

# The role of human dignity in the jurisprudence of the African Commission on Human and Peoples' Rights

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**ABSTRACT:** Human dignity is a concept that is often mentioned in core human rights treaties and national constitutions as the foundation of human rights. At its core it demands respect for the life and integrity of the human person, recognition of the equal worth of human beings and respect for their autonomy or self-determination. Many national and supra-national courts also use the concept to explicate the meaning and limitations of human rights. The constitutional court of Germany, South Africa and the European Court on Human Rights are notable in this regard. In recent years, the US Supreme Court has also increasingly used the concept in resolving hard cases and expanding the scope constitutional rights. Though, the role and application of human dignity has received considerable scholarly attention, it is mainly confined to the European constitutional orders and the US constitutional system. With respect to regional human rights systems, scholars have largely focused on examining the role of human dignity in the jurisprudence of European Court of Human Rights and the Inter-American Court. As such, little is known about what role human dignity is playing or could play in the interpretation of rights in the African human rights system. This is alarming considering the poor status of protection of human rights and weak constitutional right jurisprudence in many countries of Africa. Accordingly, this article seeks to fill the lacuna by examining the role of human dignity in the African human rights system by exploring its place in religious and cultural value systems of different African societies.

## TITRE ET RÉSUMÉ EN FRANCAIS:

### **Le rôle de la dignité humaine dans la jurisprudence de la Commission africaine des droits de l'homme et des peuples**

**RÉSUMÉ:** La dignité humaine est un concept souvent mentionné dans les principaux traités des droits de l'homme et les constitutions nationales comme étant le fondement des droits de l'homme. Elle exige essentiellement le respect de la vie et de l'intégrité de la personne humaine, la reconnaissance de l'égale valeur des êtres humains et le respect de l'autonomie ou de l'autodétermination des êtres humains. De nombreux tribunaux nationaux et supranationaux utilisent également ce concept pour expliquer le sens et les restrictions des droits de l'homme. Les Cours constitutionnelles d'Allemagne et d'Afrique du Sud et la Cour européenne des droits de l'homme sont remarquables à cet égard. Ces dernières années, la Cour suprême des États-Unis a également eu de plus en plus recours à ce concept pour résoudre des affaires complexes et étendre la portée des droits constitutionnels. Bien que le rôle et l'application de la dignité humaine aient fait l'objet d'une attention considérable de la part des chercheurs, ils sont principalement limités aux ordres constitutionnels européens et au système constitutionnel américain. En ce qui concerne les systèmes

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régionaux des droits de l'homme, les chercheurs se sont principalement concentrés sur l'examen du rôle de la dignité humaine dans la jurisprudence de la Cour européenne des droits de l'homme et de la Cour interaméricaine. En conséquence, on n'en sait pas trop sur le rôle que la dignité humaine joue ou pourrait jouer dans l'interprétation des droits dans le système africain des droits de l'homme. Cette situation est préoccupante si l'on considère le faible niveau de protection des droits de l'homme et la faible jurisprudence en matière de droits constitutionnels dans de nombreux pays africains. En conséquence, cet article cherche à combler cette lacune en examinant le rôle de la dignité humaine dans le système africain des droits de l'homme. Il explore sa place dans les systèmes de valeurs religieux et culturels de différentes sociétés africaines.

**KEY WORDS:** human dignity, equality, cultural value systems, human rights system

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## 1 HUMAN DIGNITY AS AN AFRICAN CULTURAL CONCEPT

The essence of human dignity is attribution of respect to a human person and the recognition of their superior value in comparison to other creatures.<sup>1</sup> This idea is commonly believed to have originated from the teachings of Christianity or the exposition of European philosophers such as Immanuel Kant.<sup>2</sup> In contrast, the idea is portrayed as unknown and alien to the African continent and its inhabitants. This is partly due to the writings of philosophers such as Hegel who seem to have a very condescending view of Africa and the capacity of its people, which seems to have contributed a great deal to the general misconception about the continent for generations to come.<sup>3</sup> Hegel describes Africa as 'land of childhood' and underscores the uncivilised status of the African people by noting that 'the Negro exhibits the natural man in his completely wild and untamed state'.<sup>4</sup> It does not take much effort to infer from these statements his equation of an African person with that of a child in his thinking and behaviour, not having any manner or rules for conducting his relationship with others. He also emphasises the 'wildness' and 'savagery' of the African people

1 M Mahlmann 'Human dignity and autonomy on modern constitutional orders' in M Rosenfeld & A Sajó (eds) *The Oxford handbook of comparative constitutional law* (2012) 370-396.

2 MD Cohen 'A concept of dignity' (2011) 44 *Israel Law Review* 11-17.

3 B Camara 'The falsity of Hegel's theses on Africa' (2005) 36 *Journal of Black Studies* 82-96; M Mutua 'Savages, victims and saviors: the metaphor of human rights' (2001) 42(1) *Harvard International Law Journal* 201- 202; OS Nwosu 'Morality in African traditional society' 26(2) *New Political Science* 205.

4 F Hegel *The philosophy of history* (2001) 109.

which necessitates their domestication or taming by the higher beings (the Europeans). If what Hegel is saying is taken at face value, it might seem plausible to contend that human dignity has no roots in Africa (a wholly foreign concept that Africans need to learn from others for its goodness), because its very inhabitants are savages having neither the capacity nor the time to contemplate about it. Yet, it is important to also note that while European philosophers like Hegel were discussing human dignity, European society and culture rarely practiced this in their treatment of European foreigners, people of other races, women, children, criminal suspects, people with disabilities, and the poor.<sup>5</sup> European society of the period was savage and wild and had no interest in humane considerations.

Further, it was assumed that Africans are not capable of entertaining any abstract thought and their state of mental development does not allow them to think about how they should treat each other and treat their fellow beings with respect.<sup>6</sup> Their ability to entertain ideas of God and religion is accordingly limited. Beside the account of European philosophers, Christian missionaries who sought to spread Christianity to Africa also contributed their part for the characterisation of African tradition and culture as barbaric devoid of any notion of human dignity in it.<sup>7</sup> Hence, the dominant (pre) colonial narrative about Africa and Africans in the past was that they are 'brutes', 'cannibalistic', 'crude', 'primitive', 'dark', 'savages', 'pagan', 'ignorant' with no contribution for human history or civilisation.<sup>8</sup>

Here, it might help to examine why this line of thought/picture of Africa and Africans was propagated. Discovering the reason for such characterisation of Africa is not that sophisticated. It is chiefly to provide a justification or an excuse for the colonisation of African by the West and all the evils that happened the name of 'civilizing' or 'humanizing' Africans.<sup>9</sup> Hence, in order to subjugate Africans to control by the Europeans, their portrayal as beasts and savages is crucial because it gives the impression that the colonisers are doing Africans a favour by controlling and guiding them because Africans lack the intelligence to govern themselves. In contrast, if the African culture and its people are considered to be civilised and their value system acceptable, the colonisers would lack the ground for controlling them other than for the sheer selfish desire of looting resources. Beside the

5 M Foucault *Discipline and punish: the birth of the prison* (1995) 3-31; VC Fox 'Historical perspectives on violence against women' (2002) 4(1) *Journal of International Women's Studies* 15-34; I Marini et al *Psychosocial aspects of disability insider perspectives and strategies for counselors* (2018) 3-31; T Cribelar 'From sin to laziness: early modern views of the poor and poor relief' <https://www.eiu.edu/historia/cribelar.pdf> (accessed 11 September 2021).

6 N Emeghara 'The dignity of the human person in African belief' (1992-1993) 14 *Theology Annual* 126-137.

7 Emeghara (n 6) 137.

8 Emeghara (n 6) 137.

9 B Bowden 'In the name of civilization: war, conquest, and colonialism' (2019) 23 *Pléyade* enero-junio 73-100; A Fatima 'Othering of Africans in European literature: a postcolonial analysis of Conrad's 'Heart of darkness'' (2015) 3(5) *European Journal of English Language and Literature Studies* 40-45.

issue of resources, painting the African traditional religion and belief system as savage and ridiculous, also gives advantage to religions such as Christianity and Islam to get followers in Africa. One of the most effective strategies to make people abandon a certain value system is to depict it as evil and barbarous.<sup>10</sup> This seems to be what the missionaries did to traditional African religions and succeeded in making the people believe what they say is true and win them over.

The next important issue worthy of examination is whether what people like Hegel and the missionaries are saying about Africa and Africans is plausible? More specifically, whether the claim that Africans are alien to the ideals of human dignity is indeed true or it is something that is based on sheer misconception and ignorance about African way of life. Before analysing this subject, it is important to raise one important concern with respect to how one should approach the genealogy of dignity in different cultural traditions. A person may follow different methodologies in an attempt to discover the presence or absence of human dignity in a certain community. The most common approach is to look for the word 'human dignity' in written texts and laws of the community.<sup>11</sup> If one follows this narrow approach of finding human dignity, one may be easily led to the conclusion that dignity is alien to the society simply because the word is absent from written documents. This is particularly relevant for the study of African history and value systems since most of the written pieces were destroyed by the colonisers and the African people largely relied on oral tradition.<sup>12</sup> As such, a person genuinely interested in the discovery of the notion of human dignity in Africa must be sensitive to this reality.

This in turn requires a more nuanced method of discovery which is not merely confined to searching for the word 'dignity' in written form. Instead, it requires inquiring into whether a given society has the ideal of treating human beings as creatures of special worth/value and looks for manifestations of such ideas in the right places.<sup>13</sup> These places include oral traditions, songs, their way of life, conception of religion and its practice, manners of treating individuals, as well as the duty and privileges of individuals in the community among others. In general, a holistic consideration of the community culture and value system must be considered to arrive at a sound conclusion. The adoption of such approach in the writer's view, will affirm the idea that human dignity is not an alien concept to Africa and its marks are found in different cultures of African pre-colonial communities. Yet, it is also important to bear in mind that African culture is not homogenous and like any other society there are practices which are incompatible with the idea of human dignity. In subsequent paragraphs of the article, an attempt

10 F Nkomazana & S Doreen 'Missionary colonial mentality and the expansion of christianity in Bechuanaland Protectorate' 1800 to 1900' (2016) 29 *Journal for the Study of Religion* 29-55.

11 M Mahlmann 'The good sense of dignity: Six antidotes to dignity fatigue in law and ethics' in C McCrudden (ed) *Understanding human dignity* (2014) 593-614.

12 K Wiredu 'An oral philosophy of personhood: comments on philosophy and orality' (2009) 40 *Research in African Literatures* 8-10.

13 Mahlmann (n 11) 595.

is made to demonstrate how some African societies recognise and respect human dignity by examining the anthropological and philosophical studies conducted on three indigenous African people, namely, the Igbo, the Akan and the Bantu people.

### 1.1 The Igbo and human dignity

The Igbo people are one of Africa's indigenous peoples in the present-day Nigeria. According to a study by Emeghara, a closer look at their conception of human creation, mode of worship and community life provides ample evidence to the respect traditional African societies had for human person which lies at the centre of the modern notion of human dignity.<sup>14</sup> To begin with their view of human origin, they believe that every human being is the work of Chukwu (God). What makes human beings more valuable than any other creature is the possession of *chi* (soul) which they believe is an imprint of God's nature. As such, they believe that God is within every human person through his *chi*.<sup>15</sup> This view of human beings and their worth is akin to the Christian conception of *imago dei* that ascribes dignity to human beings because they were made in God's image. However, the Igbo also identified other factors which may trigger respect for human beings beside their creation by God. The understanding of human beings as spiritual beings and recognition of their volition could be mentioned as an example in this regard.<sup>16</sup> To begin with spirituality, the Igbo believe that human life continues in a spiritual form, and it is not extinguished at death. Hence, the immortality of human soul/spirit may be interpreted as a conception of a special value of human beings that make them stand out from others. This may also explain the ascription of an important status to the dead members of the community commonly known as ancestors whose implicit presence is recognised and respected. Further, the possession of free will and volition in human heart/nature is also believed by the Igbo as distinguishing marks of a human being. As such, the capacity in human heart to do good and evil is recognised. This understanding of the Igbo resembles the position of some European philosophers like Kant emphasising the unique limited properties of human beings as a justification for bestowing dignity on them.

A closer look at the manner of worship and way of life in Igbo community also displays the respect they have for human life and human person. According to Obasola, life 'is a primary value and highly esteemed among the Africans'.<sup>17</sup> The community manifests its concern for human life in the names it gives for children and in the manner, it seeks to protect human life. For instance, names like '*Ndubuisi* (life is

14 Emeghara (n 6) 126-137.

15 Emeghara (n 6) 126-137.

16 Emeghara (n 6) 126-137.

17 KE Obasola 'Ethical perspective of human life in relation to human rights in African indigenous societies' (2014) 8 *International Review of Social Sciences and Humanities* 29-35.

the primary value)', and *Nduka* (life is the greatest thing) are common in Igbo people.<sup>18</sup> Several beliefs and rules of the Igbo community also demonstrate the respect they have for human life from their perspective. To illustrate, one can mention the absolute prohibition of taking one's own life. The community shows its disdain against such practice by not burying and mourning for the person who committed suicide.<sup>19</sup> This shows the modern debates about assisted suicide and its controversies are not new to the African mind and culture. Further, the community respects the value of human life even at its earliest stage of development. This could be seen from the way the Igbo handle the death of pregnant women in the past. When such incident happens, the Igbo conduct a surgery on the women to extract the fetus and arrange a separate burial for both.<sup>20</sup> This may be interpreted as a barbaric and absurd practice with no logical justification. But from the other side, it could also be interpreted to show how the Igbo respect human person in a fetus form by their attempt to value it through a separate burial. Moreover, respect for human life and its value, is always present in Igbo prayers.<sup>21</sup>

The most visible manifestation of the Igbo respect for human dignity is found in their communal life, manner of treating each other and their value system.<sup>22</sup> Like for many African communities, communal way of life and the duty of the individual to further the common good of the community is a cherished matter. More specifically, the central prescription of Igbo community is the requirement for every individual to show respect for other members by displaying hospitality, supporting the weak and displaying solidarity.<sup>23</sup> At the core of these practices lies respect for a human person and recognition of his unique worth. To show hospitality and friendly treatment to another human being is nothing but affirmation of his special value. It is also a complete opposite of hatred and unfriendly treatment that denies the value of certain human beings. Thus, one does not need to find a detailed philosophical account about dignity in a written form to appreciate the existence of notion of human dignity in a certain community. The way it treats its fellow beings gives enough testimony to a person with an open eye to see if human dignity is there. Likewise, support for the weak and the fortunate, underscore the belief of the community of according equal concern and appreciation of the value for human beings irrespective of their status or circumstances. Hence, the Igbo had a notion of human dignity.

18 Obasola (n 17) 29-35.

19 Obasola (n 17) 29-35.

20 Obasola (n 17) 29-35.

21 OS Nwosu 'Morality in African traditional society' (2004) 26(2) *New Political Science* 205-229.

22 Emeghara (n 6) 126-137.

23 Emeghara (n 6) 126-137.

## 1.2 The Dinka and human dignity

The Dinka are African indigenous people living in the present day of South Sudan, the eastern part of Africa. Like the Igbo, one can find the traces of notion of human dignity in the Dinka culture and value system. Francis Deng, an anthropologist and lawyer, has spent a considerable time and energy in studying the Dinka way of life and its relation to the modern conception of human rights that is primarily grounded on the notion of human dignity. His study reveals one of the misconceptions about societies in pre-colonial Africa. Commonly, African communities are perceived as having no value system for ordering their society and all one can find is endless chaos and war. The falsity of this assumption could be seen if one examines the culture of the Dinka.

According to Deng, the Dinka have a moral ideal/vision of a society they want to create and maintain. These notions are embodied in the Dinka concept called *Cieng* which embodies 'values of dignity, respect, loyalty and care for human person among others'.<sup>24</sup> The *Cieng* is a moral code of conduct that every member of the Dinka community must adhere to and observe. As noted above, its ultimate aim is ensuring respect for human a person through the prescription of treatment that goes with it. As such, for the Dinka an ideal society is one where the dignity of every member of the community is valued. The *Cieng* also imposes a duty on each member of the community to care for the wellbeing of others. These moral prescriptions preserve the essence of human dignity as we understand it today. Hence, the ideals of human dignity are not foreign to the Dinka and one could infer this from their moral code of conduct and its prescription.

The strength of their commitment to the *Cieng* is demonstrated by the consequences attached to the violation of the moral law. Like the Igbo, the Dinka also believe that the ancestors are the guardian of the Dinka moral order.<sup>25</sup> Thus, an individual who breached the *Cieng* will be punished by them. Beside their central moral code of conduct, the *Cieng*, other traditions and practices of the Dinka also affirm the recognition of human dignity and human worth. For instance, in making a decision or taking a certain course of action that affects the community, the Dinka give priority for persuasion over the use of force or violence or coercion.<sup>26</sup> This practice could be interpreted to indicate the value the Dinka give for the opinion of every person and the degrading nature of getting something done by forcing or compelling someone against his free will. Such an interpretation approximates the modern understanding of human dignity that demands the treatment of every person as an end not as a means.

24 F Deng *The Dinka of the Sudan: case studies in cultural anthropology* (1972) 14-24; F Deng et al *Human rights: southern voices* in W Twining (eds) (2009) 4-15.

25 Deng (n 24) 4-15.

26 F Deng *Identity, diversity and constitutionalism in Africa* (2008) 77-100.

Further, one can also infer the war ethics of the Dinka and see their attempt to ensure respect for a human being irrespective of the fact that he is an enemy. According to the Dinka culture, a wounded enemy fighter must be treated and taken care of by the women.<sup>27</sup> Such gesture towards the enemy could be inferred as having its source in respect for humanity or the human person. Another interesting practice in Dinka tradition is the *dheeg*.<sup>28</sup> Although exact translation of the practice to English is a challenge, it basically refers to social dignity of a person in the Dinka community. According to Deng, individuals could attain the respect of the community in three ways.<sup>29</sup> The first is the acquisition of dignity by birth or marriage. As such, a person will assume an elevated status in the community if he is born out of a class esteemed by the community or joins such family by means of marriage. But this is not the only way of acquiring societal respect in the Dinka. An individual also earns his respect in the community, if he owns cattle which is the most revered thing for the Dinkas or conforms to the moral prescription of the *Cieng*. Thus, a poor person is treated with respect in the community if he is an adherent to the requirements of the *Cieng* and displays a friendly and respectful behaviour towards other members of the community. Finally, social dignity could also be ascribed in a person by virtue of his physical appearance or beauty. Beauty and the body of the human person are treasured in the belief of the Dinka.

### 1.3 The Bantu conception of human dignity: ubuntu

One of the most widely known indigenous African value systems (in relative terms) that is often associated with the notion of human dignity is the ubuntu tradition of African people of Bantu descent. These people mainly live in Southern and Eastern parts of Africa and ubuntu is central to their societal organisation and day to day life. It is difficult to capture the whole essence of ubuntu with one single definition. But at its core lies the idea '*Umuntu Ngumuntu Ngabantu*', which can be translated as "a person is a person because of or through others".<sup>30</sup> The centrality of society in the definition of personhood is evident from this statement. As such, an African world view of individual and their link to the community is different from that of the West. In western philosophical discourse, the status of the individual and their humanity is found internally and located within the person themselves (inheres within).<sup>31</sup> Hence, the role of the community in the acquisition of personhood or humanity is not often emphasised. As such, interaction with the community seems not to add anything to the human quality of

27 Deng (n 26) 77-100.

28 Deng (n 26) 77-100.

29 Deng (n 26) 77-100.

30 D Cornell & N Muvangua *Ubuntu and the law: African ideals and post-Apartheid jurisprudence* (2012) 5.

31 IA Menkiti 'Person and community in African traditional thought' in RA. Wright (ed) *African philosophy: an introduction* (1984) 171-181; JE Lassiter 'African culture and personality: bad social science, effective social activism, or a call to reinvent ethnology?' (2000) 3(3) *African Studies Quarterly* 1-15.



the individual nor diminish it. Hence, personhood or humanity is rather internal than external.

The view of humanity and personhood in ubuntu thought is the complete opposite of this thinking. As such, a person acquires personhood or humanity only through their relation with their peers and the community.<sup>32</sup> A corollary of this belief is that what makes the person a human is not his mental or bodily attributes or features. Rather, it is their friendly and cooperative interaction with others that leads to their transformation to state of a human being. Some authors contend that for an African, personhood is something which a person may not succeed in achieving.<sup>33</sup> This means unless a person receives the assistance of others they will not be able to develop to a full human being by their own effort and will. Further, depending on the degree of interaction and good relation with others a person may become more or less of a person.<sup>34</sup> As such, when they show respect and concern for others and strive for their wellbeing, a person is regarded as having an ubuntu. In contrast, they will be considered as lacking ubuntu when they attempt to promote their wellbeing at the expense or in disregard of the interest of others.

As the previous paragraphs demonstrate, interdependence is a supreme good in the philosophy of ubuntu. Hence, an individual is expected to flourish as a person by receiving the support of others and has the duty to do the same for others to flourish or develop.<sup>35</sup> Thus, the person relies on others for their development and others can rely on them to achieve their destiny or wellbeing. Beside the emphasis on interdependence and community centred personhood, ubuntu sets certain standards and guidelines on how individuals should treat each other or relate. The core prescription in this regard is treating every person with respect, concern and friendliness.<sup>36</sup> It is only such kind of treatment that conforms to the ubuntu philosophy and leads to personal and communal development. Unfriendly treatment of others and lack of concern for their wellbeing is contrary to the value of ubuntu.

The other point which requires further analysis is the similarity of ubuntu with the understanding of human dignity in western philosophical thought. Some writers warn us of the danger of conflating human dignity and ubuntu, for the reason that such approach deprives us the opportunity to benefit and appreciate the unique features and addition of ubuntu.<sup>37</sup> One difference that is often noted in the ubuntu

32 T Metz 'African conceptions of human dignity: vitality and community as the ground of human rights' (2012) 13 *Human Rights Review* 19-37; T Metz 'Human dignity, capital punishment, and an African moral theory: toward a new philosophy of human rights' (2010) 9 *Journal of Human Rights* 81-99.

33 Metz (n 32) 81-99.

34 Metz (n 32) 81-99.

35 Metz (n 32) 81-99.

36 Metz (n 32) 81-99.

37 D Cornell 'A call for a nuanced constitutional jurisprudence: South Africa, *Ubuntu*, dignity, and reconciliation' in D Cornell & N Muvangua *Ubuntu and the law African ideals and post-Apartheid jurisprudence* (2012) 324-333.

scholarship is the focus of Kantian understanding of dignity on the autonomy of the individual contrary to the relationship centered view of humanity in ubuntu.<sup>38</sup> As such, it is argued that what is central about the human person in Kant's philosophy is the autonomy or the ability of the individual to make free choice. This does not seem to be the emphasis in ubuntu which seems to value friendly relationship between individuals more than individual capacity for choice.<sup>39</sup> However, since Kant talks about freedom under moral law, the complete differentiation of his thought with that of ubuntu should not be over emphasised.

These findings also demonstrate that non-western cultural traditions are not always incompatible with the basic conception of human dignity and human rights as it is often perceived. Rather the essence of these values is also present in the cultural traditions of various African communities.<sup>40</sup> Thus, no particular culture has a monopoly or ownership over human dignity. Respect for human dignity at a basic level is rather a value shared by all societies and there is a wide range of cross-cultural consensus on it. This also means that radical universalistic understanding of human dignity is problematic because it completely dismisses the relevance of cultural values in validating and shaping conceptions of human dignity.<sup>41</sup> Such position is incompatible with the reality and it may not also support the cause of human rights. The better approach is to use cultural values to further promote and legitimise respect for human dignity instead of rejecting them in their entirety. However, radical cultural relativist approaches, which make culture the sole determinant of any value and reject the existence of any universal value at any level, are also problematic.<sup>42</sup> They may also serve to justify gross violations of human dignity by invoking their compatibility with the conception of human dignity accepted in a particular cultural tradition. The challenge here is to strike a delicate balance between the universal and local understanding of human dignity, without one completely eliminating the other. As long as the culture of a certain community upholds basic respect for human dignity shared at universal level, it may be legitimate to allow it to add its own conceptions or variation of human dignity. This would further enrich human dignity and entrench respect for it at a deeper level instead of undermining it. To illustrate, in many African societies communal interaction and harmony is an important value. Such way of thinking must not be necessarily identical to the western approach that gives central place for individual autonomy. Further, such variation in itself it is not a violation or danger for respect for human dignity, as long

38 T Metz 'Dignity in the Ubuntu tradition' in Marcus Düwell and others (eds) *The Cambridge handbook of human dignity: interdisciplinary perspectives* 310-317.

39 Metz (n 38) 310-317.

40 F Deng 'A cultural approach to human rights among the Dinka' in AA An-Na'im & FM Deng (eds) *Human rights in Africa: cross cultural perspectives* (1990) 261-289.

41 J Donnelly 'Cultural relativism and universal human rights' (1984) 6(4) *Human Rights Quarterly* 400-419; J Donnelly *Universal human rights in theory and practice* (2013) 108-110.

42 Donnelly (n 41) 108-110.

as the respect for communal life does not destroy or eliminate the autonomy of the individual.

## **2 THE ROLE OF HUMAN DIGNITY IN THE JURISPRUDENCE OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS**

The African Charter on Human and Peoples' Rights (African Charter) gives explicit recognition to human dignity. Reference to dignity is made three times, in the Preamble and in a specific article of the Charter.<sup>43</sup> To begin with the Preamble, the notion is invoked in relation to the then Organisation of African Union (OAU) Charter which states that 'freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples'.<sup>44</sup> The African Charter reiterates the importance of these objectives through direct quotation from the constituting document of the OAU. Beside this, the Preamble also mentions dignity by linking it to the issue of colonialism. Africa was a victim of colonial ambition of the European powers. At the time of the adoption of the African Charter, some African states were still struggling to regain their independence. Cognisant of the gross indignity that colonisation has inflicted on African people and the severity of the problem, the Charter underscores the need to support people fighting for their dignity and work towards the elimination of all manifestations of indignity be it discrimination or Apartheid. A similar statement is also reiterated in the Constitutive Act of the African Union. The act celebrates the 'heroic' fight of the African people for their 'dignity' and independence; underscores the need for preserving these ideals in the African continent.<sup>45</sup>

Here one may ask what significance is of an express incorporation of dignity in the preamble of the African Charter. The scholarship on treaty interpretation underscores the importance of statements incorporated in preambles. Accordingly, one of the core functions of preambles is to specify the purpose that specific provision of the treaty seeks to achieve.<sup>46</sup> As such, they serve as guidance in the interpretation of treaties by judicial bodies. This helps to minimise the misapplication of specific provisions of the treaty. If preambles have such a role, the presence of human dignity in the African Charter is a positive development, since the adjudicatory bodies will have the mandate to use the concept in the discovery, explication, application and limitation of rights in it. Hence, it could be argued that human dignity is a value that shapes the interpretation of human rights in the African Charter.

43 African Charter on Human and Peoples' Rights (1986) Preamble & art 5.

44 African Charter (n 43) art 5.

45 Constitutive Act of the African Union (2000) Preamble.

46 MH Hulme 'Preambles in treaty interpretation' (2016) 164 *University of Pennsylvania Law Review* 1300

Beside the preamble, article 5 of the African Charter is dedicated to the right to dignity and combating several manifestations of its violations. The article provides that 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited'.<sup>47</sup> It recognises an enforceable right to dignity in the African Charter. In this sense, it is different from the reference to dignity in the preamble which is more of a value that informs all the rights incorporated under the Charter. Further, the article unequivocally perceives dignity as something that is embedded within every human person. Such understanding of human dignity resonates with the provisions of several human rights instruments such as the Universal Declaration of Human Rights. Moreover, the provision has also attempted to exemplify circumstances where the right to human dignity may be violated. These include among others denial of legal status to a human person, slavery, torture and inhuman treatment.<sup>48</sup> The list here is only illustrative and there is a room to include more acts within this article through interpretation, as long as the inherent dignity of human beings is seriously undermined by the practice in question.

Thus, arguably human dignity is recognised in the African Charter as an interpretative value and enforceable right. A closer look at the preamble and article 5 of the Charter supports such conclusion. If this is the case, it means adjudicatory bodies of the African Charter as well as the domestic courts of states which have ratified the African Charter, have the duty to elaborate and apply human dignity in the interpretation of human rights incorporated within the charter. The following paragraphs of the article examine the dignity jurisprudence of the African Commission and the overall place of dignity in the African human rights system. Before doing that, it may be important to say a few things about the institutional framework. The African Commission on Human and Peoples' Rights (African Commission) is the main body in the African human rights system that is entrusted with the mandate of human rights promotion and protection in the continent.<sup>49</sup> Yet, its decisions are usually not enforced and its power of enforcement seems to be confined to reporting to the assembly of head of states.

That being said about the institutional structure, let us examine the human dignity jurisprudence of the African Commission so far. Accordingly, only the respect for integrity and equal worth aspects of human dignity are recognised in the decisions of the Commission. The number of human dignity inspired decisions are also few. Two of them deal with physical and emotional integrity. Three other cases focus on the equal worth aspect dealing with non-discrimination. To begin with the physical and emotional integrity aspect, the first important case is *Spilg and Mack & Ditshwanelo (on behalf of Lehlohonolo Bernard*

47 African Charter (n 43) art 5.

48 African Charter (n 43) art 5.

49 African Charter (n 43) art 30.

*Kobedi) v Botswana*.<sup>50</sup> The case concerns the execution of the death sentence in Botswana on a person convicted of killing a police officer. In this application, the violation of article 5 of the African Charter was alleged on a number of grounds. The first involves the health condition of the applicant as he was suffering from a heart condition. Here, the argument was that the failure of courts to consider the health condition of the applicant and the order of execution by hanging is a cruel and inhuman treatment.<sup>51</sup> The second ground is on the failure of the court to notify the family of the applicant of the day of the execution. This in the view of the advocate deprived the applicant a dignified farewell.<sup>52</sup>

The decision of the Commission on this case is interesting and problematic from the perspective of human dignity. First, the Commission decided that the claim that execution by hanging causes severe suffering on the accused is speculative and insufficiently proved.<sup>53</sup> What makes the case interesting is that the Commission did not ask whether the very act of the death penalty is compatible with the intrinsic worth of a human person. That aside, the Commission even failed to find a violation on the cruelty of the manner of execution. Given the health condition of the accused, it would have been difficult to allow death by hanging if the Commission followed a strictly dignitarian approach of interpretation. Surprisingly, the commission found violation of article 5 for the second ground which is the failure of the Botswanan court to provide information about the date of execution. This in the Commission's view violates the human dignity of the applicant. In the view of the writer, this is a very weak conception of human dignity. The only plausible explanation for the conclusion the Commission arrived at could be the fact that the applicant was executed before it rendered the decision.

A related case of inhumane treatment where the issue of dignity was decisive is *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) v Angola*.<sup>54</sup> The case concerns the deportation of Gambian miners legally working in Angola subsequent to the adoption of a policy of expelling foreigners. In the course of this process, the applicants alleged the commission of arbitrary detention and maltreatment on the basis of their origin. They were also kept as prisoners in a house that is filled with animal waste since animals used to live in it before the prisoners moved into it.<sup>55</sup> In addition, the prison was not big enough to accommodate all prisoners. Thus, they had to sleep, eat and take bath in the same place. They did not also receive a sufficient amount of food, water and medical aid. For instance, only two buckets of water were provided for 500 prisoners per day.<sup>56</sup> Based on all these facts, the prisoners alleged the violation of a

50 *Spilg, Mack & Ditshwanelo (on behalf of Lehlohonolo Bernard Kobedi) v Botswana* Communication 277/03.

51 *Spilg v Botswana* (n 50).

52 *Spilg v Botswana* (n 50).

53 *Spilg v Botswana* (n 50).

54 *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) v Angola*, Communication 292/04.

55 *IHRD v Angola* (n 54).

number of rights recognised under the African Charter including the right to dignity. The Commission, without much reasoning ruled in their favour by noting that the treatment they have received is clearly a violation of article 5 of the African Charter since such a treatment cannot be called anything but degrading and inhuman.<sup>57</sup> In arriving at this conclusion, the Commission also referred to the dignity jurisprudence of the UN Human Rights Committee.

Another decision of the African Commission is *Purohit and Moore v Gambia*.<sup>58</sup> The case concerns mentally ill patients detained in Gambian hospitals. The communication particularly challenges provisions of the Lunatic Detention Act of Gambia (LDA).<sup>59</sup> One of the most problematic aspects of the law is its failure to specifically define who a 'lunatic' is and on what criteria their status is determined. This is problematic considering the fact that a person declared lunatic is susceptible to indefinite detention in a medical detention centre and the process of determination lacks clarity or review.<sup>60</sup> The applicants in this case alleged the violation of their right to dignity recognised under article 5 of the African Charter.

The Commission began its decision on the issue by noting that 'human dignity is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities as the case may be, are entitled to without discrimination'.<sup>61</sup> In addition, the Commission expressly mentioned the duty to 'respect' and 'protect' the right to dignity as an obligation enshrined under the African Charter. It further ruled that 'under the LDA, persons with mental illness have been branded as 'lunatics' and 'idiots', terms, which without any doubt dehumanise and deny them any form of dignity in contravention of article 5 of the African Charter'.<sup>62</sup> Through this decision, the Commission affirmed the need to respect the intrinsic worth or value of every human person irrespective of his mental or physical disability, which is a step in the right direction. In other words, the Commission's decision in this case shows that a human person will not lose his respect or dignity, by virtue of his disability. Rather he is valued or respected as any other member of human family.

On the equal worth aspect of human dignity, the first important case is that of the *Nubian Community in Kenya v Kenya*.<sup>63</sup> It concerns person of Nubian decent living in Kenya. The Nubian community used to live in Sudan originally but the British colonisers forced some members of the community to join the British army and reside in Kenya. During the colonial time, the Nubians did not have any legal

56 *IHRD v Angola* (n 54).

57 *IHRD v Angola* (n 54).

58 *IHRD v Angola* (n 54).

59 *Purohit & Moore v Gambia*, ACHPR communication no 241/2001.

60 *Purohit v Gambia* (n 59).

61 *Purohit v Gambia* (n 59).

62 *Purohit v Gambia* (n 59).

63 *The Nubian Community in Kenya v The Republic of Kenya* ACHPR communication 317/06.

status. They were neither British nor Kenyan citizens. When Kenya got its independence the issue of the Nubian community was not resolved. Later, the Kenyan government came up with a stringent procedure for issuing identity documents such as National IDs and passports to individuals of Nubian descent residing in Kenya.<sup>64</sup> These procedures include the payment of an application fee, the need to bring the ID card of their grandparents (which they cannot produce) and delayed processing of their application which is not applicable to other applicants. As such, the denial of legal status and the difficulty of acquiring identity documents made the life of the Nubians in Kenya very cumbersome and prevented their full participation in the life of the Kenyan community.<sup>65</sup>

In its decision the Commission noted that 'the respect of the dignity inherent in the human person informs the content of all the personal rights protected in the Charter'.<sup>66</sup> This is very important as it shows African Charter's conception of dignity as a permeating value across all rights and not just a single enforceable right. It further reasoned that the Kenyan law that regulates the acquisition of identity documents for Nubians is blatantly discriminatory and arbitrary. The Commission further remarked that there is 'a clear indication that Kenyan Nubians are unfairly discriminated against in the acquisition of identity documents solely on account of their ethnic and religious affiliations, which assails their dignity as human beings who are inherently equal in dignity'.<sup>67</sup> It further invoked article 2 of the Charter dealing with equality and unfair discrimination by underlining that 'differential treatment on the basis of ethnic and religious affiliations is specifically prohibited ... they have historically been misused to oppress and marginalise peoples with these attributes, thereby demeaning the humanity and dignity inherent in them'.<sup>68</sup> Here, the Commission made an interesting connection between dignity and equality, using the former to inform the latter. In other words, it used dignity as a guide to determine whether discrimination or differential treatment is fair, which resembles the approach of the Constitutional Court of South Africa.

A similar issue was entertained by the African Commission in the case *Open Society Justice Initiative v Côte d'Ivoire*.<sup>69</sup> The case concerns a challenge to the 'ivorite' policy of the Ivorian government which was introduced on the eve of the 2000 presidential election. Its main aim was to grant Ivorian nationality to persons born from an Ivorian mother and father. This policy was particularly designed to exclude the then Presidential candidate Mr Outaraa a member of the Douala ethnic group of a Burkinabe descent.<sup>70</sup> Pursuant to this policy,

64 *Nubian v Kenya* (n 63).

65 *Nubian v Kenya* (n 63).

66 *Nubian v Kenya* (n 63).

67 *Nubian v Kenya* (n 63).

68 *Nubian v Kenya* (n 63).

69 *Open Society Justice Initiative v Côte d'Ivoire*, ACHPR Communication 318/06.

70 *Open Society v Côte d'Ivoire* (n 69).

the Ivorian Supreme Court prohibited Mr Outara from competing in the election and the incumbent president Gbagbo won the election. Subsequent to this incident, the government intensified the harsh treatment against the Doulas living in the northern part of Ivory Coast, which are predominantly Muslim. Members of the Douala ethnic group faced numerous difficulties in the course of acquiring Ivorian nationality and they were asked to pay a fine for getting citizenship which is not a requirement for other people residing in Ivory Coast.<sup>71</sup> The consequence of denial of legal status and citizenship for the Doulas was too burdensome, which caused the problem of statelessness and their effective exclusion from assuming rights and obligations. In other words, the denial of a legal status entailed the denial of their very existence and a heavy burden on their day to day life.<sup>72</sup> In their communication, the applicants alleged the violation of article 5 of the African Charter which guarantees the right to human dignity and right to a legal status.

In its decision the African Commission ruled in favour of the applicants and found a violation of article 5. Its reasoning also reflected the importance of human dignity in the African Charter beside this specific issue. In this regard, the commission noted that 'Dignity is ... the soul of the African human rights system and which it shares with both the other systems and all civilised human societies. Dignity is substantial, intrinsic and inherent to the human person. In other words, when the individual loses his dignity, it is his human nature itself which is called into question, to the extent that it is likely to interrogate the validity of continuing to belong to human society ... when dignity is lost, everything is lost. In short, when dignity is violated, it is not worth the while to guarantee most of the other rights'.<sup>73</sup>

This is so far the strongest statement of the African Commission on human dignity. It endorsed the centrality of human dignity to the corpus of the African Charter and reaffirmed the fact that human dignity is not alien to African societies rather it is something which they share with 'all civilised human societies' though it did not provide details by making reference to African cultural and religious value systems. It also underscored the intrinsic character of human dignity and its direct relation to human nature. As such, when the dignity of a person is threatened their human nature is also challenged. More importantly, it emphasised the importance of securing human dignity if we are genuinely committed to further the protection of human rights in Africa.

Having made these statements as a premise, the Commission underlined the strong bond between human dignity and legal status. In doing so it referred to the jurisprudence of the European Court of Human Rights and the Inter-American Court.<sup>74</sup> The Commission noted

71 *Open Society v Côte d'Ivoire* (n 69).

72 *Open Society v Côte d'Ivoire* (n 69).

73 *Open Society v Côte d'Ivoire* (n 69).

74 *Open Society v Côte d'Ivoire* (n 69).



that, respect for human dignity presupposes the recognition of the legal status of the person which enables him/her to assume rights and duties in the society. If this status is denied, the individual will not be able to live with dignity. As such,

the Commission considers that failure to grant nationality as a legal recognition is an injurious infringement of human dignity. Such an infringement seriously affects the legal security of the individual, particularly due to the undermining of a set of consubstantial rights and privileges to the enjoyment of fundamental legal and socio-economic privileges. Ultimately, it is the very existence of the victim which is vitally compromised.<sup>75</sup>

With this reasoning, the Commission found a violation of article 5 of the African Charter.

The cases discussed above show that though human dignity is a core value and right in the African Charter, the commission's jurisprudence so far mainly focused on the integrity and equal worth aspects of human dignity. Even for these aspects, the Commission has not done anything tangible to abolish the death penalty or combat discrimination against sexual minorities on the basis of their sexual orientation through a dignity centred interpretation of the Charter. Hence, the Commission needs to do more in concretising and entrenching human dignity centred interpretation of rights in Africa by starting from within. In this regard, much is expected from the African Commission and the African Court on Human and Peoples' Rights to examine African culture and traditions, in the process of concretising the concept. This is important because human rights do not function in cultural vacuum.<sup>76</sup> They will not become universal simply because we want them to be. The task needs a greater level of commitment to trace the roots of the concept in African local tradition.

In addition, the African Commission can gain insights about the meaning and application of human dignity from national and international courts. The Commission has an express legal mandate to 'draw inspiration' from international law in the interpretation of the Charter.<sup>77</sup> It is also empowered to utilise as subsidiary sources 'other general or special international conventions, laying down rules expressly recognised by member states of the Organisation of African Unity, African practices consistent with international norms on human and people's rights, customs generally accepted as law, general principles of law recognised by African states as well as legal precedents and doctrine'.<sup>78</sup> The Commission has invoked these provisions when it made reference to the dignity jurisprudence of the Constitutional Court of South Africa and the European Court on Human Rights in the few dignity cases it has determined so far. This mandate of the Commission also enables various conceptions of human dignity to travel from one jurisdiction to the other. This is because the African Charter has a supreme status in many African constitutional orders and the interpretation of rights in the domestic system needs to conform to it.

<sup>75</sup> *Open Society v Côte d'Ivoire* (n 69).

<sup>76</sup> F Deng et al *Human rights southern voices* in W Twinning (ed) (2009) 4-15.

<sup>77</sup> African Charter (n 43) art 60.

<sup>78</sup> African Charter (n 43) art 61.

Thus, the Commission could be a venue where legal concepts like human dignity are concretised and made ready to transfer to another jurisdiction. In other words, it could serve as a market place for the exchange of constitutional ideas such as human dignity. Yet, the performance of the African Commission so far is not satisfactory. Even if the Commission refers to international and national court in rendering its decisions, it neither critically engages with them nor justifies its choice of jurisdictions. This needs to be improved if the Commission is to serve as a good platform for the migration of human dignity centered interpretation of rights within Africa in the future.

### **3 CONCLUSION**

One of the core conclusions of this article is that human dignity is a concept that occupies a central place in religious, philosophical and cultural worldviews of various African societies. More importantly, the anthropological and religious study conducted on some indigenous African communities such as the Dinka, Zulu and the Igbo demonstrates that the idea of respect for human dignity is not alien to Africa. It is rather expressed and manifested in different forms. Yet, the notion is not sufficiently concretised and used by many courts in Africa to interpret and apply human rights. Thus, cultural values of African communities could serve as input to further enrich and entrench the idea of human dignity. The other point worth noting is that despite the explicit presence of human dignity in the African Charter as a value and a right, the human dignity jurisprudence of the Commission is underdeveloped. This could be inferred from the few human dignity inspired decisions of the commission and their richness. In the future, the Commission needs to develop and strengthen its human dignity jurisprudence by engaging in dialogue with advanced national systems within the region such as South Africa and serve as a site for the development and migration of human dignity centred interpretations of rights to other African systems. This may contribute its part in potentially transforming the rights protection system in the continent.