

Constitutionality, the Rule of Law and Socio-Economic Development

Professor William Binchy

Trinity College Dublin*

It is a great honour to have been invited by the Honourable Chief Justice Nganunu to prepare a paper for today's conference. The theme that has been given to me is a challenging one, which goes to the heart of the judicial role. It requires us to reflect on difficult questions concerning the relationship between law and society and more particularly socio-economic development.

Let me summarise the thesis that I shall be presenting. Courts when called on to test the constitutionality of legislation or of executive action need tools for constitutional interpretation. Some of these, such as the presumption of constitutionality, for example, are well established. Others are more controversial. Whether courts should look to international human rights instruments or the decisions of courts of other countries when interpreting their own constitution raises highly controversial issues. Many courts, in Africa and elsewhere, unquestionably engage in precisely these practices. I shall be looking briefly at the advantages and difficulties associated with them. I shall then be suggesting that courts in Africa would be well advised to adopt a distinctively African approach towards constitutional interpretation, not as a replacement for having recourse to international human rights instruments and foreign caselaw but rather as a way of providing focus to the use of those sources. Specifically, I shall be proposing that the concepts of human dignity and equality are at the heart of an African perspective and that these concepts justify courts' adopting a broad rather than literal interpretation of their constitution in relation to the protection of economic and social rights where those rights have been compromised by the failure to respect human dignity and equality.

* In the unavoidable absence of Professor Binchy, the paper will be read by Mr. Michael Aylmer, Barrister-at-Law

The Rule of Law

Let me first deal briefly with the rule of law, not because it is of minor importance – on the contrary, it is an absolute precondition of justice in any society – but rather because its precepts are well-known and relatively uncontroversial.

The essence of the rule of law is that everyone in society is subject to law. No one, no matter how important or powerful, is above the law. Conversely, no one should suffer punishment except for a distinct breach of the law.¹ A requirement of the rule of law is that the law itself consist of determinate rules, accessible to those subject to them, properly promulgated and not subject to retrospective alteration. The third major requirement, perhaps most relevant to today's deliberations, is that the judiciary, who have the task of interpreting the law and giving flesh to it through decrees and declarations, should be truly independent.² A crucial aspect of that independence is that the other organs of state – legislative and executive – should respect the courts by not interfering with the judicial process and by complying with court decrees.³ The challenge for judges in relation to the rule of law is rarely an intellectual one: the right course of action may well be quite apparent. The real challenge is one of character: to have the courage to call powerful agencies and people to account and to insist on respect being afforded to the legitimate exercise by courts of their responsibility in seeking to implement the rule of law in their legal system.

When probed deeply, the rule of law can be seen to require fidelity to principles that are found in most constitutions today – equality, due process, fair trial, non-retrospection, and so on.⁴ This leads us to consider the requirements of

¹ See the traditional enunciation of the rule of law by A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (6th ed., 1902), 183-191. For a modern rendition, see Lord Bingham, "The Rule of Law", 66 Cambridge L.J. 67 (2007).

² For consideration of the lack of independence displayed by the judiciary and magistracy under the *apartheid* regime in South Africa, see Bizos, "The Abrogation and Restoration of the Rule of Law and Judicial Independence in South Africa", 11 *Revue Quebecoise de Droit Int'l* 155 (1998).

³ See the Venice Commission's Report, *Decisions of Constitutional Courts and Equivalent Bodies and Their Execution* (2001).

⁴ The question whether the rule of law and constitutionalism should be regarded separately has been widely debated: see, e.g., Fombad, "Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from South Africa", 55 *Am. J. of Comp. L.* 1, at 7-10 (2007).

constitutionality and to ask how best courts can interpret their constitutions to give effect to the rule of law.

Competing Approaches to Constitutional Interpretation

It appears that three main approaches to the constitutional interpretation compete for acceptance:

The first would restrict constitutional analysis to the four corners of the constitution of the particular state. Let us call this *the national approach*.

The second would look beyond the confines of the constitution of the particular state and be open to influences from international human rights instruments at global and regional levels as well as the judicial decisions of foreign courts interpreting constitutions throughout the world. Let us call this *the global approach*.

The third would acknowledge the significance of broad global influences but would seek to place some emphasis on more focused cultural and political aspects, going beyond the confines of the particular state but not simply having regard to global norms. In the context of our discussion, let us – controversially, I acknowledge – call this *the African approach*.

Each approach deserves separate consideration.

The national approach

The national approach has more to be said for it than is often acknowledged in the academic commentary, which stigmatizes it as narrow, chauvinist and largely insensitive to cosmopolitanism, enlightenment values or respect for human rights. Most obviously, it may be argued in its defence that the function of the judiciary in any state is to interpret and apply the provisions of the constitution of *its own state*,

rather than to engage in some process of international dialogue.⁵ According to Kelsenian theory, the *grundnorm*, the ultimate source of legal authority, determines the status and authority of the totality of subsidiary legal norms that emanate from it. For the judiciary to incorporate norms derived from some external legal source which has not been incorporated within the domestic legal order may be said to conflict with the ultimate source of legal authority within the state and the principle of state sovereignty.

Secondly, it has been said that judicial recourse to foreign law subverts respect for liberal democracy:

“The legitimacy and validity of constitutional law are derived from the opinions of the people, and it is through the process of democratic self-governance that the constitution expresses the values of the nation. What is important is the specificity of constitutional ideas to the nation, and maintaining specificity – a distinct constitutional culture – is dependent on decisions being both created by and accountable to the people within the country. Only then is it democratic and expressive of national values.”⁶

As against these arguments, it may be replied that constitutions tend not to be so self-contained in their normative repertoire. Some constitutions may expressly incorporate international law into their system⁷; some may require, or authorize, courts to have regard to the jurisprudence of foreign courts.⁸ There can thus be no violation in these

⁵ Cf. *Thompson v Oklahoma*, 487 US 815, at 868, fn. 4 (*per* Scalia J, dissenting, 1988):

“We must never forget that it is a Constitution for the United States of America that we are expounding. The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather ‘so implicit in the concept of ordered liberty’ that it occupies a place not merely in our mores but, text permitting, in our Constitution as well. ... But where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.”

⁶ Genesh Sitaraman, “The Use and Abuse of Foreign Law in Constitutional Interpretation”, *Harvard J. of L. & Public Policy* (22 March 2009).

⁷ The process of incorporation varies: see, e.g. Article 21 of Angola’s Constitution; Article 18 of the Mozambican Constitution; Article 144 of the Namibian Constitution; Article 211 of the Malawian Constitution.

⁸ Thus, for example, section 39(1) of the South African Constitution provides that, when interpreting the Bills of Rights, a court “(b) must consider international law; and (c) may consider foreign law.”

instances of the Kelsenian theory of law⁹; nor is it hugely plausible to contend that principles of liberal democracy are compromised where a constitution which emanates from a liberal democratic initiative permits courts to have such a role.

Where constitutional texts are silent on these matters, the broad conceptual repertoire of constitutional texts – especially Bills of Rights – may appear to invite courts to look beyond their own frontiers for guidance as to how to interpret concepts which are not sharply defined within these texts. Whether judicial perceptions are correct in this interpretation of any particular text is of course a matter on which controversy may occur.

Lurking in the background of the debate is the important issue, which courts interpreting all constitutions must confront, as to whether constitutions should be giving the meaning which their founders intended – the “original intent”¹⁰, as it is widely known – or whether, instead, constitutions should be regarded as living instruments, always speaking in the present rather than the past.¹¹ How one answers this question will greatly influence the approach one adopts to having recourse to norms derived from contemporary international human rights instruments and foreign caselaw. If one favours a strict doctrine of original intent, these sources would be likely to have little appeal. But even if one favours the “living constitution” approach, this does not necessarily commit one to embracing these global and foreign resources. Two American scholars have observed that:

“a ‘living constitution’ approach to constitutional interpretation – the conviction that the Constitution should be interpreted in light of contemporary attitudes and values – does not justify reliance on foreign precedents. If a living Constitution approach counsels in favor of interpreting the Constitution

⁹ Carozza, “Subsidiarity as a Structural Principle of International Human Rights Law”, 97 Am. J. of Int’l L. 38, at 63-68 (2003), Henkin, “Human Rights and State ‘Sovereignty’”, 25 Ga. J. of Int’l & Comp. L. 31, at 39-41 (1995).

¹⁰ The debate has been particularly forceful in the United States of America and goes back over three decades: see Treanor, “Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar’s *Bill of Rights*”, 106 Michigan L. Rev. 487 (2007), Valdes, “What’s the Fuss? Constitutionalism, Internationalism, and Original Method”, 3 F.I.U.L. Rev. 1 (2007).

¹¹ See Ackerman, “The Living Constitution”, 120 Harvard L. Rev. 1738 (2007); cf. Rehnquist, “The Notion of a Living Constitution”, 29 Harvard J. of L. & Public Policy 401 (2006).

according to the meaning that ‘we the People’ today would give it, then at the very least, it should be determined how ‘we the People’ think.’¹²

The global approach

As I have indicated, the global approach to constitutional interpretation involves reference by courts to *international human rights instruments* and to *decisions of foreign courts*. Let us consider each in turn.

International human rights instruments

Over the past six decades, our world has been transformed from one in which legal positivism largely prevailed into a new legal order based on a network of international human rights instruments, at global and regional levels. The ratification rate for most of these treaties has been strikingly high. Courts in many countries have invoked these instruments as a source of inspiration, even of interpretation, of their own constitutions.¹³

The case in favour of the global approach to constitutional interpretation¹⁴ rests on a number of arguments. The first, expressed in its extreme form, identifies the global endorsement of human rights as evidence of the acceptance of a new supra-national legal normative order of which national constitutions and legal orders are, as it were, local manifestations rather than truly independent sources of normative authority.

The argument here runs as follows. At the core of human rights theory are two principles which challenge a positivist national understanding of legal authority: universalism and state obligation. Universalism involves an understanding that

¹² Delahunty & Yoo, “Against Foreign Law”, 29 Harvard J. of L. & Public Policy 291, at 311 (2006).

¹³ See Christof Heyns, *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (2002) discussing, among other countries, South Africa and Zambia), Darrow & Alston, “Bills of Rights in Comparative Perspective”, Chapter 13 of Philip Alston ed., *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (1999), at 476-479.

¹⁴ See Olivier, “International and Regional Requirements for Good Governance and the Rule of Law”, 32 S. African Y.B. of Int’l L. 39 (2007), Benvenisti, “Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts”, 102 Am. J. of Int’l L. 241 (2008), Shang, “How Supreme Is the Supreme Law of the Land? Comparative Analysis of the Influence of International Human Rights Treaties upon the Interpretation of Constitutional Texts by Domestic Courts”, 31 Brooklyn J. of Int’l L. 341 (2006).

human rights inhere in every human being, regardless of ethnic or national affiliation, by virtue of his or her humanity. Human rights are anterior to, rather than the products of, legal orders. They are not the gift of the state – any state – and they cannot be taken away by the laws of any state. On the contrary, states are bound to respect human rights. From this perspective, far from representing the apex of legal authority, states are bearers of obligations relative to human beings, who are the rights-holders.

Of course, this argument may not be considered likely to prove attractive in those countries in which a dualist theory of incorporation of international law has traditionally applied. In recent years, however, courts in Africa and elsewhere have shown themselves willing to adapt the dualist theory to allow for reception within domestic legal orders of international human rights values.

Not everyone is happy with this process. Some have argued that, whilst professing universalism, the values actually endorsed by international human rights treaties are far from universal and betray a northern bias.¹⁵ Moreover, the maximalist interpretation of these treaties afforded by the treaty monitoring bodies has been identified as exacerbating this normative gulf. One example of the divergence, which is of particular interest because the issue has generated a body of African constitutional jurisprudence¹⁶, is that of corporal punishment of minors. The Committee on the Rights of the Child, which has responsibility for interpreting the U.N. Convention on the Rights of the Child, has interpreted the ~~Constitution~~ Convention as prohibiting all forms of corporal punishment, including parental chastisement.¹⁷ Few countries favour this position and only a minority of court decisions goes so far.

¹⁵ See e.g. Cobbah, "African Values and the Human Rights Debate: An African Perspective", 9 Human Rts Q. 309 (1987); contrast Fox, "Women's Human Rights in Africa: Beyond the Debate over the Universality or Relativity of Human Rights", 2 African Studies Quarterly No. 3 (1998); see generally Eva Brems, *Human Rights: Universality and Diversity* (2001).

¹⁶ See e.g. *In re Ex parte Attorney General: Corporal Punishment by Organs of State*, 1991 (3) SA 76 (NMSC), *S. v Williams*, 1995 (3) SA 632 (SACC), *S. v A Juvenile*, 1990 (4) SA 151 (ZSC), *Christian Education South African & Minister of Education*, 2000 (4) SA 757 (SACC), *Petrus v The State*, 1984 BLR 14, *Dube v The State* [2001] BWCA 18.

¹⁷ Committee on the Rights of the Child, General Comment No. 8, The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Articles 19; 28, para. 2; and 37, *inter alia*) (2006). For consideration of the subject generally, see Shmueli, "The influence of the United Nations Convention on the Rights of the Child on Corporal Punishment – A Comparative Study",

Probably there is no country in the world which complies fully with the maximalist interpretation of every international human rights instrument. Some commentators have therefore argued that this jurisprudence represents an inappropriate reference-point for courts when interpreting their own state's constitution or, more broadly, the provisions of their own state's domestic legal order¹⁸.

Supporters of the invocation of global human rights instruments in aid of constitutional interpretation reply that there is no suggestion that courts should surrender their interpretative role to outside agencies such as treaty bodies. They propose a much more nuanced relationship in which courts have regard to the human rights instruments, their interpretation by the monitoring bodies and the large corpus of academic analysis surrounding them, in order to have some sense of the nature and meaning of the values to which so many nations have subscribed.¹⁹ The cultural consistency between human rights protection at global and national levels is an obvious fact of life. To deny or seek to minimize this relationship is to fly in the face of contemporary reality.

Decisions of foreign courts

The question of the propriety of resort by courts to decisions of foreign courts when interpreting the provisions of their own constitutions raises somewhat different issues. The simple case in favour of the practice is that referring to the decisions of courts in other countries will have the beneficial effect of offering solutions to difficult legal problems (whether of interpretation or otherwise). Several minds addressing a troublesome issue are likely to be better than one.²⁰

¹⁰ Oregon Rev. of Int'l L. 189 (2008), Bartman, "Spare the Rod and Spoil the Child? Corporal Punishment in Schools Around the World", 13 Indiana Int'l & Comp. L. Rev. 283 (2002).

¹⁸ In the decision of *Kavanagh v Governor of Mountjoy Prison* [2002] I ESC 13, where the Irish Supreme Court declined to order the release from prison of a person whose selection for non-jury trial by the DPP had been held by the Human Rights Committee to violate Article 26 of the U.N. Covenant on Civil and Political Rights, Fennelly J (for the Court) observed: "the notion that the views of a Committee even of admittedly distinguished experts on international human rights, though not necessarily lawyers, could prevail against the concluded decision of a properly constituted court is unacceptable".

¹⁹ See Corozza, "Subsidiarity as a Structural Principle of International Human Rights Law", 97 Am. J. of Int'l L. 38 (2003), Donoho, "Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity within Universal Human Rights", 15 Emory Int'l L. Rev. 391 (2001).

²⁰ Cf. Delahunty & Yoo, *op.cit.*, fn 12, at 295. Another perceived benefit of referring to foreign case law is that it "can serve as an important tool to overcome the *status quo* bias in domestic legal decision making": Deputy Chief Justice of the Supreme Court of Israel, Eliezer Rivlin, "Foreward: Thoughts on Referral to Foreign Law, Global Chain – Novel, and Novelty", 21 Florida J. of Int'l L. 1, at 12 (2009).

But there is a difference between perusing a foreign decision to derive benefit from its legal craftsmanship or intellectual depth and deferring to the normative premises of that decision. A court that looks abroad for normative guidance, inspiration or direction has to be clear as to why the values of foreign judges should have any influence in interpreting the court's own constitution.

It is at this point that controversy begins. Enthusiasts for what one might call "normative borrowing" have put forward two main requirements in its favour. We can describe these as the *global judicial conversation* argument and the *civilized standards* argument. I shall say a few words about each.

A global judicial conversation?

The proponents of the idea of a global judicial conversation posit a contemporary world in which judges, who formerly were subject to an international hierarchy in which the law of imperial countries was imposed on countries they colonised, now all meet on equal, democratic and mutually respectful terms, exchanging insights and learning from each other. Justice Claire L'Heureux-Dubé, of the Supreme Court of Canada, has observed that:

"as courts look all over the world for sources of authority, the process of international influences has changed from *reception* to *dialogue*. Judges no longer simply *receive* the cases of other jurisdictions and then apply them or modify them for their own jurisdiction. Rather, cross-pollination and dialogue between the jurisdictions is increasingly occurring. As judgments in different countries increasingly build on each other, mutual respect and dialogue are fostered among appellate courts. Judges around the world look to each other for persuasive authority, rather than some judges being 'givers' of law while others are 'receivers'."²¹

²¹ L'Heureux-Dubé, "The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court", 34 *Tulsa L.J.* 15, at 17 (1998). See also Slaughter, "A Brave New Judicial World", Chapter 10 of Michael Ignatieff ed., *American Exceptionalism and Human Rights* (2005), Slaughter, "A Global Community of Courts", 44 *Harvard J. of Int'l L.* 191 (2003), Slaughter, "Judicial Globalization", 40

There is, of course, very substantial evidence of courts around the world citing each others' judgments in the development of their own constitutional jurisprudence. Two recent examples may be mentioned. In *Centre for Child Law v Minister for Justice and Constitutional Development*²², the Constitutional Court of South Africa, in holding unconstitutional legislative provisions making minimum sentences applicable to offenders aged 16 or 17 at the time they committed the offence, invoked caselaw of the Supreme Courts of the United States and Canada. In *Attorney General v Susan Kigula and 417 Others*²³, the Supreme Court of Uganda, when addressing the constitutional validity of the death penalty, referred to decisions from the courts of Tanzania, Zimbabwe, South Africa, Nigeria, Malawi, the United States of America and India, as well as the Privy Council.

Whether the global judicial conversation is conducted as the basis of complete reciprocity and objectivity may, however, be doubted²⁴. Judgments from some countries appear to be heeded and cited far more frequently than from others. The reasons for this imbalance are complex and reflect historical, political and cultural influences (as well as the more practical but crucial matter of international accessibility of judgments.²⁵). Dean Frederick Schauer of Harvard has sought to explain why Canadian jurisprudence has had a disproportionate international influence, especially as compared to the United States of America:

“One reason for this is that Canada, unlike the United States, is seen as reflecting an emerging international consensus rather than existing as an outlier. On issues of freedom of speech, freedom of the press, and equality, for example, the United States is seen as representing an extreme position, whether it be in the degree of its legal protection of press misbehavior, in the

Virginia J. of Int'l L. 1103 (2000), McCrudden, “A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights”, 20 Oxford J. of Legal Studies 499 (2000).

²² [2009] ZACC 18 (15 July 2009).

²³ [2009] UGSC 6 (21 January 2009).

²⁴ See Buxbaum, “From Empire to Globalization ... and Back? A Post-Colonial View of Transjudicialism”, 11 Indiana J. of Global Legal Studies 183, at 185-188 (2004), Bahdi, “Globalization of Judgment: Transjudicialism and the Five Faces of international Law in Domestic Courts”, 34 George Washington Int'l L. Rev. 555 (2002).

²⁵ In this regard, the SAFLII Internet site is a most welcome development in rendering judgments of courts in Southern and East Africa available, free of charge, throughout the world. See further Schauer, *The Politics and Incentives of Legal Transplantation* (CID Working Paper No. 44, 2000) p.18.

degree of its protection of racist and other forms of hateful speech, or in its unwillingness to treat race-based affirmative action as explicitly constitutionally permissible. People can of course argue about whether the United States is right or wrong, internally, to take these positions, positions which much of the rest of the world sees as extreme, but that is not the point here. Rather, it is the twofold point that, first, ideas that are seen as close to an emerging international consensus are likely to be more influential internationally, and, second, that nations seeking to have more international legal influence may at times, recognizing the first point, create their laws in order to maximize the likelihood of this extraterritorial influence. Canada appears to be a plausible example of both of these, and the influence of Canadian constitutional ideas in many parts of the world appears to be partly a function of the extent to which Canada has the virtue of not being the United States, but also a function of the extent to which following Canada, or at least being influenced by Canada (as in South Africa, for example), is seen as a wise route towards harmonization with emerging international norms.”²⁶

Realpolitik may have had an influence in some cases of judicial transnational borrowings. It has been suggested that the famous decision in which the Hungarian Constitutional Court, influenced by German constitutional developments, struck down the death penalty as unconstitutional may be explained, at least in part, by the fact that “Hungarian political and legal elites believed that doing so was a precondition for entry into association with the European Union.”²⁷

The truth of the matter is that courts choose to cite foreign decisions for a wide variety of reasons which cannot easily be characterized as involving a genuinely democratic judicial conversation. As an empirical matter, some countries’ courts speak and others listen and cite their judgments. There is a considerable degree of mutual citation but far more instances of the unilateral application of a body of caselaw from

²⁶ *Ibid.*, pp.13-14. Cf. Gardbaum, “The Myth and the Reality of American Constitutional Exceptionalism”, 107 Michigan L. Rev. 391 (2008).

²⁷ Vicki Jackson and Mark Tushnet, *Comparative Constitutional Law* (1999), p.171. See also Fletcher, “Searching for the Rule of Law in the Wake of Communism”, [1992] Brigham Young U.L. Rev. 145, at 159, Catherine Dupré, *Importing the Law in Post-Communist Transitions: The Hungarian Constitutional Court and the Right to Dignity* 175 (2003).

a relatively limited number of countries by a much larger group of countries. Suggestions to the contrary are misleading and patronizing.²⁸

Civilised standards?

The “civilized standards” rationale for referring to foreign judgments when interpreting one’s own constitution is based on the idea that certain provisions found in many constitutions – notably the prohibition on “cruel, degrading or inhuman treatment” (or some similar phrase) – contain a normative test which is not fixed in stone at some definitive moment (such as the date of promulgation of the particular constitution) but, rather, finds its meaning in contemporary standards within certain sectors of humankind. Courts in Africa and in many other countries elsewhere seem content to engage in an enquiry as to what these standards are by referring to the caselaw of a number of foreign countries, not necessarily treating values endorsed by these decisions as determinative of the interpretation of their own constitution but certainly as contributing positively to that process.

In *Catholic Commission for Justice and Peace in Zimbabwe*²⁹, a decision of the Supreme Court of Zimbabwe, Gubbay CJ said that, in determining whether punishment was inhuman or degrading, the Court had to make a value judgment, taking into account “not only ... the emerging consensus of values in the civilized international community (of which this country is a part) ... but of contemporary norms operative in Zimbabwe and the sensitivities of its people”. In *Makwanyane v State*³⁰ Kentridge AJ observed that there was:

²⁸ Justice Stephen Breyer of the United States Supreme Court has sought to justify the invocation of foreign caselaw on the basis of some global democratic discourse among judges in which every judicial voice is deserving of respect. Speaking extra-judicially, however, he observed:

“Look, let me be a little more frank, that in some [foreign] countries there are institutions, courts that are trying to make their way in societies that didn’t used to be democratic, and they are trying to protect human rights, they are trying to protect democracy. They’re having a document called a constitution, and they want to be independent judges. And for years people all over the world have cited the [United States] Supreme Court, why don’t we cite them occasionally? They will go to some of their legislators and others and say, ‘See, the Supreme Court of the United States cites us.’ That might give them a leg up, even if we just say it’s an interesting example. So, you see, it shows we read their opinions. That’s important.”

Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer – AU Washington College of Law, Jan 13 {2005}.

²⁹ 1993 (4) SA 239, at 248 (Zimbabwe Supreme Court).

³⁰ [1995] ZA CC 3, para. 198.

“ample evidence that evolving standards of civilisation demonstrate the unacceptability of the death penalty in countries which are or aspire to be free and democratic societies ... {W}hat is clear to my mind is that in general in civilised democratic societies the imposition of the death penalty has been found to be unacceptably cruel, inhuman and degrading, not only to those subjected to it but also to the society which inflicts it.”

In Namibian constitutional jurisprudence one finds some interesting and understandable tensions between the need to refer to nationally endorsed values and the normative perspective at an international level. In *S. v Tcoeib*³¹, a Namibian High Court decision upholding the constitutional validity of sentences of life imprisonment, O’Linn J summed up the effect of earlier caselaw³² on Article 8 as follows:

“(a) When the court must decide whether or not a law providing for a particular punishment is cruel, inhuman or degrading and thus in conflict with Article 8 of the Namibian Constitution and whether such law and such punishment is therefore unconstitutional and forbidden, the Court must have regard to the contemporary norms, aspirations, expectations, sensitivities, moral standards, relevant established beliefs, social conditions, experiences and perceptions of the Namibian people as expressed in their national institutions and Constitution, as well as the consensus of values or ‘emerging consensus of values’ in the ‘civilised international community’.

What is to be regarded as ‘the civilised international community’ is, however, subject to further definition.

(b) The resultant value judgment which the court must make, must be objectively articulated and identified, regard being had to the aforesaid norms,

³¹ 1993 (1) SACR 274 (Nm).

³² *In re Ex parte Attorney General, Corporal Punishment by Organs of State*, *supra*, some differences of approach to the propriety of referring to foreign caselaw were apparent in the judgments of Mahomed AJA and Berker CJ.

etc., of the Namibian people and the aforesaid consensus of values in the international community.

(c) Whilst it is extremely instructive and useful to refer to, and analyse, decisions by other Courts such as the International Court of Human Rights, or the Supreme Court of Zimbabwe or the United States of America the one major and basic consideration in arriving at a decision involves an enquiry into the contemporary norms, aspirations, expectations, sensitivities, moral standards, relevant established beliefs, social conditions, experiences and perceptions of the Namibian people.....”

On appeal to the Supreme Court, Mahomed CJ referred to jurisprudence of the German Constitutional Court and European Court of Human Rights. Noting that certain issues relating to life sentences remained for consideration, the Chief Justice commented:

“Suffice it for me to say that if and when such issues are properly raised in the future they will have to be addressed by having regard to the international jurisprudence but ultimately, by the proper interpretation of the relevant provisions of the Namibian Constitution and the applicable statutes ...”³³

Some tough questions can be asked about the practice of referring to the standards of “the civilised international community”. The word “civilised” has historically disturbing connotations: it was invoked by colonial powers over centuries as a justification for the desecration they inflicted on people with less military resources than theirs. In setting up a disjunction between “civilized” and “uncivilized” peoples or nations, the colonial powers rationalised the infliction of terrible injustice and discrimination, the effects of which remain with us today.

If that language is abhorrent, is there nonetheless something to be said in favour of courts, when interpreting their own constitutions, adopting some critical normative

³³ 1999 NR 24, at 37.

test determined by reference to some subset of humanity whose values should be privileged? When framed in that way, the question is shorn of rhetoric and invites a certain frankness in its resolution. Are there some people, some countries, some courts, as opposed to others around the world, whose values on controversial issues should be given weight by a court when interpreting its own constitution?

Courts clearly think that there are. Unfortunately they have been reluctant to articulate the criteria for determining which foreign courts or politics deserve such privileged status. Having a democratic structure appears to be a necessary³⁴, but not a sufficient, requirement. Speaking broadly, subscription to liberal values is likely to enhance the claim for privilege.³⁵ Beyond this, one is left to speculate as to the applicable criteria. It may be that none exist and that some courts engage in selective citation of foreign judgments when they are seen to assist a conclusion already reached by independent analysis or intuition. If there is any truth in this suspicion, perhaps those courts would be well advised to reflect further on the propriety of the practice.

It is interesting to note that recourse to the values of “the civilised international community” has been made in the context of traditional civil and political rights issues, such as the death penalty, sentences of imprisonment and prison conditions, rather than issues relating to economic and social rights, such as the rights to health and housing. Apparently the values of the civilised international community on these issues, of crucial practical importance to the victims of social and economic injustice, can offer no assistance to a court seeking to interpret its own constitution.

³⁴ Cf. McCrudden, *op.cit.*, fn. 21, *supra*, at 517.

³⁵ In this context it is interesting to note that the Uganda Supreme Court in *Attorney General v Susan Kigula and 417 Others* [2009] UGSC 6 (21 January 2009) defended the entitlement of the United States of America to claim to have “evolved standards of decency” (echoing *Trop v Dulles* 356 US 86 (1958)), in spite of the fact that some States of the Union retain the death penalty:

“We cannot say that those states in the United States of America, or indeed anywhere else in the world who retain the death penalty, have not evolved standards of decency. Each situation must be examined on its own merits and in its context.”

The African approach

Let us now consider the third approach to constitutional interpretation, which I have called “the African approach”. I put forward this description with some hesitation since it may appear to suggest hostility to the principle of universalism which underlies international human rights theory or the rejection of recourse to the constitutional jurisprudence of courts in countries outside Africa. I intend nothing of the kind. What I do suggest is that African courts should invest even greater energy than previously in examining each others’ judgments on constitutional law (and, more particularly, fundamental human rights) in order to develop a distinctively African constitutional jurisprudence – not a jurisprudence that ignores the rest of the world but one that, while embracing the global perspective, also seeks to advance a distinctive normative framework of constitutional analysis.

What are the distinctive characteristics of African constitutionalism? Two in particular are worthy of close attention: concern for respect for human dignity and concern for the principle of non-discrimination and equality. Countries that have experienced colonialism inevitably will be sensitive to these values since colonialism violated them so fundamentally. It is no accident that the African Charter on Human and Peoples’ Rights affords pride of place to human dignity and equality.

Of course the experience of the apartheid system of South Africa shaped the contours of the South African Constitution. The Honourable Chief Justice Pius Langa has spoken eloquently on the notion of transformative constitutionalism³⁶ which is at the core of the South African Constitution and acts as a guide to its interpretation. He considers that the Postamble to the Interim Constitution set “a magnificent goal for a Constitution: to heal the wounds of the past and guide us to a better future.”³⁷ For

³⁶ The Hon. Chief Justice Pius Langa, “Transformative Constitutionalism”, 17 Stellenbosch L. Rev. 351 (2006). Chief Justice Langa referred (*id.*, at 351, fn 4) to the Hon. Deputy Chief Justice Moseneke, “The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication”, 18 S.African J. on Human Rts 309 (2002). See also Klare, “Legal Culture and Transformative Constitutionalism”, 14 S. African J on Human Rts 146 (1998), Henk Botha, André van der Walt & Johan van der Walt eds, *Rights and Democracy in a Transformative Constitution* (2003).

³⁷ 17 Stellenbosch L. Rev., at 352.

him, “this is the core idea of transformative constitutionalism: that we must change”.³⁸ He goes on to observe:

“Transformation then is a social and an economic revolution. South Africa at present has to contend with unequal and insufficient access to housing, food, water, healthcare and electricity ... The provision of services to all and the leveling of the economic playing fields that were so drastically skewed by the apartheid system must be absolutely central to any concept of transformative constitutionalism. Transformation in this sense does not only involve the fulfillment of socio-economic rights, but also the provision of greater access to education and opportunities through various mechanisms, including affirmative action measures ...

In this sense then, the establishment of a truly equal society and the provisions of basic socio-economic rights to all are a necessary part of transformation.”³⁹

Chief Justice Langa commends substantive rather than formal legal reasoning, which will allow courts to examine the underlying principles that inform laws and, with due regard to the text and to the separation of powers, to change the law to bring it in line with the rights and values for which the Constitution stands.⁴⁰

South Africa’s political and constitutional history has distinctive aspects which raise the question whether it is possible or desirable to generalise from South Africa’s unique experience so as to propose an approach to constitutional interpretation for courts in other countries with a different history and a differently shaped constitution. South Africa’s Constitution has features that are not widely replicated in Southern Africa or elsewhere in the continent. Its jurisprudence on the justiciability of economic and social rights, for example, cannot easily be transposed in view of the specific provisions of its Constitution which find no direct counterpart elsewhere.

³⁸ *Id.*

³⁹ *Id.*, at 352-353. In a lecture, *Transformative Constitutionalism and Socio-Economic Rights*, to the Foundation for Law, Justice and Society at the University of Oxford on 11 June 2008, Chief Justice Langa expanded on the implications of the pursuit of a truly substantively equal society:

“It recognises the moral entitlement of persons to what some call positive liberty, that is, the ability actually to exercise your rights and to pursue your chosen projects rather than a mere empty entitlement to do so and it recognises that this entitlement vests in everyone equally”.

⁴⁰ *Id.*, at 356-357.

There is merit in this concern. Counsel in a state other than South Africa who invokes *Grootboom*⁴¹ or *TAC*⁴², for example, may face the easy riposte that these decisions do not travel well because they are rooted so firmly in the text of the South African Constitution.

My argument is not the crude one that South African jurisprudence should simply be imposed on other African countries but rather that the two key concepts of human dignity and equality, which have generated a rich jurisprudence in South Africa, have sufficient normative force and cultural acceptance throughout Africa to act as strong reference points for the interpretation of constitutions throughout the continent.

Human Dignity

Let us reflect on the scope and import of the concept of human dignity.⁴³ Constitutions throughout the world have been rushing to embrace respect for dignity.⁴⁴ Human dignity⁴⁵ is, moreover, the core value of international human rights

⁴¹ *Government of the Republic of South African v Grootboom*, 2001 (1) SA 46 (CC). For analysis see Pierre De Vos, "Grootboom, the Right of Access to Housing and Substantive Equality as Contextual Fairness" (2001) 17 *S Afr J on Human Rts* 258, Daniel Schneider, "The Constitutional Right to Housing in South Africa: *The Government of the Republic of South Africa v Irene Grootboom*" (2004) 2 *Int'l J of Civil Soc'y* L 45. More generally, See Liebenberg, "The Value of Human Dignity in Interpreting Socio-Economic Rights," 21 *S. African J on Human Rts* 1(2005), Govender, "Economic, Social and Cultural Rights in South Africa: Entitlements, Not Mere Policy Options", in B. Goldewijk, A. Baspineiro & P. Carbonari eds., *Dignity and Human Rights: The Implementation of Economic, Social and Cultural Rights* (2002), 75, Brand, "Socio-Economic Rights and Courts in South Africa: Justiciability on a Sliding Scale", in Fons Coomans ed., *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (2006), 207.

⁴² *Minister of Health v Treatment Action Campaign*, 2002 (5) SA 721 (CC).

⁴³ Among the vast literature, reference should be made to McCrudden, "Human Dignity and Judicial Interpretation of Human Rights", 19 *European J of Int'l L.* 655 (2008), which presents a magisterial analysis of the subject. Also particularly helpful are: Carozza, "Human Dignity and Judicial Interpretation of Human Rights: A Reply", 19 *European J. of Int'l L.* 931 (2008). David Feldman, "Human Dignity as a Legal Value" [1999] *Public Law* 682; [2000] *Public Law* 61; Gay Moon & Robin Allen, "Dignity Discourse in Discrimination Law: A Better Route to Equality?" (2006) *EHRLR* 610, Denise Reaume, "Indignities: Making a Place for Dignity in Modern Legal Thought" (2002) 28 *Queen's LJ* 61, Carbonari, "Human Dignity as a Basic Concept of Ethics and Human Rights", in B. Klein Goldewijk, A. Baspinero & P. Carbonari eds., *Dignity and Human Rights: The Implementation of Economic, Social and Cultural Rights* (2002), 35.

⁴⁴ In recent years dignity has been enshrined at a constitutional level in Europe in many countries: for example Belgium (Article 23), Estonia (Article 10), Finland (Articles 1, 7 and 19), Greece (Articles 7 and 106), Hungary (Article 54), Latvia (Article 95), Lithuania (Article 21), Poland (Preamble, Article 30), Portugal (Articles 1, 26(2) and 59), the Slovak Republic (Articles 12(1) and 19(10)), Slovenia (Articles 12(10) and 19(1)), Slovenia (Articles 21 and 34) and Spain (Article 10): Catherine Dupré, "Human Dignity and the Withdrawal of Medical Treatment: A Missed Opportunity?" (2006) *EHRLR* 678, at 687, note 38, European Parliament, LIBE (Committee on Civil Liberties, Justice and Home Affairs), Freedom, Security and Justice: An Agenda for Europe, Charter of Fundamental Rights of the European Union, Article 1, Human Dignity (www.europarl.europa.eu/compar/libe/elsj/charter/art01/default_en.htm). In the aftermath of the Nazi era, human dignity was enshrined as a foundational value in the German Constitution.

instruments.⁴⁶ The Preamble to the Charter of the United Nations in 1945 and the Preamble to the Universal Declaration on Human Rights in 1948 refer to ‘the dignity and worth of the human person’. Both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights recognise ‘the inherent dignity and ... the equal and inalienable rights of all members of the human family’ as the foundation of freedom, justice and peace in the world.

I have already mentioned a central role afforded to human dignity by the African Charter on Human and Peoples’ Rights.⁴⁷ The Protocol⁴⁸ to the Charter on the Rights of Women in Africa recognises in its Preamble the crucial role of women in the preservation of African values based on principles which include that of dignity. Article 3 provides that “[e]very woman shall have the right to dignity inherent in a human being...” It goes on to require States parties to adopt and implement appropriate measures to ensure that protection of every woman’s rights to respect for her dignity. Articles 22 to 24, in which States parties undertake to produce special protection for elderly women, women with disabilities and women in distress, require that they ensure that these women have the right to be treated with dignity.

The concept of human dignity is of an ancient pedigree.⁴⁹ Its philosophical origins may be found in Greek philosophy and in Judeo-Christian insight into the unique value and equal worth of every human being.⁵⁰ Moreover, it has played an important role in Islamic thought.⁵¹

⁴⁵ See David Kretzmer and Eckart Klein eds, *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International, 2002), David Feldman, “Human Dignity as a Legal Value” [1999] *Public Law* 682; [2000] *Public Law* 61.

⁴⁶ See Klaus Dicke, “The Founding Function of Human Dignity in the Universal Declaration of Human Rights” in Kretzmer and Klein eds, note 45, at 111.

⁴⁷ Cf. Lilian Chenwi, *Towards the Abolition of the Death Penalty in Africa: A Human Rights Perspective*, (2007): “The right to respect of one’s dignity is the only right in the African Charter described as ‘inherent in a human being’.”

⁴⁸ The Protocol has generated considerable analysis. See eg. Banda “Blazing a Trail: The African Women’s Protocol Comes into Force”, 50 *J of African L* 72 (2006), Mengesha, “Reconciling the Need for Advancing Women’s Rights in Africa and the Dictates of International Trade Norms: The Position of the Protocol on the Rights of Women in Africa”, 6 *African Human Rts LJ* 166 (2006), Dyani, “Protocol on the Rights of Women Protection of Women from Sexual Violence During Armed Conflicts”, 6 *African Human Rts LJ* 166 (2006), Durojaye, “Advancing Gender Equity in Access to HIV Treatment through the Protocol on the Rights of Women in Africa”, 6 *African Human Rights LJ* 188 (2006).

⁴⁹ See Hubert Canick, “‘Dignity of Man’ and ‘Personae’ in Stoic Anthropology: Some Remarks on Cicero, *De Officiis I*, 105-107” in Kretzmer and Klein eds, note 45, at 19.

⁵⁰ Cf Christian Starck, “The Religious and Philosophical Background of Human Dignity and Its Place in Modern Constitutions” in Kretzmer and Klein eds, note 43, at 179, 180-18; John Coughlin, “Pope John

Dignity as a feature of constitutions in Southern Africa

Dignity features in very many African constitutions, including those within the Southern Africa.⁵² The most striking example is, of course, South Africa. Section 1(a) of the Constitution of 1996 identifies dignity as one of the values on which the Republic of South Africa is founded. Section 7 “affirms the valu[e] of human dignity...” Section 10 provides that “[e]veryone has inherent dignity and the right to have their dignity respected and protected.” Section 36(1) requires that limitations on rights be “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”. Section 39(1)(a) requires the courts, when interpreting the Bill of Rights, to promote the values that underlie such a society. The Constitutional Court of South Africa has developed a rich jurisprudence on dignity. Most recently, in *Hassam v Jacobs NO*⁵³, Nkabinde J sought to emphasise that:

“the content of public policy must now be determined with reference to the founding values underlying our constitutional democracy, including human dignity and equality”

In the Namibian Constitution, the first recital of the Preamble acknowledges that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace. It identifies the desire of the People of Namibia “to promote amongst all of us the dignity of the individual.” Article 8(1) provides that “[t]he dignity of all persons shall

Paul II and the Dignity of the Human Being” (2003) 27 *Harv J of L & Public Pol’y* 65; Jean Bethke Elshtain, “The Dignity of the Human Person and the Idea of Human Rights: Four Inquiries” (1999) 14 *J of L & Religion* 53; William Joseph Wagner, “Universal Human Rights, The United Nations and the *Telos* of Human Dignity” (2005) 3 *Ave Maria L Rev* 197; Lorne Sossin, “The Supremacy of God, Human Dignity, and the *Charter of Rights and Freedoms*” (2003) 52 *UNBLJ* 227; Izhak Englard, “Human Dignity: From Antiquity to Modern Israel’s Constitutional Framework” (2000) 21 *Cardozo L Rev* 1903; Kevin Hasson, “Religious Liberty and Human Dignity: A Tale of Two Declarations” (2003) 27 *Harv J of L & Public Pol’y* 81; Eibach, “Protection of Life and Human Dignity: The German Debate between Christian Norms and Secular Expectations”, 14 *Christian Bioethics* 58 (2008).

⁵¹ Article 1(a) of the Cairo Declaration on Human Rights in Islam provides as follows:

“All human beings form one family whose members are united by submission to God and descent from Adam. All men are equal in terms of basic human dignity and basic obligations and responsibilities....”

Cf. Eva Brems, *Human Rights: Universality and Diversity*, 263-264 (2001); Mashood Baderin, *International Human Rights and Islamic Law* (2003) 15 (“[T]he protection and enhancement of the dignity of human beings has always been a principle of Islamic political and legal theory”).

⁵² See Rory O’Connell, “The Role of Dignity in Equality Law: Lessons from Canada and South Africa”, 6 *Int’l J. of Constitutional L.* 267 (2008).

⁵³ [2009] 2 ACC 19 (15 July 2009), para. 25. See also *Residents of Joe Slovo Community, Western Cape v Thubeliska Homes* [2009] 2 ACC 16 (10 June 2009).

be inviolable”⁵⁴ and Article 8(2)(a) guarantees that in any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.⁵⁵

One of the fundamental underlying principles on which the Malawian Constitution is founded is that:

“[t]he inherent dignity and worth of every human being requires that the State and all persons shall recognize and protect fundamental human rights and afford the fullest protection to the rights and views of all individuals, groups and minorities whether or not they are entitled to vote.”⁵⁶

Section 19(1) provides that “[t]he dignity of all persons shall be inviolable” and section 19(2) involves the guarantee of respect for human dignity in any judicial proceedings or in any other proceedings before any organ of the State, and during the enforcement of a penalty.⁵⁷

⁵⁴ Cf. *Government of the Republic of Namibia v Getachew* [2008] NASC 4 (unlawful detention held to violate Article 8(1)), *McNab v Minister of Home Affairs NO* [2007] NAHC 50 (prison conditions held to violate dignity, though claim for damages failed on procedural grounds), *Minister of Health and Social Services v Lisse* [2005] NASC 8 (refusal by Minister of authorisation for doctor to practice at a State hospital held to violate Article 8(1)). In *Kauesa v Minister of Home Affairs* 1995 NR 175, the Supreme Court of Namibia, influenced by Canadian jurisprudence, held that, in assessing the extent of the Conventions to rights and freedoms permitted by Article 21(2) of the Constitution, it “must be guided by the values and principles that are essential to a free and democratic society which respects the inherent dignity of the human person, equality, non-discrimination, social justice and other such values.”

⁵⁵ In *Namunjepo v Commanding Officer Windhoek Prison* 1999 NR 271, the Supreme Court held that placing prisoners in irons violated Article 8(2)(a) (as well as Article 8(2)(b)).

⁵⁶ Section 12, para (iv).

⁵⁷ In *Kafantayeni v Attorney General* [2007] MWHC 1 (27 April 2007), the High Court of Malawi held that the mandatory death penalty for murder violated the constitutional guarantees of rights under section 19 (and other sections) of the Constitution. In *Palitu v Republic* [2001] MWHC 43 (19 September 2001) Mwaungulu J considered “it offensive to public policy and human dignity” for the judicial process to use evidence obtained by a confession made under duress. In *Jumbe v Attorney General* [2005] MWHC 15 (21 October 2005) a reverse onus provision in the Corrupt Practices Act was struck down as violating the right to a fair trial guaranteed by section 42(2)(f)(iii). *Per* Katsala J:

“Admittedly corruption is bad... and it has to be rooted out of our society ... Those that engage in corruption in a way violate the citizens’ right to development as enshrined in section 30 of the Constitution. They ... divert for their own use public resources thereby depriving the general public the benefit from such resources. Such people are selfish and greedy at the expense of everyone else. Surely, if caught, they must be dealt with firmly.

However, inasmuch as we may harbour hatred for such people, we can only show and prove to the whole world and indeed to ourselves that we are an open and democratic society and that we cherish and promote the values that underlie such a society if we treat those we suspect of committing heinous crimes with dignity as fellow human beings and afford them all the protection that accused persons enjoy under the Constitution. I do not see any justification for limiting their right to be presumed innocent bearing in mind that they are mere suspects and have not been convicted of the alleged crimes.”

In *In re Adoption of Children Act (Cap. 26: 01)*; *In re: David Banda (Adoption Cause No. 2 of 2006)*, [2008] MWHC 3, Nyirenda J, noted that the human rights provisions in the Constitution were “purposely there contained to enhance and uphold the rights of all manner of people in our nation in order to preserve their dignity.” He considered that section 19(1) “in particular” stressed that the dignity of all persons should be inviolable and he added that “in order to preserve the dignity of all persons section 30

Persons who are detained, including sentenced prisoners, have the right to be detained “under conditions consistent with human dignity, which shall include at least the provision of reading and writing materials, adequate nutrition and medical treatment at the expense of the State.”⁵⁸ Children arrested for, or accused of, the alleged commission of an offence are entitled to be treated in a manner consistent with the promotion of their “sense of dignity and worth...”⁵⁹

Section 9 of the Tanzanian Constitution obliges the state authority and all its agencies to direct their policies and programmes towards ensuring, *inter alia*, “(a) that human dignity and other human rights are respected and cherished” and “(f) that human dignity is preserved and upheld in accordance with the spirit of the Universal Declaration of Human Rights”. Section 12(2) provides that “[e]very person is entitled to recognition [of] and respect for his dignity.” To ensure equality before the law, the state authority is required by section 13(6) to make procedures which are appropriate or which take into account a number of principles, including that expressed in paragraph (d), as follows:

“human dignity shall be protected in all activities pertaining to criminal investigation and process, and in any other matters for which a person is restrained, or in the execution of a sentence.”

Human dignity is considered to generate a duty as well as rights. Section 25(1) provides that:

“[w]ork alone creates the material wealth in society, and is the source of the well-being of the people and the measure of human dignity. Accordingly, every person has the duty to –

- (a) participate voluntarily and honestly in lawful and productive work; and
- (b) observe work discipline and strive to attain the individual and group production targets ~~derived~~ desired or set by law.”

of the Constitution in turn obligates the State to ensure the right to development at every stage and level of humanity...”

⁵⁸ Section 42(1), para (6).

⁵⁹ Section 42(2), sub-para (g)(iv).

The Preamble to Zambia’s Constitution involves a pledge by the people of Zambia to ensure that the State shall respect “the rights and dignity of the human family...”

Section 18(1) of Swaziland’s Constitution provides that “[t]he dignity of every person is inviolable”. Section 30(1) requires the State and society to recognise the right of persons with disabilities to respect and human dignity.

Section 28(a) of the Constitution of Lesotho requires the state to adopt policies aimed at securing that education is directed to “the full development of the human personality and sense of dignity...”

The two Lusophone constitutions of Southern Africa are also enthusiastic about respect for dignity. Article 20 of the Constitution of Angola requires the State “to respect and protect the human person and human dignity.” Article 19(1) of the Mozambican Constitution expresses Mozambique’s solidarity with the struggle of the African peoples and states for “unity, freedom, dignity and the right to economic and social progress”.⁶⁰

Article 16 of the Ugandan Constitution requires society and the State to recognise the right of persons with disabilities “to respect and human dignity”. Article 24 requires the State to promote and preserve those cultural values and practices “which enhance the dignity and well-being of Ugandans”. Article 24 is headed “Respect for human dignity and protection from inhuman treatment”. Its content does not use the expression “dignity” but the courts have made it plain that this value underlies the Article.⁶¹ Article 33(1) requires that women be accorded “full and equal dignity of the person” with men. Article 33(6) prohibits laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status.

⁶⁰ See further Binchy, “The Constitution of Timor-Leste in Comparative Perspective”, Chapter 10 of William Binchy ed., *Timor-Leste: Challenges for Justice and Human Rights in the Shadow of the Past* (2009), at 264-265.

⁶¹ See, e.g. *Attorney General v Susan Kigula and 417 Others*, *supra*, *Abuki v Attorney General* [1997] UGCC5..

Dignity and equality

The essence of the concept of dignity is the unique inherent value of every human being. This value does not depend on age, capacity or social position. Human beings are understood to have a relational and social dimension: human flourishing is not possible without regard to this interpersonal perspective which generates a large tapestry of rights and obligations as between individuals, groups and society. This understanding of dignity clearly has significant implications for constitutional jurisprudence of equality and non-discrimination. Indeed this is demonstrated unambiguously by the constitutional experience in a range of countries.⁶²

Implications for Constitutional Interpretation

What are the practical implications for the approach that courts in Southern Africa might consider adopting in relation to the protection of economic and social rights? I would respectfully suggest that, conscious of the centrality to African constitutions of the values of human dignity and equality, courts may legitimately visit, or revisit, their constitutional texts, so as to give maximum judicial support to the vindication of these rights. You are aware of how the Indian Supreme Court adopted precisely this approach.⁶³ The skies did not fall. On the contrary, the boldness of the judiciary has

⁶² In the Irish Supreme Court decision of *Quinn's Supermarket v Attorney General*, [1972] IR 1, at 13 Walsh J said that the provision in the Constitution relating to equality involved:

“a guarantee related to their dignity as human beings and a guarantee against any inequalities grounded upon an assumption, or indeed a belief, that some individual or individuals or classes of individuals, by reason of their human attributes or their ethnic or racial, social or religious background, are to be treated as the inferior or superior of other individuals in our country.”

⁶³ Among the rich jurisprudence, leading decisions include *Mullin v Administrator, Union Territory of Delhi*, AIR 1981 SC 746, *Tellis v Bombay Municipal Corporation*, AIR 1986 SC 180, *Bandhua Mukti Morcha v Union of India*, AIR 1984 SC 802 and *Jain v State of Karnataka*, (1992) 2 SCC 666. See Muralidhar, “Judicial Enforcement of Economic and Social Rights: The Indian Scenario”, in Fons Coomans ed., *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (2006), 237, Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (2002), 258-260, Neuborne, “The Supreme Court of India” 1 Int'l J of Constitutional L 476, at 500-504 (2003), Rajamani, “Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability”, 19 J of Environmental L 293 (2007), Young, “The Minimum Core of Economic and Social Rights: A Concept in Search of Content”, 33 Yale L J of Int'l L 113 at 128-130 (2008), Deva, “Human Rights Realization in an Era of Globalization: The Indian Experience”, 12 Buffalo Human Rts L Rev 93, at 119-132 (2006), Sripathi, “Constitutionalism in India and South Africa: A Comparative Study from a Human Rights Perspective”, 16 Tulane J of Int'l & Comp L 49, at 98-104 (2007), Ní Chuilleanáin, “Opening Up the Courts to the Marginalised: The Uses and Usefulness of Public Interest Litigation in India”, 6 Trinity College L Rev 18 (2003). A similar approach has been adopted in Pakistan: *Zia v WAPDA*. PLD 1994 SC 639. See further Martin Lau, “Islam and Judicial Activism: Public Interest Litigation and

been widely regarded as appropriate to the social, political and legal challenges facing the Court. The Court's ability to use the non-justiciable Directive Principles of State Policy as inspiration for its interpretation of substantive rights, especially those of a social and economic character, offers a useful model – not necessarily for copying but for reflecting upon with a view to giving substance to these rights.

Concluding Observations

The task of interpreting Constitutions is a challenging one. I hope that, in interrogating the international dimensions and in suggesting a possible approach which concentrates on dignity and equality, I may provoke some further reflections on the judicial role in protecting fundamental rights.

Environmental Protection in the Islamic Republic of Pakistan”, Chapter 14 of Alan Boyle & Michael Anderson eds., *Human Rights Approaches to Environmental Protection* (1998). In Africa, some courts have favoured an expansive interpretation of the right to life. Cf. *Waweru v Republic* [2006] eKLR (High Court of Kenya, Nyamu J, 2 March 2006). Other courts have taken a different view: see *Baitsokoli v Maseru City Council* [2005] LSCA 13 (Lesotho Court of Appeal, 20 April 2005). The decision of the High Court of Botswana in *Sesana v Attorney General* [2006] 2 BLR 633 is consistent with an expansive interpretation of the right to life.