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HUMAN DIGNITY AND JUDICIAL INTERPRETATION

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INTRODUCTION

Interpretation is an essential element of the processes of constitutional justice. Constitutional justice includes the exercise of the power of interpretation in the processes of constitutional review and human rights adjudication in individual complaints applications. That justice is based on and derived from the interpretation and enforcement of constitutional law to protect, enforce and fulfil fundamental human rights and freedoms. Interpretation involves discovering the meaning of a constitutional provision. It describes an activity that Judges undertake in their resolution of disputes. Although most constitutions will refer to the term “interpretation”, very few define it. In most constitutional statutes, interpretation is described by how it must be done rather than by what it is. This is significant because interpretation assumes a functional role in constitutional adjudication. What is important is to understand why it assumes such a vital role in constitutions. This paper connects judicial interpretation and human dignity in constitutional interpretation. It proceeds from a general overview of the importance of interpretation and proceeds to analyse how the concept of human dignity comes in to aid the same.

INTERPRETATION

Although the paper primarily focuses on constitutional interpretation, it is important to discuss interpretation in general. According to Rieg, the term “interpretation” has both a broad and a narrow definition.¹ He states that a very broad definition of the term “interpretation” can be considered as synonymous with the function of a jurist whose task involves the role of interpreting.² Interpretation refers to the activity of the Judge who on the one hand attempts to determine the scope of an ambiguous or obscure text and on the other hand attempts to find a solution when the text presents a gap.³ From the aforementioned definition, it can be noted that the main function of Judges is judicial interpretation. The purpose of interpretation is to render ambiguous provisions of the law clearer and more understandable where there is a *lacuna*.

On the other hand, the narrow definition of the term “interpretation” means determining the meaning of a text in a statute or a regulation. In

¹ Alfred Rieg, *Judicial Interpretation of Written Rules*, 40 La. L. Rev. (1979). Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol40/iss1/5>. Accessed on 30 September 2024.

² *Ibid.*

³ Alfred Rieg, *Judicial Interpretation of Written Rules*, 40 La. L. Rev. (1979) at p. 49. Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol40/iss1/5>. Accessed on 30 September 2024.

the case of *Burnet v Gaggenteim* 28, US 280 (1993), it was held as follows:

“... statutory interpretation involves making a choice between uncertainties that allow judges to employ a variety of methods to find the message of the legislature and decide in concrete cases what the law means.”

From the above authorities, judicial interpretation occurs when a provision is obscure, ambiguous or vague. Judicial interpretation affects the outcome of matters, as matters are resolved on a judicial officer’s interpretation of the law.

Constitutional interpretation is a form of interpretation. According to Currie and De Waal, constitutional interpretation is the process of determining the meaning of a constitutional provision.⁴ It is the process of determining the meaning and the application of constitutional provisions by the courts. It refers to the particular way of legislative interpretation which applies to the Constitution. Thus, interpretation denotes the process which arises when Judges resolve a matter for adjudication to find a proper meaning concerning a particular provision

⁴ I. Currie and J. D. Waal, *The New Constitutional & Administrative Law Volume 1 Constitutional Law* (Juta: 2001) p. 334.

of the Constitution. The importance of interpretation in constitutional justice must be considered from the perspective of the inclusion of interpretation as one of the functions of a constitutional court. The topic at hand recognises that interpretation plays a role in constitutional adjudication. In addition, it must be observed that interpretation is performed by public officials who have been appointed as Judges. It is closely tied to the purpose for which Judges are appointed and to the purpose for which the courts exist.

LOCATING THE ROLE OF THE CONSTITUTIONAL COURTS OR TRIBUNALS IN INTERPRETATION

The starting point in locating the role of constitutional courts, tribunals and councils in interpretation is to understand the role of courts generally. All courts undertake the process of interpretation. While the process may be undertaken for any area of law by generalist courts, the same cannot be said for specialist courts. Specialist courts are courts that deal with disputes that are based on a defined subject matter, with parameters as to what the subject matter includes. A good example of specialist courts are constitutional courts, tribunals or councils. While the specific jurisdiction of a constitutional court or council differs from

one jurisdiction or another, it is important to appreciate the similarities in their jurisdiction. At the very least, all constitutional courts, tribunals or councils will adjudicate over constitutional matters. The similarity in their jurisdiction portrays a message about the role of constitutional jurisdiction and adjudication in constitutional democracies.

The Constitutional Court of Zimbabwe (“the Constitutional Court”) is used as a case study in appreciating the role of constitutional courts in constitutional interpretation. In Zimbabwe, the Constitutional Court and its jurisdiction are provided for in the Constitution. Section 167(1)(a) of the Constitution states that “The Constitutional Court is the highest court in all constitutional matters, and its decisions on those matters bind all other courts.” The Constitutional Court has jurisdiction to hear and determine constitutional matters only. In turn, section 332 of the Constitution defines a constitutional matter as “a matter in which there is an issue involving the interpretation, protection or enforcement of this Constitution”. By its definition, a constitutional matter is defined as a matter in which there is an issue involving the interpretation, protection or enforcement of the Constitution. The Constitutional Court decides whether a matter is a constitutional matter.

Its decision on a constitutional matter is final and binding on all courts, the State, its agents at every level and everyone. There are other provisions of the Constitution that are addressed to the jurisdiction of the Constitutional Court. These include section 85(1), setting out, in the main, an individual complaint procedure and the power of persons to institute claims against the likely or actual violation of their human rights.

In defining the jurisdiction of the Constitutional Court, the Constitution employs the word “interpretation”. Interpretation is a core activity of the Constitutional Court. The makers of the Constitution recognised interpretation as one of those functions that the Constitutional Court must discharge in order to ensure the protection and enforcement of the Constitution. The importance of the role of interpretation in constitutional justice is revealed by its centrality in the definition and the limitation of the jurisdiction of the Constitutional Court. Authoritative interpretation, in the sense of a final and binding decision on what a particular constitutional provision guaranteeing or enshrining a fundamental right or freedom means lies with the Constitutional Court. Interpretation is, thus, appropriately mentioned in the definition

of the jurisdiction of the Constitutional Court. It is, therefore, an element of the jurisdiction of the Constitutional Court.

The status of the Constitutional Court as the highest court in constitutional matters has a legal effect. The decisions of the Constitutional Court, as provided in section 167(1)(a) of the Constitution, are final and binding on all other courts. By a constitutional provision, interpretation of a fundamental right or freedom enshrined in the Constitution is correct because it is final and binding on the State, its agents at every level and everyone. The Constitutional Court is placed as the most authoritative arbiter of what the law is in constitutional matters. Although unsaid, there is an inherent obligation derived from the jurisdiction of the Constitutional Court to ensure that whenever it engages in the process of resolving disputes, it does so in a manner that bestows finality to the disputes and upholds the Constitution. The obligation presupposes the capacity of the Constitutional Court to do so accountably, authoritatively and appropriately.

In some cases, constitutional courts or councils share concurrent jurisdiction with other subordinate courts. The relevance of concurrent

jurisdiction is the legal interaction that emerges between a constitutional court or council and other subordinate courts. In a hierarchical system of courts, especially in countries with common law traditions, higher courts guide subordinate courts on important matters of the law. This is so because their decisions are regarded as authoritative and pronouncements of what the law on the particular subject of dispute is.

In the case of Zimbabwe, the Constitutional Court primarily shares jurisdiction with the High Court. Section 171(1)(c) of the Constitution provides for the jurisdiction of the High Court to “decide constitutional matters except those that only the Constitutional Court may decide”. There is a limited number of categories of constitutional matters that only the Constitutional Court may decide. This means that in most constitutional matters there is scope for an opportunity for a subordinate court to decide a constitutional matter. Such cases may then be subject to subsequent constitutional reviews, appeals and confirmation proceedings before the Constitutional Court. This introduces another dimension of the constitutional jurisdiction of the Constitutional Court. The Constitutional Court has the power to review

and to supervise the decisions of subordinate courts. In these cases, justice is secured by the possibility of constitutional review and supervision by the Constitutional Court. Notably, the concurrency of the jurisdiction of the highest constitutional tribunal with other courts is common in most jurisdictions.

Constitutional interpretation recognised under the Constitution is a scientific process of constitutional justice subject to rules. The Constitutional Court, as a creation of the Constitution for the specific purpose of hearing and determining constitutional matters only and with final and binding jurisdiction on such matters, is not left to its own free will. It is subjected to objective requirements of constitutional interpretation of fundamental rights and freedoms. Hence section 46 of the Constitution, which is discussed more fully herein below.

HUMAN DIGNITY AS A VALUE IN CONSTITUTIONAL INTERPRETATION

In demanding that the interpretation must promote human dignity as one of the foundational values listed under section 3 of the Constitution, the constitutional commandment ensures that the interpretation of human rights provisions is values-oriented. The role

of human dignity as a foundational constitutional value and a source of interpretation of fundamental rights and freedoms within the legal framework of the fundamental principles of the supremacy of the Constitution, the rule of law, and democracy becomes clear.

Human dignity has emerged as a core value of modern constitutionalism around the world. It is generally recognised as a quality or a virtue accepted to accrue by the mere fact of the existence of a human being.

In judicial parlance, it is an inherent characteristic or hallmark of every human being. This implies that certain minimum standards must be met when dealing with human beings. Therefore, human dignity is tied to the recognition of core minimum standards that are intrinsically tied to the idea of a human being.

The core attributes underlying human dignity refer to every individual's inherent worth, value and respect. This is regardless of his or her circumstances, characteristics or actions. Human dignity does not choose when and where it should be applied. It is an automatic value given to any human being. From this premise, human dignity occupies

a central role as an interpretative guide in the judicial interpretation of human rights. It is open to significant judicial manoeuvring which enables the courts to adopt particular human rights interpretation and adjudication methods that are responsive to local contexts and societal evolution.

The judicial interpretation of human dignity has affirmed three key elements in adjudicating individual rights claims. The first relates to the ontological element which recognises the inherent worth of human beings that cannot be waived or diminished. This is recognised as the specific individual content of human dignity.

The second element provides that such human dignity must be recognised and respected. This is referred to as the relational claim which regulates the interaction of the individual and his or her community. It has been referred to as the dignity of recognition as it encompasses the social dimension of human dignity.

The third element stipulates the limited State claim which presupposes that States must exist for the benefit of the individual. It regulates the interaction between the individual and the State. This element compels

the State to progressively recognise human dignity, especially through the realisation of socio-economic rights.

Accordingly, the recognition of these three elements has led to the development of an emerging global *ius commune* of human rights.⁵ It highlights that the universality of human dignity enables the concept to transcend sovereign limitations and serve as an interpretative guide in the adjudication of human rights.⁶

The understanding of the distinct roles that human dignity fulfils in constitutional architecture is important to appreciate its significance in the judicial interpretation of human rights. Human dignity is at the centre of the Judiciary's role in preserving peace and the rule of law. In the realm of judicial interpretation, human dignity evolves from being a mere individual claim into a universal value of significance to the protection, promotion and fulfilment of human rights.

In the African context, the doctrine of human dignity can be traced to the concept of *ubuntu/hunhu*. Long before colonialism, traditional African societies recognised the inherent worth of a human being and

⁵ C McCrudden "Human dignity and judicial interpretation of human rights" IILJ Working Paper 2008/8

⁶ Carozza, 'The Universal Common Good and the Authority of International Law', 8 Logos: A Journal Of Catholic Thought And Culture (2006) 28.

this recognition was embodied in the African philosophy of *ubuntu/hunhu*.

Ubuntu/hunhu is an indigenous African philosophy which constitutes a range of social values. These include respect, solidarity and compassion.⁷ Therefore, *ubuntu/hunhu* is a philosophy which emphasises the significance of a group or communal life and is best captured in the Nguni/Ndebele phrase “*umuntu ngumuntu ngabantu*” and the Shona expression “*munhu munhu muvanhu*”, which mean “a person is a person because of other persons”.

The philosophy of *ubuntu/hunhu* was developed and practised in order to protect human dignity. In this sense, therefore, *ubuntu/hunhu* created individual and collective social obligations namely: the obligation to demonstrate compassion with each other; the obligation to offer solidarity to those who are in need; and the obligation to respect others. It is because of this philosophy that our societies always had a way of helping the underprivileged and making sure that they were not left

⁷ Notre Dame Philosophical Reviews, “Dignity: Its History and Meaning”, (2012) (Reviewed by Stephen Darwall, Yale University). Available at <https://ndpr.nd.edu/reviews/dignity-its-history-and-meaning/>. Accessed on 26 September 2024.

behind. It is this philosophy which bound our forefathers and foremothers together and united them to confront social and political evils, including poverty, colonialism and other vices that came their way. It was the quest to protect the dignity of all by practising the social values of respect, solidarity and compassion which make up *ubuntu/hunhu*.

Therefore, respect for cultural values promoted human dignity under the broad umbrella of *ubuntu/hunhu*. The individual rights attached to the human being were recognised as being derived from the communal values that society protected, promoted and upheld. This entrenched the respect for the innate dignity of every person from an African perspective.

Having discussed the place of human dignity in African culture, it must be emphasised that the Constitution does not only declare in section 3(1)(e) recognition of the inherent dignity and worth of each human being as a fundamental value and principle and its respect as the foundation of the whole constitutional architecture, it goes on to declare in section 51 inherent dignity as a direct fundamental human right in itself. Section 51 provides that “every person has inherent dignity in

their private and public life, and the right to have that dignity respected and protected”. In *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); [2000] ZACC 8 at p 36, the Constitutional Court of South Africa observed that:

“Human dignity ... informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights ... Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.”

FUNDAMENTAL PRINCIPLES OF CONSTITUTIONAL INTERPRETATION

In the process of constitutional justice, interpretation mainly features in the adjudication of human rights and constitutional review. The observations made above apply to the importance of interpretation in the adjudication of human rights and constitutional review. The reason is that both the adjudication of human rights and constitutional review are procedural mechanisms embedded in constitutions to achieve the

respect and fulfilment of their provisions. Interpretation is, therefore, a means for achieving constitutional review.

The provisions of section 332 of the Constitution, defining what a constitutional matter is, are not the only provisions that bring out the importance of interpretation in constitutional adjudication. Section 46 of the Constitution also applies. It reads:

“(1) When interpreting this Chapter, a court, tribunal, forum or body —

- (a) must give full effect to the rights and freedoms enshrined in this Chapter;
- (b) must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, the values and principles set out in section 3;
- (c) must take into account international law and all treaties and conventions to which Zimbabwe is a party;
- (d) must pay due regard to all the provisions of this Constitution, in particular the principles and objectives set out in Chapter 2; and
- (e) may consider relevant foreign law;

in addition to considering all other relevant factors that are to be taken into account in the interpretation of a Constitution.

(2) When interpreting an enactment, and when developing the common law and customary law, every court, tribunal, forum or body must promote and be guided by the spirit and objectives of this Chapter.”

The provision must be read together with section 331 of the Constitution, which provides for the interpretation of the Constitution in general. The section states that: “Section 46 applies, with any necessary changes, to the interpretation of this Constitution apart from Chapter 4”.

Constitutional interpretation of fundamental rights and freedoms is specifically provided for under section 46 of the Constitution as a critical aspect of constitutional justice for the protection and promotion of fundamental rights and freedoms. This provision would apply to any court when it has to engage in the interpretation of a constitutional provision protecting a fundamental right or freedom. Section 46 of the Constitution deals with a situation where there has arisen a dispute relating to the interpretation of a constitutional provision on a fundamental right or freedom.

It is observed that the provisions of the interpretation of the Constitution are metarules. They guide the interpretation and application of other provisions of the Constitution. The rules of interpretation determine directly how to interpret specific provisions of

the Constitution. The norms of constitutional interpretation are entrenched in the Constitution as an expression of the will of the people. The entrenchment of interpretation norms in the Constitution is a conscious recognition of the effectiveness of judicial interpretation as a tool to advance transformative justice. The Constitution is responsible for defining the rules of interpretation and defining how interpretation must be undertaken. The role of the Judiciary concerning human rights becomes one of utilising the interpretative tools and guides that are entrenched in the Constitution to shape transformative justice.

Section 46 of the Constitution provides a good case study of how the rules of interpretation are influenced by underlying values and the need to promote the respect for and fulfilment of fundamental human rights and freedoms. It is, therefore, important to study the provisions of section 46 of the Constitution in order to derive the benefits and the lessons it carries for judicial interpretation.

The first point to note is that the wording of section 46 brings out the purpose of interpretation in constitutional adjudication. During interpretation, the meaning of a provision is clarified. In addition, every process of interpretation results in outcomes setting out what the

meaning of a particular provision of the Constitution is. The deduction of the meaning of a constitutional provision is crucial. This is so because the Constitution is a transformative document adopted to achieve results for its people. Therefore, when one has regard to the wording of section 46 of the Constitution, there is conclusive proof of the purpose of interpretation in constitutional adjudication.

Section 46 envisages giving full effect to the rights and freedoms set out in Chapter 4 of the Constitution of Zimbabwe. Given the applicability of section 46 to other provisions of the Constitution in interpretation, it is also notable that the provision is focused on setting out the rules of interpretation that give effect to the full realisation of other constitutional provisions through constitutional interpretation. Interpretation must also promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and, in particular, the values and principles set out in section 3 of the Constitution.

To guarantee the recognition of the centrality of human dignity as an interpretative guide, section 46 of the Constitution ought to be read together with the preceding sections 44 and 45 of the Constitution.

Section 44 of the Constitution imposes a duty on every person to respect, protect, promote and fulfil the fundamental rights and freedoms entrenched in the Declaration of Rights. This obligation is imposed on individuals, juristic persons as well as State institutions such as the Judiciary.

Section 45 fortifies the specific duty that is placed on the Judiciary by providing that the Declaration of Rights binds “the State and all executive, legislative and judicial institutions and agencies of government at every level”. Accordingly, the Judiciary is mandated to respect, protect, promote and fulfil fundamental human rights and freedoms through an interpretation that gives effect to the central value of human dignity in conjunction with the other values that are entrenched in section 3 of the Constitution.

This means that the interpretation adopted by the Judiciary must not violate the duty that is imposed concomitantly by the provisions of sections 44, 45(1) and 46(1)(b) of the Constitution. The courts are duty-bound to protect and promote fundamental rights and freedoms in a manner that resonates with the value of human dignity.

Judicial interpretation in respect of section 46(1) of the Constitution must be conscious of the fact that human dignity in this sense is not applied as a substantive right. It ought to be applied as a value that enables the Judiciary to give full effect and promote the fundamental rights and freedoms in the Declaration of Human Rights. Additionally, the interpretation that is given must be cognisant of the allegations that give rise to the need for judicial intervention.

In the case of *S v C (a juvenile) (supra)*, the Constitutional Court acknowledged human dignity as an interpretative source for fundamental human rights and freedom. It was held that:

“Section 46 of the Constitution is the interpretative provision. It makes it mandatory for a court to place reliance on human dignity as a foundational value when interpreting any of the provisions of the Constitution which protect fundamental human rights and freedoms. This is because human dignity is the source for human rights in general. It is human dignity that makes a person worthy of rights. Human dignity is therefore both the supreme value and a source for the whole complex of human rights enshrined in Chapter 4 of the Constitution. This interdependence between

human dignity and human rights is commented upon in the preambles to the *International Covenant on Economic, Social and Cultural Rights (1966)* and the *International Covenant on Civil and Political Rights (1966)*. The preambles state in express terms that human rights ‘derive from the inherent dignity of the human person’. They all refer to ‘... the inherent dignity ... of all members of the human family as the foundation of freedom, justice and peace in the world’. The rights and duties enshrined in *Chapter 4* of the Constitution are meant to articulate and specify the belief in human dignity and what it requires of the law.” [*Emphasis is added*]

The integration of the core elements of human dignity through the interpretative medium of section 46 of the Constitution was highlighted in the case of *S v C (a juvenile) (supra)*. The Court held that:

“Human dignity is not created by the State by law. The law can only recognise the inherence of human dignity in a person and provide for equal respect and protection of it. In fact, human dignity demands respect. In other words, every human being merits equal respect for his or her inherent dignity regardless of social, economic and political status.

A human being is a social person. He or she relates to others as a member of society. Society has its own rules or norms that define rights and duties in terms of which members relate to each other for the common good and social order. In its social context, human dignity requires that the individual respects himself or herself (self-respect) by internalising the values of the society in which he or she lives and must accord others equal respect. The others are required in turn to accord the person's inherent dignity equal respect. There is interdependence. Arising from this is the communitarian understanding of inherent dignity with its emphasis on mutual interdependence.

The reciprocal nature of human dignity is evident in its curtailment of self-degradation and its limiting effect on the exercise of rights to accommodate the rights of others or the common good. Equal respect for the inherent dignity of the other person means refraining from doing anything under the guise of the exercise of one's rights which would injure his or her rights.

Injuring another person's rights shows no respect for his or her dignity as a human being, because rights are derived from human dignity and human dignity is the essence of every fundamental right.”

Section 46 of the Constitution is based on five fundamental principles of constitutional interpretation of fundamental rights and freedoms.

HUMAN RIGHTS-BASED APPROACH TO INTERPRETATION

The first fundamental principle is that the interpretation of a fundamental human right provision must give full effect to the fundamental right or freedom. The task of interpretation demands a human rights approach. The constitutional commandment that the interpretation of a constitutional provision enshrining a fundamental human right or freedom must give full effect to the fundamental human right or freedom means that the Constitutional Court must adopt a human rights-based approach. This involves interpreting legislation in a manner that takes into account the human rights of people. All human rights assume constitutional status. Interpretation that takes into account the human rights of people gives effect to the constitutional imperative for their respect. There is almost universal consensus that interpretation demands human rights to always be taken into account. Where interpretation fails to take into account that the laws are addressed to human beings, there is scope for the dehumanisation of

people. The full realisation of human rights is only possible by adherence to a human rights approach to interpretation.

In practice, a human rights approach to interpretation has certain features. A judicial officer interpreting a provision, whether of a constitutional nature or not, must always bear in mind the imperative to protect, respect, promote and fulfil human rights. In this sense, human rights are a reference point for the validity of approaches to interpretation. This entails judicial officers asking the question of whether the outcome of the application of the rules of interpretation is consistent with human rights.

The obligation to adopt a human rights approach to interpretation is embedded in provisions of the Constitution that require judicial officers to give full effect to human rights. One cannot give effect to a norm that he or she fails to take into account in interpretation.

As already mentioned, the effect of that rule is that the highest possible form of the effect of a constitutionally entrenched human right must be realised through interpretation. The rationale for this rule is found in the necessity of recognising human rights and freedoms in law. Human

rights are considered to be inalienable, inherent and indivisible and demanding of respect. The inherent nature of human rights suggests that the law simply recognises their preexistence and preeminence rather than that their recognition by law is the basis for their origin.

According to Currie and De Waal, and with particular reference to human rights interpretation, the overarching objective of interpretation “is to ascertain the meaning of a provision in the Bill of Rights in order to establish whether law or conduct is inconsistent with the provision”.⁸

The process involves two important steps, namely, determining the meaning or scope of a fundamental right and whether or not the challenged law or conduct conflicts with the fundamental rights.⁹

VALUES-BASED APPROACH TO INTERPRETATION

The second fundamental principle is set out in terms of section 46(1)(b) of the Constitution. The provision obliges a court, tribunal, forum or body to promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, the values and principles set out in section 3

⁸ *Ibid* at p. 332.

⁹ *Ibid*.

of the Constitution. The second fundamental principle is that the interpretation of a fundamental human right provision must promote fundamental values. In this case, the interpretation must promote inherent human dignity. The essence of the provision is that interpretation must promote fundamental values and principles enshrined by the Constitution. The outcomes of interpretation must be consistent with the norms embodied in the fundamental constitutional values and principles. Put differently, the fundamental values and principles of the Constitution cannot be violated by interpretation. In the Constitution the principles and values set out in section 46 are derived from section 3 of the Constitution. The principles and values have an overarching influence on all provisions of the Constitution and must permeate all judicial interpretation.

Most significantly, a failure to comply with the Constitution in this regard leads to constitutional invalidity. Once the judicial interpretation adopted by the courts falls short of the values-oriented approach, it no longer conforms to the disciplined approach that is commanded by the Constitution. Therefore, the judicial interpretation of human rights

enshrined in the Constitution must be sensitive to the oriented values to ensure that the process remains constitutionally valid.

Notably, the value of human dignity is one of the principles and values that the interpretation of the Constitution must promote. Its recognition as one of the principles and values that interpretation must promote heightens its importance to the present discussion. It is discussed separately below.

INTERPRETATION IN ACCORDANCE WITH INTERNATIONAL LAW

The third fundamental principle is that the interpretation of a fundamental human right or freedom must take into account international law and all treaties and conventions relating to human rights and freedoms to which Zimbabwe is a party. In other words, the constitutional provisions regarding fundamental human rights and freedoms must be interpreted in harmony with international human rights instruments such as the Universal Declaration of Human Rights (“the UDHR”), the International Covenant on Civil and Political Rights (1966) (“the ICCPR”), the International Covenant on Economic, Social

and Cultural Rights (“the ICESCR”), and the African Charter on Human and Peoples’ Rights (1981) (“the ACHPR”). These human rights instruments provide the sources of the fundamental human rights and freedoms enshrined in the Declaration of Rights by the Constitution. They all declare the fundamental principle that inherent human dignity is the source of all fundamental human rights and freedoms. According to this fundamental principle, which the interpretation of a fundamental human right or freedom must recognise, every fundamental human right or freedom serves human dignity as its essence.

In essence, the provision recognises the universal acceptance of the basic constitutional norms on the international plane. Given this fact, the interpretation of a constitution must necessarily also be done by reference to the rich body of international law that is founded on a body of shared constitutional experiences. There is, therefore, an objective to interpret human rights and fundamental constitutional principles and values in a manner that is consistent with the provisions of international law.

HOLISTIC CONSTITUTIONAL INTERPRETATION

The fourth fundamental principle of interpretation of fundamental human rights and freedoms is that the interpretation must pay due regard to all the provisions of the Constitution. A holistic or generous interpretation robustly favours an expansive interpretation of human rights and other provisions of the Constitution. With respect to human rights, it is, thus, an interpretation that seeks to promote, the essence and substance of the freedoms and rights set out in the Declaration of Rights.

The Supreme Court of Zimbabwe, in the case of *Ndewere v President of Zimbabwe and Others* SC-13-23 at pp 13-14, discussed holistic interpretation thus:

“I am mindful of the celebrated principle of constitutional interpretation that the provisions of the Constitution must be considered holistically to find the legislative intentment.

The Constitutional Court has had occasion to pronounce on that principle in a number of cases. In *Mupungu v Minister of Justice Legal and Parliamentary Affairs & Ors* CCZ -7-21 at pp 46 -47, PATEL JCC made the point that all relevant provisions that bear on the subject for interpretation must be considered together and as a whole, so as to give effect to the objective of the Constitution having regard to the nature and scope of the rights, interests and

duties that form the subject matter of the provisions to be construed.

See also *Chamisa v Mhangagwa & Ors* CCZ – 21-19 at pp 32 – 33; *Museredza & Ors v Minister of Agriculture, Lands, Water and Rural Resettlement & Ors* CCZ 1 – 22 at p18 para 34 and *Mawere v Registrar General* CCZ - 4–15 at p 7 para 20.”

It follows, therefore, that the interpretative value of human dignity can be infused in interpretation to ensure that it bears upon other provisions of the Constitution. In this way, the outcomes of interpretation will be capable of ascribing meaning to provisions of the Constitution in a manner that recognises the inherent dignity of every person.

The case of *Zimbabwe Homeless People’s Federation & Ors v Minister of Local Government and National Housing & Ors* SC 90/20 is illustrative of the use of the purposive and holistic approaches to the interpretation of socio-economic rights. The appellants sought a declaratory order and relief concerning the right to shelter for their minor children. The Court held the following in interpreting the right to shelter for minors:

“It is axiomatic that the Constitution must be interpreted in an holistic and seamless fashion. Each provision is to be interpreted, without doing violence to the actual language used, in a manner

that is consistent and accords with every other relevant provision, so as to achieve the underlying purpose of those provisions. They must be construed as being mutually complementary rather than as being contradictory to one another. In short, the Constitution must be construed as a unified whole.

Reverting to s 81(1) of our Constitution, I am persuaded to adopt the more purposive approach to the interrelationship between paras. (d) and (f) of s 81(1) ... In other words, the obligation of the State to provide shelter to children in need in terms of s 81(1)(f) is not contingent upon the absence of parental care or other appropriate care under s 81(1)(d). The obligation of the State in this respect is not negated or diluted by the primary duty of care ordinarily imposed upon parents. In most situations where socio-economic normalcy is possible, where children are living with their parents, the parental duty of care must predominate so as to proportionately reduce the State's correlative obligations. However, where the parents themselves are financially or otherwise incapacitated from fulfilling their parental obligations, it then becomes incumbent upon the State to intervene and carry

out its own obligation to ensure that the children's welfare is adequately addressed and safeguarded ...To conclude on this aspect, the primary duty of care reposed with parents in respect of their own children does not operate to absolutely absolve the State of its underlying obligation of care towards those children."

The enforcement obligation of the State to promote the realisation of socio-economic rights of persons is contingent on the use of human dignity to give effect to the substantive content of the identified human right. Liebenberg aptly summarises the utility of human dignity in this regard as follows:

“Thus far I have argued that the value of human dignity can enrich our socio-economic rights jurisprudence, first, by justifying claims against social resources when groups lack the material conditions necessary for the development of their capabilities as human beings. Second, respect and concern for the dignity of each person requires an approach that considers the impact of the deprivation on the actual needs and circumstances of the individuals and groups concerned. Finally, it requires an appropriate response to these conditions. Urgent needs and severe

deprivations demand a strong, immediate response. We give expression to the value of human dignity in our constitutional jurisprudence by placing the state under a stringent burden of justification in claims involving a deprivation of basic needs.¹⁰

[Emphasis is added]

OVERVIEW OF THE FUNDAMENTAL PRINCIPLES OF CONSTITUTIONAL INTERPRETATION

The final fundamental principle of interpretation of fundamental human rights and freedoms is that the factors referred to are in addition to any other relevant factors that are to be taken into account in the interpretation of a constitution. The fundamental principles of constitutional interpretation are not exhaustive. In the case of Zimbabwe, section 46(1) of the Constitution makes it clear that the factors it sets out as having a bearing on interpretation are in addition to other factors that are to be taken into account in the interpretation of a constitution. In other words, the fundamental principles cannot be

¹⁰ Sandra Liebenberg, 'The Value of Human Dignity in Interpreting Socioeconomic Rights', (2005) 21 SAJHR.

substituted by other relevant factors to be taken into account in the interpretation of a constitution.

It must follow from the fundamental principles that, since inherent human dignity is recognised as the source or essence of fundamental human rights and freedoms, a purposive interpretation which gives full effect to the fundamental right or freedom *ipso facto* promotes human dignity as the foundational value lying at the root of every legal system for ordered liberty.

The process of the exercise of the power of interpretation ordinarily moves from a normative position to an authoritative meaning of the text, which then becomes the standard. In the case of the interpretation of fundamental human rights provisions, the normative position is defined by the constitutional provision. An interpretation of a constitutional provision is governed and underlined by the foundational values of the supremacy of the Constitution and the rule of law, which control the constitutionality of the standard of the interpretation and its application to the legislation or conduct alleged to be in violation of the fundamental human right or freedom.

In the context of the above fundamental principles of interpretation, one notes that the fundamental principles encapsulate the objectives and intended outcomes of constitutional interpretation. The status of the fundamental principles as objectives of interpretation is important. This is so because in interpretation, a norm is interpreted to arrive at an end – the meaning of the norm. To achieve an interpretative end, there must be a means. The end is the standard ultimately derived from interpretation as the means.

Interpretation is an important means of giving effect to constitutional law as the protector of fundamental rights and freedoms. It is a mechanism for giving effect to the obligations imposed by the Constitution on duty-bearers to respect, protect, promote and fulfil fundamental rights and freedoms.

While interpretation is a means towards an end, it is also an end in itself. It is an end because a constitution, though declaring what the constitutional framework of a country is, leaves room for disputes about the meaning of its provisions to be interpreted and resolved by the courts. In this regard, where a dispute arises regarding the meaning

of a provision of the Constitution, interpretation stands as the end achieved during the interpretation of the provision.

Human dignity serves as a fundamental principle in shaping governmental relations with citizens, as well as influencing the nature of interactions among individuals within society. Human dignity not only acts as a guiding principle but also serves as a legal benchmark, fundamentally shaping the State's obligations and the formulation of laws. The State commits to creating laws and institutions that protect individual rights, such as the right to life, liberty, and equality, which are rooted in the concept of human dignity.

When sections 3(1)(e) and 51 of the Constitution are read together with section 46, the dominant influence of inherent human dignity as a constitutional value in the interpretation of fundamental human rights provisions is unquestionable. Not only must a court promote inherent human dignity as a foundational value and principle in the process of the exercise of the power of interpretation of a fundamental right, it must respect, protect and give it full effect when it is claimed directly as a fundamental human right. In compliance with the obligation to respect, protect and give full effect to inherent human dignity as a

fundamental human right, a court cannot adopt an interpretation based on the principle that a fundamental human right may be subject to a limitation only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society. This is because, in terms of section 86(3)(b) of the Constitution, the right to human dignity is an absolute right and non-derogable. This means that the doctrine of proportionality, often invoked in the interpretation of derogable fundamental human rights and freedoms, is not applicable in the interpretation of a constitutional provision enshrining inherent human dignity as a fundamental human right.

In the case of *S v C (a juvenile)* 2019 (2) ZLR 12 (CC) at 24G-25A, it was held that:

“Section 86(3) of the Constitution makes it clear that both the right not to be subjected to inhuman or degrading punishment and the right to the inherent dignity which must be respected and protected are non-derogable. The section provides that no law may limit these rights and no person may violate them. The rights are not only inherent and inalienable; they are also inviolable. In *S v Ncube and Ors supra* at 267B-D it is stated:

‘The *raison d’etre* underlying section 15(1) is nothing less than the dignity of man. It is a provision that embodies broad and idealistic notions of dignity, humanity, and decency, against which penal measures should be evaluated. It guarantees that the power of the State to punish is exercised within the limits of civilised standards. Punishments which are incompatible with the evolving standards of decency that mark the progress of a maturing society or which involve the unnecessary and wanton infliction of pain are repugnant. Thus, a penalty that was permissible at one time in our nation's history is not necessarily permissible today. What might not have been regarded as inhuman or degrading decades ago may be revolting to the new sensitivities which emerge as civilisation advances.’”

It is equally emphasised in terms of section 86(3) of the Constitution that no person may violate the right to human dignity. Thus, the court in interpreting relations between individuals must also take into account whether there has been any limitation of human dignity. This principle takes into account the Kantian moral philosophy that humans as individuals have to abide by certain standards that accommodate and recognise the equal inherent dignity of other persons. A critical

appreciation of the Constitution highlights that the relational claim of human dignity is well protected by the various of the supreme law which culminates in the explicit outlaw of the limitation of human dignity *vis-a-vis* inter-subject relations which are highlighted in the aforementioned section 86(3).

In the case of *Makoni v Commissioner of Prisons and Another* 2016 (2) ZLR 196 (CC) at p 199H-200A, wherein it was stated that:

“As a preliminary interpretive point of departure, it is necessary to recognise the special status enjoyed by the rights and freedoms guaranteed by ss 51 and 53 of the Constitution. By virtue of paras (b) and (c) of s 86(3), no law may limit and no person may violate, *inter alia*, the right to human dignity and the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment. What this means is that these two rights are inviolable. They cannot be circumscribed by reference to the rights and freedoms of others as envisaged by s 86(1). Furthermore, they are not derogable by dint of any law of general application contemplated under s 86(2).”

Human dignity remains relevant insofar as setting out the boundaries which statutory limitation of a fundamental right or freedom may not exceed. The principal consideration is that the legislation passed by the Legislature must not trammel or erode the value of human dignity irrespective of its intended purpose or benefit to the State. This is indicative that, in relation to the interpretation of fundamental human rights, the normal principles of interpretation are secondary. They are discarded in favour of a values-driven interpretation that balances State and individual interests upon the basis of human dignity.

The dominant and omnipresent influence of human dignity as a foundational value in the interpretation of fundamental human rights and freedoms is apparent from the fact that a court that does not enjoy final and binding decision-making in the interpretation of constitutional matters may fail to respect, protect and promote fundamental human rights and freedoms.

The Constitution provides, through the remedy of constitutional review and individual complaint procedure, accountability mechanisms in terms of which where there is an allegation of infringement of a fundamental right or freedom by a subordinate court the judicial

process is available to investigate the complaint and redress the infringement if proved. The Constitutional Court has stated that it is clear from the consideration of the objective for the establishment of the remedies that the possibility of having direct access to the Constitutional Court for the protection of fundamental rights and freedoms is consistent with the general spirit of the Constitution, which strongly affirms the central role of human dignity and fundamental rights and freedoms.

The rights-based and values-oriented approach in the interpretation of fundamental human rights and freedoms provisions means that a court must work with and understand particular human rights and freedoms allegedly violated. It must also work with and understand the value of recognition of inherent human dignity that it must promote. It must bear in mind the fundamental principle that human dignity is at the heart of the constitutional scheme for the protection of fundamental human rights and freedoms. In other words, the interpretation sets off a series of consequential events aimed at and culminating in the declaration of a normative standard which respects, protects and promotes human dignity. It is that normative standard, set in particular by the court of

final and binding constitutional jurisdiction, which forms part of constitutional law and is applied to the legislation or conduct alleged to be in violation of a fundamental human right or freedom to test its constitutionality.

The fundamental principles of constitutional consistency and therefore validity at the centre of the litigation on the interpretation of the fundamental rights and freedoms in the first place require that the normative standard be applied to the legislation or conduct alleged to be the source of the infringement of the fundamental right or freedom.

There would therefore have to be the interpretation of the legislation or the conduct concerned before the application of the normative standard to it to decide whether the legislation or the conduct is in violation of the fundamental right or freedom and therefore a threat to human dignity.

It is clear from the above analysis that constitutional interpretation provided for under section 86(3) of the Constitution must proceed on the basis of the acceptance of the fundamental principle of the absoluteness of the values that constitute the foundation undergirding the whole constitutional order. These values include the supremacy of

the Constitution, the rule of law, and inherent human dignity. Human dignity gives meaning to fundamental human rights and freedoms.

There is therefore a special role in the constitutional interpretation of fundamental human rights and freedoms which only human dignity can play. The role cannot be served by any other foundational value. The Constitution is based on the commitment by all that the fundamental human rights and freedoms enshrined in the Declaration of Rights will at all times be respected, protected, promoted and fulfilled.

Zimbabwean scholar Admark Moyo observed the following regarding a values-oriented approach to the judicial interpretation of human rights:

“A value-coherent theory is fundamentally premised on the realisation of justice for the individual and, where applicable, the community. The value-oriented approach involves ‘the rejection of positivism as a legal creed and the adoption of a realist cum-value-oriented approach to the judicial process and civil liberty’. Teleological interpretation is wider than both literal and purposive interpretation. It does not just revolve around the ‘isolated purpose of the individual statute, but *par pro toto* refers to all considerations that can be applied’. Value-based interpretation of legal texts aspires to the coherence of the legal system as a whole and, in this respect, is broader than the purposive theory. It is, in Mureinik’s words, ‘the judge’s chief weapon against legislative injustice’ by making recourse to such broader goals of the legal system as justice, human dignity, equality and freedom. Teleological theory recognises the

importance of the abstract, vague and more general purposes of the law that often form the background of legal texts. The need to avoid hard, harsh and unjust consequences, even when they are clearly mandated by the legislative or constitutional text, imposes on judges the duty to make creative efforts to justify rulings that are consistent with the core values of justice, equality, human dignity and freedom.”¹¹ [*Emphasis is added*]

Accordingly, the entrenchment of human dignity as a value is meant to ensure that there is delivery of transformative justice. Human dignity in terms of section 3 of the Constitution is responsible for establishing standards and norms of interpretation for Judges. In this regard, it is a normative basis for interpreting other human rights enshrined within the Constitution.

In the case of *Sogolani v The Minister of Primary and Secondary Education and Ors* CCZ 20/20, the Constitutional Court also alluded to the normative role of human dignity as a foundational constitutional value. The case involved a claim for constitutional relief based on the enforcement of the right to freedom of religion in terms of section 60 of the Constitution. In reaffirming the normative status of human dignity under section 3 of the Constitution, it was held that:

¹¹ Admark Moyo, ‘Zimbabwe’s Constitutional Values, National Objectives and the Declaration of Rights’ in Admark Moyo (ed), “*Selected Aspects of the 2013 Zimbabwean Constitution and the Declaration of Rights*”, Raoul Wallenberg Institute, 2022

“The State cannot control the exercise of the right to choose, have, adopt, change religion or entertain a religious belief because the contents of the exercise of the right and their effects remain embedded in the conscience of the individual. The State may pass laws of general application to limit the exercise of the right to manifest, express or propagate religion or religious belief in the interests of the common good. The actions of the State are regarded by the Constitution as an exception, because the primary constitutional duty on the State is to respect, protect, promote and fulfil the fundamental rights and freedoms guaranteed to every person under s 60(1) of the Constitution. Underlying the constitutional order is the unity of the fundamental values and principles of human dignity, equality, justice and freedom which every governmental institution in a democratic society is required to protect and promote.” [*Emphasis is added*]

The same sentiments were also noted in the case of *S v C (a juvenile)* 2019 (2) ZLR 12 (CC), in which the Constitutional Court presided over confirmatory proceedings regarding the constitutional invalidity of section 353 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] for violating the right against physical or psychological torture or cruel, inhuman or degrading treatment or punishment in terms of section 53 of the Constitution. The Court held the following regarding the effect of the constitutional value of human dignity on the judicial interpretation of section 53 of the Constitution:

“The assessment of the purpose of the protection of a fundamental human right or freedom takes into account the values and principles on which a democratic society is based. It is clear from

a consideration of the value system underpinning the Constitution that the object and purpose of s 53 of the Constitution is to afford protection to human dignity, and physical and mental integrity, which are some of the most fundamental values.

Section 3 of the Constitution recognises human dignity as one of the values and principles on which Zimbabwe is founded. As a foundational value, human dignity gives rise to all fundamental rights and forms the essence of each of them. The Constitution underscores the national commitment to the protection of the interests of the individual, supported by human dignity as a foundational value. The principle of the inherent dignity of the individual provides the foundation for other human rights and freedoms enshrined in the Constitution.” [*Emphasis is added*]

In the case of *Kachingwe and Others v Minister of Home Affairs and Another* 2005 (2) ZLR 12 (S), the Supreme Court ruled that the conditions under which the appellants were subjected to whilst in police detention were degrading and in violation of the right to human dignity as contained in the Constitution of Zimbabwe as it was at that time.

In the case of *Makoni v Commissioner of Prisons & Anor supra* the Constitutional Court found that a life sentence imposed on a convicted prisoner without the possibility of parole or release on license constituted a violation of human dignity and amounts to cruel, inhuman or degrading treatment or punishment in breach of sections 51 and 53 of the Constitution.

Accordingly, human dignity may be invoked to illustrate the violation of a primary right. This approach was highlighted in the case of *S v C (a juvenile)* (*supra*) where the Constitutional Court was seized with a matter involving the violation of the right against torture, inhumane and degrading punishment. The Court linked the aforementioned right to human dignity as follows:

“The fundamental principle is that a person does not lose his or her human dignity on account of the gravity of an offence he or she commits. Even the vilest criminal remains a human being with inherent dignity meriting equal respect and protection (per BRENNAN J in *Furman v Georgia* 408 US 238 (1972) at 273). The fact that he or she has committed a crime of a serious nature does not mean that he or she has lost the capacity to act with self-respect and respect for others in the future. Commission of an offence is a result of an exercise of freedom of choice to act in a manner proscribed by a societal norm. That in itself means that the person has the rational capacity to choose to act in a manner approved by the societal norm which is consistent with self-respect and respect for the inherent dignity of others. He or she remains entitled to the equal respect of his or her dignity as a human being, regardless of the gravity of the crime he or she committed. A humane penal system is one that is based on the

principle that a human being must not be treated only as a means but always as an end for the purposes of punishment.”

The cited authorities illustrate that where there is a legal dispute regarding the rights and freedoms of persons, Judges must interpret the law in a manner that promotes the constitutional value of human dignity. This is because the foundational value established the normative standard that must be applied when giving effect to the substantive content of fundamental rights entrenched by the Constitution.

The appropriate role of constitutional values in the interpretation of human rights is reflected in constitutional literature. It is advanced that:

“Founding values and principles play a secondary but nonetheless important role in determining the content of rights. This is because the Constitution requires a value-laden approach to the interpretation of rights. Since they entrench normative values and standards, the founding provisions do not create self-standing and enforceable constitutional rights, but merely lay down the principles and values with which all the rights and their interpretation must be consistent ... At a more critical level,

reference to the values which underlie a democratic society imposes on courts the duty to consider the spirit of the Constitution when interpreting the rights in the Declaration of Rights ... The spirit of the Constitution is often derived from shared societal values, i.e. norms that pervade all subsidiary value systems in a political community. Values, whether enumerated or not, animate the underlying spirit and philosophy of the Constitution. The idea of unenumerated values and rights implies that in constitutional interpretation there is a place for the unwritten in the written Constitution. These values represent the spirit of the Constitution and, in giving meaning to fundamental rights or freedoms, courts must give effect to such values¹²

[Emphasis is added]

CRITICISM OF THE USE OF HUMAN DIGNITY IN JUDICIAL INTERPRETATION OF HUMAN RIGHTS

The criticism of human dignity in contemporary constitutional law as a prominent constitutional value generally revolves around two key

¹² Admark Moyo, Zimbabwe's Constitutional Values, National Objectives and the Declaration of Rights' in Admark Moyo (ed), "Selected Aspects of the 2013 Zimbabwean Constitution and the Declaration of Rights", Raoul Wallenberg Institute, 2022

issues. Human dignity is regarded as the cornerstone of transformative justice. However, there is no universally accepted definition of human dignity and the use of human dignity as an interpretative tool can also promote judicial overreach when Judges lean towards their subjective understanding during the decision-making process.

The foremost criticism of human dignity relates to the absence of a general definition of the term. This is illustrated in several international human rights documents that entrench human dignity. The UDHR, which is regarded as the foundational text of human dignity in contemporary constitutional law, does not define human dignity. This design has been integrated into domestic constitutions that entrench human dignity such as the Constitution of South Africa and the Constitution of Zimbabwe.

Human dignity has been criticised by scholars as a vague concept whose specific content is subjective to cultural standards. It was held that:

“First, one could argue that dignity is a vague and complex concept, one that is difficult to define and that often exists in the eye of the beholder. This is a common critique of dignity as a legally enforceable value. According to these skeptics, dignity is

such an elastic concept that judges will inevitably use it to reach whatever preconceived result they like. To make it a constitutional value is problematic enough, these skeptics would argue, but to attempt to interpret the work of legislatures based on such a vague concept would be to subject those legislatures to the whims of judges. In other words, ‘if the Court fails to enforce structural constitutional norms because the Constitution provides little guidance as to their content in specific cases, how does the Court expect to come up with [statutory interpretation] rules that are any more principled?’¹³

Another scholar has criticised the ambiguity of human dignity on the basis of the following rationale:

“The judicial invocation of the concept of human dignity raises two important questions – the failure to provide a specific guidance because of the variety of existing concepts about the meaning and scope of human dignity, and the connection of dignity with two sides of the equally important conflicting rights, e.g. liberty and equality, freedom of speech and privacy, etc. Critics argue that dignity alone cannot resolve such a conflicting situation. In practice, the conflict is solved by balancing based on the concrete factual situation and particular cultural values (RAO, 2013, p. 211). The critics ask what is the role of dignity if not just a rhetorical gloss? Some scholars, such as Robert Post, join this criticism and warn against the inevitable confusion by linking dignity with other rights. For example, in the context of dignity’s connection with equality, he argues that the objective of anti-discrimination law should be eliminating harmful social injustice than the protection of human dignity (GLENSY, 2011, p. 133).”¹⁴

¹³ Noah B. Lindell, ‘The Dignity Canon’, Cornell Journal of Law and Public Policy [Vol. 27:415]

¹⁴ Marcio Ricardo Staffen, ‘About the Principle of Dignity: philosophical foundations and Legal Aspects’

The lack of consensus regarding the definition of human dignity has also been criticised as enabling judicial overreach by Judges. It is submitted that human dignity provides Judges with a standard, reference to which enables them to overcome subjective dispositions when interpreting the law. It has been said that:

“Second, some have argued that importing constitutional values into statutory interpretation allows judges ‘to make constitutional law on the cheap’. Resolution through substantive canons, critics argue, allows judges to treat decisions of enormous importance as ‘mere’ statutory interpretation cases. The result is a counter-majoritarian system in which courts can drastically change the law without the same salience that would accompany constitutional decisions.”¹⁵

However, it is evident that while there might be merit in some of the concerns expressed, the criticism fails to take into account that the purposive interpretation is governed by norms. Whilst it differs from the narrow construction of a positivist approach to judicial interpretation, human dignity still abides by the basic tenets of statutory interpretation. In addition, the argument against the vagueness of human dignity is counteracted by the acceptance of core minimum standards that are then subjected to the cultural or societal values

¹⁵ Noah B. Lindell, ‘The Dignity Canon’, *Cornell Journal of Law and Public Policy* [Vol. 27:415]

depending on the context. As such, it is arguable that there is no consensus regarding the concept of human dignity as a constitutional value and a fundamental human right.

The rationale for the use of human dignity in constitutional interpretation was justified by Niemi as follows:

“In its second distinctive sense, human dignity functions in an enabling manner in legal argumentation. This could also be called the positive use of human dignity. From an individual’s perspective, this positive sense describes ‘... something that virtually all people want’. The aim is to empower people and promote conditions for autonomous life. As Dupré clarifies:

‘... power relationship between individuals and the state, and its (re)balancing in favour of human beings, [is] a recurring issue in dignity case law. This is particularly clear in relation to people who are vulnerable for a range of reasons, such as terminal illness, mental or physical disability, or inability to earn a living. In all these cases, it is suggested that the dignity argument was raised in an attempt to foster a greater level of autonomy and quality of life for the applicants.

In line with these observations, the clearest examples of the enabling use can be found in judgments regarding guardianship services.

The rationale of this use is to respect the rights that people have and not restrict them unnecessarily, even if the individual has for some reason a limited capacity to act. The objective is to guarantee people the means to set their own ends in life. Both the enabling use and the restrictive use can be seen to argue for protection against totalitarian destructive influences, but by different means. The enabling

use is not typically connected with evaluation of severity; instead, the operation can be quite subtle, and the effects proportionate. The aim is to respect and enable people to act as autonomous rights-holding agents.’’¹⁶

Similarly, McCrudden also commented on the utility of human dignity in judicial interpretation thus:

“Whether dignity is used as a principle with specific content, or as a right, or as an obligation, or as a justification, particular values seem particularly closely related to the judicial interpretation of the core idea of dignity. Sometimes dignity is viewed as particularly associated with individual autonomy where, for example, a woman's freedom to have an abortion is upheld on the basis of dignity. Sometimes dignity is viewed as particularly associated with freedom from humiliation as, for example, where restrictions are placed on the publication of information or data that would lead to a person being pilloried. Sometimes dignity is seen as particularly associated with protecting individuals from severe physical or mental torment inflicted by the authorities, thus prohibiting torture and other forms of inhuman or degrading treatment. Sometimes dignity is seen as particularly associated with protection from discrimination. In an important intervention, Andrew Clapham has usefully suggested that:

‘... concern for human dignity has at least four aspects: (1) the prohibition of all types of inhuman treatment, humiliation, or degradation by one person over another; (2) the assurance of the possibility for individual choice and the conditions for “each individual's self-fulfilment”, autonomy, or self-realization; (3) the recognition that the protection of group identity and culture may be essential for the protection of personal dignity; (4) the creation of the

¹⁶ Niemi, Hanna-Maria. 2021. “The Use of Human Dignity in Legal Argumentation: An Analysis of the Case Law of the Supreme Courts of Finland.” *Nordic Journal of Human Rights* 39 (3): 280–99. doi:10.1080/18918131.2021.1999576.

necessary conditions for each individual to have their essential needs satisfied.’

We can use this rough categorization as a useful starting point for our analysis of the cases, whilst recognizing that these are overlapping categories.”¹⁷

CONCLUSION

In light of the foregoing, it is evident that human dignity is one of the core constitutional values that Judiciaries have universally recognised to protect and promote human rights. The concept of human dignity is generally understood as encompassing three elements, which are the ontological claim, the relation claim and the State claim. These elements form the constituent features of human dignity as entrenched in contemporary constitutional law. The normative understanding of human dignity has been informed by its philosophical underpinnings and evolution in international law which has cascaded into the domestic jurisdictions of States.

As a constitutional value, human dignity has been utilised to inform the normative understanding of human rights, to function as an interpretative source of other human rights and fundamental freedoms,

¹⁷ Christopher McCrudden, Human Dignity and Judicial Interpretation of Human Rights, *European Journal of International Law*, Volume 19, Issue 4, September 2008, Pages 655–724, <https://doi.org/10.1093/ejil/chn043>

and as an instrument to measure the legality of statutory limitations imposed on human rights. In carrying out these interrelated roles during the process of judicial interpretation, human dignity has been the driving force behind the attainment of transformative social justice that resonates with societal values. Accordingly, human dignity is a fundamental value that can be purposively utilised by courts both in present and future matters to give effect to evolving societal standards and values.