

**THE CONSTITUTIONAL COURT'S USE OF HUMAN
DIGNITY IN THE INTERPRETATION OF THE SOUTH
AFRICAN BILL OF RIGHTS: SELECTED CASES**

By

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Chapter 1: INTRODUCTION

1.1 Outline of research question

The Constitutional Court often relies on human dignity in the interpretation of Bill of Rights.¹ Human dignity is a constitutional value enshrined in section 1, section 10, section 36 and section 39 of the Constitution. It is a founding value of the constitution of South Africa.² As a foundational value '[i]t reinforces rights claims, gives direction to or informs the extent and scope of other rights and it is emphasised to determine whether violations of such rights have occurred.'³

Human dignity is an inherent attribute of human beings, a characteristic of life which protects people from actions that fail to recognize that everyone is equal in dignity and worth.⁴ It is not very clear what the role of human dignity is in the interpretation of the Bill of Rights by the Constitutional Court. It has been linked to equality,⁵ transformation of society,⁶ right to life,⁷ cruel and inhumane punishment,⁸ and freedoms.⁹ The link to any of these concepts has not been clearly explained by the Court.

The research question in this thesis is as follows: How has human dignity helped the Constitutional Court in the interpretation of the Bill of Rights? I will argue that given that human dignity is imprecise and vague it is difficult to determine the extent of its usefulness in the interpretation of the Bill of Rights. It seems that Court has used the in such a way that makes it look like a value which can be thrown into any, if not all arguments in the

¹ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) Para 327. *Prince v President of the Law society of the Cape of Goodhope and Others* 2002 (3) BCLR 231 (CC) Para 50. *Dawood and Another v Minister of Home Affairs and others* 2000 (3) SA 936 (CC) Para 35. These are just the few examples of the cases.

² Section 1 of the Constitution of the Republic of South Africa Act 108 of 1996 hereinafter referred to as the Constitution.

³ Nicholas Haysom 'Human Dignity' *Butterworth's Lexus* (2008) 5-6.

⁴ *Ibid* 5-11.

⁵ *President of the Republic of South Africa and another v Hugo* 1997 (4) SA 1 (CC).

⁶ *Soobramoney v Minister of Health. KwaZulu-Natal* 1998 (1) SA 765 (CC) Para 8.

⁷ *S v Makwanyane (note 1)* Para 327.

⁸ *S v Williams* 1995 (3) SA 632 (CC) Para 20.

⁹ *Prince v President of the Law Society of the Cape of Good Hope and others* (note 1).

interpretation of the Bill of Rights without much merit or explanation as how it assists in the interpretation of the rights. This undermines the importance of human dignity as a foundational value. Furthermore it hinders human dignity from assisting the Court in the interpretation of rights.

My focus will be on selected cases of the Constitutional Court dealing with the following areas: punishment cases, socio-economic rights particularly housing and social assistance and the right to equality. I have chosen these areas for the following reasons. In the sentencing cases the Constitutional Court relied heavily on human dignity in determining the constitutionality of both the death penalty and corporal punishment. Socio-economic rights were chosen because the provision of socio-economic rights was intended to get rid of poverty with the hope of allowing people to live in and with dignity.¹⁰ With respect to equality it has been characterized as 'closely related' to dignity such that at most times the two are dealt with and applied in a similar manner.¹¹

1.2 Research objective

My objective in this project is two-fold. First, to clarify and understand how and why human dignity plays a fundamental role in the interpretation of the Bill of Rights by Constitutional Court. Second, to assess how human dignity assists the Court in the interpretation of the Bill of Rights.

1.3 Reasons for choosing the topic

Human dignity is a crucial value in the South African constitutional era and the Constitutional Court has relied intensely on it when interpreting the Bill of rights. Furthermore, human dignity has been described as a

¹⁰ *Government of the Republic of South Africa and Other v Grootboom and Others* 2000 (11) BCLR 1169 (CC) Para 23. Nyaradzo Machingambi 'Can a case be made for the provision of government funded social assistance to refugees in South Africa? Defining a constitutional standard for refugee protection in South Africa. LLM Dissertation submitted in 2006 to the University of Cape Town 8.

¹¹ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 665 (CC) Para 31.

fundamental value of the constitution thus an important value in the jurisprudence of the Constitutional Court. Therefore, I chose to look into human dignity because I wish to determine how and why human dignity is important in the interpretation of the Bill of Rights. Once this importance is determined, I will consider how it has assisted the Court in the interpretation of rights.

1.4 Literature review

There are several pieces of work which are of direct relevance to this study. The first one is an article by Haysom which acknowledges that human dignity is a difficult concept to define and this has been accepted by the Constitutional Court in the *National Coalition for Gay and Lesbian Equality v Minister of Justice*.¹² It is no surprise then that human dignity is held to be broad, imprecise and too general. In a different article written by Chaskalson, it is maintained that human dignity is not a 'substantive norm which can be defined in substance, rather its legitimizing function depends on its relation to single human rights.'¹³ Furthermore, this legitimizing role must be accompanied by regulative principles and norms that govern and control the relationship between the right and the norm. Respect of dignity according to Chaskalson has been stressed because of the historical background and context of South Africa.¹⁴

Haysom goes to state that recognition of human dignity informs, animates and directs all the other fundamental rights because human dignity is the cornerstone value of the Bill of rights.¹⁵ It gives purpose and meaning to the rights in the Bill of rights thus it used frequently by the Constitutional Court. Human dignity is used as balancing and harmonizing tool in competing rights and interests like freedom and equality.¹⁶ Rights like freedom from

¹² *National Coalition for Gay and Lesbian Equality v Minister of Justice* (note 11) para 28.

¹³ Arthur Chaskalson 'The Third Bram Fisher Lecture: Human Dignity as a foundational value of our Constitutional Order' 16 *SAJHR* 193 2000, 198.

¹⁴ Arthur Chaskalson 'Human dignity as a Constitutional Value' in *The Concept of Human Dignity in the Human Rights discourse*. The Hague: Kluwer Law 2002, 133-145, 138.

¹⁵ Haysom (note 3) 5-1.

¹⁶ *Ibid*.

cruel and inhumane punishment, privacy, equality and security of a person, which are fundamental rights, are closely linked to human dignity thus cannot be held to be completely separate.¹⁷

Human dignity plays a foundational role to the rights in the Bill of rights which entails that '[i]t reinforces rights claims, gives direction to or informs the extent and scope of other rights and it is emphasized to determine whether violations of such rights have occurred.'¹⁸ Furthermore it guides the Constitutional Court or any court in determining the purpose and aim of each right. Dignity plays an important role in the limitation inquiry, for example if a law limits a right then the limitation should be justifiable under section 36 of the constitution, the limitation clause.¹⁹ For the limitation to be justified it must be 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.'²⁰ In this limitation clause human dignity plays an important role in balancing competing rights and interests.

Haysom states that human dignity and the right to life are intertwined thus agree with the decision in *S v Makwanyane* that the imposition of the death offends the value of human dignity.²¹ Furthermore Haysom agrees with the decision in *S v Williams* which places human dignity at the heart of the prohibition of cruel and inhumane punishment.²² He further states that human dignity also lies at the heart of the prohibition against torture, arbitrary deprivation of freedom, detention without trial and rights over one's physical self.²³

The link between human dignity and equality has been confirmed by statements that states that human dignity lies at the heart of the prohibition against unfair discrimination.²⁴ Furthermore, as stated by Chaskalson,

¹⁷ Ibid, 5-3.

¹⁸ Ibid, 5-6.

¹⁹ Ibid, 5-9.

²⁰ Section 36 of the Constitution of the Republic of South Africa.

²¹ Haysom (note 3) 5-10.

²² Ibid, 5-11.

²³ Ibid.

²⁴ Ibid

discrimination practices during apartheid are a denial of people's inherent worth²⁵ which emphasizes that dignity and equality are interdependent. Haysom does not however consider the weakness of the value of human dignity and how these weaknesses can hinder or help in the interpretation of the Bill of Rights. Furthermore he does not really discuss whether human dignity assists the Constitutional Court, he simply assumes it does and discusses human dignity based on this assumption.

Sandra Liebenberg discusses human dignity in relation to socio-economic rights and she states that human dignity plays a central role in informing the interpretation of socio-economic rights especially in the reasonableness test.²⁶ She states that they are positive and negative aspects to the application of human dignity by the courts. The positive ones help show the insufficiency of the application of human dignity to socio-economic rights.²⁷ Furthermore, she also highlights how the jurisprudence can be improved to amount to a stronger interpretation and application of socio-economic rights.²⁸

In the article three critiques of human dignity are discussed. The first one is the 'indeterminacy of human dignity as a legal value,' which means that human dignity 'cannot guide us as to when constraints should be placed on state interference with liberties and when it should act to reconstruct society.'²⁹ Liebenberg states the way to rebut this criticism is to look at dignity as relational value which assists in 'us to perceive the limits of individual claims on social resources with reference to the needs (equal worth) of others and the available resources.'³⁰ The second one is the focus of human dignity to personal issues rather than a focus on the 'systemic socio-economic injustices in societies.' Lastly, its link with freedom and autonomy which de-emphasizes the positive measures needed to remedy material

²⁵ Chaskalson (note 14) 140.

²⁶ Sandra Liebenberg 'The Value of Human dignity in interpreting Socio-economic Rights' (2005) 21 *SAJHR* 1, 1.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*, 3.

³⁰ *Ibid.*

disadvantage.³¹ However she states that if human dignity had these 'inevitable implications' then it will be unfavourable to the development of transformative socio-economic rights jurisprudence.³² The main issue with this article is that it is restricted only to socio-economic rights which limit the application of the arguments made in the article.

The use of human dignity together with equality and freedom in interpreting the Bill of rights by the Constitutional Court has been characterized by Woolman as flaccid thus 'invariably substitutes for more rigorous interrogation of constitutional challenges in terms of the specific substantive rights found in Chapter 2 of the Constitution.'³³ Furthermore, reliance by the Constitutional Court on values like human dignity has allowed the Court to move away completely from the text of the constitution which allows the Court to decide cases as they please thereby undermining the Bill of Rights.³⁴

Woolman discusses the approach of the Constitutional Court in deciding cases and he maintains that the decisions of the Constitutional Court are thinly reasoned, murky, lack analytical rigor and are fond of an outcome based mechanism. Furthermore they are characterized by a refusal to directly apply the Bill of Rights, instead they are characterized by a constant analysis of flaccid and vaguely defined terms i.e. dignity, equality and freedom³⁵ which was not intended by the drafters of the constitution. The constant use of s39 is favoured by the court so as to secure agreements between the judges and 'suppresses the logic behind the outcome which leaves readers of the judgment at a loss of how the court may apply the Bill of Rights in the future.'³⁶ The conclusion in this article is that the Constitutional Court is a minimalistic court which has shied away from

³¹ Ibid, 2.

³² Ibid, 3.

³³ Stuart Woolman 'Amazing, Vanishing Bill of Rights' *SALJ* 2007 762, 762.

³⁴ Ibid.

³⁵ Ibid

³⁶ Ibid.

approaching the Bill of Rights directly. The article however does not really deal directly with the application of human dignity in the interpretation of the Bill of Rights but it highlights the characteristics of the Constitutional Court.

1.5 Research methodology

In this study the following sources will be used: primary sources which will be the cases of the Constitutional Court and secondary sources which will include books, dissertations, journals and internet sources.

1.6 Structure of the thesis:

1.6.1 Chapter 1: Introduction

This chapter introduces the context of the study and aspects of human dignity. This chapter also aims to establish what the paper seeks to discuss and the need for the discussion. It defines the ambit of this study.

1.6.2 Chapter 2: History and the meaning of human dignity

The main focus here is putting human dignity in the historical context of South Africa which entails discussing the place of human dignity during apartheid and in the constitutional era. The history and origin of human dignity will be discussed in this chapter. The chapter will also highlight how human dignity was undermined during apartheid and why it is a crucial value in the constitutional era. Finally, the chapter will also discuss the definition of human dignity and the conceptual limitations of human dignity.

1.6.3 Chapter 3: Application of human dignity in punishment cases

This chapter will show how human dignity is used in the punishment cases to determine the nature of an appropriate punishment. It will explore how human dignity is used in the determination of a constitutional

punishment which does not unjustifiably limit any of the entrenched rights. The link between right to life, freedom from cruel and inhumane punishment and human dignity will be explored in an effort to highlight how this interdependency should assist a sentencing court in reaching a constitutionally acceptable sentence. The main cases that will be focused on are *S v Makwanyane*³⁷ and *S v Williams*.³⁸

1.6.4 Chapter 4: Human dignity in selected socio-economic right cases

The right to housing and the right to health care are the main focus of this section because of the way the Constitutional Court has interpreted these rights in relation to human dignity. The aim here is to show how the right to human dignity has been used to argue that the above rights should be made available as failing to do so is a failure to allow people to live in dignity. The main cases to be focused on are *Government of the Republic of South Africa and Other v Grootboom and Others*³⁹ and *Soobramoney v Minister of Health. KwaZulu-Natal*.⁴⁰

1.6.5 Chapter 5: Human dignity in selected equality cases

The main focus of this chapter is the right to equality and how it is linked to human dignity as a value. The aim is to show how human dignity helps in the interpretation of the right to equality and the prohibition of discrimination. The main cases to be focused on are *President of RSA v Hugo*,⁴¹ *Khosa and Others v Minister of Social Development and Others*;

³⁷ *S v Makwanyane* (note 1).

³⁸ *S v Williams* (note 8).

³⁹ *Government of the Republic of South Africa and Other v Grootboom and Others* (note 10).

⁴⁰ *Soobramoney v Minister of Health. KwaZulu-Natal* (note 6).

⁴¹ *President of the Republic of South Africa and another v Hugo* (note 5).

*Mahlaule and Others v Minister of Social Development and Others*⁴² and *Harksen v Lane*.⁴³

1.6.6 Chapter 6: Conclusion and recommendations

This section will draw some conclusions and make recommendations. The focus of this chapter is to show how the Constitutional Court should be interpreting the Bill of Rights. The chapter will discuss the lack of content in the application and discussion of human dignity by the Constitutional Court and how more content can be added to such an important value of the constitution. The intention is to show how content can be added to the application of human dignity without undermining the Bill of Rights. Afterwards the chapter will recommend the approach to be taken when interpreting the Bill of Rights. This preferred approach will enable the Court to discuss the issues before it in more detail than it currently does.

⁴² 2004 (6) BCLR 569 (CC).

⁴³ 1998 (1) SA 300 (CC).

Chapter 2: HISTORY AND THE MEANING OF HUMAN DIGNITY

2.1 Introduction

The 'recognition, promotion and protection of human dignity are the touchstone of the new political order and are fundamental to the new Constitution of South Africa.'⁴⁴ The history and origin of human dignity will be discussed in order to clearly establish where human dignity originates from and why it plays an important role in the new democratic South Africa. The value and place of human dignity in the new constitutional era will also be discussed in an effort to highlight how the constitutional era has transformed the apartheid era thereby explaining why human dignity has become a very crucial and pre-eminent value in the constitutional era. This chapter will also focus on the definition of human dignity including a highlight of the conceptual limitations of human dignity.

To establish that human dignity functions as a touchstone of the new constitutional order, it is important to consider human dignity in a South African context which requires one to consider the past events so as to highlight the lack of respect, promotion and protection of the value of human dignity. The historical past will clearly establish that the place of human dignity during apartheid was undermined because of the lack of, among other things, equality and freedom.

2.2 Origins of human dignity

Human dignity originates from the ability to appreciate that our fellow human beings are capable of governing and managing themselves.⁴⁵ It originates from the moral theories of Immanuel Kant which asserts the

⁴⁴ *S v Makwanyane* (note 1) Para 329.

⁴⁵ Stuart Woolman 'Dignity' in Stuart Woolman et al *Constitutional Law* 2nd Edition, Revision Service 36-2.

'inherent worth of human beings.'⁴⁶ In this moral theory human dignity is what gives any human or individual their intrinsic worth.⁴⁷ It affirms that people should treat each other as having 'inherent moral status'⁴⁸ and should be treated with equal respect and concern.⁴⁹ Human dignity has also been attributed to the history of the world after the end of the Second World War hence dignity is a central value to the German Constitution.⁵⁰ For South Africa, human dignity is a promise not to treat non-whites as inferior beings who could not be allowed to live with whites so needed to live in their own Bantustans.⁵¹

It is further rooted in the notion that human beings are capable of making their own choices, creating and shaping their own identities, defying injustices and capable of active participation in the shaping of their societies.⁵² In addition, it has been held that '[p]ainted with a very broad brush, dignity inheres in the evaluations we all have to make of our lives, the ethical decisions we consciously confront, and even the ones we ignore. Dignity lies in our struggle to remain true to our moral vision, and even in our wavering from it.'⁵³ The aim of human dignity is to protect the humanity of all people without considering who they are or what they have.⁵⁴

The respect for human dignity is crucial because of the fact that it is inherent in all human beings because they are humans.⁵⁵ The fact that human dignity is inherent means that it can never be lost even in the worst of situations that any human being lives in.⁵⁶ Thus we 'undermine both the ideal and critical aspect of dignity when we attempt to say and elaborate the

⁴⁶ Sandra Liebenberg (note 26) 2.

⁴⁷ Ian Currie, Johan De Waal and Gerhard Erasmus, eds. *The Bill of Rights Handbook*, 5 ed (2005) 273.

⁴⁸ Sandra Liebenberg (note 26) 2.

⁴⁹ O'Regan in *S v Makwanyane* (note 1) Para 328.

⁵⁰ Stuart Woolman (note 45) 5.

⁵¹ *Ibid* 6.

⁵² Sandra Liebenberg (note 26) 2.

⁵³ *The National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 1999 (1) SA 6 (CC) Para 36. See also Sandra Liebenberg (note 26) 2.

⁵⁴ P de Vos 'Blog: Constitutionally Speaking' From www.constitutionallyspeaking.co.za [Accessed 10 September 2008].

⁵⁵ *Ibid*.

⁵⁶ Sandra Liebenberg (note 26) 2.

conditions under which it can be lost.⁵⁷ In certain situations of deprivation or oppression, human dignity is not lost but the human beings concerned are denied the opportunity to live in and with dignity. They are also denied an opportunity to create their own identity and participate freely in the own societies.⁵⁸ This implies that when a society values human dignity they must also value and ensure that the material conditions exist allow people to live in dignity. Valuing human dignity is also valuing the conditions that allow human beings to live in dignity together with protecting the ideal of human dignity.

2.3 Human dignity during the apartheid era in South Africa

Before the constitutional era, South Africa was dominated by conflicts between the white minority who had control over all the state's political instruments and the non-white majority who resisted this control and domination.⁵⁹ The apartheid era was characterized by a denial of people's dignity⁶⁰ as it institutionalized racial discrimination through statutes and regulations.⁶¹ Furthermore, it controlled, regulated and defined the lives of the people in South Africa.⁶² The governing bodies during apartheid sought to protect and promote the interests of the white communities that were already powerful and dominant.⁶³ It also sought to marginalize the interests of the non-whites communities and individuals.⁶⁴

Apartheid era had no value for the human dignity for non-whites as it denied them the ability to own and occupy land, to be properly educated, to be mobile and to be employed in other jobs besides menial and unskilled jobs and any access to fundamental rights and freedoms.⁶⁵ The results of the

⁵⁷ Drucilla Cornell as cited in *ibid* (note 26) 2.

⁵⁸ *Ibid* 3.

⁵⁹ *AZAPO v President of The Republic of South Africa* 1996 (4) SA 671 (CC) Para 1.

⁶⁰ Jewel Amoah 'Constructing equality: Identity and Intersectionality in Canada and South African Jurisprudence' LLM Dissertation submitted at the University of Cape Town 2004, 17. See also Makau wa Mutua, "Hope and Despair for a New South Africa: The Limits of Rights Discourse", (1997) 10 *Harvard Human Rights Journal* 63, 65.

⁶¹ Arthur Chaskalson (note 14)138.

⁶² *Ibid*.

⁶³ *Ibid*.

⁶⁴ *Ibid*.

⁶⁵ *Ibid*.

apartheid era were that non-whites were forced to live in inferior, degrading and humiliating conditions⁶⁶ which was an extreme undervaluing of human dignity for non-whites.

In the apartheid era, the parliament had sovereign power and they constituted the supreme law of the country.⁶⁷ The courts could not evaluate the statutes enacted by parliament so as to remove any injustices embodied by the statutes because the courts lacked the power to evaluate the supreme law of the country.⁶⁸ This enabled the legislatures in the apartheid era to have a systematic perpetration of injustices without having to answer to anyone. The government had so much power and control over the non-whites which enabled and allowed them to oppress and degrade during the apartheid regime.

2.4 The value of human dignity in the new constitutional era

The enactment of the new constitution in South Africa has been seen as revolutionary because it gave rise to the new and democratic South Africa. The Interim Constitution came into force on 27 April 1994 and it brought to an end the apartheid era.⁶⁹ The doctrine of parliamentary supremacy was replaced by the doctrine of constitutional supremacy which put in place a Bill of Rights 'to safeguard human rights, ending centuries of state-sanctioned abuse.'⁷⁰

The Interim Constitution was only a transitional constitution which sought to facilitate the negotiation and drafting of a final constitution.⁷¹ Hence when the final constitution was adopted the Interim Constitution was repealed.⁷² In the Interim Constitution, democracy, freedom and equality

⁶⁶ Ibid.

⁶⁷ Truth and Reconciliation Commission of South Africa Report Volume 4, 95.

⁶⁸ Ibid.

⁶⁹ Currie, De Waal and Erasmus (note 47) 2. See also Interim Constitution Act 200 of 1993.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

were emphasized. The value of human dignity is a value which is 'immanent in these values and in the rights entrenched in the Interim Constitution's Bill of Rights, its role as a foundational value of the constitution was not acknowledged in specific terms until the adoption of the 1996 constitution.'⁷³

The final constitution clearly states the foundational value of human dignity and recognizes it as an inherent attribute of life which is not a privilege that has to be granted by the government.⁷⁴ Human dignity is crucial to the balancing of any constitutional conflicts and different constitutional interests as it plays a role in the limitation clause.⁷⁵ For example when one is balancing two competing interests under the limitation clause it is important to consider how the limitation affects the value of human dignity before deciding whether the limitation is justifiable or not.⁷⁶

As stated already, the constitutional era is based on the respect for human rights and democracy and the constitution is the supreme law of the country.⁷⁷ The core values of the constitutional era are democracy, human dignity, equality and freedom.⁷⁸ The constitution denies the history of apartheid and clearly states that 'human dignity is the touchstone of the new political order and is fundamental to the new Constitution.'⁷⁹

The goal of the constitution in this new era is to transform our societies. This means that the constitution does not only seek to move away from the past but also seeks to develop South Africa to be open and democratic society based on human dignity, equality and freedom.⁸⁰ Open and democratic societies have the capability to accommodate and balance the conflicting and different interests of individuals and groups within the society.⁸¹

⁷³ Arthur Chaskalson (note 13) 196.

⁷⁴ Ibid. See also the Constitution of the Republic of South Africa, Act 108 of 1996.

⁷⁵ Ibid 201.

⁷⁶ Currie and De Waal (note 47) 273.

⁷⁷ Section 1 of the Constitution of the Republic of South Africa, 1996.

⁷⁸ Arthur Chaskalson (note 14) 138.

⁷⁹ *S v Makwanyane* (note 1) Para 329.

⁸⁰ Ibid Para 262.

⁸¹ Arthur Chaskalson (note 13) 200.

The objective and normative value of the constitution have at their core the value of human dignity which is regarded as central to the constitutional objectives.⁸² Furthermore, human dignity has been referred to as the pre-eminent value of the constitutional era. The value of human dignity has been stressed and widely used because of the history of South Africa discussed above.⁸³ Human dignity is ranked equally with the value of equality and freedom which 'requires a conception of a constitutional order in which the purpose of rights is not merely to protect individual liberty against state power but one in which state power is used to secure the goals of dignity and equality.'⁸⁴ Human dignity is common to all the core values of the constitution. Thus it informs and is vital to the content of concrete rights in the Bill of Rights.⁸⁵

Human dignity is the source of the innate rights to freedoms and integrity of human beings.⁸⁶ The value of human dignity provides the basis for one of the most important rights in the constitutional era, equality.⁸⁷ Human dignity is an inherent value that ought to be respected. This means that every human being 'must be treated as equally worth of respect' regardless of the fact that they are poor, non-white, uneducated, homeless or from a minority group.⁸⁸ Therefore, the importance of human dignity in the equality challenge means that the right to equality is similarly important as will shown in chapter of this paper. In this regard, it is correct to say that one cannot say they value human dignity if they do not respect and promote equality as well.⁸⁹

Human dignity is used widely by the Constitutional Court as a value because the court prefers to develop the law rather than making it.⁹⁰ Human dignity holds many different positions in the constitution of South Africa.

⁸²Currie, De Waal and Erasmus (note 47) 273.

⁸³ Arthur Chaskalson (note 14) 138.

⁸⁴ Currie, De Waal and Erasmus (note 47) 273.

⁸⁵ Arthur Chaskalson (note 13) 204.

⁸⁶ Currie, De Waal and Erasmus (note 47) 273.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Jewel Amoah (note 60) 67.

⁹⁰ Stuart Woolman (note 45) 36.22

Firstly, it is the foundational value⁹¹ on which all the other rights are founded. It also reinforces the presence of other rights and guarantees the importance of the constitutional rights.⁹² Secondly, it is a cornerstone of democracy and the Bill of Rights⁹³ which implies that the value of human dignity plays a vital role in the promotion of the democracy and the Bill of rights. Thirdly, human dignity helps in the interpretation of substantive provisions of the Bill of Rights⁹⁴ and it also helps in the limitation analysis⁹⁵ where the main role here is balancing the competing constitutional interests between the entrenched constitutional rights.

2.5 Definition of human dignity

It is difficult to define human dignity.⁹⁶ This is because it is of a personal nature thus difficult to discern objectively.⁹⁷ Any attempt to define it must therefore needs to be done with a lot of caution.⁹⁸ However, the objective determination of human dignity can be done through comparing how others in the same situation would be treated with how the complainant was treated or related to.⁹⁹ Even though human dignity is difficult to define it comes down to what a person feels when confronted with a particular situation.¹⁰⁰ As stated earlier on, human dignity cannot be lost but people can be denied the opportunity to live in dignity.¹⁰¹ This means that human dignity cannot be lost but people can have their dignity undermined and disrespected in certain situations they encounter.

⁹¹ Section 1 of the Constitution of the Republic of South Africa, 1996.

⁹² Nicholas Haysom (note 3) 5-1.

⁹³ Section 7 of the Constitution of the Republic of South Africa, 1996

⁹⁴ Section 39 (1) of the Constitution of the Republic of South Africa, 1996

⁹⁵ Section 36 of the Constitution of the Republic of South Africa, 1996

⁹⁶ Jewel Amoah (note 60) 19.

⁹⁷ Ibid.

⁹⁸ Ibid 20. To determine whether an individual's human dignity has been violated one has to compare the individual's treatment and position to those individuals who share similar personal characteristics and are located same position as the individual in question.

⁹⁹ Ibid.

¹⁰⁰ Ibid 23.

¹⁰¹ Sandra Liebenberg (note 26) 2

The difficulty in defining human dignity is highlighted by the Constitutional Court's failure to give human dignity a comprehensive definition.¹⁰² Human dignity cannot be defined with much precision. However the core of the protection of human dignity is the acknowledgement of the equal worth of all human beings that co-exist in a society.¹⁰³ There have been attempts to define human dignity. One perspective is to say that

[h]uman dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical, psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences.¹⁰⁴

In a broad sense the promotion of human dignity implies the respect of the autonomy of each person and protection from being treated in a degrading manner or a manner that devalues the integrity person concerned.¹⁰⁵ Human dignity means that an individual or a group of people in a society feels self-respect and self worth, their integrity and psychological integrity are protected and respected.¹⁰⁶ Human dignity is harmed and undermined by laws that do not value the self-worth, self-respect and integrity of any human being. It is 'enhanced by laws which are sensitive to the needs, capabilities and merits of different individuals taking into account the context underlying their differences'.¹⁰⁷

The recognition of the inherent dignity of human beings 'takes the form of an apparent variation on the Golden rule, the categorical imperative: Act in such a way that you always treat humanity, whether in your own person or in the person of another, never simply as a means, but always at the same time as an end.'¹⁰⁸ Human dignity is the floor that any constitutional or any other

¹⁰² Currie, De Waal and Erasmus (note 47) 10.1.

¹⁰³ Ackermann in *The National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (note 53) para 36.

¹⁰⁴ *Law v Canada (Minister of employment and immigration)* [1999] 170 DLR 4th 1 (SCC) Para 53 as cited in *ibid* para 42.

¹⁰⁵ Arthur Chaskalson (note 14) 134.

¹⁰⁶ *The National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (note 53) Para 41.

¹⁰⁷ *Ibid.*

¹⁰⁸ Stuart Woolman (note 45) 36.2.

conduct should not fall short of.¹⁰⁹ This implies that all humans should not be treated as objects or instruments of others.¹¹⁰ Human dignity is the minimum requirement of all constitutional and any other conduct supports prohibitions of slavery and forced labour,¹¹¹ punishment which completely annihilates the humanity of any human being and punishment which renders human beings as subjects of social control because the nature of the punishment cannot be considered to be proportional.¹¹²

Dignity is not only preserved for individuals. The Constitutional Court has contemplated the value of human dignity which promotes and protects the interests of a group as a whole.¹¹³ When poor people for example, are treated in a degrading manner when they are evicted from their homes, it is not only their dignity which is impaired but that of the society as well.¹¹⁴ Thus human dignity can be defined as a value that binds communities together and exists when mutually recognized.¹¹⁵ The constitutional era demands and commits itself to 'an understanding of human dignity in which wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole.'¹¹⁶ This makes the well-being of the poor people equally important to that of any other member in a particular community.

The hallmark of human dignity is the ability to define ourselves and our humanity through being able to rationally choose our own ends and not just those that are moral.¹¹⁷ When individuals are denied the ability to develop their humanity and to its full extent then human dignity cannot be fully respected.¹¹⁸ The Constitutional Court has held that

¹⁰⁹ Ibid.

¹¹⁰ Ibid 10.

¹¹¹ Section 12 of the Constitution of the Republic of South Africa, 1996.

¹¹² Stuart Woolman (note 45) 10.

¹¹³ Ibid 16.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* (note 42) Para 74

¹¹⁷ Stu Woolman (note 45) 36.2

¹¹⁸ *Ferreira v Levin* 1996 (1) SA 984 (CC) Para 49.

'[a]n 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 dignity is little more than an abstraction...To deny people their freedom is to deny them their dignity.'¹¹⁹

The value of human dignity can be referred to as the ability to self-govern.¹²⁰ This means at the least that people must be able to participate collectively determine what best suits the community.¹²¹ As the Constitutional Court through Justice Sachs maintains, '[t]he vote of each and every citizen is a badge of dignity and personhood.'¹²² This emphasizes that one of the core elements of human dignity is the ability of human beings to legislate for them.¹²³ This ability to self-govern is what makes human beings who they are and not animals.

2.6 Criticisms of human dignity

A number of scholars have expressed criticisms about human dignity. One of the criticisms expressed is that human dignity is an intangible and fluid therefore difficult to determine its ultimate goal.¹²⁴ It has an emotive value which is not measureable thus it is perceived differently by everyone.¹²⁵ Because of this emotive value human dignity focuses on individual personality instead of a 'group-based understanding of material advantage and disadvantage, i.e. a focus on systemic socio-economic injustice in society.'¹²⁶ The systemic socio-economic injustices for example, are neglected because the emotive value of human dignity demands the society to focus on individual violations. Furthermore, the value of human dignity means a lot of things. It is characterized as a term which is too broad therefore difficult to define its limits.¹²⁷

¹¹⁹ Ibid.

¹²⁰ Stu Woolman (note 45) 36.2.

¹²¹ Ibid.

¹²² *August v Electoral Commission* 1999 (3) SA 1 (CC) Para 17.

¹²³ Stu Woolman (note 45) 36.2

¹²⁴ Jewel Amoah (note 60) 22.

¹²⁵ Ibid.

¹²⁶ Sandra Liebenberg (note 26) 2.

¹²⁷ Arthur Chaskalson (note 14) 134

In addition, human dignity is lacking in content. The Constitutional court has managed to manipulate it in such a way that it can be 'used in whatever shape and form is required by the demands of the judicial designer.'¹²⁸ Furthermore, the Court has used human dignity as a tool which facilitates agreement between the judges because of its flexibility and its lack of content.¹²⁹ As stated above, the constitution seeks to transform our society not only from our past also to a society in which the intrinsic worth of all human beings is recognized.¹³⁰ Thus human dignity plays a huge role in transformative constitutionalism.¹³¹ However, human dignity does not clearly explain what the transformative vision should be and what should be used to achieve such a transformative society.¹³² This shows how human dignity can easily be used in any context because of its lack of content and flexibility.

Furthermore, human dignity can be used 'without further development to support its conclusion.'¹³³ The Constitutional Court has failed to realize that the value of human dignity can be interpreted differently thus have different results.¹³⁴ The fact that human dignity can be interpreted differently means that it can be applied to anything and everything thus making it vague and too broad.¹³⁵ This implies that human dignity can be used to justify any interpretation of the constitutional rights.

However, as stated earlier on, human dignity is the founding value of the Bill of Rights; it is the value that informs all the rights in the constitution.¹³⁶ This characterization seeks to show that human dignity in the constitutional sense means a lot of things and this characterization does not take anything away from the value it has in the new constitutional order. It can be interpreted differently because it is a value that the constitution is built and

¹²⁸ David Bilchitz *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-economic Rights* (2007) 139,147

¹²⁹ Stuart Woolman (note 33) 763.

¹³⁰ Ibid.

¹³¹ Stuart Woolman (note 45) 36.65

¹³² D.Bilchitz (note 128) 148

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Stuart Woolman (note 45), 6-65.

¹³⁶ Arthur Chaskalson (note 14) 134.

developed from. As a foundational value, it is supposed to be inferred when interpreting the Constitution especially in terms of section 39 (2) of the Constitution. The Constitutional Court can improve on the issue of the application and interpreting of human dignity leading to different results by developing and implementing stages of inquiry which would attempt to clarify how the value can be used consistently.

Human dignity is irrevocably linked with the protection of freedoms and individual autonomy and because of this connection to freedom; human dignity only reinforces checks on state action instead of accentuating the need to provide and redistribute resources that are available to a particular community.¹³⁷ Human dignity requires the respect of individual choices and freedom and 'it also requires the creation of social conditions on which our capacity for development, for human being agents, depends on.'¹³⁸ However, the respect and promotion of human dignity 'may subvert rather than enhance choice and in some circumstances it may limit rather than extend the scope of traditional 'first generation' human rights and fundamental freedoms.'¹³⁹

Due to the above, human dignity can then be said to be an indeterminate legal value because it does not provide guidance as to what constrains can be placed on state actions which interferes with liberties and when that specific state should act in order to reconstruct the society concerned.¹⁴⁰ However, because of the fact that human dignity can function as a relational value,¹⁴¹ it helps a society perceive the constrains on individual interests and claims on social resources with reference to the needs of others because all the members of society have equal worth and the available resources that a society has for its members should be

¹³⁷ Sandra Liebenberg (note 26) 3.

¹³⁸ Ibid.

¹³⁹ Feldman as cited in Ibid 3.

¹⁴⁰ Ibid 3.

¹⁴¹ Ibid. Human dignity as a relational value stresses the idea that all human beings are interconnected by their sense of self worth which is inextricably linked to how human beings are treated and how they treat other human beings. See also *S v Makwanyane* (note 1) para 326-7.

distributed among the members of the society.¹⁴² Thus it is true then to say that '[t]he value of human dignity gives us rights, but at the same time, it imposes reciprocal duties on us all to ensure the basic conditions for human survival and development.'¹⁴³ This explains why human dignity is irrevocably linked with freedom and autonomy.

2.7 Conclusion

In conclusion, this chapter has highlighted the origins of human dignity, the status of human dignity during apartheid and the new constitutional dispensation. It has also touched on the definition of human dignity and the criticisms that have been raised by different authors in relation to it. It is clear that in the new constitutional era human dignity is the founding value on which the other rights and values are based on. Though it is difficult to define, a number of definitions extended show that human dignity is mainly concerned with equal worth and respect, self actualization and self governance of individuals regardless of who they are or what possessions they have.

¹⁴² Ibid 4.

¹⁴³ Ibid.

Chapter 3: APPLICATION OF HUMAN DIGNITY IN SENTENCING CASES

3.1 Introduction

The primary focus here is to investigate the link between the right to life, freedom from cruel, inhuman and degrading punishment and human dignity. The chapter intends to explore the way the Constitutional Court has dealt with the link between right to life and the right not to be treated in a cruel, inhuman and degrading manner and human dignity. The link between these rights with human dignity will be explored while keeping in mind the fact that human dignity as stated in the previous chapters is imprecise and vague. The chapter also seeks to explore how this interdependency should assist a sentencing court in reaching a constitutionally acceptable sentence.

Human dignity is linked with the right to life and the right not to be subjected to cruel, inhuman and degrading punishment. The Constitutional Court held that 'deliberately extinguishment of human life by the state is uniquely degrading to human dignity'¹⁴⁴ therefore found the death penalty to be unconstitutional. This was because the death penalty is the ultimate annihilation of human dignity.¹⁴⁵

In *S v Williams*¹⁴⁶, a case dealing with corporal punishment, the Constitutional Court held that the way in which corporal punishment is administered violates the right to human dignity because of the arbitrariness of the pain.¹⁴⁷ Furthermore, the court held that the way punishment is administered by the state should reflect the values that underlie the constitution.¹⁴⁸ In addition, the sentencing structure of the state should

¹⁴⁴ *S v Makwanyane* (note 1) para 178.

¹⁴⁵ *Ibid* para 95.

¹⁴⁶ See note 8.

¹⁴⁷ *Ibid* para 39-48.

¹⁴⁸ *Ibid* para 38.

conform to the values that underlie the constitution such as the value of human dignity.¹⁴⁹

3.2 Constitutionally structured sentences

As stated in Chapter 2, the apartheid era was dominated by constant violation of human rights and deprivation of freedoms.¹⁵⁰ As further stated in chapter 2, it was characterized with detention without trials which the constitution as a transformative constitution seeks to eradicate.¹⁵¹ Detention without trial is an example of the lack of respect for the value of human dignity which was rife in apartheid era as stated above. The new values that underlie the constitution like human dignity and legality do not support such lack of respect for any persons in South Africa. The constitution creates a new sentencing and detention values and rules. This section will discuss these rules and values in an effort to show how constitutional sentencing is structured and operates.

Judicial punishment infringes the right of the accused and their human dignity but the courts are still allowed by the constitution to punish offenders.¹⁵² However, offenders can only be punished through sentences that are imposed by courts which are subject to intense constitutional requirements.¹⁵³ The constitutionality of these sentences is determined by the extent that the state's power to punish is restricted by constitutional rights.¹⁵⁴ The protection of the constitutional rights is limited and constrained by the limitation clause which allows for these rights to be limited by a law of

¹⁴⁹ Ibid.

¹⁵⁰ Arthur Chaskalson (note 14) 138.

¹⁵¹ Section 12 (1)(b) of the Constitution of South Africa, 108 of 1996.

¹⁵² Dirk Van Zyl 'Sentencing and Punishment' in Stuart Woolman et al *Constitutional Law 2nd* Revision Service (2007), 3.

¹⁵³ Ibid.

¹⁵⁴ Constitutional rights are entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996. Dirk Van Zyl (note 152) 3.

general application.¹⁵⁵ The limitation must be 'just and reasonable in an open and democratic society based on human dignity, equality and freedom.'¹⁵⁶

Constitutional norms in sentencing create new dimensions which focus on the 'question of whether the legislative framework of the sentencing is constitutionally valid.'¹⁵⁷ This creates two questions,

'[t]he first is the immediate issue of whether statutorily authorized forms of sentence are constitutionally acceptable. The second is the wider issue of whether legislative provisions for the imposition and implementation of sentences observe general constitutional norms such as legality, equality, proportionality and the protection of human dignity.'¹⁵⁸

These principles will be discussed below in order to highlight what they encompass.

The principle of legality emphasizes that the penalties must be defined precisely and their imposition of the sentences must be administered by clear legal rules that meet the principle of legality too. Equality seeks to ensure that everyone is equal before the law and everyone is equally protected by the law.¹⁵⁹ The principle of proportionality aims to ensure that the punishment fits the crime.¹⁶⁰ It is factor to be considered when attempting to decide whether the punishment is cruel, inhuman and degrading.¹⁶¹ Most of the punishments that are imposed by courts on offenders undermine the value of human dignity to some extent thus the offender would have to argue that the punishment in question is 'so fundamentally repugnant that they cannot be considered even for the most heinous crimes.'¹⁶²

3.3 The death penalty in South Africa

3.3.1 History of the death penalty

¹⁵⁵ Section 36 of the Constitution of the Republic of South Africa, 1996.

¹⁵⁶ Section 36 of the Constitution of the Republic of South Africa, 1996.

¹⁵⁷ Dirk Van Zyl (note 152) 28.2.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

¹⁶¹ *S v Makwanyane & Another* (note 1) para 94.

¹⁶² Dirk Van Zyl (note 152) 28.2

In 1910 during the English rule the death penalty was used only for murder convictions.¹⁶³ When the Afrikaner National Party took over in 1948, they used the death penalty for many different kinds of crimes including aggravated robbery, sabotage, terrorism and kidnapping.¹⁶⁴ The National Party also used the death penalty to intimidate political resistance and repression.¹⁶⁵ Studies highlighted that the probability of an offender receiving the death penalty depended heavily on the judge hearing the case regardless of the fact the death penalty was a mandatory sentence.¹⁶⁶

The imposition of the death penalty in South Africa was met with a lot of international and national protests, studies and pressures. These influenced the government after 1989 to discontinue the use of the death penalty.¹⁶⁷ Instead they approved a law giving 'judges discretion on whether or not to impose death sentence based on new procedural and substantive guidelines.'¹⁶⁸

3.3.2 The ultimate turning point: *S v Makwanyane*¹⁶⁹

The accused in this case were found guilty 'on four counts of murder, one count of attempted murder and one count of robbery with aggravating circumstance.'¹⁷⁰ The defendants were sentenced to death for the four counts of murder and long term sentences for the other counts of attempted murder and robbery.¹⁷¹ The Constitutional Court had 'to decide whether Section 277(1) (a) of the Criminal Procedure Act of 1977 (as amended in

¹⁶³ M Kende 'The constitutionality of the death penalty: South Africa as a model for the United States.' (2006) 38 *Goe, Wash Int'l L. Rev.* 209, 211.

¹⁶⁴ *Ibid* 212.

¹⁶⁵ *Ibid* 212.

¹⁶⁶ *Ibid* 214.

¹⁶⁷ *Ibid* 214.

¹⁶⁸ *Ibid* 214. See also the Criminal Procedure Act No. 51 of 1977 as amended by the Criminal law Amendment Act No. 107 of 1990 s. 4.

¹⁶⁹ *S v Makwanyane and Another* (note 1).

¹⁷⁰ *Ibid* para 1.

¹⁷¹ *Ibid* para 401.

1990), which prescribed the death penalty as a component sentence for murder was consistent with the provisions of the 1993 constitution.¹⁷²

The Interim Constitution came into effect after the accused had been convicted and sentenced by the trial court.¹⁷³ The constitution did not specifically prohibit nor allow the death sentence. The appellants 'argued that capital punishment was in conflict with Section 9 and 11(2) of the Constitution.'¹⁷⁴ Section 9 of the Interim Constitution provided that everyone has the right to life. Section 11(2) of the Interim Constitution stated that no one shall be 'subjected to torture of any kind, whether physical, mental or emotional, nor shall any person be subjected to cruel, inhuman and degrading treatment or punishment.'

The court found that the death penalty was inconsistent with the Interim Constitution because 'it destroys life which is protected under section 9 of the constitution, it annihilates human dignity which is protected under section 10, elements of arbitrariness are present in its enforcement and it is irremediable.'¹⁷⁵ Furthermore the death penalty was held to be cruel, inhuman and degrading punishment.

a. Application of human dignity in *S v Makwanyane*

The judgments of Justices Chaskalson, Langa and O'Regan will be discussed in some detail to the extent relevant in this chapter. The judgment of Chaskalson P is discussed because it is the majority judgment which all the judges concurred with. I discuss the judgment of Langa DP and O'Regan J because they discussed human dignity in slightly more detail than the other justices. Furthermore, they find that human dignity was a ground for holding that the death penalty was unconstitutional even though it played a very minor role in the finding of unconstitutionality.

¹⁷² M. Kende (note 163) 215.

¹⁷³ Ibid.

¹⁷⁴ Act No. 200 of 1993 cited in *S v Makwanyane* (note 1) paras 401-402.

¹⁷⁵ Ibid para 95.

i. Chaskalson P

Chaskalson held that the death penalty was the ultimate annihilation of human dignity protected under section 10 of the Constitution.¹⁷⁶ He, however, does not analyze human dignity in much depth and he does not base his decision on human dignity.¹⁷⁷ Furthermore, Chaskalson in his judgment does not provide a comprehensive definition for human dignity.¹⁷⁸ This is because he focused mainly on the language of section 11 (2) of the Interim Constitution.¹⁷⁹ As indicated above, human dignity played a very minor role in finding that the death penalty was unconstitutional.

The Constitutional Court chose to adopt a generous and purposive approach provided for in section 35 (1) of the Interim Constitution which stated that '[i]n interpreting the provisions of this chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality.' This provision entails that the founding values that underlie the constitution should be promoted in the interpretation of the constitution. Furthermore, it means the core values of the constitution should assist in the interpretation of the Bill of Rights thus a court when interpreting the constitution should refer to and use values like human dignity.

Chaskalson mentions human dignity in passing in his judgment. He however does not explain why human dignity is even invoked in his judgment or what roles it plays in the interpretation of the constitution. He does not clearly mention that human dignity is a value that underlies the constitution. This may explain the absence of much substantive content in the judgment of Chaskalson. The lack of content could have been avoided had Chaskalson used and applied human dignity the way it was meant to be applied in the interpretation of the constitution, as a value which informs and assists any interpretation of the constitution.

¹⁷⁶ Ibid.

¹⁷⁷ M. Kende (note 163) 223.

¹⁷⁸ Ibid.

¹⁷⁹ Ibid 218.

The absence of any comprehensive definition and discussion of human dignity can be attributed to the fact that the Interim Constitution emphasized democracy, freedom and equality.¹⁸⁰ Human dignity as a value was tacitly recognized through freedom and democracy.¹⁸¹ Chaskalson P accepted the presence of human dignity in the Interim Constitution when he mentioned that death penalty is the ultimate annihilation of human dignity. This acknowledgement warrants some explanation of what human dignity is, how it functions and its place in the new constitutional order. This would have helped in showing the transformative role of the constitution which is also applicable in constitutionally structured sentences.

ii. Langa DP

Langa DP¹⁸² held that human dignity and the value of life had been undermined in the history of apartheid in South Africa. The climate for violence was created by the political, social and other factors, which created retaliation and vengeance.¹⁸³ In this climate of violence the respect for human dignity and the respect for life were undermined the most.¹⁸⁴ He further stated that '[t]he State has been part of this degeneration, not only because of its role in the conflicts of the past, but also by retaining punishments which did not testify to a high regard for the dignity of the person and the value of every human life.'¹⁸⁵ Thus it was important to the new constitutional order to respect human dignity and the right to life.

Langa states that the values which are implicit in the constitution rely on moral persuasion rather than force.¹⁸⁶ The state is a role model in such a society and must lead in promoting human life and dignity.¹⁸⁷ The state will not only promote the respect of life and dignity, it will also lead by example as

¹⁸⁰ Arthur Chaskalson (note 13)196.

¹⁸¹ *Ibid.*

¹⁸² *S v Makwanyane* (note 1) para 218

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid* para 222.

¹⁸⁷ *Ibid.*

the state will demonstrate the respect for life and human dignity by respecting the dignity and life of a criminal.¹⁸⁸ The state will spare the human dignity and life of the criminal because these are important rights and values in the constitutional sense. They also help in the moral persuasion which the constitution seeks to achieve. As a result, the sentences that are imposed on any offender must respect human dignity the right to life. The death penalty fails to respect the two therefore it should be held to be unconstitutional.

The concept of *ubuntu*, according to Langa, emphasizes the notion that people live in a community and depend on each other to survive.¹⁸⁹ The concept is important because '[i]t recognizes a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from members of the community such person happens to be part of.'¹⁹⁰ The person in the community should also give the other members of the community same respect and value as given to him by the other members of the community.¹⁹¹ *Ubuntu* values life and human dignity, the life of another is at the very least valuable as one own life.¹⁹² Failing to value and respect the life of the criminal, like the death penalty does, is the ultimate violation of the value of *ubuntu* which in turn violates the human dignity of the offender.

The problem with the use of human dignity by Langa is that he does not define human dignity at all and neither does he attempt to place it in the context of the constitution. He also fails to give human dignity substantive content which makes it very difficult to understand how exactly the value of human dignity functions or assists in the interpretation of rights. This is a huge oversight in his judgment and it makes it difficult to understand how dignity fits with the death penalty without giving much content to both the right to life and human dignity. Defining human dignity would have given it much more content and structure which would have helped in understanding how and why human dignity is an important part of the right to life. This would

¹⁸⁸ Ibid.

¹⁸⁹ Ibid para 224.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² Ibid para 225.

have ultimately highlighted how human dignity assists in the interpretation of the right to life.

iii. O'Regan J

O'Regan states that the constitution has entrenched fundamental rights which include the right to life, the right to dignity and the right not to be subjected to cruel, inhuman and degrading punishment.¹⁹³ The right to life and the right to human dignity are intertwined because without life there is no dignity.¹⁹⁴ The right to life means the right to be treated as a human being with dignity.¹⁹⁵ The importance of human dignity as a founding value in the new constitutional dispensation cannot be undervalued.¹⁹⁶ The recognition of the human dignity is an acknowledgement of the intrinsic worth of human beings and that human beings should be treated as equally worthy of concern and care.¹⁹⁷ For this reason, human dignity is the foundation that the Bill of rights is founded and built on.

Respecting human dignity is important in South Africa because of historical past where black people were denied respect and dignity.¹⁹⁸ The new constitution rejects this past and emphasizes the equal worth of the people of South Africa.¹⁹⁹ The recognition and promotion of human dignity is 'a touchstone to the new political order and fundamental to the new constitution.'²⁰⁰ Thus the protection and promotion of human dignity is important regardless of whose dignity is promoted and protected. The respect for dignity does not pay any regard to whose dignity is being protected because everyone is equally worthy of protection. That is the human dignity which the constitution seeks to promote and protect.

¹⁹³ Ibid para 321.

¹⁹⁴ Ibid para 327.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid para 328.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid para 329.

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

The purpose of the death penalty is to kill the offender and deprive them of any existence.²⁰¹ It is denial of human life thus a violation of the right to life.²⁰² It is also a denial of the accuser's human dignity because of the way it is executed. The execution is described as following, '[t]he man's spinal cord will rupture at the point where it enters the skull, electrochemical discharges will send his limbs flailing in a grotesque dance, eyes and tongue will start from the facial apertures under the assault of the rope and his bowels and bladder may simultaneously void themselves to soil the legs and drip on the floor....'²⁰³ This is undeniably the destruction of human dignity and the annihilation of life.

O'Regan should be commended because she makes an effort to try and give some content to human dignity. However her effort still falls short. She uses human dignity extensively but does not give a comprehensive definition of human dignity. A comprehensive definition of human dignity would clearly give the meaning of the value, the ambit of the value, the functions of the value, how it can be placed in the context of the constitution and how it functions as an underlying value of the constitution.

She accepts that human dignity is violated by the death penalty and that is one of the reasons why she holds death penalty to be unconstitutional but states that any further content and scope of the rights in question will be unnecessary and inappropriate.²⁰⁴ She gives a lot of content for the right to life but she fails to do the same for human dignity which she relies equally on in making her decision. As she did for the right to life, O'Regan should have given human dignity more content so as to highlight how human dignity assisted her in reaching her finding of unconstitutionality. This would have unequivocally highlighted how human dignity functions as a founding value of the Bill of Rights and the Constitution.

²⁰¹ Ibid para 334.

²⁰² Ibid.

²⁰³ Rand Daily Mail 12 June 1978 as cited by O'Regan in ibid para 335.

²⁰⁴ Ibid para 334.

Furthermore, in her judgment, she fails to separate human dignity as a value and human dignity as right. She acknowledges that human dignity is a founding value yet she also mentions that the right to dignity is a right on which other rights are founded on clearly using them interchangeably. She has, however, not explained the similarities which allow them to be used interchangeably and if at all they can be used interchangeably. All this makes the use of human dignity by O'Regan very limited even though she made a better attempt at applying human dignity to the death penalty. Chapter 6 of this thesis will suggest a preferred approach to the application and use of human dignity in constitutional interpretation which will highlight how the Court should have applied it in their judgments.

3.4 Corporal punishment

3.4.1 *S v Williams*²⁰⁵

The constitutionality of Section 294 of the Criminal Procedure²⁰⁶ was challenged in this case. Section 294 allowed for juvenile whipping which was challenged as being contrary to human dignity and the right not to be punished in a cruel, inhuman and degrading manner.²⁰⁷ This was because 'the circumstances under which juvenile whipping is administered, including the fact that it involves the intentional infliction of physical pain on the juvenile by a stranger at the instance of the State, are incompatible with respect for and the protection of the dignity of the person being punished.'²⁰⁸ It was alleged further that it was a violation of the dignity of both the person administering the punishment and the person receiving the punishment.²⁰⁹

The Constitutional Court discussed section 11(2) of the Interim Constitution extensively because much of the applicants' argument was

²⁰⁵ *S v Williams* (note 8).

²⁰⁶ Act 51 of 1977.

²⁰⁷ *S v Williams* (note 8) para 16. Other grounds were discussed by the court which includes section 8 and section 30 of the Constitution of the Republic of South Africa.

²⁰⁸ *Ibid* para 17.

²⁰⁹ *Ibid*.

based on section 11(2).²¹⁰ Section 11(2) is about the freedom and security of person and provides that 'no person shall be subjected to torture of any kind, whether physical, mental or emotional, nor shall any person be subjected to cruel, inhuman or degrading treatment or punishment.'²¹¹ The court further stated that the definition of the terms in section 11(2) should reflect the experiences that South Africa has encountered.²¹² The court adopted a purposive approach which places the rights in the context of South Africa.²¹³ The Constitutional Court then held that section 294 of the Criminal Procedure Act indeed violates section 11(2) of the Interim Constitution.

a. Application of human dignity

The Constitutional Court stated that when one considers cruel, inhuman and degrading punishment the common elements are decency and human dignity.²¹⁴ There is consensus that judicial whipping which involves the intentional infliction of pain on the accused offends everyone's right to human dignity.²¹⁵ The Constitutional Court then went on to say that '[a]n enlightened society will punish offenders, but will do so without sacrificing decency and human dignity'²¹⁶ of the person to be punished. This is because of the value of human dignity in the new constitutional era in South Africa.

The Court stated that '[t]he Constitution clearly places a very high premium on human dignity and the protection against punishments that are cruel, inhuman or degrading; very stringent requirements would have to be met by the State before these rights can be limited.'²¹⁷ Human dignity was held to be a value that is innate to all human beings thus 'acknowledging it includes an acceptance by society that even the vilest criminal remains a human being possessed of common human dignity.'²¹⁸ Such a society cannot

²¹⁰ Ibid para 19.

²¹¹ Section 11(2) of the Interim Constitution Act 200 of 1993.

²¹² *S v Williams* (note 8) para 23.

²¹³ Ibid para 51.

²¹⁴ Ibid para 35.

²¹⁵ Ibid para 39.

²¹⁶ Ibid para 68.

²¹⁷ Ibid para 76.

²¹⁸ Ibid.

allow judicial whipping to exist because it is brutal in its nature which constitutes severe assault on the recipient's human dignity.²¹⁹ The Constitutional Court then held that there is no dignity in the act itself, to the recipient of the whipping and the person delivering the whipping.²²⁰

b. Shortcomings on the use of human dignity by the Court

Human dignity was one of the grounds that the appellants relied on in saying that juvenile whipping was unconstitutional. The Court did not define human dignity like it did cruel, inhuman and degrading punishment. Human dignity was not given much content except when discussing how juvenile whipping violated or was contrary to human dignity. The Court did not even discuss the importance of human dignity in South Africa considering the history of the country. The Court should have at least discussed human dignity in more detail as it was one of the grounds that the appellants relied on. But the Court simply stated that the appellants relied mainly on cruel, inhuman and degrading punishment then did not bother to discuss human dignity in any further detail.

As stated above the Court does not engage with the substantive content of human dignity thus it fails 'to articulate the constitutional rules that amplify the content'²²¹ of human dignity. The failure to engage with the substantive content does not deter the Court from relying on human dignity as one of the grounds for holding that juvenile whipping was unconstitutional. Certain considerations must be taken into account when applying human dignity like considering whether the rule in question treats individuals as mere means or whether it allows for inhumane or degrading treatment.²²² Human dignity appears in the constitution for a specific reason thus must be considered in some detail when it is being relied upon in a constitutional matter.

²¹⁹ *S v Khumalo and Others* as in *ibid* para 84.

²²⁰ *Ibid* para 89.

²²¹ Stuart Woolman (note 33) 767.

²²² *Ibid* 770.

The Court should be commended for applying and giving content to section 11(2) of the Constitution. They give extensive content to right not to be treated or punished in a cruel, inhuman and degrading manner. They define the terms and define what it means to say that punishment is cruel, inhuman and degrading.²²³ As will be highlighted in Chapter 6 of this paper this is a very important part of the interpretation of the Bill of Rights which the Court has generally replaced with the application of values that underlie the constitution.

The Court, however, can be characterized as a minimalistic court that decides cases before it but leaves some parts of the case undecided or discussed narrowly.²²⁴ The judgment of the Court in this case can be seen to be minimalistic because the Court focused extensively on the right not to be treated in a cruel, inhuman and degrading punishment. Once it had given it enough content the Court chose to discuss human dignity vaguely and without much substantiation of how it operates and assists in the interpretation of the specific right. This minimalistic characteristic makes the judgments of the Court very thinly reasoned²²⁵ and difficult to understand how the Court applied human dignity as a foundational value.

The other problem with the use of dignity in this case is that it is not clear when human dignity is being used as a value. Some parts of the judgment clearly state that they are using human dignity as a right while the other parts do not mention what human dignity is being used as. It is important to determine what human dignity is being used as because as a value, human dignity informs all the rights in the Bill of rights and can assist in giving content of the rights in question.

It would have assisted the Court to give more content to the rights in question because this allows the Court to give a historical context and content which can help in understanding the cases and rights. Furthermore,

²²³ *S v Williams* (note 8) para 24.

²²⁴ David Bilchitz (note 33) 762.

²²⁵ *Ibid.*

using human dignity without clearly stating how it is being used creates an impression that the Court is not sure how and when human dignity can be used in deciding cases. As stated earlier, Chapter 6 will highlight how the Court can apply human dignity as a foundational value with much more substance and content.

3.5 Conclusion

This chapter has attempted to show that human dignity is indeed relevant in deciding the constitutionality of sentences as seen in the use of human dignity by the Constitutional Court in sentencing cases. This use of human dignity has however highlighted certain weaknesses discussed above in the way the Constitutional Court applied human dignity. The use of human dignity in sentencing cases has not brought much clarity into how human dignity can assist in the determination of constitutional sentences and neither has it contributed to the content and substance of the relevant rights being interpreted. This is because it appears that the Justices of the Court are not too sure how to apply human dignity with some substantiation and more content. They accept the importance of human dignity but do not go as further as giving it more content and detail because of the presence of other grounds in the case that helps them make a decision.

Chapter 4: HUMAN DIGNITY AND SOCIO-ECONOMIC RIGHTS IN THE CONSTITUTIONAL COURT

4.1 Introduction

The Constitutional Court has held that when people live in poverty, without food and water they are stripped of the opportunity to live with dignity.²²⁶ This makes human dignity one of the grounds that can be used to hold the government accountable in providing socio-economic rights. Instead of just focusing on individual rights and interests, human dignity can be used in the enforcement of group claims to socio-economic rights. Human dignity is important in identifying the needs of the most vulnerable people which would need to be urgently attended to.

The content and nature of socio-economic rights will be discussed so as to highlight their importance in the new constitutional dispensation and the communities of South Africa. This discussion of socio-economic rights will highlight the transformative role of the constitution and the characteristics of the socio-economic rights themselves. The right to have access to adequate housing will be focused on because of the desperate need of housing and the conditions that most poor people live in South Africa.²²⁷ The right to have access to health care will be discussed also because one can argue by analogy that without the right to access health care, the people in South Africa would be denied an opportunity to live with dignity.

The aim here is to show that how the right to human dignity has been used to argue that the above rights should be made available as failing to do so is a failure to allow people to live in dignity. Furthermore human dignity has been held to be a value that informs the scope, content, extent and scope of the rights entrenched in the Constitution.²²⁸ The main cases to be focused on are *Government of the Republic of South Africa and Other v*

²²⁶ *Government of the Republic of South Africa and Other v Grootboom and Others* (note 10) para 23.

²²⁷ *Ibid* para 7 for a discussion of the conditions that the people from Wallacedene.

²²⁸ Nicholas Haysom (note 3) 5-6.

*Grootboom and Others*²²⁹ for housing. For health care the main case to be looked at is *Soobramoney v Minister of Health. KwaZulu-Natal*.²³⁰

4.2 The nature and content of socio-economic rights

The entrenchment of socio-economic rights in the South African Constitution is a great achievement.²³¹ The inclusion of socio-economic rights in the Constitution creates the possibility and potential for the Constitution to change the social injustices of the past.²³² The recognition of socio-economic is characterized by the acknowledgement that human beings cannot develop their full potential without water, food, shelter, health care, social security and education.²³³ Socio-economic rights are concerned with the material dimensions of human interests.²³⁴

The constitution places an obligation on the state 'to respect, protect, promote and fulfil the rights in the Bill of Rights.'²³⁵ The Bill of Rights establishes both negative and positive duties on the state.²³⁶ For these obligations the

state is required to take reasonable legislative and other means. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well directed policies and programs implemented by the executive.²³⁷

²²⁹ See note 10.

²³⁰ See note 6.

²³¹ Nyaradzo Machingambi (note 10) 34.

²³² Ibid 34

²³³ Sandra Liebenberg 'The Interpretation of Socio-economic rights' in Stuart Woolman et al *Constitutional Law 2nd Edition Revision 12-03 (2007)*, 33-1

²³⁴ Ibid.

²³⁵ Section 7 (2) of the Constitution of the Republic Of South Africa Act 108 of 1996.

²³⁶ Sandra Liebenberg (note 233) 33-6.

²³⁷ *Government of the Republic of South Africa and Other v Grootboom and Others* (note 10) para 42.

Respecting socio-economic rights obliges the state to refrain from law or conduct that directly or indirectly obstructs the ability of the people to enjoy socio-economic rights.²³⁸ The duty to protect creates an obligation on the state 'to take legislative and other means, including the provision of effective remedies, to promote vulnerable groups against violations of their rights by more powerful private parties.'²³⁹ The promotion of socio-economic rights is regarded as part of the obligation towards the realization of socio-economic rights.²⁴⁰ Promoting socio-economic rights involves the state educates and raises awareness of socio-economic rights in the communities and people in South Africa.²⁴¹ The obligation to recognize socio-economic requires the state to take positive measure to realize the socio-economic rights especially for people who lack access to the rights.²⁴²

Socio-economic right are closely related to each other, must be read and understood in line with the setting of the Constitution.²⁴³ When dealing with socio-economic rights, they should not be read and understood as individual, isolated and separate rights.²⁴⁴ This is because socio-economic rights are interdependent and related. The interdependency of socio-economic rights is an important aspect of socio-economic rights that must be taken into consideration when interpreting them.²⁴⁵ It should be considered particularly when determining whether the state has fulfilled its obligation for socio-economic rights under the Constitution.²⁴⁶

It has been held that

²³⁸ Sandra Liebenberg (note 233) 33-6.

²³⁹ Ibid.

²⁴⁰ Ibid.

²⁴¹ Ibid.

²⁴² Ibid.

²⁴³ *Government of the Republic of South Africa and Other v Grootboom and Others* (note 10) para 24.

²⁴⁴ Ibid para 24.

²⁴⁵ Ibid.

²⁴⁶ Sandra Liebenberg (note 233) Para 33-10. See also *Government of the Republic of South Africa and Other v Grootboom and Others* (note 10) para 24

[r]espect for human dignity requires society to marshal its resources and respond strongly to situations in which vulnerable groups are unable to gain access to basic socio-economic needs. The consequences of the deprivation will be severe (either in terms of threats to life or health), and erode the foundation for the further development of the person.²⁴⁷

Therefore in cases where people live in extreme conditions of poverty the state must respond with an appropriate and immediate response.²⁴⁸

However, this response depends on the capacity and resources available to the state. Even though the response is dependent upon the resources available, it demands that a community do its best to ensure that those without access to socio-economic are taken care of in line with the constitutional obligations.²⁴⁹ However, if the available resources cannot cater for the provision of socio-economic rights the failure to meet the obligation will thus not be held to be a violation of human dignity.

4.3 Selected cases on socio-economic rights

a. *Soobramoney v Minister of Health (Kwazulu-Natal)*²⁵⁰

i. The facts

Mr. Soobramoney was diabetic who suffered from ischaemic heart disease and cerebro-vascular disease.²⁵¹ This disease caused him to stroke and attacked his kidneys to the extent that his kidneys failed in 1996.²⁵² His condition worsened and became irreversible which rendered his condition terminal and in its final stages.²⁵³ However, his life could have been lengthened by means of renal dialysis.²⁵⁴ Due to this fact Mr. Soobramoney

²⁴⁷ Sandra Liebenberg (note 26) 7

²⁴⁸ Ibid.

²⁴⁹ Ibid.

²⁵⁰ *Soobramoney v Minister of Health Kwazulu-Natal* (see note 6).

²⁵¹ Ibid para 1.

²⁵² Ibid.

²⁵³ Ibid.

²⁵⁴ Ibid.

sought the dialysis treatment from the renal unit at the Addington state hospital in Durban.²⁵⁵

The hospital could provide dialysis only to a limited number of patients.²⁵⁶ This was because the hospital had only twenty dialysis machines and some of these machines were in bad conditions.²⁵⁷ Moreover, each treatment takes four hours and an additional two hours have to be added for cleaning the machines after it has been used.²⁵⁸ All these factors limited the ability of the hospital to provide Mr. Soobramoney with the dialysis treatment he requested.

The shortage of machines at this hospital led to the creation of hospital policy to determine who can be admitted for dialysis treatment.²⁵⁹ The policy was that

[o]nly patients who suffer from acute renal failure, which can be treated and remedied by renal dialysis, are given automatic access to renal dialysis at the hospital. Those patients who, like the appellant, suffer from chronic renal failure which is irreversible are not admitted automatically to the renal program. A set of guidelines has been drawn up and adopted to determine which applicants who have chronic renal failure will be given dialysis treatment. According to the guidelines the primary requirement for admission of such persons to the dialysis program is that the patient must be eligible for a kidney transplant.²⁶⁰

Patients eligible for transplant will be on dialysis until they get their organ.

Mr. Soobramoney's condition was terminal thus he was not eligible for a kidney transplant therefore the hospital could not give him the dialysis treatment he had requested.²⁶¹ Mr. Soobramoney had received dialysis from

²⁵⁵ Ibid.

²⁵⁶ Ibid.

²⁵⁷ Ibid.

²⁵⁸ Ibid.

²⁵⁹ Ibid para 3.

²⁶⁰ Ibid.

²⁶¹ Ibid para 4.

private hospitals and doctors.²⁶² However, he couldn't continue receiving dialysis from the private hospitals because he could no longer afford to pay for it.²⁶³ As a result Mr. Soobramoney made an urgent application to the Court directing the Addington Hospital to provide him with dialysis on the basis of the Constitutional right to have access to health care. In particular, Mr. Soobramoney's claim was based on the right not to be denied emergency health care²⁶⁴ and the right to life.²⁶⁵

ii. Decision of the Court

The Court held that the provisions of the rights in section 26 and 27 of the Constitution depend upon the available resources and limited by the lack of such resources.²⁶⁶ Section 27 (3) of the Constitution deals with emergency medical treatment. This cannot be construed to include 'ongoing treatment of chronic illnesses for the purpose of prolonging life.'²⁶⁷ Emergency treatment is defined by the Court as medical treatment which is

'clearly necessary. The occurrence [is] sudden, the patient [has] no opportunity of making arrangements in advance for the treatment that [is] required, and there [is] urgency in securing the treatment in order to stabilize his condition. The treatment [is] available but denied.'²⁶⁸

The Court further stated the right to have access to health care does not have to be inferred from the right to life; it is dealt with in section 27 of the constitution.²⁶⁹ Mr. Soobramoney suffered from terminal illness which required treatment three times a week which was characterized as an on-going condition not an emergency treatment.²⁷⁰ Furthermore, the court held that when the right to emergency treatment was entrenched there was no intention to prioritize it over other forms of medical care.²⁷¹ Moreover, Mr.

²⁶² Ibid para 5.

²⁶³ Ibid.

²⁶⁴ Section 27 (3) of the Constitution of the Republic of South Africa, Act 108 of 1996.

²⁶⁵ Section 11 of the Constitution of the Republic of South Africa, Act 108 of 1996.

²⁶⁶ *Soobramoney v Minister of Health (Kwazulu-Natal)* (note 6) para 11.

²⁶⁷ Ibid para 13.

²⁶⁸ Ibid para 18.

²⁶⁹ Ibid para 19.

²⁷⁰ Ibid para 21.

²⁷¹ Ibid para 19.

Soobramoney's condition was not a condition which was to be regarded as an emergency.

Because Mr. Soobramoney's condition was not classified as an emergency one, it fell under section 27(1) and (2) of the Constitution and not section 27(3).²⁷² Section 27 gives everyone the right to have access to health care services but within available resources.²⁷³ The Court stated that if it ordered the hospital to provide dialysis treatment to Mr. Soobramoney then the hospital would have had to provide the same treatment to other patients in the same condition as Mr. Soobramoney.²⁷⁴ The Court then stated that the hospital would not have been financially able to provide such treatment to everyone who needs such treatment.²⁷⁵ Thus the failure to provide Mr. Soobramoney with the dialysis treatment was not a violation of the constitutional obligations by the state.²⁷⁶

iii. Application of human dignity

The Court states that the value of human dignity, together with equality and freedom are 'are values which the Constitution seeks to provide, nurture and protect for the future of South Africa.'²⁷⁷ The Court did not discuss human dignity in any further detail after stating the above which vaguely explains how human dignity assists in the interpretation of rights. Chaskalson just stated that the Constitution seeks to address and transform the social injustices of the past.²⁷⁸ This transformation seeks to transform the past society into one based on human dignity, freedom and equality.²⁷⁹

²⁷² Ibid para 22.

²⁷³ Ibid.

²⁷⁴ Ibid para 24.

²⁷⁵ Ibid.

²⁷⁶ Ibid para 36.

²⁷⁷ Ibid para 43.

²⁷⁸ Ibid para 8,

²⁷⁹ Ibid para 8.

Human dignity is been recognized as one of the central values that informs the interpretation of socio-economic rights.²⁸⁰ Because the Court was interpreting socio-economic rights, it must have invoked human dignity as an underlying value. After doing so, the Court should have given human dignity more detail and placed it within the context of socio-economic rights. This would have been an important step in the development of the jurisprudence of the Court because it would have emphasized the role of human dignity in the development and application of socio-economic rights. Invoking human dignity in more detail would have been important especially when the court had failed to give the specific rights any content and meaning.

After mentioning that the Constitution seeks to transform the past societies to societies based on human dignity among other values, it should have explained firstly, why they are even relying on it to make a decision or why they are influenced by human dignity in their decision. Secondly, the Court should have explained and highlighted the role of human dignity in the interpretation of socio-economic rights particularly the importance of section 39(2) of the Constitution.²⁸¹ Thirdly, the Court should have clarified how human dignity assists in the interpretation and application of socio-economic rights. As they discuss all the above the Court would have had to at least define human dignity and the ambit of its role in the interpretation of socio-economic rights.

As will be argued in Chapter 6, the language of the constitution requires the Court to interpret the individual sections firstly, which will give the sections meaning and content.²⁸² After considering the language of the rights in the particular sections, the Court would then have to apply the founding and underlying values of the Constitution as required by the interpretation clause of the Constitution.²⁸³ The values that underlie the Constitution should not be interpreted in a way that undermines the actual

²⁸⁰ Sandra Liebenberg (note 26)1.

²⁸¹ Act 108 of 1996.

²⁸² This would be done by considering the text of the actual provisions of the right in the constitution; in this case the Court would have needed to consider the content and meaning of section 27 of the Constitution.

²⁸³ Section 39(2) of the Constitution of the Republic of South Africa.

wording of the sections in question. It is still essential to consider these values after the Court has examined the wording of the particular section first.

One of the values that the court would have had to apply in detail would be human dignity as it is one of the values listed in the interpretation clause and the founding provision of the constitution. Such an oversight allows one to conclude that the *Soobramoney* case like the other following constitutional cases was thinly reasoned.²⁸⁴ Moreover, like the other judgments that follow after this one, the Constitutional Court portrays itself as a minimalistic court that avoids judicial activism.²⁸⁵

The discussion of the right to have access to health care 'is premised on a presumption of fixed and limited resources.'²⁸⁶ This case was the first case in which the Court had to discuss everyone's right to have access to health within the available resources.²⁸⁷ It is clear from the judgment of *Soobramoney* that the Constitutional Court intended to have the application of socio-economic rights 'informed by the realities of limited resources.'²⁸⁸ This approach is correct but it is not enough.

The Court should instead have looked at all the circumstances and available contexts of the right which would have included the actual text of the right as it appears in the constitution, meaning of the right and the ambit of the right, the implications and influence of the founding values on the content and meaning of the right then the constrains of the limited resources. Applying all these aspects would have resulted in the Court making a very thorough judgment which would have probably been a better reasoned one. This is because this would have highlighted the meaning of the text and the right without overlooking the intention of the Constitution. Furthermore this

²⁸⁴ Sandra Liebenberg (note 233) 33-33.

²⁸⁵ David Bilchitz (note 128) 149.

²⁸⁶ Arun K. Thiruvengadam 'An appraisal of social rights in the contemporary South Africa: Lessons for other developing countries.' *LINES* August 2004 From http://www.lines-magazine.org/Art_Aug04/arun.htm Accessed on 10 January 2009.

²⁸⁷ ESCR –NET: *Thiagraj Soobramoney v. Minister of Health (Kwazulu-Natal)* From http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=673074 Accessed 10 January 2009.

²⁸⁸ Sandra Liebenberg (note 233) 33-9.

approach would have conformed to the interpretation clause of the Constitution as it would have recognized and applied the founding values of the Constitution.

b. *Government of the Republic of South Africa v Grootboom*²⁸⁹

i. The facts

The Respondents in the *Grootboom* case were a group of extremely poor people who lived in very appalling and desperate conditions. They previously lived in an informal squatter settlement called Wallacedene.²⁹⁰ According to Yacoob J some of the households had no income at all and 'more than two thirds earned less than R500 per month.'²⁹¹ Half of the population of Wallacedene at the time was children who lived all lived in shacks.²⁹² Yacoob further stated Wallacedene had no running water, sewage or refuse removal system and only a small percentage of the shacks had electricity.²⁹³ The area was partly waterlogged and was located dangerously close to a main thoroughfare.²⁹⁴

Most of the residents of Wallacedene had applied for subsidized low cost housing from the municipality and were on the waiting list for as long as seven years.²⁹⁵ They had enquired from the municipality about their applications but the municipality did not give anything definitive.²⁹⁶ The respondents were going to wait for a very long time for these houses to be provided for them. The respondents thus moved their shacks to a privately owned land 'earmarked for low-cost housing.'²⁹⁷

²⁸⁹ *Government of the Republic of South Africa and Other v Grootboom and Others* (note 10).

²⁹⁰ *Ibid* para 7.

²⁹¹ *Ibid*.

²⁹² *Ibid*.

²⁹³ *Ibid*.

²⁹⁴ *Ibid*.

²⁹⁵ *Ibid* para 8.

²⁹⁶ *Ibid*.

²⁹⁷ *Ibid*.

Because they did not have any consent to stay on this land they were ordered to evict the land but they had nowhere to go so they tried to negotiate with the municipality.²⁹⁸ Nothing fruitful came out of these negotiations thus the respondents went back to Wallacedene and stayed in a sports field in temporary structures.²⁹⁹ The temporary structures did not give them much protection when the winter rains came thus the respondents' attorney appealed to the municipality to take action.³⁰⁰

The response given by the municipality was not satisfactory thus they launched an urgent application to the High Court compelling the state to satisfy its constitutional obligations.³⁰¹ The High Court ordered the state to provide the residents of Wallacedene with shelter.³⁰² The Court ordered the state to provide the minimum requirements of shelter which included tents, portable toilets and water supply.³⁰³

ii. The decision of the Constitutional Court

The Court stated that, '[a]s will appear from the discussion below; the real question in terms of our Constitution is whether the measures taken by the state to realize the right afforded by section 26 are reasonable.'³⁰⁴ The Court stated that the reasonableness of the measures is determined by considering the programs that the state has established and implemented towards the progressive realization of the right to access adequate housing.³⁰⁵ The Court later stated that these programs must be well-coordinated, comprehensive and coherent to be regarded as reasonable.³⁰⁶

²⁹⁸ Ibid para 10.

²⁹⁹ Ibid para 11.

³⁰⁰ Ibid.

³⁰¹ Ibid.

³⁰² *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C) 293.

³⁰³ Ibid 293.

³⁰⁴ Ibid para 33.

³⁰⁵ Ibid para 40 & 41. See also David Bilchitz (note 128) 141.

³⁰⁶ *Government of the Republic of South Africa and Other v Grootboom and Others* (note 10) para 38 & 40.

When determining whether the measures or programs taken by the state are reasonable it is not necessary to consider whether other more favourable measures could have been adopted by the state.³⁰⁷ Legislation alone does not mean the measures are reasonable.³⁰⁸ Instead there must be legislation followed with conduct directed towards achieving the intended and required result.³⁰⁹ In addition, 'a reasonable program must be balanced, flexible and should make appropriate provision for attention to housing crises and to short, medium and long term needs. A program that excludes a significant segment of society cannot be said to be reasonable.'³¹⁰

Yacoob found that the state had programs in place which considered the short, medium and long terms needs of the respondents.³¹¹ The main weakness of the programs implemented was that it lacked any capacity of dealing with and providing for the desperate needs of the respondents.³¹² Thus these programs cannot be said to be a reasonable programs which means that the Cape Metropolitan Council had failed to meet its Constitutional obligation.

iii. Application of human dignity

Yacoob states that the real question in terms of the Constitution in such matters is whether the measures taken to realize the rights protected in section 26 are reasonable.³¹³ From the judgment of Justice Yacoob, one can conclude that he realized the inadequacy of relying entirely on reasonableness.³¹⁴ This is because of the arguments he raised for holding the measures to be unreasonable. Yacoob states that any program that does not deal with the short term needs of the people is unreasonable.³¹⁵ One of

³⁰⁷ Ibid para 41.

³⁰⁸ Ibid.

³⁰⁹ Ibid para 42.

³¹⁰ Ibid para 43. See also David Bilchitz (note 128) 141.

³¹¹ Ibid para 64.

³¹² Ibid.

³¹³ Ibid 33.

³¹⁴ Ibid.

³¹⁵ Ibid para 43.

the consequences of not meeting the immediate needs of people, according to Yacoob, is the inevitable land invasions by desperate people.³¹⁶

But it can be argued that the failure to meet the immediate needs of desperate people does not automatically and in all probability lead to land invasions.³¹⁷ The issue of land invasions can be dealt with strictly by legislation and policies which will deter any attempts to invade land.³¹⁸ But the word everyone in section 26 suggests that everyone has the right to have access to adequate housing thus the intention of the Constitution in this section is not to ignore the short term needs of desperate people.³¹⁹ This is because the deprivation of the short term needs could lead to a total deprivation of the protected right. The problem with proceeding in this line of meeting the short term needs is that the Court will then have to state what the short term needs are which will ultimately lead to a discussion of the minimum core obligation.³²⁰

Yacoob avoided the determination of the minimum core obligation. Instead he further argued that it cannot be acceptable for desperate people to be left without any form of assistance.³²¹ If the main Constitutional obligation in terms of section 26 is providing for the long term housing plan to increase the number of people with housing then it is not clear why this leads to a finding of unreasonableness.³²²

Provision for the desperate is a goal which cannot be supported by the constructions and wording of the Constitution in section 26. The goal seems to be the access to adequate housing in a progressive manner within available resources. This argument thus fails to support the finding that any measure which does not cater for the needs of the desperate is unreasonable.

³¹⁶ Ibid para 65.

³¹⁷ David Bilchitz (note 128) 144.

³¹⁸ For example the response to Kempton Park Invasions as cited in *ibid* (note 128) 144.

³¹⁹ Ibid para 145.

³²⁰ Ibid.

³²¹ *Government of the Republic of South Africa and Others v Grootboom* (note 10) para 65.

³²² Ibid para 145.

It can then be argued that Yacoob realized that the reasonableness test was insufficient when he stated that,

[i]t is fundamental to an evaluation of the reasonableness of state action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity. Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to human dignity. In short, I emphasize that human beings are required to be treated as human beings. This is the backdrop against which the conduct of the respondents towards the appellants must be seen.³²³

Human dignity in the passage above is aimed to cover the shortcomings of the reasonableness test. However, it still does not assist Yacoob much because he does not explain how human dignity and reasonableness are connected in the interpretation and evaluation of the obligation in terms of section 26.

It would have been helpful for the sake of understanding how human dignity assists in the interpretation of rights for Yacoob to clearly establish the relationship between socio-economic rights, reasonableness and human dignity. Instead Yacoob does not give much content to the application and meaning of human dignity but just a vague analysis that human beings should be treated as human beings. It is really unclear and too imprecise to say human beings should be treated as human beings. The text of the constitution would have been the starting point for Yacoob to attempt to understand and clarify the relationship of the rights and dignity. After this examination Yacoob would have then proceeded to look at and apply the values that underlie the Constitution like human dignity.

³²³ Ibid para 85.

In addition, the Court in its use of human dignity does not discuss the ambit of the meaning of human dignity thus it can lead to different conclusions. As stated in chapter 2, the ambit of human dignity is very difficult to define³²⁴ thus when one deals and applies human dignity there is need for a lot more content to clarify the importance of human dignity in interpreting the Constitution. Justice Yacoob further states that 'a society must seek to ensure that the basic necessities of life are provided to all if it is a society based on human dignity, freedom and equality.'³²⁵ This gives the impression that the constitutional values support human dignity as integrity rather dignity as a freedom.³²⁶

Human dignity as integrity supports the idea that respect for dignity must involve the protection of a whole range of the basic interests and needs that individuals and groups have. Human dignity as a freedom emphasises the respect of free choice of all individuals and their ability and responsibility to improve their own positions. The constitutional values support the use of dignity as integrity because as stated by Yacoob a society should seek to ensure that the basic needs of the people are met showing that he intended to use human dignity as a value. I agree with this use of human dignity because the Constitution and all its values seek to protect the basic interests and needs that individuals and groups have among other goals it seeks to achieve.

The use of dignity as integrity should have led the Court to discuss what the basic interests and needs of the people from Wallacedene and of South Africa in light of the right to have access to adequate housing. In other words, the use of dignity as integrity would have demanded that a minimum core of rights be defined to ensure that all the basic needs and interests of people are satisfied and met.³²⁷ Yacoob avoided the idea of a minimum core of section 26 in his judgment and he states that it is not 'necessary to decide

³²⁴ Arthur Chaskalson (note 14) 134.

³²⁵ *Government of the Republic of South Africa and Other v Grootboom and Others* (note 10) para 44.

³²⁶ David Bilchitz (note 128)148.

³²⁷ *Ibid.*

whether it is appropriate for a court to determine in the first instance the minimum core of a right.³²⁸ The conclusion reached by Yacoob needed to include a determination of the minimum core of the right to have access to adequate housing as he used dignity as integrity.

The determination and discussion of minimum core in more detail as part of dignity as integrity, would have 'inherently involved judicial activism.'³²⁹ Judicial activism would have diminished judicial minimalism which is 'saying no more than is necessary to justify an outcome, leaving as much possible undecided.'³³⁰ The determination and discussion of minimum core would have led to a better reasoned judgment which would be a good example of judicial activism which would have led to an adequately justified decision.³³¹ Furthermore the failure to discuss minimum core highlights the fact that the Court did not correctly apply and understand the role that human dignity plays in Constitutional interpretation.

But the Court in *Grootboom* should be commended for showing a commitment to enforce the socio-economic rights that are entrenched in the Bill of Rights.³³² The approach taken by the Court in the *Grootboom* case on socio-economic rights shows that the Court understands the role of the Constitution as a transformative tool in the new constitutional dispensation.³³³ This transformative role of the Constitution is aimed at addressing the past injustices in South Africa.³³⁴ As the lack of housing originates from apartheid the Court attempted to use the Bill of Rights to compel the state to provide housing as stated in the Constitution. However, the Court's efforts are diminished by its display of judicial minimalism.

³²⁸ *Government of the Republic of South Africa and Other v Grootboom and Others* (note 10) para 33.

³²⁹ Steinberg as cited in David Bilchitz (note 128)149.

³³⁰ Cass Sunstein as cited in *Ibid.*

³³¹ Steinberg as cited in *Ibid.*

³³² P de Vos 'Substantive equality after *Grootboom*: The emergence of socio and economic context as a guiding value in equality jurisprudence' (2001) *Acta Juridica* 52, 53

³³³ *Ibid* 52.

³³⁴ *Ibid.*

The Court attempted to give content to the right to have access to adequate housing.³³⁵ The Court stated that what the right to have access to adequate housing entails.³³⁶ However, the discussion of what the right to have access to adequate housing entails loses its value when the Court states that what matters is whether the measures taken are reasonable and whether the measures value the dignity of the people concerned.³³⁷

The Court appears to be avoiding a direct application of the right to have access to adequate housing. This ultimately strips this right of any meaning.³³⁸ It undermines the value and content of the Bill of Rights because they opt to apply the obligations in section 26 according to the constraints of vaguely defined terms, like human dignity and reasonableness instead of relying on the actual content of the right.³³⁹

In addition, by opting to use notions like human dignity and reasonableness, the Court can be accused of using such terms to secure agreements between the judges.³⁴⁰ This need to secure agreements between the judges suppresses the logical and beneficial reasoning which is required to reach and justify the outcome.³⁴¹ Furthermore, it leaves readers unsure of the outcome of future constitutional determinations by the Court.³⁴² Ultimately leaving the readers or lower courts without much certainty as to how the law will be applied and whether the law will be applied equally.³⁴³ This lack of certainty in law is inconsistent with the principle of the rule of law.³⁴⁴

As stated above and as will be seen in Chapter 6, it would have been preferable to see the Court grapple with the text and content of section 26.

³³⁵ *Government of the Republic of South Africa and Other v Grootboom and Others* (note 10) para 35.

³³⁶ *Ibid.*

³³⁷ *Ibid* para 42.

³³⁸ *Stuart Woolman* (note 33) 762.

³³⁹ *Ibid.*

³⁴⁰ *Ibid.*

³⁴¹ *Ibid.*

³⁴² *Ibid.*

³⁴³ *Ibid.*

³⁴⁴ *Ibid.*

The Court should have clearly defined the nature and ambit of the right to show nature of the obligation thereof. After setting out the content of the right the Court then should have proceeded to clearly explain the test of measuring whether the obligation has been met. With the minimum core debate lurking around because of socio-economic rights and the use of dignity as integrity, the Court then should have explained why minimum core is not the test to be used instead of just simply shying away from it.

After describing and explaining why reasonableness is the test in South Africa the Court should have referred to the interpretation clause which states that when interpreting the Bill of Rights and the Constitution, the values that underlie the Constitution must be reflected in the interpretation. This would have introduced human dignity into the judgment without taking away from anything that the Court would have already stated. At this point then the Court would define dignity, the nature of the value, why it is important in the interpretation of socio-economic right and how it assists in such interpretation. In my opinion this would lead to well reasoned and argued judgment.

4.4 Conclusion

The chapter has attempted to show the importance of socio-economic rights in the Constitution and how they play a part in the transformative role of the Constitution. The specific socio-economic rights, right to access adequate housing and health care, have been discussed in an attempt to show how the Court applied and could have applied human dignity respectively. The use of human dignity in the *Grootboom* case indicates how the value should have assisted the Court in making a logical, well reasoned and thought out judgment. This is because they do not really apply human dignity as intended in the chapter 39 of the Constitution which highlights some lack of clear understanding on how human dignity assists in the interpretation of rights on the part of the Court.

The absence of an elaborate application of human dignity in the right to access to health care is an example of the Court only doing the minimum to reach their decisions. In the same regard, it made the *Soobramoney* judgment very thinly reasoned. All this has led to the Constitutional Court to be referred to as a Court that shies away from being judicially active. Instead, the judges chose to agree with each other than discussing the text and meaning of the rights together with the values that underlie the Constitution and the specific rights which has led to the Constitutional Court to be characterized as a minimalistic court.

Chapter 5: HUMAN DIGNITY IN SELECTED EQUALITY CASES

5.1 Introduction

The main focus in this chapter is the right to equality and how it is linked to the value of human dignity. The aim is to show how human dignity assists in the interpretation of the right to equality and the prohibition of unfair discrimination. In *The National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, the Constitutional Court held that human dignity is linked to the right to equality³⁴⁵ thus implying that human dignity is central to the protection and promotion of equality.³⁴⁶ Human dignity is linked with the idea that 'an individual or a group feels self respected and self worth. It is concerned with physical and psychological integrity and empowerment.'³⁴⁷

The cases I will discuss will show how the Constitutional Court has used human dignity in their interpretation of the equality clause. The chapter will attempt to show that this use of human dignity is inadequate and insufficient as such fails to elaborate what or how human dignity should assist in the interpretation of the right to equality. Even though the Court has continuously stated that human dignity and equality are linked, this link is not clarified by the Court or when utilised, it is difficult to follow how the link has assisted in the interpretation of the right to equality. This chapter will point out cases where the Court did not use human dignity or where it was not used in a way that assisted the court. This chapter will also attempt to highlight what the Court should have done in relation to human dignity's role in the interpretation of the equality clause.

³⁴⁵ *The National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (note 53) Para 30.

³⁴⁶ *Ibid* Para 41.

³⁴⁷ *Law v Canada (Minister of Employment and Immigration)* (1999) 170 DLR (4th) 1, Para 52-4 as cited in *ibid*.

The respect for dignity implies the respect of the autonomy of the every person and the need not to treat all human beings in a cruel and degrading manner.³⁴⁸ The idea of human dignity, as stated in Chapter 2, flows from the idea that human beings have inherent value and worth simply because they are humans.³⁴⁹ Because of the link between human dignity and equality it is necessary for the purposes of analyzing the role of human dignity when interpreting equality to discuss the impact of human dignity to the unfair discrimination assessment.

The main cases I will focus on are *President of RSA v Hugo*,³⁵⁰ *Khosa v Minister of Social Development*³⁵¹ and *Harksen v Lane*.³⁵² It is important to state from the outset that, like all the other constitutional rights, the right to equality must be read, interpreted and understood contextually.³⁵³ This means that it is important to understand 'the type of society that South Africa once was and the new constitution has set itself.'³⁵⁴ In light of this, the status of the right to equality in both the apartheid era and the new constitutional dispensation will be discussed in this chapter.

5.2 The right to equality during the apartheid era

The apartheid era was based on inequality and discrimination.³⁵⁵ The Constitutional Court in *Brink v Kitshoff NO*³⁵⁶ clearly stated that apartheid government

systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as 'white', which constituted nearly 90 percent of

³⁴⁸ Arthur Chaskalson (note 14)134

³⁴⁹ P de Vos (note 64).

³⁵⁰ *President of RSA v Hugo* (note 5).

³⁵¹ *Khosa v Minister of Social Development* (note 42).

³⁵² *Harksen v Lane* (note 43).

³⁵³ Ian Currie, Johan De Waal and Gerhard Erasmus (note 47) 231.

³⁵⁴ *Ibid.*

³⁵⁵ *Ibid* 231.

³⁵⁶ 1996 (4) SA 197 (CC) para 40.

the land mass in South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities including transport systems, public parks, libraries and many shops were closed to black people.³⁵⁷

Separate and inferior structures were provided for black people which created 'deep scars' in the communities of South Africa.³⁵⁸ These scars caused by racial discrimination and inequality are evident in the quality of life between the different races.³⁵⁹ White people enjoy a relatively better and wealthier life.³⁶⁰ This is noticeable as white people are generally healthier, better nourished and enjoy high standards of literacy and education than the black population in South Africa. Moreover, the 'infant mortality rates and life expectancy among black South Africans are equivalent to those of the poorest nations of the world.'³⁶¹

The apartheid government promoted the socio-economic development of the white minority population while the rest of the South African population suffered and lived without much.³⁶² This promotion of the socio-economic interests of white people was facilitated by the idea that all the non-whites were inferior thus less deserving of any kind of protection.³⁶³ Due to the fact that non-whites were considered to be inferior it also meant that their dignity or equality was not worthy of protection and promotion.³⁶⁴

5.3 The right to equality in the new constitutional dispensation

Equality is a core value of the new constitutional dispensation.³⁶⁵ The preamble of the constitution expresses an ideal of democracy and an open

³⁵⁷ Ibid para 40.

³⁵⁸ Ibid.

³⁵⁹ Ian Currie, De Waal and Gerhard Erasmus (note 47) 231.

³⁶⁰ Ibid.

³⁶¹ Ibid.

³⁶² Ibid.

³⁶³ Jewel Amoah (note 60) 17.

³⁶⁴ Ibid.

³⁶⁵ The Constitution of the Republic of South Africa, Act 108 of 1996.

society in which everyone is equally protected by the law.³⁶⁶ Furthermore, equality is one of the founding values of the constitution.³⁶⁷ In this new constitutional dispensation, equality is a goal to be achieved and promoted.³⁶⁸ In addition, the measures to be put in place in an attempt to achieve equality must be measures that also promote and value the right to equality.³⁶⁹

Section 9 of the Bill of Rights makes provision for the right to equality.³⁷⁰ It prohibits unfair discrimination and this prohibition applies to both the state and its organs.³⁷¹ The prohibition against unfair discrimination also applies to all persons. The constitution states that the question of whether the rights in the Bill of Rights binds natural and juristic persons depends on the nature of the right and the correlative duty imposed by the right.³⁷²

However, there is no need for such a determination for the prohibition of unfair discrimination in the constitution which clearly highlights how fundamental the right to equality is in the new constitutional dispensation.³⁷³ This is because section 9(4) of the constitution provides that '[n]o person may unfairly discriminate directly and indirectly against anyone on one or more grounds listed subsection 3.'

³⁶⁶ Janet Kentridge 'Equality' in Stuart Woolman et al Constitutional Law (2007) 2nd Edition, Revision Service 36-2, 67.

³⁶⁷ Section 1 of the Constitution of the Republic of South Africa, Act 108 of 1996.

³⁶⁸ Janet Kentridge (note 366) 67.

³⁶⁹ Ibid.

³⁷⁰ Section 9 provides:

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

(2) Equality includes the full and equal enjoyment of all rights and freedoms.....

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

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).....

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

³⁷¹ Section 9(2) of the Constitution of the Republic of South Africa, Act 108 of 1996.

³⁷² Section 8(2) of the Constitution of the Republic of South Africa, Act 108 of 1996.

³⁷³ Janet Kentridge (note 366) 67.

The interpretation of the right to equality must not be contrary to the underlying constitutional values and the interests that the constitution seeks to protect.³⁷⁴ When dealing with the right to equality one needs to make a distinction between formal and substantive equality.³⁷⁵ Formal equality emphasises that everyone should be treated the same i.e. people in the same situation or circumstance are supposed to be treated the same.³⁷⁶ Furthermore, it emphasises that everyone is an equal bearer of rights thus inequality can be eliminated by extending the same rights to everyone in a way that does not favour anyone.³⁷⁷ Formal equality does not give any regard to social and economic differences between different groups and individuals in a society.³⁷⁸ It risks and threatens to undermine the values that underpin the new constitutional dispensation.³⁷⁹

Substantive equality 'requires the law to ensure equality of outcome and is prepared to tolerate disparities of treatment to achieve this goal.'³⁸⁰ It requires the consideration of the actual existing social and economic disparities between different groups and individuals so as to determine whether the constitutional obligations are being satisfied.³⁸¹ There is no doubt that the jurisprudence of the Constitutional Court embraces a substantive idea of the right to equality as demonstrated by the Constitutional Court in the *Hugo case*.³⁸²

A substantive conception of equality is supportive of the founding values of the constitution³⁸³ and confirms the idea that South African's constitution is indeed a transformative constitution.³⁸⁴ As stated in chapter 4 of this paper, the South African Constitution is a transformative constitution.

³⁷⁴ Cathi Albertny and Beth Goldblatt 'Section 9 – The Right to Equality.' Paper for presentation at the Constitutional Law of South Africa Conference, 29 March 2006, Constitutional Hill, 1-18, 3.

³⁷⁵ Ian Currie, De Waal and Gerhard Erasmus (note 47) 232.

³⁷⁶ Ibid.

³⁷⁷ Ibid 233.

³⁷⁸ Ibid.

³⁷⁹ Ian Currie, De Waal and Gerhard Erasmus (note 47) 233.

³⁸⁰ Ibid.

³⁸¹ Ibid.

³⁸² *President of RSA v Hugo* (note 5) Para 41.

³⁸³ Ibid.

³⁸⁴ Ibid 234.

This means that '[i]t goes without saying that a very particular conception of the right to equality is required to give effect to this transformative vision.'³⁸⁵

This notion of equality rejects the notion of similar treatment and sameness.

The Constitutional Court

has adopted what can be described as a 'contextual approach' to equality in which the actual impact of an alleged violation of the right to equality on the individual within and outside different socially relevant groups is to be examined in relation to the prevailing social, economic and political circumstances in the country.³⁸⁶

Putting these different views of equality in the context of the constitution and the aims the constitution intends to achieve, it is clear that the constitution's right to equality is a substantive one.³⁸⁷ This is clearly highlighted by the text of the constitution which states that 'equality includes the full and equal enjoyment of all rights and freedoms.'³⁸⁸ Furthermore, the Constitutional Court has held that the constitutional goal of creating 'a non-racial and non-sexist egalitarian society underpinned by human dignity, the rule of law, a democratic ethos and human right informs a conception of equality that goes beyond mere formal equality and mere non-discrimination.'³⁸⁹

5.4 The link between equality and human dignity

The Constitutional Court has emphasized and accepted the relationship between equality and human dignity.³⁹⁰ In *President of South Africa v Hugo*³⁹¹ the Court stated that

[a]t the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of

³⁸⁵ P de Vos (note 332) 58.

³⁸⁶ Ibid 59. See also *President of RSA v Hugo* (note 5) para 41.

³⁸⁷ Ian Currie, De Waal and Gerhard Erasmus (note 47) 233.

³⁸⁸ Section 9 (2) of the Constitution of the Republic of South Africa, Act 108 of 1996.

³⁸⁹ *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) Para 26.

³⁹⁰ Cathi Albertyn and Beth Goldblatt (note 374) 2.

³⁹¹ *President of RSA v Hugo* (note 5).

a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.³⁹²

The theoretical basis for a successful equality challenge lies in holding that a measure that discriminates against a specific group of people ultimately impairs their dignity also.³⁹³ This makes human dignity the focal point of the equality challenge³⁹⁴ and the guiding factor in the equality challenge.³⁹⁵

Human dignity has been referred to as the 'guardian' of unfair discrimination.³⁹⁶ This is seen in the test for unfair discrimination described in *Harksen v Lane*³⁹⁷ which confirms the importance of human dignity to the unfair discrimination test. However, it has been argued that it is seldom clear what the Constitutional Court has in mind or what they mean when they say that human dignity and the right to equality are linked.³⁹⁸ The Court has just applied human dignity without any further explanations of how the link between human dignity and equality can be explored and applied so as to assist in the interpretation of the right.

I agree with this view because the Constitutional Court's decisions have not described and formulated the stages of inquiry when applying human dignity in equality cases. Stages of inquiry highlight the steps to be followed or the steps to be met when applying human dignity to the unfair discrimination challenge. Furthermore, these stages of inquiry are important because they highlight how human dignity can assist in the unfair discrimination determination. Neither has the Court given much content to human dignity as such it is very difficult to see and understand how the value of human dignity and the right to equality are linked or how human dignity can be regarded as the 'guardian' of unfair discrimination.

³⁹² *Ibid* para 41.

³⁹³ Susie Cowen 'Can 'Dignity' guide South Africa's Equality Jurisprudence?' as cited in Jewel Amoah (note 60) 17.

³⁹⁴ *Ibid*.

³⁹⁵ Susie Cowen 'Can Dignity Guide South Africa's Equality Jurisprudence' (2001) 17 South African Journal on Human Rights 34, 34.

³⁹⁶ Cathy Albertyn and Beth Goldblatt (note 374) 2.

³⁹⁷ *Harksen v Lane* (note 53) para 50 and 53.

³⁹⁸ P de Vos (note 332) 61.

The central role of equality in the jurisprudence of the court is patent in three ways, all which are in the prohibition of unfairness provision.³⁹⁹ Dignity is firstly relevant in determining whether there is discrimination on an unlisted ground in the prohibition of unfair discrimination clause.⁴⁰⁰ Secondly, dignity is important in determining whether discrimination based on a listed or unlisted ground is unfair.⁴⁰¹ Thirdly dignity can be relevant in the determination of whether the unfair discrimination can be justified under the limitation clause.

This chapter will focus on the first two uses of human dignity and the cases discussed below will discuss this use of dignity in a bit more detail. It is important to note that the uses of dignity above do not operate 'in isolation; their force is gained partly from their location in what is commonly referred to as "substantive" view of equality which has been adopted⁴⁰² by the Constitutional Court as stated above.⁴⁰³ This implies that the use of human dignity should be understood within the frameworks of substantive equality endorsed by the Court.

5.5 Selected equality cases of the Constitutional Court

The majority judgements of the *Harksen*, *Hugo* and of the *Khosa* case will be discussed and analysed. *Harksen* is discussed because it created the equality test and stages of inquiry when there is alleged unfair discrimination. *Hugo* is looked at because it is one of the Constitutional Court cases that highlighted the relationship between equality and the value of human dignity.⁴⁰⁴ Furthermore, it is the first case to establish the centrality of human

³⁹⁹ Susie Cowen (note 395) 35.

⁴⁰⁰ *Ibid* 36.

⁴⁰¹ *Ibid*.

⁴⁰² *Ibid* 37.

⁴⁰³ *President of RSA v Hugo* (note 5) Para 41. For a more detailed discussion of substantive equality please refer to 5.3 above.

⁴⁰⁴ Cathy Albertyn and Beth Goldblatt (note 374) 2.

dignity in the equality jurisprudence.⁴⁰⁵ Finally, *Khosa* is discussed because the case was based on an analogous ground of equality which relies intensely on the impact of the discrimination on the person's human dignity to be considered unfair.

a. The *Harksen* case

i. The facts

In this case, the constitutionality of certain provisions of the Insolvency Act was being challenged.⁴⁰⁶ Sections 21, 64 and 65 were being challenged and it was alleged that they were inconsistent with the Bill of Rights.⁴⁰⁷ This was because they impacted on the property and affairs of solvent spouses upon the sequestration of an insolvent spouse.⁴⁰⁸ Mrs. Harksen's property had been attached during the sequestration of Mr. Harksen's estate according to the provisions of the Insolvency Act.⁴⁰⁹

It was submitted on behalf of Mrs. Harksen that section 21 of the Insolvency Act violated the equality clause in the Interim Constitution.⁴¹⁰ It was further alleged that the

'vesting provision constitutes unequal treatment of solvent spouses and discriminates unfairly against them; and that its effect is to impose severe burdens, obligations and disadvantages on them beyond those applicable to other persons with whom the insolvent had dealings or close relationships or whose property is found in the possession of the insolvent.'⁴¹¹

⁴⁰⁵ Ibid.

⁴⁰⁶ *Harksen v Lane* (note 53) para 1.

⁴⁰⁷ Ibid para 7.

⁴⁰⁸ Ibid. For further and detailed discussion of the provisions of the Insolvency Act see para 11-23 of Ibid.

⁴⁰⁹ Ibid Para 24.

⁴¹⁰ *Harksen v Lane* (note 53) Para 40.

⁴¹¹ Ibid.

The section allegedly violated both the equal protection before the law provision⁴¹² and the prohibition of unfair discrimination.⁴¹³

ii. Decision of Goldstone J in *Harksen v Lane*

Goldstone J wrote for the majority. He started by quoting the *Prinsloo*⁴¹⁴ case which stated that equality challenges raise difficult questions about constitutional interpretation thus require a careful analysis of facts and the context of the case.⁴¹⁵ He then proceeded to look at section 8(1) and 8(2) in detail. Goldstone stated that the first inquiry in section 8(1) is to determine whether the provision in question does indeed differentiate between different groups of people.⁴¹⁶ If it does differentiate between groups of people, the only way it can pass the equality challenge in this section is the presence of 'a rational connection between the differentiation in question and the legitimate governmental purpose it is designed to further or achieve. If it is justified in that way, then it does not amount to a breach of section 8(1).'⁴¹⁷

For section 8(2), Goldstone stated that differentiation which does not violate section 8(1) may violate section 8(2).⁴¹⁸ If it does bear a link to a rational connection, the next stage of inquiry in section 8(2) would be to determine whether the differentiation amount to unfair discrimination.⁴¹⁹ This stage in section 8 (2) requires a two stage analysis,

(b)(i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

⁴¹² Section 8(1) of the Interim Constitution Act 200 of 1993.

⁴¹³ Section 8(2) of the Interim Constitution Act 200 of 1993.

⁴¹⁴ *Prinsloo v Van der Linde and Another* 1997 (6) BCLR 759 (CC) para 20 as cited in *Harksen v Lane* (note 53) para 41.

⁴¹⁵ *Ibid.*

⁴¹⁶ *Ibid* para 42.

⁴¹⁷ *Ibid* .

⁴¹⁸ *Ibid* para 43.

⁴¹⁹ *Ibid* para 53. See also Currie and De Waal (note 47) 235.

(b)(ii) If the differentiation amounts to “discrimination”, does it amount to “unfair discrimination”? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).⁴²⁰

If the discrimination is found to be unfair then it must be determined whether it is justifiable in terms of the limitation clause.⁴²¹ If there is no presence of any form of differentiation then there can be no violation of the equality clause.⁴²²

Goldstone stated that there was a difference between solvent spouses of insolvent people and those that have dealings with the insolvent people.⁴²³ There was however a rationale connection to a legitimate government purpose.⁴²⁴ The differentiation was not one based on a listed ground thus Mrs. Harksen had to prove that the differentiation amounted to unfair discrimination.⁴²⁵ He further stated that ‘the inconvenience and burden of having to resist such a claim does not lead to an impairment of fundamental dignity or constitute an impairment of a comparably serious nature.’⁴²⁶ The Court then held that Mrs. Harksen had not proved that the discrimination was unfair in terms of section 21 of the said Act.⁴²⁷

iii. Consideration of human dignity in the decision of Goldstone J

⁴²⁰ Ibid para 53.

⁴²¹ Section 33 of the Interim Constitution Act 200 of 1993 and Section 36 of the Final Constitution of the Republic of South Africa Act 108 of 1996. See also para 53 of *Harksen v Lane* (note 53).

⁴²² Currie, De Waal and Erasmus (note 47) 236.

⁴²³ *Harksen v Lane* (note 53) para 55.

⁴²⁴ Ibid para 60.

⁴²⁵ Ibid para 62.

⁴²⁶ Ibid para 67.

⁴²⁷ Ibid para 68.

The Court in the *Harksen* case stated that specified grounds in the constitution are grounds which have been misused in the past to marginalise and oppress the people in the groups concerned.⁴²⁸ These grounds have the potential to infringe the dignity of the person when manipulated.⁴²⁹ For unspecified grounds there will be discrimination if it is based on attributes or features which can potentially infringe human dignity of a person.⁴³⁰ All this makes human dignity the underlying value in any alleged unfairness inquiry.⁴³¹

The Court in the *Harksen* case stressed that what is important in the equality inquiry is to focus on the impact of the discrimination of the person concerned.⁴³² The determination of the adverse effects of the discrimination considers various factors.⁴³³ One of these factors is the impact of the discrimination on the individual involved.⁴³⁴ This suggests that the infringement of human dignity is determined and highlighted by the impact of the differentiation.⁴³⁵ This means that the context for the determination of the impact of the discrimination on human dignity has to be established.

The context is established by looking at whether the victim has suffered patterns of disadvantage in the past or is from a group that can be classified as vulnerable.⁴³⁶ The analysis 'acknowledges that a determination of 'unfair discrimination' cannot be made in the abstract, but must take into account the structural inequality that promotes and perpetuates the subordination of certain individuals and groups in a society.'⁴³⁷ The context of determining the impact of differentiation establishes the role of human dignity in the equality analysis.

⁴²⁸ Ibid para 49.

⁴²⁹ Ibid.

⁴³⁰ Ibid para 46.

⁴³¹ Ibid para 50.

⁴³² Ibid.

⁴³³ P de Vos (note 332) 62.

⁴³⁴ *Harksen v Lane* (note 53) para 50.

⁴³⁵ P de Vos (note 332) 62.

⁴³⁶ *Harksen v Lane* (note 53) Para 49-51. See also P de Vos (note 332) 62.

⁴³⁷ *National Coalition for lesbian and Gay Equality v Minister of Justice* (note 11) para 22.

In this regard the Court should have specifically stated that human dignity is closely linked with the idea that all beings have 'equal moral worth, regardless of the differences between them.'⁴³⁸ When this equal moral worth is denied or undermined then human dignity would be violated.⁴³⁹ However, the point of substantive equality is not to only look at the impact of the discrimination but to also consider the socio and economic context of discrimination.⁴⁴⁰

The negative impact on the person concerned should be determined in the social and economic situation in which the complaint operates.⁴⁴¹ Relying only on human dignity in this context leads court to overlook a serious factor which must be taken into consideration in an unfairness enquiry. This oversight on the part of the Court is very significant and undermines the value of the socio-economic considerations in the equality challenge.

The failure of the Court to clearly highlight the role of socio-economic considerations confirms the idea that human dignity can be thrown into any argument without much explanation as to how it will assist in the argument or why it is referred to in that particular interpretation of the right. In my opinion this could be because human dignity is imprecise and vague thus it is very difficult to establish and highlight the 'role' it supposedly plays in the interpretation of the right to equality. Goldstone J, by failing to clearly define and discuss the role of human dignity in the equality challenge he ultimately undermines the founding role that human dignity was intended to play in the constitution and the relationship between rights and the value that underpin them.

b. The *Hugo* case

i. The facts

⁴³⁸ P de Vos (note 332) 62.

⁴³⁹ Ibid 63.

⁴⁴⁰ Ibid.

⁴⁴¹ Ibid.

The President while exercising his presidential powers had pardoned some categories of prisoners.⁴⁴² One of the groups that the president had granted pardons to was 'all mothers in prison on 10 may 1994 with minor children under the age of twelve (12) years.'⁴⁴³ The respondent would have qualified for remission if he had been a mother and not a father as he was a prisoner who he had a son who was under 12 years of age at the time.⁴⁴⁴

The respondent brought an application before court seeking the court to declare the Presidential Act to be unconstitutional.⁴⁴⁵ He alleged that the Act was contrary to the provisions in section 8(1) and section 8(2) of the Interim Constitution.⁴⁴⁶ He alleged that the Act 'unfairly discriminated against him on the grounds of sex or gender and indirectly against his son in terms of section 8(2) because his incarcerated parent was not a female.'⁴⁴⁷

In the High Court the application was upheld and the court held that the Presidential Act unfairly discriminated against the respondent and his son on the ground of gender.⁴⁴⁸ The High Court further stated that the finding of unfairness 'raised the presumption of unfairness in section 8 (4) of the Interim Constitution, which presumption was found not to have been rebutted by the appellants.'⁴⁴⁹ As a result, the court ordered the first appellant to amend the Presidential Act so that it ceases being contrary to the constitution.⁴⁵⁰

ii. Decision of the majority in the *Hugo* case

Goldstone J held that the prohibition of unfair discrimination in the new constitutional era seeks to avoid both discrimination of previously

⁴⁴² *President of RSA v Hugo* (note 5) para 2.

⁴⁴³ *Ibid* para 2.

⁴⁴⁴ *Ibid*.

⁴⁴⁵ *Ibid* para 3.

⁴⁴⁶ *Ibid* para 3. See also Interim Constitution Act 200 of 1993.

⁴⁴⁷ *Ibid*.

⁴⁴⁸ *Hugo v President of the Republic of South Africa and Another* 1996 (4) SA 1012 (D) as cited in *ibid* para 4.

⁴⁴⁹ *Ibid*.

⁴⁵⁰ *ibid*.

disadvantaged groups and all human beings.⁴⁵¹ He further stated that the concept of unfair discrimination is a concept that affords everyone equal treatment regardless of their membership to a particular group.⁴⁵² The promotion of equality is a goal of the constitution which the constitution seeks to achieve through substantive equality.

Goldstone went further and stated that in order to determine if the impact of the presidential act was unfair it is not only essential to look at the group that was disadvantaged.⁴⁵³ The court has to look at the 'nature of the powers in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination.'⁴⁵⁴ He held that the decision by the president to pardon a group of people is very impossible not to do it through a 'blunt axe' method.⁴⁵⁵ He then concluded that the presidential decision had been exercised fairly thus it was not contrary to the provisions of the Interim Constitution.⁴⁵⁶ Thus the appeal should have been dismissed.⁴⁵⁷

iii. Human dignity in the decision of Goldstone J

Goldstone J accepted the link between human dignity and equality. This can be seen when he states that,

[a]t the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that is the goal of the Constitution should not be forgotten or overlooked.⁴⁵⁸

⁴⁵¹ Ibid para 41.

⁴⁵² Ibid para 41.

⁴⁵³ Ibid para 43.

⁴⁵⁴ Ibid.

⁴⁵⁵ Ibid para 48.

⁴⁵⁶ Ibid para 52.

⁴⁵⁷ Ibid.

⁴⁵⁸ Ibid para 41.

Goldstone then cites *Egan v Canada*⁴⁵⁹ with approval. He agrees that the right to '[e]quality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity."⁴⁶⁰ This establishes the link between equality and dignity while also emphasising the importance of dignity to the equality challenge.

Having said that much, Goldstone does not discuss human dignity in further detail. He accepts the role that human dignity plays in the equality challenge but does not seem keen to clearly and completely discuss the concept. Furthermore, he had previously held that human dignity is important in the impact assessment of the alleged unfair discrimination.⁴⁶¹ As his use of human dignity in the *Harksen* case was not sufficient he had an opportunity to develop the role of human dignity in the equality assessment particularly the effect of human dignity on right to equality particularly unfair discrimination.

The failure to improve his use of human dignity in equality cases shows that the value of human dignity can be thrown into the interpretation of rights without much consideration as to how and why it will assist in such interpretation. As stated above, this undermines the value of human dignity in interpreting the Bill of Rights. Furthermore it confirms that human dignity is just used by the Court to reach agreements and to avoid detailed analysis of the right in question.

By failing to discuss the role of human dignity in the impact assessment in more detail than he did in the previous case, Goldstone missed an opportunity to develop and re-emphasise the role of human dignity in much detail. In addition to the above, the failure to discuss human dignity makes

⁴⁵⁹ (1995) 29 CRR (2d) 79 104-5 as cited in *ibid*.

⁴⁶⁰ *Ibid*.

⁴⁶¹ *Harksen v Lane* (note 53) para 49 -51.

the jurisprudence of the court very inconsistent thus not easily followed or clearly understood by the readers particularly in their use of human dignity. This leads one to conclude that in the cases discussed in this chapter human dignity was carelessly and imprecisely applied and referred to by the Court. Furthermore, Goldstone failed to apply his previous submissions in more detail so as to have a progressive jurisprudence for one of the most important values in the constitutional era, human dignity. This seriously undermines the judgement of Goldstone and the jurisprudence of the Constitutional Court as a whole.

c. *Khosa v Minister of Social Development*⁴⁶²

i. The facts

The applicants in this case were Mozambican citizens who had become permanent residences of South Africa in terms of the exemptions in the Aliens Control Act 96 of 1991.⁴⁶³ The applicants were destitute and would have qualified for social grants if they were South African citizens.⁴⁶⁴ The applicants contended that the exclusion of non-citizens from receiving the social grants was inconsistent with the provisions of the constitution in section 27(1) (c).⁴⁶⁵ Furthermore, they argued that their exclusion from receiving benefits from the state simply because they were not South African citizens unlawfully violated the prohibition of unfair discrimination.⁴⁶⁶ In addition, they claimed that their right to dignity,⁴⁶⁷ life⁴⁶⁸ and in connection with the children of the applicants, the right to children in section 28 of the Constitution.⁴⁶⁹

ii. Majority Decision of Mokgoro J

⁴⁶² *Khosa v Minister of Social Development* (note 42)

⁴⁶³ Ibid para 2.

⁴⁶⁴ Ibid Para 3.

⁴⁶⁵ Ibid para 38.

⁴⁶⁶ Ibid para 39.

⁴⁶⁷ Section 10 of the Constitution of the Republic of South Africa Act 108 of 1996.

⁴⁶⁸ Section 11 of the Constitution of the Republic of South Africa Act 108 of 1996.

⁴⁶⁹ *Khosa v Minister of Social Development* (note 42) Para 39.

One of the main issues in the *Khosa* case was whether the exclusion of permanent residences limited their right to equality as it was unfair under section 9 and the limitation was an unjustifiable limitation of the right to equality.⁴⁷⁰ As far as equality is concerned, Mokgoro J discusses the nature of unfair discrimination analysis first.⁴⁷¹ She held that there may be a rational basis of differentiating between citizens and non-citizens which does not necessarily mean that it is a fair discrimination.⁴⁷² She further stated that if the ground of discrimination is one that is listed in section 9(3) then there is a rebuttable presumption of unfairness.⁴⁷³ When the ground of discrimination is one that is not listed in section 9(3) but is analogous to the listed grounds then unfairness has to be established.⁴⁷⁴

This case, according to Mokgoro J, was one in which the ground for discrimination was an analogous ground thus unfairness had to be proved by the person alleging the unfairness.⁴⁷⁵ This is because citizenship is not a listed ground in section 9(3). She further stated that for a ground to be analogous to the listed grounds it must be a ground of discrimination that would have an adverse effect on the dignity of the person or people concerned.⁴⁷⁶ Mokgoro J concludes that the exclusion of citizens from benefitting from the grants was unfair⁴⁷⁷ thus a violation of the right to equality in section 9 of the constitution. Moreover such a violation was not justifiable under section 36 of the constitution.⁴⁷⁸

iii. Consideration of Human Dignity in the decision of Mokgoro J

⁴⁷⁰ Ibid. See also S Fredman 'Providing equality: Substantive equality and the positive duty to provide' (2005) 21(2) *SAJHR* 163, 174.

⁴⁷¹ *Khosa v Minister of Social Development* (note 42) Para 68.

⁴⁷² Ibid.

⁴⁷³ Ibid.

⁴⁷⁴ Ibid.

⁴⁷⁵ Ibid.

⁴⁷⁶ Ibid para 70.

⁴⁷⁷ Ibid para 77.

⁴⁷⁸ Ibid para 80.

Mokgoro J states that for a ground to be analogous it must have an adverse effect on the dignity of person concerned.⁴⁷⁹ She does this without giving much content as to how the analogous ground of discrimination can affect the dignity of the person in question. Since human dignity is at the centre of determining whether a ground is an analogous ground or not, it was necessary for Mokgoro to have discussed human dignity in more detail and give it more content by showing how the effect of the conduct can affect one's dignity for the purposes of the analogous ground. This creates the impression that, like Goldstone she just throws human dignity to assist her argument and does not give due regard to how human dignity operates in assisting the interpretation of analogous grounds.

Moreover, the previous decisions of the Constitutional Court⁴⁸⁰ had stated clearly that the value of human dignity plays a crucial role in the unfairness determination. Mokgoro J cites parts of the decision of the *Hugo* case,⁴⁸¹ and parts of *Hoffmann v South African Airways*⁴⁸² without any criticisms or additions to these judgements. She just follows what the Court did, for example she like Goldstone uses human dignity without paying attention to the question of how and why human dignity comes into the interpretation, she also does not explain this which can lead one to also conclude as I did for Goldstone that her use of human dignity is imprecise and careless.

This acceptance of the positions that were held in previous Constitutional Court cases showed that Mokgoro accepted the role of dignity in the equality challenge. This should have warranted a more detailed discussion and application of human dignity in the determination of whether citizenship was an analogous ground. Furthermore, it may lead to the conclusion that Mokgoro did not completely apply her mind to the case on this aspect and just rubber stamped the previous decisions of the Court.

⁴⁷⁹ Ibid para 70.

⁴⁸⁰ For example *Hugo* case (note 5) para 41.

⁴⁸¹ *Khosa v Minister of Social Development* (note 42) Para 69.

⁴⁸² Ibid para 70.

She cites cases that accepted the role of human dignity in the assessment of the impact of the unfairness challenge. This is highlighted when she stated in her judgement that 'the exclusion of permanent residents from the scheme is likely to have a severe impact on the dignity of the persons concerned, who, unable to sustain themselves, have to turn to others to enable them to meet the necessities of life and are thus cast in the role of supplicants.'⁴⁸³ She carries the oversights and weaknesses of the judgments she quotes which undermines the quality of her judgment in this case.

5.6 Conclusion

The value and importance of the right to equality in the new constitutional dispensation has been highlighted by this chapter. Since context is important to the equality challenge the history of South Africa in relation to the right to equality has been discussed in an effort to show the path that equality has taken. This chapter has attempted to show the importance of the value of human dignity in the equality challenge. It has, in addition, attempted to show that the Constitutional Court accepts the link between human dignity and equality.

Like the discussion in the previous chapters, this chapter has highlighted the weaknesses and oversights of the Constitutional Court in dealing with the value of human dignity. The Court has failed to give detailed content to the value of human dignity to make sure that the role and importance of human dignity in the Bill of Rights as whole is clearly highlighted. Moreover, the Court, especially in the *Harksen* and *Hugo* cases failed to develop and re-emphasise its position in the previous cases. This seriously undermines the quality of the judgments and makes it difficult to understand the use and function of human dignity in the equality challenges. Furthermore, it confirms that the Court has just thrown human dignity in the

⁴⁸³ Ibid para 80.

interpretation of rights to assist the Court with the reasoning but they do so without explaining the role of human dignity in the interpretation of the rights concerned. This, as stated earlier, undermines the value of human dignity in interpreting rights and the value of the right being interpreted.

All the oversights, lack of content and explanation discussed in this chapter ultimately confirms the following,

[t]he Constitutional Court has, however, been slow and restrained in giving content to the concept of dignity and in explaining what it means when it says that dignity is impaired. In light of its role it would seem desirable that the Court be more explicit in what it means when it uses the term. Moreover, it important to understand the concept not only in general and historical terms but in a way that can provide a vision for the future distinct from South Africa's past.⁴⁸⁴

This is particularly disappointing because if one considers the status of human dignity in the apartheid era and the current role of the value in human dignity. Human dignity was almost non-existent in the apartheid era as discussed above but in this new constitutional dispensation human dignity is one of the foundational values that underpins this new constitutional era. For the value to be misunderstood and undermined because the highest Court in constitutional matters seems not to understand the 'actual role' of the value in the interpretation of rights is particularly disappointing. The Constitutional Court definitely has to improve its application of human dignity in order to show the importance and role of this value in the new constitutional dispensation.

⁴⁸⁴ Susie Cowen (note 395) 54.

Chapter 6: Conclusion and Recommendations

6.1 Introduction

Chapter 2 discussed the history and meaning of human dignity. The aim was to show the importance of human dignity in the new constitutional dispensation. Chapter 3 highlighted the importance of human dignity in the sentencing cases especially the link between human dignity and right to life and the right not to be treated in a cruel, inhuman and degrading manner. Chapter 4 illustrated the importance of human dignity in considering whether the demands of the constitution in terms of socio-economic rights have been satisfied. Chapter 5 highlighted the link and importance of human dignity in some equality cases.

The chapters above have highlighted how the Constitutional Court has used human dignity in the interpretation of human dignity. It was argued in the chapters above that the application of human dignity by the Constitutional Court is insufficient and unsatisfactory. Furthermore, the Constitutional Court has been called a minimalistic court because of the fact that it does not cover all the necessary and important considerations relating to the alleged violations of the rights before them. As long one right justifies the relief or judgment then the Court goes no extra mile.

The focus of this chapter is to show how the Constitutional Court should be interpreting the Bill of Rights. The intention is to show how the Court can add content to the application of human dignity without having to undermine the Bill of Rights. The chapter will start by discussing the lack of content in the application and discussion of human dignity by the Constitutional Court and how more content can be added to such an important value of the constitution. After this has been done the next step will be to discuss the recommended approach when interpreting the Bill of Rights. This preferred approach will enable the Court to discuss constitutional issues before it in more detail than it currently does.

6.2 Lack of content in the use human dignity by the Constitutional Court

The lack of content in the use of human dignity can be attributed to the fact that the Constitutional Court hardly engages intensely or directly apply the Bill of Rights when deciding cases.⁴⁸⁵ The reliance on human dignity and section 39(2) by the Court 'may be a convenient way to secure agreement amongst eleven judges regarding the appropriate outcome of a case at the same time as they finesse (or suppress) the logic behind the outcome.'⁴⁸⁶ This frees the Court from the text of the constitution granting the Court the leeway to decide cases as they please without much discussion of the content of human dignity.

In the jurisprudence on the Constitutional Court, '[h]uman dignity is a catch all phrase used to capture the idea of human as equally capable and equally deserving of concern, respect and consideration.'⁴⁸⁷ The fact that human dignity is a central value that can apply to all the rights in the Bill of Rights makes human dignity a very difficult concept to apply with much precision. The Constitutional Court has failed to contain and embrace the broadness of human dignity. Their application of human dignity highlights this difficulty. In addition, the Court's attempt to define human dignity is not satisfactory as it is done through other values which undermine its content and meaning.

6.3 Preferred Approach in applying the Bill of Rights

⁴⁸⁵ Stuart Woolman (note 33) 763.

⁴⁸⁶ Ibid .

⁴⁸⁷ P de Vos (note 332) 63.

Interpretation of the Bill of Rights is aimed at determining the meaning of substantive rights.⁴⁸⁸ As stated above the Constitutional Court often substitutes the content of the rights with the values that underlie the Constitution. The values that underlie the Constitution should not be used to substitute the application of substantive rights.⁴⁸⁹ The text of the Constitution cannot be understood to allow such a reading and application of substantive rights.

The meaning of the constitutional provision depends on the context that it is placed in or the way it is used.⁴⁹⁰ The context within which the rights should be read is very important. Thus 'most of the constitutional interpretation is therefore about establishing the context within which a particular constitutional provision must be given meaning.'⁴⁹¹ The Constitution itself does not prescribe how this context can be interpreted. In addition, the Constitution does not prescribe how the Bill of Rights should be interpreted. It attempts to prescribe a method of interpreting in section 39, the interpretation clause.⁴⁹²

It is within the context discussed above that the meaning, content and scope of the substantive rights should be determined which will highlight how a certain right can be interpreted and applied. This is done before the values are applied. This stage will further be discussed in 6.3.1 below. After this has been done then the Court would then proceed to apply and interpret the founding values of the Constitution as discussed in 6.3.2 below. I explain this preferred approach as follows.

6.3.1 Stage 1 : Content of the Rights

Without rushing too quickly to interpret and apply the underlying and founding values of the constitution, the right in question must be interpreted

⁴⁸⁸ Ian Currie, Johan De Waal and Gerhard Erasmus (note 47) 145.

⁴⁸⁹ Stuart Woolman (note 33) 763.

⁴⁹⁰ Ian Currie, Johan De Waal and Gerhard Erasmus (note 47)146

⁴⁹¹ Ibid.

⁴⁹² Ibid 147.

and given meaning and context. When faced with an alleged breach of a right, the Constitutional Court should adequately interpret the right first in order to place it within the context of the constitutional framework.⁴⁹³ They should formulate a test of how to interpret the particular right⁴⁹⁴ to create an understanding of how the right was intended to be interpreted and applied. This application and interpretation of the right must be done first before venturing into a value-based interpretation of the Bill of Rights which the Constitutional Court usually rushes to do first.⁴⁹⁵

However, there are other rights that require a value-based readings more than others in the Bill of Rights. An example of these rights is the right to equality.⁴⁹⁶ The Constitutional Court has managed to give a step by step interpretation analysis of section 8 where human dignity plays a role.⁴⁹⁷ This interpretation clearly establishes how one or a court can interpret and apply the right to equality in with dignity. It also highlights how both the right and the value can be applied without limiting either of the two. Furthermore, such an interpretation of any right adds value to the right because it gives content to it. This will in turn allow the right to be interpreted in a way that promotes its intended role in the Bill of Rights.

In the interpretation of the rights the Court cannot replace the intended interpretation or reading of the rights with a discretionary reading of the rights or the text of the rights. The text is very important in the interpretation of rights. The text is the starting point in the determination of what a right means.⁴⁹⁸ On this point the Constitutional Court held that

'[w]hile we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing the general language must have a single 'objective meaning.' Nor is it

⁴⁹³ Theunis Roux 'Tactical adjudication: How the Constitutional Court of South Africa Survived its First Decade' [From: <http://www.saifac.org.za/docs/2007/Tactical%20Adjudication.pdf>] Accessed on the 11th of November 2007, 17.

⁴⁹⁴ Ibid.

⁴⁹⁵ Ibid.

⁴⁹⁶ Ibid 18.

⁴⁹⁷ Of the Interim Constitution Act 200 of 1993.

⁴⁹⁸ Ian Currie, Johan De Waal and Gerhard Erasmus (note 47) 147.

easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean. We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination.⁴⁹⁹

This passage highlights the importance of text in the interpretation of rights thus a court should not easily deviate from the text of the constitution.

In the interpretation of the constitutional rights, important, relevant or key words in the text must be defined.⁵⁰⁰ The definitions of these key concepts go beyond just the literal/ordinary/dictionary meaning.⁵⁰¹ The interpretation of the text of the constitution entails looking beyond the literal meaning. However, it should be noted that this does not mean that when there is 'evident and plain meaning of a provision it cannot be ignored in favour of a 'generous' and 'purposive' account of the provision's meaning.'⁵⁰²

In contrast to the above, the Constitutional Court has also stated that, 'whilst paying due regard to the language that has been used, [an interpretation of the Rights should be] 'generous' and 'purposive' and give....expression to the underlying values of the constitution.'⁵⁰³ The Constitutional Court states that the literal meaning will be only taken into consideration if and only 'if it accords with a 'generous' and 'purposive' interpretation.'⁵⁰⁴ It seems that this approach and not the one above is what the Constitutional Court favours and it better describes the practice of the Court in interpreting the Bill of Rights.⁵⁰⁵

⁴⁹⁹ *S v Zuma* 1995 (2) SA 642 (CC) para 17.

⁵⁰⁰ *Theunis Roux* (note 493) 21.

⁵⁰¹ *Ian Currie, Johan De Waal and Gerhard Erasmus* (note 47) 148.

⁵⁰² *Ibid.*

⁵⁰³ *S v Makwanyane* (note 1) para 9.

⁵⁰⁴ *Ian Currie, Johan De Waal and Gerhard Erasmus* (note 47) 148.

⁵⁰⁵ *Ibid.*

In addition to the text, the Constitutional Court when interpreting the Bill of Rights must define the core content of a particular group of rights.⁵⁰⁶ The Court should define the underlying conceptual tests in a group of rights.⁵⁰⁷ For example when interpreting any one of the socio-economic rights the Court should define what the test for reasonableness entails as it is the test of discerning whether the constitutional demands have been met.⁵⁰⁸ This is important because the standard of the reasonableness is what the conduct of the state is measured to determine its constitutionality thus it important to clearly define reasonableness.

6.3.2 Stage 2: Application of the founding values (section 39(1))

Section 39(1) requires an interpretation of the Bill of Rights that promotes the values which underlie 'an open and democratic society based on human dignity, equality and freedom.'⁵⁰⁹ It expressly requires the law in question to be interpreted in the light of purpose and aims of the Bill of Rights.⁵¹⁰ The founding values, human dignity, equality and freedom play a big role in this stage of interpretation. Furthermore, this is where the 'purposive' interpretation of the constitution comes into play.

The 'purposive' approach applies here because the approach is 'aimed at teasing out the core values that underpin the listed fundamental rights in an open and democratic society based on human dignity, equality and freedom and then to prefer the interpretation that best supports and protects those values.'⁵¹¹ The Constitutional Court has therefore approved what the Canadian Supreme Court held when it stated that

'[t]he meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of such a guarantee; it was to be understood, in other words, in the

⁵⁰⁶ Theunis Roux (note 493) 22.

⁵⁰⁷ Ibid.

⁵⁰⁸ Ibid.

⁵⁰⁹ Section 39(1) of the Constitution of the Republic of South Africa, Act 108 of 1998.

⁵¹⁰ Theunis Roux (note 493) 16

⁵¹¹ Ian Currie, Johan De Waal and Gerhard Erasmus (note 47) 148.

light of the interests it was meant to protect. In my view, this analysis is to be undertaken and the purpose of the right or freedom in question is to be sought, by reference to the character and larger objects of the Charter (or Rights and Freedoms) itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be.....a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection.⁵¹²

Purposive approach states that once one has identified the purpose of a right then one will be able to determine the scope of the right.⁵¹³ This means that the purposive approach inevitably requires a value or values that underpin the rights to be identified and discussed in an effort to understand the meaning of the rights.⁵¹⁴ A value judgment cannot thus be avoided. This value judgment is one objectively identified and articulated.⁵¹⁵ Regard had to be given to the following, 'contemporary norms, aspirations, expectations and sensitivities'⁵¹⁶ of the South African people as described and expressed in the text of the Constitution.

All the above clearly highlight how a value like human dignity can be interpreted and applied in the determination of the meaning of the rights in question. Furthermore, '[g]iven the central role that human dignity plays in the Court's jurisprudence'⁵¹⁷ it is important to determine how it should be interpreted so as to add value to the socio-economic rights jurisprudence. As stated above when making a value judgment one should note that, '[c]onditions of poverty are not a reflection of the moral blameworthiness of

⁵¹² *R v Big M Drug Mart Ltd* 1985 18 DLR (4th) 321 395-6, cited in *ibid* 149.

⁵¹³ *Ibid*.

⁵¹⁴ *Ibid*.

⁵¹⁵ *Ex Parte Attorney- General, Namibia: In Re Corporal Punishment of Organs of State* as cited in Ian Currie, Johan De Waal and Gerhard Erasmus (note 47) 149.

⁵¹⁶ *Ibid*.

⁵¹⁷ Sandra Liebenberg (note 26)1.

groups experiencing poverty. Rather they reflect how we as a society have failed to value human dignity.⁵¹⁸

Interpreted in the light of section 39(1) and the purposive interpretation the value of human dignity will have much more content than it currently has. This is because it is not interpreted in the abstract and according to how each individual judge understands the value. Furthermore, this restricts the Court from just applying human dignity so as to avoid discussing the right in question. In this approach both the right and the value have to be discussed in some detail. When human dignity is applied in such a way it is inevitable to discuss the value in some detail thus its meaning, content and stages of analysis will have to be discussed. This invariably will solve the problem that underlies the jurisprudence of the Court, i.e. human dignity lacks content and meaning in its application.

6.4 Final remarks

This study does not deny the importance of human dignity in the interpretation of the Bill of Rights. In fact, it acknowledges and stresses the importance of human dignity in the new constitutional dispensation. The main contention in this thesis is that the Constitutional Court has failed to utilize the value of human dignity in such a way that assists them in the interpretation of the Bill of Rights. In some cases they fail to utilize it at all and in others they utilize it but in a very unsatisfactory manner which is very far from being adequate. Neither is the current application of human dignity a clear show of what the role that human dignity was intended for.

It has been argued that human dignity has been used by the Court to replace a more rigorous application of the Bill of Rights. The use of human dignity has resulted in the Court undermining the actual text and content of the rights. Not only does the current application of human dignity limit the content of the right, it also limits the content of the value itself thus failing to

⁵¹⁸ Ibid.

assist in the interpretation of the Bill of Rights. This is because the Court does not give much content and depth to human dignity. They simply use it as a catch all phrase which enables them to easily reach agreements among the judges.

The first part of this chapter attempts to suggest the stages of interpretation of the Bill of Rights in line with Roux's argument. Human dignity is an important part of the Constitution thus one can only hope that the Constitutional Court as the guardian of the constitution utilizes the value adequately and satisfactorily in future cases. The Court's attempts to utilize the value should be applauded but it is however not enough. It is disappointing that after operating for over a decade, the highest Court in the country has failed to clearly and adequately discern and interpret one of the fundamental and founding values that underlie the Constitution.

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