial issues, until the societal attitude towards such matters changes.

4.4 The State of Indigenous Dignity Jurisprudence in Uganda

One of the notable features of the Ugandan constitution is the place it has given for the development of local cultural values and traditions. Several provisions of the Constitution demonstrate this commitment. For instance, the cultural objectives in the directive principles part provides 'cultural and customary values which are consistent with fundamental rights and freedoms, human dignity, democracy and with the Constitution may be developed and incorporated in aspects of Ugandan life.[954] As such, the Constitution imposes a duty on all stakeholders to promote Ugandan cultural values to the extent that it is compatible with human dignity and human rights. The qualification here is very important because those cultural practices that violate or contrast with fundamental rights and the dignity of the person will not have a place.

[952] ibid.
[953] ibid.
[954] Const. of Uganda (n836) XXIV.

Thus, the potential of the cultural 'practice to enhance the dignity and well-being' of humans is the yardstick for its exercise and validity.[955] From this, one can infer that different organs of states have the responsibility to develop cultural practices in a manner that support human dignity and discard those, which undermines it. Further, courts are particularly mandated to take into account local values in the interpreting the constitution and other laws. The Constitution explicitly states that *'judicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people*'.[956] As such, reference to local values is a constitutional requirement and basis for the legitimacy of courts in discharging their judicial duties.

Despite a strong textual basis for Ugandan courts to develop constitutional (dignity) jurisprudence by considering local values, the extent they have travelled so far does not seem to be that great compared to other courts, such as the CCSA. This however does not mean that there is no attempt. In some cases, the CCU has declared certain customary practices as unconstitutional for their incompatibility with the dictates of the constitutional right to human dignity. A good example for this could be the decision that prohibits the refund of dowry or bride price following the dissolution of customary marriage, which is discussed in the previous section of the chapter.[957] This shows an attempt on the part of Ugandan courts to reshape cultural practices in a manner that respect the dignity of human beings.

Further, one can also find an attempt by Ugandan courts to base their reasoning on African values such as *ubuntu*. This is clearly reflected in the *Abuki* case in which one of the judges noted that '*the concept of "ubuntu", the idea that being human entails humaneness to other*

[955] ibid.
[956] ibid 126(1).
[957] *Mifumi (U) Ltd & 12 Others v Attorney General* (n920).

people is not confined to South African or any particular ethnic group in Uganda. It is the whole mark of civilised societies… the word "ubuntu" though linguistically peculiar to only certain groups, is a concept embraced by all the communities of Uganda…. carries with it the idea of human dignity end true humanity.[958] The quote highlights the presence of the idea of *ubuntu* or humanness in Ugandan societies though the terminology used might be different in different groups. It also rejects the idea that respect for human dignity is an idea foreign to Ugandan cultural values and this is important for the concept to have a strong root.

Yet, in the assessment of the author, the state of indigenous dignity jurisprudence in Uganda is at a very rudimentary stage of development. Only in very few cases was the dignity argument was used in outlawing cultural practices that undermine it. Even the reference to an African idea of human dignity or *ubuntu* is a one-time incident. No subsequent commitment to the idea was observed in the jurisprudence of Ugandan courts. Further, in trying to define and understand what humanity means, the preference of judges seems to be looking at the dictionary meaning of the term or consider the definition given by other courts both national and supra- national. [959] Although this not a bad thing in itself, it has severely curtailed the development of indigenous dignity jurisprudence in Uganda.

4.5 The Migration of Human Dignity into Uganda: Ugandan Exceptionalism?

Among the issues, which are not expressly addressed in the Ugandan Constitution, is the use/ place of comparative jurisprudence in constitutional interpretation. The Constitution nowhere mentions what should be the frame of reference for courts in discharging their duties. Further, this gap is not filled by a statutory enactment by Parliament. In relation to this matter, Mujuzi

[958] *Salvatori Abuki and Another v Attorney General* (n861).
[959] ibid.

argues that the Ugandan constitution must be amended to incorporate a clear provision that mandates the courts to use comparative law in the course of constitutional interpretation as it is vital to enrich their judgement.[960] Yet, this does not mean that comparative jurisprudence has no place in Ugandan constitutional order. Rather different courts of Uganda have underlined the significance of considering the decision of other courts in adjudicating cases. For instance, the court in the *Kigula* case concerning death penalty noted that '*decision from foreign jurisdictions with similar constitutions as ours are useful in helping in the interpretation of our Constitution'*.[961] As such, the court considered examination of comparative jurisprudence as one core principle of constitutional interpretation in Uganda. However, Mujuzi argues that such an approach will result in inconsistent application of comparative law where courts rely on it in some cases and disregard it completely in others.[962]

Here it is also important to bear in mind that Uganda courts not only considers the constitution of other states and their decisions. They also look into international law and the decision of international courts. This is affirmed by the court in the following statement '*the decisions of international Courts and international bodies interpreting the inherent meaning of fundamental rights are relevant to the interpretation of the fundamental rights and freedoms of the individual in our Constitution'*.[963] Thus, despite the absence of an explicit textual basis for utilizing jurisprudence of national and international judicial bodies, courts seem to have developed the practice on their own. This may also be the influence of the common law legal system in Uganda, which heavily relies on precedent and case law. Further, it is also important to note that 'foreign' jurisprudence has only a 'persuasive' role in Uganda and this has been

[960] Jamil Ddamulira Mujuzi, 'Execution by Hanging Not Torture or Cruel Punishment - Attorney General v. Susan Kigula and Others' (2009) 3 Malawi L.J. 133, 133-146.
[961] *Susan Kigula & 416 Ors v Attorney General* (n875).
[962] Mujuzi (n960) 133-146..
[963] *Susan Kigula & 416 Ors v Attorney General* (n875).

stated in a number of cases.[964] As such, irrespective of the reputation a certain constitutional system or a court has, its precedent will not be binding on Ugandan courts. In other words, foreign jurisprudence is relevant to the extent that it helps or guides the court in making its final decision.

The next important issue concerns the criteria of selecting case laws and particular preferences, if any. In their decision so far, Ugandan courts have not outlined a comprehensive list of parameters for foreign case selection. Most of the time, their choice seems to be promiscuous and case specific. However, there are certain justifications, which commonly appear in their analysis of comparative law. The first seems to be textual similarity between the Ugandan constitution and the foreign constitution considered.[965] This is an important factor as outlined in landmark decision of the court including death penalty. The second factor, which influences the choice of foreign case law, seems to be proximity in cultural values and traditions.[966] In their dignity related judgements, Ugandan courts have shown preference to use jurisprudence from African courts or other courts with similar cultural and social context. This could be contrasted with the rejection of other cases for reflecting European values.[967] Similarity between the legal system of Uganda and the other jurisdiction is also seen to be pivotal. As such, the judges have shown a particular preference to use jurisprudence form constitutional systems following the common law legal tradition, which Uganda follows.[968]

The manner of engagement of Ugandan court on dignity related cases of other court is also unique. This could be partly attributed to one provision of the Ugandan constitution often invoked by the court when it undertakes comparative analysis of case law. The article states

[964] ibid.
[965] ibid.
[966] ibid.
[967] ibid.
[968] ibid.

'*judicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people*'.[969] The underlined part of the provision was particularly controversial in the death penalty judgement of the court. What was at issue was the role of public opinion in constitutional adjudication. This issue is also a point of contention in other systems and different approaches were taken by different courts. In *Kigula* case, the applicants argued for unconstitutionality of death penalty citing comparative jurisprudence of other courts such as the *Makwanyn*e decision of the constitutional court of South Africa which held death penalty to be a cruel and inhuman punishment.[970]

Beside textual difference, in the formulation for the right to life in the two systems, the respondents argued the special place of public opinion in the resolution of constitutional disputes in Uganda unlike many other systems. This was used by them to assert the irrelevance of decisions such as *Makwanyan*e due to a difference in value attached to public opinion in Uganda on the propriety of death penalty.[971] In its final decision the constitutional court noted public opinion is not the only consideration that courts take in to account in interpreting the constitution. This could be seen from the sentence, which says '*though public opinion may have some relevance, it is in itself, no substitute for the duty vested in this court to interpret the constitution and to uphold its provisions without fear or favor*'.[972] However, it undermines this stance in the subsequent paragraphs of the judgment and uses public opinion as an additional ground to forestall the migration of dignity jurisprudence from other jurisdiction including South Africa.

[969] Const. of Uganda (n836), 126(1).
[970] *Susan Kigula & 416 Ors v Attorney General* (n875).
[971] ibid.
[972] ibid.

This is particularly expressed in the courts opinion, which says '*in the interpretation of this Constitution and indeed any other law, the views of the people, wherever they can be reasonably accurately ascertained, must be taken into account. This is a command, which no court can ignore. There is no equivalent provision in the Constitutions of Tanzania or the Republic of South Africa. Their authorities on this matter are not very helpful to Uganda'*.[973] The underlined part of the quote signify the centrality of public opinion and Ugandan values, in judicial reasoning. This is further reflected in courts line of argumentation justifying the constitutionality of death penalty. It said '*unlike in South Africa where people's opinion may not be a relevant considerations in constitutional interpretation, in Uganda, the people's views are very relevant because of article 126 of our Constitution. Whether you call hanging cruel, inhuman, degrading, sadistic, barbaric, primitive, out moded e.t.c, as long as the people of Uganda still think that it is the only suitable treatment or punishment to carry out a death sentence, their values norms and aspirations must be respected by the courts'*.[974]

The invocation of local 'value' argument to reject comparative jurisprudence on a similar matter is not confined to the issue of death penalty. In equality cases where human dignity appears as equal worth, the Ugandan value based reasoning was also instrumental in determining the final outcome of the case. A good example for this could be the *Nabagesera* case discussed in section three of this chapter.[975] The court upheld the dispersal action of the minster of ethics and integrity of a conference organized by alleged members of the LGBT community. In this case, the lawyer for the applicants cited the European Court of Human Rights judgement in *Baczowski & ors v Poland*, where the court found action of dispersal of a similar gathering to violate the European Convention.[976] Interestingly enough the court rejected

[973] ibid.
[974] ibid.
[975] *Nabagesera & 3 ors v Attorney General & Anor* (n943)
[976] ibid.

the relevance of the ECtHR judgement invoking value difference. It particularly noted that '*Ugandan circumstances are different because homosexual acts are offences against morality and culture and their promotion is prohibited by law making it prejudicial to public interest. Uganda and Europe have different laws and moral values and accordingly define their public interests differently*'.[977]

The court further relied on the African Charter on Human and People's Right to defend its position. It particularly invoked the provision which mandates the African Commission on Human and People's Right to draw inspiration from a number of sources including '*customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine*'.[978] The judges gave an interesting interpretation for the underlined part. Accordingly, they argued '*international jurisprudence is considered as a legal precedent depending on whether the cited rules and legal principles are expressly recognized by African states and reflect African practices'*.[979] As such, the jurisprudence or decision of the ECtHR on homosexuality has no relevance or binding force, since African states are not parties to it. They further argued *'that the recognition of homosexuals as a Minority whose acts are legitimately protected is not a principle of law and norm generally recognized by all African states nor are homosexual acts recognized as an accepted African practice*'.[980] Here we can see that the court even went to examine whether the practice in issue is compatible with the broader African value system. In order to determine this, they looked whether the majority of African states recognize or legalize the practice in question, irrespective of what is happening elsewhere. Such approach seems to be unique to Uganda and it might have a huge

[977] ibid.
[978] African Charter on Human and Peoples' Rights, 1986, 60.
[979] *Nabagesera & 3 ors v Attorney General & Anor* (n943).
[980] ibid.

impact in determining the extent of circulation of human dignity as a constitutional concept from one system to another.

Conclusion

The finding of this chapter shows several distinctive features of human dignity in the Ugandan constitutional order with respect to its status, scope and migration. Unlike the other constitutional systems studied in different chapters of the dissertation, human dignity is not explicitly recognized as a founding value of the Ugandan constitution. It is only through a careful and implied interpretive exercise that one establishes human dignity as a general underlying value. Hence, its status as a constitutional value is not that clear. This could be contrasted with the express recognition of the right to dignity in different parts of the Ugandan constitution. The only concern however is the scope of this right. Thus, depending on the approach of interpretation one adopts, the right may apply only to cases like torture or specific group of persons such as women and people with disabilities or have a general reach.

The role of human dignity in the interpretation of fundamental rights in Uganda also seems to be ambivalent. On the one hand, human dignity reasoning is utilized to challenge practices that undermine the integrity and equal worth of individual human beings in few cases including the unconstitutionality of certain acts such as banishment orders, return of bride price, inhuman and humiliating treatments were mainly decided on the ground of human dignity. On the other hand, the role or weight of human dignity argument seems to lose its force when it is invoked to challenge controversial issues such as death penalty and discrimination against sexual minorities. The conception of human dignity as respect for autonomy and self-determination seems to be absent completely. Several factors may explain why this is the case in Uganda. The unique textual formulation of human dignity as a value and right in the constitution of

Uganda, the textualist approach of interpretation followed by the judges and the invocation of local values and public opinion in judicial reasoning are the major ones.

The attitude of Ugandan courts towards indigenous dignity jurisprudence as well as its migration from other constitutional systems seems to be peculiar. As noted in the chapter, there was a one-time attempt to incorporate the African conception of human dignity *ubuntu* in their reasoning, which is not pursued in subsequent cases. As such, there is no significant progress in this direction. On the issue of migration of human dignity, courts in Uganda have shown an extreme degree of caution and reservation in dealing with comparative jurisprudence and decision of other courts. They have also shown a general preference towards referring to the decision of African courts especially in controversial cases such as death penalty and rights of sexual minority. They were also able to reject the finding of other court on similar issues based on African values, Ugandan values and the state of public opinion arguments. All these matters make the status, application and migration of human dignity in Uganda peculiar.

Chapter 5- Comparative Perspectives on the Role and Migration of Human Dignity in African Constitutional Orders: Lessons and the Way Forward

Introduction

The prime objective of this chapter is to bring together and compare, the core findings regarding the role and migration of human dignity in the African constitutional system studied in this work. For the sake of conducting an in-depth study of each system, the previous chapters have exclusively dealt with one jurisdiction. This chapter will demonstrate the similarities and differences regarding the status of human dignity as a constitutional concept, its role and migration in the constitutional systems of South Africa, Kenya and Uganda. To accomplish this goal in an orderly manner, the chapter is organized in three parts. The first part addresses the issue of comparability and common threads in the studied jurisdictions. This would be followed by a comparative analysis of the role human dignity is playing in the judicial interpretation of fundamental rights in the three systems. Areas of convergence and divergence will be identified including the possible factors which may explain them. The third part of the chapter discusses lessons from the comparative study to further improve the development and utility of human dignity in protecting rights in African constitutional systems. Some of the issues raised in this sub-section includes the need for human dignity centered interpretation of rights, transformative constitutionalism and judicial dialogue.

5.1 Comparison of the Status and Meaning of Human Dignity as a Constitutional Value and Right

In any work of comparative study establishing the comparability of the systems is extremely important. This is because it significantly impacts the acceptability and relevance of the insights or findings that comes from it.[981] Many scholars of comparative law agree that for undertaking a meaningful comparison between two or more jurisdictions, it is essential for them to have certain 'common elements' which they share. If the systems compared have nothing in common, the outcome of the comparative work would not have that much value.[982] It is for this very reason that these chapter addresses the issue of comparability first.

Accordingly, the jurisdictions chosen for these comparative works are three African constitutional systems i.e. South Africa, Kenya and Uganda. These systems share several factors which make comparison between them reasonable. Geographically, the jurisdictions are located in the Eastern and Southern part of Africa. As such, they share a considerable degree of similarity in culture and traditions. Historically, all of them were subjected to colonial rule. Kenya and Uganda were under British rule until 1960's. South Africa was also a colony of the Dutch and Britain. This fact has in turn has contributed for the similarity of their legal system. Because of the British influence, the three jurisdictions, primary follow the common law legal tradition. However, some authorities characterize the South African legal system as a mixed one i.e. Roman-Dutch Civil Law and British Common Law.[983]

Historically speaking, the Constitutions of the three jurisdictions aim to address something that is deeply troubling with their past. The South African Constitution is written in the background

[981] François Venter, *Constitutional Comparison: Japan, Germany, Canada and South Africa as Constitutional States*, (Kluwer Law International 2000) 44-45, 262-264.
[982] ibid.
[983] Ackermann, 'Constitutional Comparativism in South Africa (n491)169-194.

of Apartheid, which divided the South African people along racial lines and undermined the dignity of Black South Africans.[984] The constitutions of Uganda and Kenya also aim at addressing their past characterized by authoritarian rule, undemocratic governance and gross violation of human right. To what extent these aspirations have been realized in practice is something which requires lots of debate and is beyond the scope of this dissertation. In all the three constitutional systems courts are mandated to control the constitutionality of legislations and acts of the government. The Supreme Court is the final arbiter of constitutional cases in Uganda and Kenya. [985] In contrast, in South Africa this mandate is given to the Constitutional court of South Africa (CCSA). Until very recently, the CCSA used to be a specialized court that only handles cases dealing with the constitution. This seems to be changing after the recent constitutional amendment that expands its reach to cases which are no necessary related the constitution.[986]

Regarding the status of human dignity as a constitutional value and right, it is clearly recognized as an important founding value and right in the constitutions of South Africa, Kenya and Uganda. [987] This is in line with the central place human dignity acquired in national constitutions and international human right treaties after the Second World War. As a value, human dignity is explicitly enshrined in the Constitution of South Africa and Kenya. Further, the Constitution of Kenya particularly states that the ultimate purpose of human rights is preserving the dignity of individuals and communities.[988] The Constitution of Uganda is an exception in this regard, as human dignity is only an implicit constitutional value. As a right, all constitutional systems examined in this research expressly recognize the right to human

[984] A Chaskalson, 'Dignity as a Constitutional Value: A South African Perspective' (2011) 26 Am. U. Int'l L. Rev. 1377-1407
[985] The Constitution of Kenya 2010 art.163(4) & Constitution of the Republic Uganda, 1995 art 132 (1) (2).
[986] Constitution Seventeenth Amendment Act 2012 section 3 & Superior Courts Act of 2013.
[987] Constitution of the Republic of South Africa, 1996, art. 1(a), 10; The Constitution of Kenya 2010 art.10 (2) a, 28 & Constitution of the Republic Uganda, 1995 art. 24.
[988] Constitution of Kenya (n527) art 19(2).

dignity. Here one may inquire whether the explicitness or implicitness of the recognition human dignity in a constitution makes any difference on its use and application. The first response to this issue could be in the affirmative since it is presumed that litigants and courts are more likely to rely on it if it has clear basis in the text of the constitution. Here, it may suffice to mention the explanation some scholars provide for the limited role of human dignity in the US Constitutional system. [989] In their view, the absence of human dignity as an explicit value or right has its own contribution for the reluctance of courts to use the concept as often as other systems. It is not however possible to generalize here and say in all those systems where human dignity is implicitly recognized, its role in Constitutional interpretation is weak. The case of Canada could be a good example here.[990] Despite the absence of a clear textual basis for human dignity in the constitution Canada, courts frequently refer to it in resolving disputes concerning fundamental rights. Thus, the strength or weakness of a role human dignity plays in a certain constitutional system is not entirely dependent on the explicitness or implicitness of its existence in the text of the constitution.

However, there are some differences regarding the formulation and the scope of the right. In terms of scope, the right to human dignity seems to have a broader scope in South African and Kenyan Constitutions, where it could apply to the various aspects of dignity.[991] In contrast, the right to dignity has a narrow scope in Uganda textually speaking as it is formulated in the context of prohibiting cruel and inhuman treatment. For this reason, extending it to equality and autonomy aspects might be difficult. Further, all constitutional systems analyzed in the research accept the crucial role of human dignity in guiding interpretation of fundamental

[989] N Rao, 'Three Concepts of Dignity in Constitutional Law' (2013) 86 Notre Dame L. Rev. 183 ,183-271
[990] Barak (n1) 209-223.
[991] Constitution of the Republic of South Africa, 1996, art10 & The Constitution of Kenya 2010, art. 28 & Constitution of the Republic Uganda, 1995 art. 24.

rights.[992] The interpretative role of human dignity is explicitly articulated in the Constitutions of South Africa and Kenya. In contrast, in Uganda the interpretative status of human dignity was judicially established. This difference seems to be crucial because courts in South Africa and Kenya are clearly required by the constitution to take human dignity into account in interpreting fundamental rights and in assessing the legitimate limitations on them. As such, it is not up to them to consider the impact of their decision on human dignity or not. They must do that always as it is dictated by the constitution. The absence of similar stipulation in the Uganda Constitution may limit the application of human dignity and make it conditional on the preference of a particular court or bench. As such, human dignity may be considered in some cases or completely disregarded in others. This in turn makes the approach of courts will be unprincipled and arbitrary. However, since Uganda follows the precedent systems, it could be argued that if human dignity is identified by the highest court of Uganda as a principle considered in the interpretation of fundamental rights, lower courts could also apply it in resolving cases before them.

The analysis undertaken in this research also shows that three aspects of human dignity have been concertized in the jurisprudence of courts in the studied jurisdictions to a various degree i.e. dignity as respect for human life and integrity, dignity as equal worth and concern and dignity as respect for individual autonomy.[993] In relation to this, the constitutional systems of

[992] Constitution of the Republic of South Africa, 1996, 39(1) a & The Constitution of Kenya 2010, art 20 (4) a & *Uganda Law Society v Attorney General of the Republic of Uganda* (Constitutional Petition No. 18 of 2005)) [2006] UGCC 10 (30 January 2006).

[993] *S v Makwanyane and Another* (6 June 1995), *National Coalition for Gay and Lesbian Equality and another v. Minster of Justice and others* 1999 (1) SA 6 (CC) *President of the Republic of South Africa and Another v Hugo* (18 April 1997), *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (9 October 1998) , *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] (1 December 2005), *Government of the Republic of South Africa and Others v Grootboom and Others* (4 October 2000), *Christian Lawyers' Association v National Minister of Health and Others Case* No:7728/2000 High Court, Transvaal Provincial Division 2004 (10) BCLR 1086 (T) 24/05/2004, *Minister of Justice and Correctional Services and Others v Estate Late James Stransham-Ford and Others* (531/2015) (6 December 2016), *AB and Another v Minister of Social Development* (29 November 2016), *DE v RH*) (19 June 2015) **(South Africa)** *Isaac Ngugi v Nairobi Hospital & 3 others* [2013] , *A.N.N v Attorney General* [2013], *V M K v C U E A* [2013], *P N N v Z W N* [2017], Sonia Kwamboka Rasugu v Sandalwood Hotel & Resort Limited T/A Paradise Beach Resort & Leon Muriithi Ndubai [2013], *Richard Dickson Ogendo & 2 others v Attorney General & 5 others* [2014], *P K M*

South Africa and Kenya seem to be converging on lots of areas. The jurisprudence of courts in both jurisdictions reflects the three dimensions of dignity in different issues litigated before them. These issues include death penalty, inhuman and degrading treatment, discrimination on the basis of race, sex, gender and sexual orientation, abortion, reproductive choices and assisted suicide. Most notably, both South Africa and Kenya use human dignity for differentiating just from unjust discrimination. As such, human dignity has a central role in the equality jurisprudence of both jurisdictions.

In addition, human dignity is also a core value that guides the interpretation of socio-economic rights in Kenya and South Africa. This is evident in eviction cases that demanded the state to undertake eviction in a manner that respects the dignity of the occupants.[994] Further, courts in both systems have rendered decisions that explicitly recognize the importance of respecting individual choices as a core element of preserving the dignity and intrinsic worth of the person. Relatively speaking, the number of autonomy-based decisions in South Africa is higher and it covers areas including reproductive choice and assisted suicide. The decisions of Kenyan courts in this regard are relatively few and mainly confined to personality and identity issues regarding transgender people.[995] A number of factors could explain the convergence between

v Senior Principal Magistrate Children's Court at Nairobi & another [2014], *Republic v Kenya National Examinations Council & another Ex-Parte Audrey Mbugua Ithibu* [2014], *Mwaniki v Kenya Methodist University* [2015] , *Mary Mwaki Masinde v County Government of Vihiga & 2 others* [2015], *Beatrice Wangechi Mwaniki v Kenya Methodist University* [2015], *Mary Mwaki Masinde v County Government of Vihiga & 2 others* [2015], *Lewis Wilkinson Kimani Waiyaki v Hon. Attorney General* [2016], *C O L & another v Resident Magistrate - Kwale Court & 4 others* [2016], *Kenya National Commission on Human Rights & another v Attorney General & 3 others* [2017], *Eliud Wefwafwa Luucho & 3 others v Attorney General* [2017], *Mohammed Abduba Dida v Debate Media Limited & another* [2017], *Kenya National Commission on Human Rights & another v Attorney General & 3 others* [2017], *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others* **(Kenya)** *Uganda Law Society v Attorney General of the Republic of Uganda* (30 January 2006), *Salvatori Abuki and Another v Attorney General* (13 June 1997), *Susan Kigula & 416 Ors v Attorney General* (10 June 2005), *Attorney General v Susan Kigula & 417* (21 January 2009), *Mukasa and Oyo v. Attorney General, High Court of Uganda at Kampala* (22 December 2008), *Uganda v Nabakoza Jackline and Others* (7 September 2004) *Mifumi (U) Ltd & 12 Others v Attorney General*, (26 March 2010), *Carolyne Turyatemba & 4 Ors Vs Attorney General & anor* (8 August 2011, *Nabagesera & 3 ors v Attorney General & Anor* (24 June 2014), *Oloka-Onyango & 9 Ors v Attorney General* (1 August 2014) **(Uganda)**

[994] *Government of the Republic of South Africa and Others v Grootboom and Others* (4 October 2000) & *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others* 2013.

[995] *Republic v Kenya National Examinations Council & another* (n786).

the South African and Kenyan constitutional orders with respect of the role of human dignity. The transformative character and mission of both constitutions and the significant influence of the South African constitution on Kenya both at the constitution making and at the interpretation stage are the major ones.

In contrast, the human dignity jurisprudence of courts in Uganda seems to diverge. To begin with, only two dimensions of human dignity are partially accepted in this system to a certain degree i.e. dignity as respect for integrity of human being (physical and emotional) and dignity as equal worth and concern. The third aspect of human dignity as respect for individual autonomy is not recognized at all. In addition, courts in Uganda seem to disregard dignity-based arguments to ban death penalty citing the qualified nature of the right to life in the Ugandan constitution and the support for it in public opinion.

In the area of human dignity as equal worth and concern, a number of cases were decided in Uganda mainly in the areas of gender-based discrimination.[996] However, courts in Uganda do not use human dignity as a determining factor for establishing the unfairness of discrimination. This approach is different from that of Kenya and South Africa. Further, discrimination based on sexual orientation is excluded from the dignity-based reasoning. In addition, human dignity does not have a central role in Uganda like that of South Africa in developing substantive equality approach that is sensitive to context and impact of discrimination on the individual. This has partly contributed for the poor equality jurisprudence.

[996] *Mifumi (U) Ltd & 12 Others v Attorney General* (n 920).

5.2 Comparative Perspectives on the Role and Migration of Human Dignity

The finding of the research shows that human dignity is playing an important role in transforming the protection of fundamental rights in the South African and Kenyan Constitutional orders. Both constitutions have a transformative mission and character.[997] They were adopted in the background of Apartheid, colonial and authoritarian past that utterly disregards the intrinsic worth and dignity of a human person. It is the lesson learned from their unpleasant past that motivated the drafters to build a new constitutional order founded on respect human dignity as a constitutive value. This is not unique to South Africa and Kenya. Many other constitutional systems in different parts of the world have made human dignity the center of their constitutional architecture as symbolizing clear rejection of their horrific past.[998] The Basic Law of the Federal Republic of Germany is a good example.

However, the role of human dignity in these systems is not merely symbolic. It is rather actually transforming the interpretation of fundamental rights and improving their protection in concrete terms. To begin with South Africa, the Constitutional Court of South Africa (CCSA) relied on the intrinsic worth of human life and non-objectification of human beings to outlaw death penalty.[999] This is a landmark ruling not only for South Africa but also for the continent as well since the majority of African countries still retain death penalty in their criminal laws. Further, the need to respect the physical and emotional integrity of a human being is invoked to ban corporal punishments and acts that humiliate individuals be it committed by a state or private actor. In addition, the human dignity centered reasoning has also transformed the equality jurisprudence of the CCSA in expanding prohibited grounds of discrimination, identifying

[997] Eric Kibet & Charles Fombad (n516) 340-366.
[998] Botha 'Human Dignity in Comparative Perspective'(n215) 172.
[999] *S v Makwanyane and Another* (n290).

unjust differentiation and developing a remarkable substantive equality approach. Most notably, the sexual orientation decisions the court in decriminalizing same sex conduct and in recognizing same sex marriage were based on equal worth and dignity reasoning.[1000] These judgments are very progressive compared to the case in most African states where discussion of these issues is still a taboo and the rights of sexual minorities are still utterly disregarded.

In the area of substantive equality, reliance on human dignity assisted the CCSA to take in to account the 'context and impact' of discrimination on the individual.[1001] This approach enabled the court to consider the actual circumstances of people affected by discrimination and address systematic causes of inequality. It also served as a justification for the acceptability of differential treatments in certain cases to makes the constitutional vision of creating an egalitarian society that recognizes the equal worth and value of everyone. This is not without forgetting the few cases where the court failed to do so.[1002] Human dignity centered approach has also left its imprint in the socio-economic rights jurisprudence of the CCSA.[1003] The court relied on dignity to emphasize the importance realizing social rights for individuals to a live a dignified life compatible with the intrinsic worth of a human person. In addition, it also utilized the concept to convey the message that the poor and marginalized deserve equal concern when the government implement different policies as they are equal in dignity and deserve respect. As such, any policy that does not address the needs and concerns of these people is regarded by the court as unreasonable.

The role of human dignity as respect for individual autonomy has also transformed the protection of reproductive rights in South Africa. In the past South Africa used to have a very

[1000] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (n373).
[1001] ibid.
[1002] *S v Jordan and Others* (n357).
[1003] *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000) & *Port Elizabeth Municipality v Various Occupiers* (CCT 53/03) [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (1 October 2004)

restrictive abortion regime. This is the reality even today in the overwhelming majority of African states as abortion is criminalized with a very limited exception. With the advent of the 1996 constitution and human dignity centered approach of interpretation the courts in South Africa were able to liberalize abortion and making safe termination of pregnancy accessible for many women. It also gave women who are both pregnancy and conception infertile the opportunity to have child through surrogacy arrangement relying on the importance of respecting their individual choice as a manifestation of recognizing their intrinsic worth and dignity.[1004] Autonomy based reasoning was also decisive in resolving cases involving assisted suicide and other matters.

Like that of South Africa, human dignity is also playing a crucial role in the interpretation of fundamental rights in Kenya mainly after the adoption of the 2010 constitution. Yet, its role is intermediate compared to South Africa. On the progressive side, various courts of Kenya have rendered important decisions regarding inhuman and humiliating treatment, discrimination on the basis of gender and other grounds, enforcement of socio-economic rights and issues related to development of personality on a dignity-based reasoning. Human dignity also has clear presence in the equality and socio-economic jurisprudence of Kenyan constitutional system. In addition, dignity inspired reasoning of courts is also securing the right of sexual minorities in Kenya to a certain degree. Here, the decision which made forced anal examination of persons accused of engaging in same sex conduct unconstitutional and the recent judgment of the Kenyan Court of Appeal which recognized the constitutional right to association of LGBT persons could be mentioned. [1005] In these cases, the respect for integrity of a human person and the equal worth aspect of human dignity were emphasized. The court also held that the denial of the right to association to LGBT persons amount to unjust discrimination. In doing so, it

[1004] *AB and Another v Minister of Social Development* (n449).
[1005] *Non-Governmental Organizations Co-Ordination Board v EG & 5 others* (n717).

expanded the grounds of discrimination listed under the Kenyan Constitution by including sexual orientation.[1006] The courts did this despite a hostile attitude towards the LGBT people from various directions and the rejection of this ground in the constitution making process. As discussed in chapter three of the thesis, judges even had to use a religious inspired argument which includes the creation of all human beings in the image of God irrespective of their sexual orientation to persuade conservative groups and recognize certain rights for LGBT persons in Kenya.[1007] In addition, in the 2017 decision of the Supreme Court of Kenya which made mandatory death penalty unconstitutional, human dignity based reasoning played a notable role. Here, the court found that the imposition of death penalty automatically for certain types of crimes without considering the particular circumstance of each case and individual is incompatible with the human dignity of a person.[1008]

However, there are also a number of areas where limitation could be seen in the role human dignity is playing in Kenya. One of this issue is death penalty which is held to be compatible with the Kenyan Constitution in a decision rendered by Kenyan courts few years back.[1009] Many other systems including South Africa have abolished it for its incompatibility with the intrinsic worth of human life and dignity. The textual difference between Kenyan constitution and other systems is offered as a justification for its retention. It was also a matter discussed and deliberated upon in the constitution making stage. The other area is the rights of sexual minorities. Despite few progressive decisions rendered by Kenyan courts as discussed above their equal dignity does not seem to be fully embraced yet. The recent decision of the Kenyan High Court which refused to decriminalize same sex-conduct could be mentioned as a good example.[1010] Though the court was sensitive to the dignity claim of the applicants to a certain

[1006] ibid.
[1007] ibid.
[1008] *Francis Karioko Muruatetu & another v Republic* (n617).
[1009] ibid.
[1010] *EG & 7 others v Attorney General* (n742).

extent it chose to link the matter to the right to marriage which was not an issue before the court and rejected it. The autonomy aspect of human dignity is also relatively underdeveloped compared to South Africa. The few numbers of cases decided on this aspect may support this claim. In addition, it is important to mention to mention the restrictive reproductive rights regime and abortion law in Kenya compared to South Africa. This was mainly due to the strong influence of the Catholic Church in the constitution drafting process which made the protection of the right to life to start at the moment of conception.[1011]

Compared to South Africa and Kenya, the role human dignity is playing in Uganda is weak. There are several manifestations for this claim. First, in terms of number the dignity-based decisions are relatively few compared to both systems. Second, these cases do not embrace the three-core dimension of human dignity as a constitutional value and right. Here it is important to note the complete absence of the autonomy aspect of human dignity in all cases discussed in chapter four of the thesis. Moreover, even the respect for human life and integrity aspect of human dignity is not fully recognized in Uganda. A good evidence for this is the decision of the Ugandan Supreme Court which not only declared the constitutionality of death penalty but also found hanging as an acceptable mode of execution.[1012] This happened despite the persuasive dignity-based arguments presented to the court which dismissed them on the ground of textual difference and support of the Ugandan public.

Third, even compared to Kenya the role of human dignity is playing in challenging discriminatory practices against sexual minorities is extremely limited. On the several occasions, Ugandan court consistently avoided to consider/rejected the equal dignity claim of LGBT persons.[1013] They have also refused to recognize the existence of this group of persons

[1011] Tom Joel Obengo, *The Quest for Human Dignity in the Ethics of Pregnancy Termination: A Theological-Ethical Evaluation of the Church's Approach in Kenya*, (MA thesis, University of Stellenbosch, 2013)11.
[1012] *Susan Kigula & 416 Ors v Attorney General* (n875).
[1013] *Nabagesera & 3 ors v Attorney General & Anor* (n943).

and their minority/vulnerable status. For doing this, they heavily relied on the argument of incompatibility of such practices with the African values.[1014] As such, their conception of human dignity excludes or does not apply to LGBT persons. They also invoked the justification that many LGBT persons are not recognized as sexual minorities in many African countries and the practice is also criminalized.[1015] They further dismissed all progressive decisions in recognizing their rights as western and incompatible with the African cultural values. The absence of any decision by African supra-national bodies that recognizes their right has further emboldened Ugandan courts to be insensitive to their suffering. In none of these cases however they confronted or directly addressed the question whether LGBT people have equal worth and dignity as a human being. Instead of making such analysis, what they commonly do is invoke culture or public opinion or resolve the case on a technical issue.[1016] This has contributed for weak interpretation of fundamental rights Uganda.

Finally, the complete absence of the autonomy aspect of human dignity has also further weekend the role of human dignity in Ugandan constitutional order and left some respect for fundamental choices-based rights unprotected. A good manifestation for this could be the restrictive abortion legal regime in Uganda. According to the Ugandan constitution, 'no person has the right to terminate the life of an unborn child except as may be authorised by law'.[1017] The existing law at the sub-constitutional level was adopted during the colonial time and it only allows abortion only on two grounds. These are risk to the health of the mother and instance of rape.[1018] In the absence of this preconditions it is illegal for any person to assist in undertaking abortion. There is also an imprisonment for medical professionals who perform abortion other

[1014] ibid.
[1015] ibid.
[1016] *Oloka-Onyango & 9 Ors v Attorney General* (n949)
[1017] ibid
[1018] Charles G. Ngwena, Taking Women's Rights Seriously: Using Human Rights to Require State Implementation of Domestic Abortion Laws in African Countries with Reference to Uganda (2016) 60 J. Afr. L. 110, 110-140

than this cases which could go up to 14 years imprisonment.[1019] Because this prohibition it is not possible for majority of Ugandan women to undertake abortion in as safe manner with the assistance of medical professionals. Studies also indicate that many women in Uganda are losing their life due to unsafe abortion.[1020] Had the autonomy or respect for fundamental choices dimension of human dignity is recognized, it could be used to challenge laws and practices like this which violate core fundamental rights.

This being said regarding the role human dignity is playing in the three jurisdictions, the next issue worth considering is the methodology courts in studied systems use to give meaning or develop their human dignity jurisprudence. With respect to this, the thesis shows that the CCSA succeeded in developing a rich human dignity by combining indigenous values with progressive ideas obtained from engagement with comparative law. With respect to indigenous notions, the court relied on the cultural value of *ubuntu* that recognizes the equal dignity of human beings and interdependence between the individual and the community.[1021] The role of *ubuntu* as such is not merely legitimizing the constitutional order by aligning it to the cultural belief of the South African society as the constitution is regarded by some as 'de-Africanized' and western. It also in somehow helped the court to tame the individualistic conception of dignity in other jurisdictions, to create a caring and egalitarian society that the constitution envisions for South Africa.

The important role of *ubuntu* is evident in various decision of the court including death penalty, socio-economic and reproductive rights. In contrast to South Africa: Kenya and Uganda are performing poorly in the use of indigenous values to advance human dignity and ensure adequate protection of human rights, this is evident from the negligible number cases that

[1019] ibid.
[1020] ibid.
[1021] *Port Elizabeth Municipality v Various Occupiers* (n406).

mention *ubuntu* as part of their reasoning. Furthermore, indigenous values are sometimes used by these jurisdictions as a defense for resisting liberal interpretation of rights in other jurisdictions. A good example in this regard is the case of Uganda where African values are invoked to undermine the cause of human right and human dignity instead of advancing them.[1022] Thus, caution it necessary in the use of indigenous values to ensure their compatibility and alignment with the core ideal of respecting the intrinsic worth and dignity of the human person.

Besides indigenous values, openness and engagement with comparative law has contributed greatly for the development of human dignity jurisprudence in the South African constitutional order. The research also shows that other jurisdictions of the study also engage with comparative law in varying degree and form. What makes the South African case unique is the extent and quality of engagement with the jurisprudence of other courts. It is a well-known fact that the CCSA is one of the leading courts in the word in utilizing comparative law in its decision and reasoning. The textual basis in the South African Constitution that permits consideration of foreign law in the interpretation of fundamental rights, South Africa's alienation during apartheid and the need to keep abreast with recent developments as well as the mixed nature of its legal system have contributed their part for the great reliance of South African court on comparative jurisprudence.[1023] As such, the influence of foreign law is visible in all aspects of dignity recognized by the CCSA in cases ranging from death penalty, discrimination and reproductive choices. Most notably, three jurisdictions have a prominent influence on the human dignity jurisprudence of the CCSA i.e. Canada, Germany and the United States. These could be explained by their influence during drafting of the South African constitution, similarity of normative foundations and the 'open and democratic' character of

[1022] *Nabagesera & 3 ors v Attorney General & Anor* (n943).
[1023] Ursula Bentel, 'Mining for Gold the Constitutional Court of South Africa's Experience with Comparative Constitutional Law' (2009) 37 GA. J. INT'L & COMP. L. 219,219-265.

the systems. With respect to manner of engagement, the CCSA adopts a dialogical and critical approach mainly utilizing foreign law to understand the South African context and take lesson from others where need be.

Like their South African counterpart, courts in Kenya also heavily rely on comparative law in resolving human dignity related cases despite the absence of a provision in its constitution regarding the use of foreign law. Its common law legal system could be the main explanation for the openness of its courts towards comparative law. Accordingly, the primary source of inspiration for Kenyan courts are the decisions of the CCSA. The judgments of Indian courts and ECtHR are also considered in some cases.[1024] This could be explained by the significant influence of the South African constitution on the 2010 constitution of Kenya. The similarity between the two constitutions in the area of fundamental rights and their interpretation is particularly striking. However, the manner of engagement with comparative law is different from the CCSA qualitatively. As various judgment of courts in Kenya demonstrate, their reference to foreign law is uncritical often quoting decisions without a sufficient analysis or discussion of the Kenyan context. This needs to be addressed in the future as it helps to enhance the quality and richness of their decisions.

In contrast to South Africa and Kenya, the engagement of courts in Uganda with comparative jurisprudence/law in developing its dignity jurisprudence is limited. Though Ugandan courts consider foreign decisions in their reasoning, they often choose those jurisdictions which have arrived at an outcome agreeable to them while ignoring others. In cases where they considered opposing views of other courts, they primarily reject their finding on the basis of the textual difference between the constitution of Uganda and the other constitutional system. Further, unlike South Africa and Kenya, courts in Uganda tend to show a particular preference for the

[1024] *Willis v The United Kingdom*, No. 36042/97, ECHR 2002 – IV and Okpisz v Germany, No. 59140/00, 25th October 2005.

decisions of African courts for the purpose of engagement.[1025] This is mainly justified by the similarity of context. Furthermore, Ugandan courts often use the notion of 'African values' as a shield for rejecting and dismissing the finding of other courts without making any substantive analysis. Thus, the finding of this research shows that Uganda is relatively closed to letting in various aspects of human dignity from other jurisdictions and this has contributed its part for the low level of protection of fundamental rights.

5.3 Lessons and the Way Forward

5.3.1 Transformative Constitutionalism, Courts and Human Dignity

In many functional constitutional democracies' courts play a prominent/primary role in protecting fundamental rights.[1026] Several justifications could be offered why this should be the case. The chief among them is the institutional independence of courts in comparison to other branches of the government that makes them better suited for the task.[1027] Members of the political arms of the state such as the parliament are primarily concerned about their voters. In every decision and policy, every effort is exerted to please the voters with the intention of acquiring their vote in the next election. As such, they are constrained by the wish of the majority of voters in making decisions.[1028] Contrary to this, courts are not primary concerned about voters at least theoretically speaking. This gives them more liberty to decide cases even contrary to the position of the majority of the public.[1029] However, this may not be necessarily the case in those systems where judges themselves are elected or only serve limited terms. In

[1025] *Nabagesera & 3 ors v Attorney General & Anor* (n943).
[1026] Ahron Barak, 'On judging' in Martin Scheinin (eds) *Judges as Guardians of Constitutionalism and Human Rights* (Edward Elgar Publishing 2016) 32.
[1027] J Marcus Schulzke and Amanda Carroll, 'Judicial Review in Context: A Response to Counter-majoritarian and Epistemic Critiques' (2011) 58 (127) Theoria 1-23.
[1028] ibid.
[1029] ibid.

any case, the principle of independence of courts is recognized in all constitutional systems as a matter of principle and they are expected to function accordingly.

More importantly, courts are the only guardians or refuge for preserving the rights of minorities and the vulnerable in the society. These group of persons do not have the capacity to advance their interests or rights through the normal democratic process. [1030] As such, in the absence of strong involvement of courts in protecting their right they will be completely defenseless and will be subjected to the whim of the majority. The comparative study undertaken in this thesis has shown what courts can do in defending rights. Accordingly, courts in South Africa and Kenya have done a commendable job by playing an active role in developing a strong human dignity jurisprudence that preserved the right of the minorities and vulnerable even when there is a resistance from the public.[1031] These is primarily reflected in cases concerning sexual minorities. In contrast, courts in Uganda are extremely deferential to other branches of the government and also give too much weight for public opinion in crafting their decisions.[1032] This approach of courts is partly responsible for the weak human dignity jurisprudence and level of protection of rights in Uganda.

The key factor that explains the difference between the courts in Uganda and the two systems is there very conception of constitutionalism. As mentioned in previous, chapters of the thesis both Kenyan and South African constitutions identified as a transformative constitution.[1033] In several cases which appeared before courts in both jurisdictions emphasized this fact as a justification for courts for being assertive in defense of rights. Many scholars agree that, transformative constitutionalism demands a more robust role from courts in bringing about

[1030] Milner S. Ball, 'Judicial Protection of Powerless Minorities' (1974) 59 IOWA L. REV. 1059, 1059-1096 Wojciech Sadurski, 'Judicial protection of minorities: the lessons of footnote four' 1989 17(3) Anglo-Am. L.R.163, 163-181.
[1031] *Non-Governmental Organizations Co-Ordination Board v EG* (n717).
[1032] *Susan Kigula & 416 Ors v Attorney General* (n875).
[1033] Eric Kibet & Charles Fombad (n516) 340-366.

social and political transformation.[1034] Further, it also requires them to adopt a particular approach of constitutional interpretation that enables them to accomplish this mission. As such, transformative constitutionalism dictates courts to adopt a value-oriented interpretation of the constitution instead of adherence to legal formalism, positivism and technicalities. [1035] Such approach will enable courts to play a meaningful role in protection of rights and develop a right friendly jurisprudence.

Further, transformative constitutionalism also provides guidance to courts on how they should deal with public opinion. This is particularly important in controversial cases or in cases where there is a hostile public attitude towards the rights of certain minorities in the society. In such cases, the primary aim of courts should be defending rights and ensuring equality of all regardless of contrary public opinion.[1036] In making decision their primary guidance should not be public opinion and prejudice, but the values enshrined in the constitutions. According to Kibet and Fombad, the move towards transformative constitutionalism in South Africa and Kenya is partly responsible for the right friendly jurisprudence emerging both jurisdictions.[1037] As noted in the section dealing with constitutional history of both countries, courts were unable to defend rights for so long partly because of there extreme deference to the other branches of the government and their legalistic approach that gives too much importance for technical matters. Following the adoption of the 1995 South African and the 2010 Kenyan transformative constitutions, courts are becoming a strong guardian of rights not only from the other branches of the government but also from the view of the majority in the general public.

Kibet and Fombad also argue that if the idea of transformative constitutionalism spreads to other African countries is it could potentially enhance the protection of rights in the

[1034] Klare (n270)146-188.
[1035] ibid.
[1036] Eric Kibet & Charles Fombad (n516)340-366.
[1037] ibid.

continent.[1038] This in my view is a sensible analysis considering the state of protection of rights in the Ugandan constitutional system. Contrary to transformative constitutionalism, courts in Uganda by and large are playing a limited role in safeguarding rights. They have repeatedly failed to ensure the protection of rights of sexual minorities. Even in cases concerning death penalty they are primarily concerned/considerate about the opinion of the public on the matter. This has its own contribution for the weak human dignity jurisprudence in Uganda. In addition, with this mindset it is very difficult to expect the emergence of a right-enhancing dignity jurisprudence in the future. Further, Ugandan courts still give too much weight for formalism and the intent of the framers rather than a value and purpose-oriented interpretation of rights. Thus, a shift towards a transformative constitutionalism essential to improve the state of protection of rights by courts in Uganda and develop a robust human dignity jurisprudence.

5.3.2 The Need for Genuine Judicial Dialogue at National and Supranational Level

One of the important lessons from this research is the importance of meaningful judicial dialogue for developing a rich human dignity jurisprudence and a strong rights protection regime. It is demonstrated that the relative openness of South African and Kenyan constitutional systems towards comparative law from other jurisdictions has contributed its part for the development of human dignity-based interpretation of rights. This is without forgetting the difference in quality of engagement of the two jurisdictions with foreign case law. Compared to the two systems, Uganda is a relatively closed system and the influence of comparative law on its human dignity jurisprudence is not that much significant. In addition, even in cases where it relied on comparative law, its dialogue is selective, and courts prefer to engage primarily with other African courts which are not that different from Uganda.[1039]

[1038] ibid.
[1039] *Nabagesera & 3 ors v Attorney General & Anor* (n943).

Unless courts in Uganda conduct genuine dialogue with other systems engagement will just be a futile exercise for finding justification for their pre-disposed position. Hence, genuine dialogue presupposes certain degree of openness to change one approach if there are arguments in other systems which are persuasive and right friendly.

The other important point worth noting here is that judicial dialogue does not only happen horizontally between various constitutional systems. There is also a possibility where it could happen between national and supra-national systems vertically.[1040] Judicial dialogue between nationals and supra-national institutions is a common phenomenon in European and Latin American systems. For instance, in Europe constitutional courts regularly engage in dialogue with the European Court of Human rights.[1041] This primarily happens because in course of assessing domestic standards, their compatibility with the rights enshrined under the convention will be considered. The case law of the ECtHR is also taken in to account by domestic courts.

However, constitutional courts are not always expected to adhere to the interpretations given by ECtHR. They are rather given a margin of appreciation in certain matters to decide the case differently while respecting the convention.[1042] These is intended to balance between the regional and local realties within the continent. It also has a legitimacy enhancing effect. Further, the ECtHR also engages with domestic jurisprudence of courts in the EU system and it could learn from them as well.[1043] Thus the dialogue and conversation is two way. Likewise, there also exists a vertical dialogue between domestic courts in Latin America and the Inter-

[1040] Matej Avbelj, 'Human Dignity and EU Legal Pluralism' in Gareth Davies(eds.) *Research Handbook on Legal Pluralism and EU Law* (Edward Elgar Publishing 2018) 101, 5, Davide Paris, 'Allies and Counterbalances, Constitutional Courts and the European Court of Human Rights: A Comparative Perspective', (2017) 77 ZaoRV 623, 623-64.
[1041] ibid.
[1042] ibid.
[1043] ibid.

American Court on Human Rights.[1044] Constitutional courts have the duty to check the conformity of their decisions with the human rights jurisprudence developed by the Inter-American court. Some scholars are critical of this system stating that the dialogue is top-down and one way.[1045] As such, it is the Inter-American Court that dictates to domestic courts how they should interpret the convention and it has not shown that much willingness to learn from domestic systems. In their view, making a two-way dialogue not only enriches the jurisprudence of the Inter-American Court but also enhances its legitimacy.[1046]

In contrast to the two regional systems discussed above the dialogue between African national constitutional systems and regional supra national bodies such as the African commission on human and people's rights has not received a scholarly attention. However, it is the contention of this thesis that a meaningful dialogue between national constitutional systems in Africa and with supra-national institutions is crucial to develop a human dignity centered intersection of rights in the continent which has the potential to transform the protection of rights. With this premise, let us briefly see the status human dignity in the African human rights system and the human dignity jurisprudence of the African Commission.

The African Charter on Human and Peoples Rights (ACHPR) is among regional human right treaties that gave an explicit recognition to human dignity. A reference to the dignity is made three times, in the preamble and in a specific article of the Charter.[1047] To begin with the preamble, the notion is invoked in relation to the then Organization of African Union (OAU) Charter which states that 'freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples'. [1048] The African Charter

[1044] Jorge Contesse, 'The final word? Constitutional dialogue and the Inter-American Court of Human Rights', (2017) 15 (2) International Journal of Constitutional Law 414, 414–435.
[1045] ibid.
[1046] ibid.
[1047] African Charter (n978) preamble & article 3.
[1048] ibid art 5.

reiterates the importance of these objectives through direct quotation from the constituting document of the OAU. Beside this, the preamble also mentions dignity by linking it to the issue of colonialism. Africa was a victim of colonial ambition of the European powers. At the time of the adoption of the African Charter, some African states were still struggling to regain their independence. Cognizant of the gross indignity that colonization has inflicted on African people and the severity of the problem, the Charter underscores the need to support people fighting for their dignity and work towards the elimination of all manifestations of indignity be it discrimination or Apartheid. A similar statement is also reiterated in the Constitutive Act of the African Union. The act celebrates the 'heroic' fight of the African people for their 'dignity' and independence; underscore the need for preserving these ideals in the African continent. [1049] Here one may ask significance of an express incorporation of dignity in the preamble of the African Charter. More specifically whether its presence there has any value at all and serves some function? The scholarship on treaty interpretation underscores the importance of statements incorporated in preambles. Accordingly, one of the core functions of preambles is to specify the purpose that specific provision of the treaty seeks to achieve.[1050] As such, they serve as guidance in the interpretation of treaties by judicial bodies. This helps to minimize the misapplication of specific provisions of the treaty. If preambles have such a role, the presence of human dignity in the African Charter is a positive development, since the adjudicatory bodies will have the mandate to use the concept in the discovery, explication, application and limitation of rights in it. Hence, it could be argued that human dignity is a value that shapes the interpretation of human rights in the African Charter.

Beside the preamble, article 5 of the African Charter is dedicated to the right to dignity and combating several manifestations of its violations. The article provides that '*Every individual*

[1049] Constitutive Act of the African Union (2000) preamble.
[1050] Max H. Hulme, 'Preambles in Treaty Interpretation', 164 University of Pennsylvania Law Review 1281,1300

shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man *particularly* slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited'.[1051] It recognizes an enforceable right to dignity in the African Charter. In this sense, it is different from the reference to dignity in the preamble which is more of a value that informs all the rights incorporated under the Charter. Further, the article unequivocally perceives dignity as something that is embedded within every human person. Such understanding of human dignity resonates worth the provisions of several human right instruments such as the Universal Declaration of Human Rights. Moreover, the provision has also attempted to exemplify circumstances where the right to human dignity may be violated. These includes among others denial of legal status to a human person, slavery, torture and inhuman treatment among others.[1052] The list here is only illustrative and there is a room to include more acts within this article through interpretation, as long as the inherent dignity/worth of human beings is seriously undermined by the practice in question.

Thus, arguably human dignity is recognized in the African Charter as interpretative value and enforceable right. A closer look at the preamble of the text and specific provision of the Charter supports such conclusion. If this is the case, it means adjudicatory bodies of the African Charter as well as the domestic courts of states which have ratified the African Charter, have the duty to elaborate and apply human dignity in the interpretation of human rights incorporate within the charter. The following paragraphs of the chapter examines the dignity jurisprudence of the African Commission and the overall place of dignity in the African human rights system. Before doing that, it may be important to say few things about the institutional framework. Accordingly, the African Commission on Human and People's Right (The African

[1051] African Charter (n 978), art 5.
[1052] ibid.

Commission) is the main body in the African human right system that is entrusted with the mandate of human right promotion and protection in the continent.[1053] Yet, its decisions are usually not enforced and its power of enforcement seems to be confined is to reporting to the assembly of head of states. To remedy this problem, the African Court of Justice and Human Rights was established with an additional protocol.[1054] Yet, only eight African states have ratified the protocol and accepted the jurisdiction of the court so far. This has contributed its part for the small number of cases decided by the court.

That being said about the institutional structure, let us examine the human dignity jurisprudence of the African Commission so far. Accordingly, only the respect for integrity and equal worth aspects of human dignity are recognized in the decisions of the commission. The number of human dignity inspired decisions is also few. Two of them deal with physical and emotional integrity. Three other cases focus on the equal worth aspect dealing with non-discrimination. To begin with the physical and emotional integrity aspect, the first important case is *Spilg and Mack & Ditshwanelo (on behalf of Lehlohonolo Bernard Kobedi) v. Botswana*.[1055] The case concerns the execution of death sentence in Botswana on a person convicted of killing a police officer. In this application, the violation of article 5 of the African Charter was alleged on a number of grounds. The first involves the health condition of the applicant as he was suffering from a heart condition. Here, the argument was that the failure of courts to consider the health condition of the applicant and the order of execution by hanging is a cruel and inhuman treatment.[1056] The second ground is on the failure of the court to notify the family of the

[1053] ibid art 30.
[1054] Protocol on the Statute of the African Court of Justice and Human Rights 2008.
[1055] *Spilg and Mack & Ditshwanelo (on behalf of Lehlohonolo Bernard Kobedi) v. Botswana*. ACHPR communication no.277/03.
[1056] ibid.

applicant of the day of the execution. This in the view of the advocate deprived the applicant a dignified welfare.[1057]

The decision of the Commission on this case is interesting and problematic from the perspective of human dignity. First, the Commission decided that the claim that execution by hanging cause severe suffering on the accused is speculative and insufficiently proved.[1058] What makes the case interesting is that, the Commission did not ask whether the very act of death penalty is compatible with the intrinsic worth of a human person/dignity. That aside, the Commission even failed to find violation on the cruelty of the manner of execution. Given the health condition of the accused, it would have been difficult to allow death by hanging if the Commission followed a strictly digniterian approach of interpretation. Surprisingly, the commission found violation of article 5 for the second ground which is the failure of the Botswanan court to provide information about the date of execution. This in the Commission's view violates human dignity of the applicant. In my view, this is a very weak conception of human dignity. The only plausible explanation for the conclusion the Commission arrived at could be the fact that the applicant was executed before it rendered the decision.

A related case of inhumane treatment where the issue of dignity was decisive is Institute for *Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) v. Angola*.[1059] The case concerns the deportation of Gambian miners legally working in Angola subsequent to the adoption of a policy of expelling foreigners. In the course of this process, the applicants alleged the commission of arbitrary detention and maltreatment on the basis of their origin. They were also kept as prisoners in a house that is filled with animal waste and plethora

[1057] ibid.
[1058] ibid.
[1059] *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) v. Angola*, ACHPR, communication 292/04.

since animals used to live in it before the prisoners moved into it.[1060] In addition, the prison was not enough to accommodate all prisoners. Thus, they had to sleep, eat and take bath in the same place. They did not also receive sufficient amount of food, water and medical aid. For instance, only 2 buckets of water were provided for 500 prisoners per day.[1061] Based on all these facts, the prisoners alleged the violation of a number of rights recognized under the African Charter including the right to dignity. The Commission, without much reasoning ruled in their favor by noting that the treatment they have received is clearly a violation of Article 5 of the African Charter since such a treatment cannot be called anything but degrading and inhuman.[1062] In arriving at this conclusion, the Commission also referred the dignity jurisprudence of the UN Human Rights Committee among others.

Another decision of the African Commission is *Purohit and Moore v. Gambia*.[1063] The case concerns mentally ill patients detained in Gambian hospitals. The communication particularly challenges provisions the Lunatic Detention Act of Gambia (LDA).[1064] One of the most problematic aspects of the law is its failure to specifically define who a lunatic is and on what criteria his/her status is detained. This is problematic considering the fact that a person declared Lunatic is susceptible to indefinite detention in medical detention center and the process of determination lacks clarity or review.[1065] The applicants in this case alleged the violation of their right to dignity recognized under article 5 of the African Charter.

The Commission began its decision on the issue by noting that 'human dignity is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities as the case may be, are entitled to without discrimination'.[1066] In addition, the Commission

[1060] ibid.
[1061] ibid.
[1062] ibid.
[1063] ibid.
[1064] *Purohit and Moore v. Gambia, ACHPR communication no 241/2001.*
[1065] ibid.
[1066] ibid.

expressly mentioned the duty to 'respect' and 'protect' the right to dignity as an obligation enshrined under the African Charter. It further ruled that 'under the LDA, persons with mental illness have been branded as "lunatics" and "idiots", terms, which without any doubt dehumanize and deny them any form of dignity in contravention of Article 5 of the African Charter'.[1067] Through this decision, the Commission affirmed the need to respect the intrinsic worth or value of every human person irrespective of his mental or physical disability, which is a step in the right direction. In other words, the Commission's decision in this case shows that human person will not lose his respect or dignity, by virtue of his disability. Rather he is valued or respected as any other member of human family.

On the equal worth aspect of human dignity, the first important case is that of the *Nubian community in Kenya v the government of Kenya*.[1068] It concerns person of Nubian decent living in Kenya. The Nubian community used to live in Sudan originally but the British colonizers forced some members of the community to join the British army and reside in Kenya. During the colonial time, the Nubians did not have any legal status i.e. they were neither British nor Kenyan citizens. When Kenya got its independence and issue of the Nubian community was not resolved. Later, the Kenyan government came up with a stringent procedure for issuing identity documents such as National ID and passports to individuals of Nubian decent residing in Kenya.[1069] These procedures include the payment of application fee, the need to bring the ID card of their grandparents (which they cannot produce) and delayed processing of their application which is not applicable to other applicants. As such, the denial of legal status and difficulty of acquiring identity documents made the life of the Nubians in Kenya very cumbersome and prevented their full participation in the life of the Kenyan community.[1070]

[1067] ibid.
[1068] The *Nubian Community in Kenya v. The Republic of Kenya*, ACHPR, communication 317/06.
[1069] ibid
[1070] ibid.

In its decision the Commission noted that 'the respect of the dignity inherent in the human person informs the content of all the personal rights protected in the Charter'.[1071] It further reasoned that the Kenyan law that regulates the acquisition of identity documents for Nubians is blatantly discriminatory and arbitrary. The Commission further remarked that there is 'a clear indication that Kenyan Nubians are unfairly discriminated against in the acquisition of identity documents solely on account of their ethnic and religious affiliations, which assails their dignity as human beings who are inherently equal in dignity'.[1072] It further invoked article 2 of the Charter dealing with equality and unfair discrimination by underling that 'differential treatment on the basis of ethnic and religious affiliations is specifically prohibited…. they have historically been misused to oppress and marginalize peoples with these attributes, thereby demeaning the humanity and dignity inherent in them'[1073] Here, the Commission made an interesting connection between dignity and equality, using the former to inform the latter. In other words, it used dignity as a guide to determine whether discrimination or differential treatment is fair, which resembles the approach of the Constitutional Court of South Africa.

A similar issue was entertained by the African Commission in the case *Open Society Justice Initiative v. Côte d'Ivoire*.[1074] The case concerns a challenge to the 'ivorite' policy of the Ivorian government which was introduced on the eve of the 2000 presidential election. Its main aim was to grant Ivorian nationality to persons born from Ivorian mother and father. This policy was particularly designed to exclude the then Presidential candidate/hopeful Mr. Outaraa a member the Douala ethnic group of a Burkinabe decent.[1075] Pursuant to this policy, the Ivorian Supreme Court prohibited Mr. Outara from competing in the election and the incumbent president Gbagbo won the election. Subsequent to this incident, the government intensified the

[1071] ibid.
[1072] ibid.
[1073] ibid.
[1074] *Open Society Justice Initiative v. Côte d'Ivoire,* ACHPR Communication 318/06.
[1075] ibid.

harsh treatment against the Doulas living in the northern part of Ivory Coast, which are predominantly Muslim. Members of the Douala ethnic group faced numerous difficulties in the course of acquiring Ivorian nationality and they were asked to pay fine for getting citizenship which is not a requirement for other people residing in Ivory Coast.[1076] The consequence of denial of legal status and citizenship for the Doulas was too cumbersome, which caused the problem of stateless and their effective exclusion from assuming rights and obligations. In other words, the denial of a legal status entailed the denial of their very existence and a heavy burden on their day to day life.[1077] In their communication, the applicants alleged the violation of article 5 of the African Charter protection of human dignity and right to a legal status.

In its decision the African Commission ruled in favor of the applicants and found violation of article 5. Its reasoning also reflected the importance of human dignity in the African Charter beside this specific issue. In this regard, the commission noted that 'Dignity is… the soul of the African human rights system and which it shares with both the other systems and all civilized human societies. Dignity is consubstantial, intrinsic and inherent to the human person. In other words, when the individual loses his dignity, it is his human nature itself which is called into question, to the extent that it is likely to interrogate the validity of continuing to belong to human society…when dignity is lost, everything is lost. In short, when dignity is violated, it is not worth the while to guarantee most of the other rights'.[1078]

This is so far the strongest statement of the African Commission on human dignity. It endorsed the centrality of human dignity to the corpus of the African Charter and reaffirmed the fact that human dignity is not alien to the African societies. Rather it is a vital value that Africans share with all other members of the human family. It also underscored the intrinsic character of human dignity and its direct relation to human nature. As such, when the dignity of a person is

[1076] ibid.
[1077] ibid.
[1078] ibid.

threatened his/her human quality/nature is also challenged. More importantly, it emphasized the importance of securing human dignity if we are genuinely committed to further the protection of human rights in Africa.

Having made these statements as a premise, the Commission underlined the strong bond between human dignity and legal status. In doing so it referred to the jurisprudence of the European Court of Human Rights and the Inter-American Court.[1079] The Commission noted that, respect for human dignity presuppose the recognition of the legal status of the person which enables him/her to assume right and duty in the society. If this status is denied, the individual will not be able to live with dignity. As such, the 'commission considers that failure to grant nationality as a legal recognition is an injurious infringement of human dignity. Such an infringement seriously affects the legal security of the individual, particularly due to the undermining of a set of consubstantial rights and privileges to the enjoyment of fundamental legal and socio-economic privileges. Ultimately, it is the very existence of the victim which is vitally compromised.'[1080] With this reasoning, the Commission found violation of article 5 of the African charter.

The cases discussed above show that that though human dignity is a core value and right tin the African Charter, the commission jurisprudence so far mainly focused on integrity and equal worth aspect of human dignity. Even for these aspects, the Commission has not done anything tangible to abolish death penalty or combat discrimination against sexual minorities on the basis of their sexual orientation through dignity centered interpretation of the Charter. Further, what is disconcerting here is that the weak human dignity jurisprudence of the Commission is serving as an excuse or justification for jurisdictions like Uganda to resist progressive interpretations of rights from Africa and outside. Hence, the Commission needs to do more in

[1079] ibid.
[1080] ibid.

concretizing and entrenching human dignity centered interpretation of rights in Africa by starting from within. In this regard, lot is expected from the African Commission and the African Court of Justice and Human Rights to examine African culture and traditions, in the process of concretizing the concept. This is important because human rights do not function in cultural vacuum.[1081] They will not become universal simply because we want them to be. The task needs a greater level of commitment to trace the roots of the concept in African local tradition.

In addition, the African Commission can gain insights about the meaning and application of human dignity from national and international courts. The Commission has an express legal mandate to 'draw inspiration' from international law in the interpretation of the Charter.[1082] It is also empowered to utilize as subsidiary sources 'other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and people's rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine'.[1083] The Commission has invoked these provisions when it made reference to the dignity jurisprudence of the Constitutional Court of South Africa and the European Court on Human Rights in few dignity cases it has determined so far. Such mandate of the Commission also enables various conceptions of human dignity to travel from one jurisdiction to the other. This is because the African Charter has a supreme status in many African constitutional orders and the interpretation of rights in the domestic system needs to conform to it. Thus, the Commission could be a venue where legal concepts like human dignity are concretized and made ready to transfer to another jurisdiction. In other words, it could serve as a market place for the exchange of constitutional ideas such as human

[1081] Francis Deng *et al*, *Human Rights Southern Voices*, William Twininng (eds.) (Cambridge University Press, 2009) 4-15.
[1082] African Charter (n978) art 60.
[1083] ibid art 61.

dignity. Yet, the performance the African Commission so far is not satisfactory. Even if the Commission refers to international and national court in rendering it decisions, it neither critically engages with them nor justify its choice of jurisdictions. This needs to be improved if the Commission is to serve as a good platform for migration of human dignity centered interpretation of rights within Africa in the future.

Conclusion

The major objective of this thesis was examining the role and migration of human dignity in African constitutions which received little scholarly attention so far by focusing on three African constitutional systems South Africa, Kenya and Uganda. In relative terms a lot has been written on the South African human dignity jurisprudence compared to the other two jurisdictions. Yet, this thesis provides an additional insight to the existing literature with its unique focus and approach. Recent developments in the human dignity jurisprudence of South Africa are also included. Before discussing the findings of the thesis with respect to the core research questions addressed, it is important to say few things about the theoretical grounding of the work analyzed in the first chapter of the thesis.

In relation to this, the first issue concerns the importance of human dignity as a constitutional concept. In the existing scholarly literature, there are those who are skeptical about the importance of human dignity i.e. its role in grounding and interpreting rights in international treaties and national constitutions. They raise concerns of complexity and controversial nature of the notion and advocate for a more pragmatic approach that does not attach itself to human dignity. On the other hand, others underscore the centrality of human dignity for understanding and adequately protecting rights as it is their ultimate end/purpose. Complexity of the concept and lack of consensus is not a reason to abandon it. In my view also, human dignity centered interpretation of rights is extremely crucial to ensure adequate protection of rights as the underlying cause of many of the gross violation rights be it deprivation of human life, torture, unjust discrimination or failure to respect autonomy primarily emanate from explicit or implicit denial of equal dignity or intrinsic worth of all human beings. Thus, an account of rights alienated from human dignity will lead to weaker protection.

The second important theoretical matter concerns the meaning of human dignity as constitutional concept. This issue is also controversial in the existing literature and there are several meanings attached to it. For the purpose of this thesis however, human dignity as a constitutional value and right is construed to embody three core elements at a very high level of abstraction i.e. human dignity as respect for human life and integrity, respect for equal worth and respect for autonomy. These dimensions of human dignity are found in the jurisprudence of several jurisdictions with one aspect being more emphasized than the others. They are also the most common elements in the understanding of human dignity which appear in the existing scholarly works on the subject. Further, this way of conceptualizing human dignity is more comprehensive as it brings all dimensions together compared to other conceptions that define it in a very narrow manner. Having said this much about the theoretical grounding of the work as a background, I will summarize the core findings of the research and lessons which could be drawn from it as follows.

With respect to the constitutional status and meaning of human dignity, the thesis shows that the three systems studied in this work share certain features and differ on others. As a constitutional value, human dignity is recognized in all of them. The formulation is more explicit in South Africa and Kenya compared to Uganda. As a constitutional right, human dignity is expressly enshrined in the constitutions of the three constitutional orders. In terms of formulation and scope, the right to dignity provision of South Africa and Kenya are almost identical. This is partly because the Kenyan provision is modeled after its South African counterpart. In terms of scope also, the right to dignity provisions in both constitutions is broad and capable of embracing the various elements of human dignity noted in the previous paragraph. In contrast, the right to dignity under the Ugandan Constitution seems to be narrower mainly associated with prohibition of torture and degrading treatment. This may have

also contributed its part for narrower conception of human dignity in the jurisprudence of Ugandan courts.

The constitutional meaning of human dignity is primarily determined by courts in the process of interpretation since the text of the constitution is usually crafted in a general and abstract manner. In relation to this, the finding of this thesis demonstrates that the constitutional meaning ascribed to human dignity in South Africa and Kenya is converging to a certain extent. This is because all the three aspects of human dignity i.e. respect for human life and integrity, equal worth and autonomy appear in several cases decided by these jurisdictions. The significant influence of the South African constitutional jurisprudence in the making as well as interpretation of the Kenyan Constitution may have significantly contributed for this development. Also, in both systems autonomy-based conception of human dignity is relatively underdeveloped. Yet, even on this aspect the South African system is more advanced. The reason behind the limited number decided on the autonomy based conception of human dignity in both jurisdictions could be the value they attach for communal life besides individual right. In Kenya, the Constitution states that fundamental rights are intended to preserve not only the dignity of the individual but of the community as well. Similarly, the egalitarian vision of the South African Constitution and the indigenous notion of *ubuntu* which emphasize communitarian value and interdependence in South Africa has constrained the reach of autonomy-based conception of dignity.

In contrast to these systems, the thesis shows that the constitutional meaning of human dignity is mainly confined to the physical integrity and equality dimension in the Ugandan constitutional system. As such, human dignity is not associated with respect for intrinsic value of human life or respect for autonomy or fundamental choices. No single case in Uganda was decided to date on the autonomy based conception of human dignity. Even for the 'equal worth'

or value aspect of human dignity seems to apply in Uganda only for a certain class of human beings while excluding others.

This thesis further demonstrates that the role human dignity is playing in enhancing the adequate interpretation and protection of fundamental rights in the constitutional systems studied in this work exists at different stage of development. In comparative terms, its role in South Africa is strong, in Kenya intermediate and in Uganda weak. The advanced role of human dignity the constitutional jurisprudence of South Africa could be seen in its crucial use in interpretation and limitation of rights. Several landmark decisions were rendered by the Constitutional Court of South Africa on matters including death penalty, same sex marriage, socio-economic rights and reproductive rights which were heavily informed by the various dimensions or aspects of human dignity. A strong textual basis of the concept in the Constitution of South Africa, its past apartheid history and the sensitivity of its courts to human dignity may have contributed its part for its robust presence and role.

In comparison to South Africa, the role human dignity is playing in the Kenyan constitutional system seems to be limited. On the positive side, all aspects human dignity were recognized by Kenyan courts in deciding cases before them and they are increasingly using the concept as an interpretive guide. This is particularly evident in its equality jurisprudence where human dignity is being used as a yardstick for assessing the fairness or unfairness of discrimination like its South African counterpart. Important decisions in the areas of on socio-economic rights, rights of transgender people and sexual minorities were rendered by courts which are heavily shaped by human dignity. On the negative side however, the limited number of cases decided on autonomy-based conception of human dignity, the failure of human dignity inspired claims in challenging death penalty and de-criminalization of same sex conduct could be mentioned as a weakness. The firm textual basis of human dignity in several provisions of the Kenyan

Constitution and the influence of South African jurisprudence may account for some of the progressive decisions. In contrast, the relative conservativeness of courts, textual difference in the formulation of certain matters in Kenyan Constitution and consideration of public opinion to a certain extent may explain some of the regressive decisions.

Compared to South Africa and Kenya, the role human dignity playing in the Ugandan constitutional system seems to be weak. This is the case despite the recognition of human dignity in the text of the Constitution of Uganda and its acceptance by courts as key interpretive value in adjudicating issues related to fundamental rights. In terms of number, relatively few human dignity inspired decisions were rendered by courts in Uganda compared to the other systems studied in this work. Most of these cases relate to integrity and equal worth aspect of human dignity. The autonomy dimension is not recognized at all. Even for the equality cases, dignity-based claims to brought to courts protect or ensure equal worth of sexual minorities and prevent unjust discrimination were utterly ignored/rejected. Death penalty as well as hanging as a mode of execution was also found to be constitutional in Uganda despite their incompatibility with the respect for human life and integrity aspect of human dignity. The weak textual status of human dignity in the constitution of Uganda, the limited scope of the right to dignity, the textualist approach of interpretation adopted by courts, their high level of passivism and the extreme weight they attach for public opinion in the course of adjudication may partly explain the indecisive role of human dignity in the Ugandan constitutional order.

Concerning the relationship between African culture and the notion of human dignity, it was argued in the thesis that a deeper study of African values and religious systems shows that respect for a human person is a core belief recognized in many indigenous African communities. As such, human dignity not an alien idea. Yet, these ideals were not sufficiently concretized and used by courts in developing their own human dignity jurisprudence. In terms

of indigenous human dignity jurisprudence, the three constitutional systems studied in the thesis exist at deferent level although all of them accept the importance of indigenous values. Comparatively speaking, courts in South Africa succeeded to a certain extent in developing rich indigenous human dignity jurisprudence by using the indigenous cultural value of *ubuntu*. This not only helped courts to enhance the legitimacy of their decision but also enriched the content by adding communal perspective to the individualistic conception of human dignity. Courts in Kenya and Uganda did not travel that far on this matter besides mentioning the importance of indigenous values and making few references to values such as *ubuntu* in few of their judgments.

This thesis also demonstrated that the extent of migration of human dignity in the studied jurisdictions is not at a similar level. South Africa seems to be the most open system for a genuine dialogue and migration with other systems followed by Kenya. In a number of cases, interpretation of human dignity migrated from various jurisdictions to South Africa including Canada, Germany and the United States at least in the early years following the adoption of the South African Constitution which still continued to a certain extent. The unique provision in the South African Constitution that allows for the consideration of foreign law may have its own contribution for the openness. Though a similar provision is absent in Kenya, the emerging human dignity jurisprudence is also heavily influenced by ideas which migrated from other jurisdictions particularly from South Africa. However, Kenyan courts do not engage that much with decisions beside quoting and relying on them in crafting their judgments.

In relative terms, Uganda seems to be closed system and there is a little migration of notions of human dignity from other jurisdictions. This is the case despite the acceptance of foreign law by courts as one of the standards that guide them in constitutional interpretation. The thesis also shows that Ugandan courts are extremely reserved in engaging in dialogue with those

systems that are considered as having a progressive human dignity jurisprudence and prefer to consider conceptions of human dignity by other African courts. As such, they primarily engage in selective dialogue which is not that much productive.

One important lesson that could be drawn from this work is that human dignity centered interpretation of rights has a potential to enrich and ensure better protection of rights. The power of dignity inspired reasoning and arguments were seen in cases concerning death penalty, socio-economic rights, rights of sexual minorities and reproductive rights among others. However, there are additional factors which determine the strength and the weakness of the role human dignity in a certain constitutional system. The crucial ones here are the model of constitutionalism adopted by courts, their approach of interpretation, level of activeness of courts and nature of dialogue they undertake with other systems. This thesis shows that, those jurisdictions which adopt transformative model of constitutionalism are more likely to have strong human dignity jurisprudence. The case of South Africa and Kenya could be an example in this regard. This approach requires courts to actively defend rights and pay little attention to formalism. It also demands them to be agents of social and political transformation by adopting a value-oriented interpretation of rights rather than literal textual approach.

The nature of dialogue courts undertake with other systems is also crucial in developing their human dignity jurisprudence. Yet, this dialogue must be genuine and undertaken with openness to accept persuasive ideas from other jurisdictions. Further, the dialogue must be conducted not only with national systems but also with supra-national bodies as they are interconnected. Unfortunately, as this thesis shows the human dignity jurisprudence of the African Commission on Human and People's Rights (the main supra-national body in Africa) is underdeveloped despite the presence of a strong textual support for a human dignity centered interpretation of rights in the Charter. In the future, if the Commission develops its human dignity jurisprudence

by engaging in dialogue within advanced systems within the region such as South Africa, it could serve as a site for the development and migration of human dignity centered interpretation of right to other African systems. This may play its part in potentially transforming the rights protection system in the continent

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