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A Case for Dignity in the Constitution of Mauritius

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ABSTRACT

Mauritius has a unique hybrid legal system which has evolved from the French and the English legal systems. On 12 March 1968, Mauritius acceded to Independence and was "granted" a Westminster Independence Constitution, drawn up in Whitehall, London . Apart from a few minor amendments no in-depth review of the Constitution has been undertaken. Thus Mauritius still applies its 1968 Independence Constitution in 2024, despite major changes in its economy, societal build of its population. It is more and more felt that features considered as cornerstones of constitutionalism are missing. The present article will endeavour to highlight how the 1968 Independence Constitution of Mauritius can still be applied comprehensively to present day situations by reference to human dignity. While human dignity is specifically mentioned in the Constitution of South Africa such is not the case in the Constitution of India and yet the Supreme Court of India has delivered landmark judgments on human dignity.

***Keywords**: Human dignity, Constitution of Mauritius, Indian and South African Jurisprudence.*

I. INTRODUCTION

Mauritius, a small Island State in the Indian Ocean, has had a very rich history from the time it was discovered in 900 AD until now. The present day population of Mauritius is a racial and cultural mix which started with the descendants of the first European settlers, indentured labourers and enslaved manpower brought to work on sugar plantation. To this mix were added the migrants and traders who came to the Island of their own volition in search of new opportunities. Since its independence in 1968, Mauritius has strived very hard and succeeded in developing its economy from a monocrop sugar cane agriculture to semi-industrialised and a specialised service provider.

On the legal side, Mauritius has a unique hybrid legal system which has evolved from the French and the English legal systems. This is due to the fact that after the British conquered Mauritius

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then Isle de France, in 1810[3], they maintained the existing French laws[4] in place so as not to create any disruption[5] in the administrative system. On 12 March 1968, when Mauritius acceded to Independence, Mauritius was "granted"[6] a Westminster Independence Constitution, drawn up in Whitehall, London[7]. Since 1968 to the present day, apart from a few minor amendments there has never been any in-depth review of the Constitution of Mauritius to bring it at par with the needs of the diverse Mauritian population faced with present day challenges. This will be done by reference to human dignity which is specific constitutional tenet in the South Africa but not in India. The present article will endeavour to highlight how Mauritius can draw lessons from the application of human dignity by Indian Courts.

Human dignity is not specifically mentioned in the Constitution of Mauritius and therefore it has to be construed as a read-in from other provisions of the Constitution. Arguably, this might be the reason why there has so far never been any case entered specifically on the ground of human dignity as an inherent right which needs to be protected. However, it can be counter argued that in other countries with older generation constitutions, as in India, for example, human dignity has also not been specifically mentioned in the Constitution. Nevertheless, this has not prevented the Supreme Court of India to make landmark pronouncements on human dignity. Contrary to India and Mauritius, in South Africa, human dignity holds a very distinct place in the Constitution of South Africa and the Constitutional Court of South Africa has created a rich jurisprudence on the application of human dignity as a constitutional tenet in diverse situations. For these reasons, lessons will be drawn from the Indian and South African experience since human dignity is a well-established feature in constitutional adjudication in the Indian as well as the South African jurisdictions.

II. HUMAN DIGNITY: DEFINITION AND IMPORTANCE

(A) History

Human dignity emerged as a contemporary constitutional concept in the aftermath of World War II (WWII). The horrors of WWII were such that "51 countries committed to maintaining international peace and security, developing friendly relations among nations and promoting

[3] The Battle of Grand Port took place from 22-27 August 1810, available at https://www.britannica.com/event/Battle-of-Grand-Port Accessed on 11 August 2020.
[4] Act of Capitulation of Mauritius see the timeline of the National Archives of Mauritius available at https://nationalarchives.govmu.org/nationalarchives/?cool_timeline=the-british-period-1810-1968 Accessed on 29 July 2020.
[5] See article on the Mauritian Legal System from late Sir Victor Glover, GOSK, former Chief Justice of Mauritius available at https://www.gloverchambers.com/the-mauritius-legal-system/Accessed on 20 August 2020.
[6] Meetarbhan at note 1 above.
[7] Ibid.

social progress, better living standards and human rights."[8] Human dignity has been included in both the United Nations Charter, the founding document of the United Nations (UN), in 1945, and the Universal Declaration of Human Rights, in 1948. Shultziner and Carmi[9], after researching the inclusion of human rights in national constitutions, published the following findings: following the inclusion of human dignity in the United Nations Charter and the Universal Declaration of Human Rights, new constitutions started incorporating human dignity as a constitutional tenet. Prior to 1945 only 5 countries had referred to human dignity in their constitution, but by the end of 2012, 162 countries, representing 84% of the member states of the UN, had included human dignity in their constitution[10]. Human dignity was also being researched and used in various fields of study such as legal psychology, legal studies, political science, policy studies, bioethics, human rights and international law.[11]

(B) Definition

Over time, different meanings and explanations have been given to human dignity but no definition has been ascribed to it so far probably due to the various different aspects which human dignity can take depending on circumstances.

Article 1 of the German Basic Law, *Grundegesetz*, which is the term by which the Constitution of Germany is referred to, states as follows: "[H]uman dignity is inviolable. To respect and protect it is the duty of all state authority."[12] According to late Professor Emeritus Donald Kommers[13], Article 1 settles human dignity as a strong constitutional tenet which places a duty over all state authority and makes a normative demand on the state, informing the scope and meaning of the *Grundegesetz (*Basic Law*).* Thereafter, much of the strength of human dignity has derived from Article 1 of the German Basic Law.

It is generally agreed that Immanuel Kant[14] was the force behind the emergence of the concept

[8] History of the United Nations, UN official website available at https://www.un.org/un70/en/content/history/index.html Accessed on 29 November 2021.
[9] Shultziner, D., and Carmi G. E., *Human Dignity in National Constitutions: Functions, Promises and Dangers* The American Journal of Comparative Law, Vol.62, No.2, (Spring 2014), pp. 461-490.
[10] Ibid.
[11] Ibid, at page 2.
[12] German Basic Law (*Grundegesetz)*, article 1.
[13] Donald Kommers, late, Joseph and Elizabeth Robbie Professor of Political Science Concurrent Professor Emeritus of Law, author of *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd Ed.) (2012), Duke University Press, as reported by Goolam, N.M.I., *Human Dignity – Our Supreme Constitutional Value,* (2001) revised version of a paper delivered at the International Conference on Development in the Contemporary Constitutional State, Potchefstroom University, 2 - 3 November 2000.
[14] Immanuel Kant was a Prussian Philosopher, born in 1724 in Königsberg, Prussia, where he died in 1737. Kant was well known for his theory on transcendental metaphysics and his contribution towards creating the body of "moral law" from which the concept of human dignity has emerged.

of human dignity[15]. Kant wanted human dignity to be recognized and acknowledged in all persons. In Kant's view, human dignity was an intrinsic innate worth, regardless of birth or wealth, which could not be earned nor forfeited. It was to be unconditional and incomparable, without any equivalent[16].

III. DIGNITY: CONSTITUTIONAL UNDERPINNING AND APPLICATION

i. South Africa

The fight in Africa was not only for freedom but also for the ending of all forms of subjugation and for the recognition of the humanity of Africans[17]. Colonisation[18] generally and apartheid in particular, through the schism of racial segregation, systemically deprived the colonised population of their basic recognition as human beings and their fundamental right to be treated with dignity and equality. The black majority was mainly seen as a source of cheap labour whether for mines or agricultural and farming estates and were often sold as part of such estates. Colonisation and apartheid were potent means of keeping the population subdued and in a state of servility which emanated from the conviction and certainty that they did not have and could not have any rights[19]. In the 1996 Constitution of South Africa, dignity and equality take centre stage within the constitutional transformation project as important elements of transformative constitutions. Dignity, equality and freedom are the entwined meshes of the golden thread which runs throughout the Constitution[20]. In fact, due to the conditions which prevailed ante democratisation in South Africa, equality constitutes the focus and organising principle of the 1996 Constitution[21].

The right to dignity was introduced for the first time in South Africa in the Bill of Rights of the

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[15] Hill, Thomas E., *22 – Kantian perspectives on the rational basis of human dignity*, Chap 22, Part III – Systematic conceptualization, *The Cambridge Handbook of Human Dignity* (2015)

[16] Ibid.

[17] *Prinsloo v Van der Linde and Another* **[1997] ZACC 5**; **1997 (3) SA 1012** (CC); **1997 (6) BCLR 759** (CC) at para 31 the following description of discrimination was given "Given the history of this country we are of the view that 'discrimination' has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them. We are emerging from a period of our history during which the humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short, they were denied recognition of their inherent dignity."

[18] Bulhan, Hussein A., *Stages of Colonialism in Africa: From Occupation of Land to Occupation of the Being*, Journal of Social and Political Psychology, 2015, Vol. 3(1), 239–256.

[19] Ibid.

[20] Van Reenen, T., *Equality, Discrimination and Affirmative Action – Section 9 of the Constitution* (1997) SAPR 12.

[21] *The President of the RSA v Hugo*[21] *1997* (4) SA 1 (CC) per Kriegler J at para 74 stated as follows:
'The South African Constitution is primarily and emphatically an egalitarian Constitution. The supreme laws of comparable constitutional states may underscore other principles and rights. But in the light of our own particular history, and our vision for the future, a Constitution was written with equality at its centre. Equality is our Constitution's focus and its organizing principle'.

Interim Constitution[22]. Despite the fact that South Africa had been endowed with a Constitution since 1909, it is only 84 years later, in 1993, that a Bill of Rights was introduced for the first time in South Africa. The Interim Constitution was transitional in nature and would be replaced by the "final" Constitution once it was adopted. The Interim Constitution also introduced democracy, freedom and equality in South Africa. When the 1996 Constitution was adopted and the Interim Constitution abrogated, dignity was acknowledged as being inherent to all people "as an attribute of life itself, and not a privilege granted by the state."[23] South Africa, like many countries[24] which have suffered indescribable trauma either under their outgoing regimes[25], or otherwise and have reformed their government structure post-World War II[26], have explicitly adopted human dignity as a key uncompromising value of their constitutional framework[27]. The right to dignity under the 1996 Constitution underpins all other constitutional rights both vertically and horizontally: it provides redress against unlawful state action as well as in issues between citizens.

Section 1 of the Constitution of South Africa unequivocally announces that the Republic of South Africa is one, sovereign, democratic state founded on the following values: human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism, supremacy of the constitution and the rule of law, universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness[28]. Section 10 of Chapter 2, the Bill of Rights, entrenches human dignity as a justiciable and enforceable constitutional right by stating that "[E]veryone has inherent dignity and the right to have their dignity respected and protected." The 1996 Constitution also put in place a new strong and independent judicial system made up of Judges who would apply the new Constitution and bring about the intended transformation. The Constitutional Court was set up as the apex Court to oversee the transformation as propounded by the 1993 and 1996 Constitutions[29].

[22] Section 10 of the 1993 Interim Constitution.
[23] Section 10 of the 1996 Constitution.
[24] Glensy, R.D., *The Right to Dignity* 43 Colum. Rights L. Rev. 65. The countries which have incorporated human dignity in their Constitution are Germany, Italy, Japan and South Africa.
[25] Ibid.
[26] Israel is the only exception because human dignity was adopted since its creation most probably to prevent the recurrence of another anti-Semitism campaign or eradication similar to that of the Nazi German government. Glensy at note 11 above.
[27] Glensy at note 11 above.
[28] Section 1 1996
[29] See Note 5.1.2 at page 27 of the *Discussion Document on the Transformation of the Judicial System and the Role of the Judiciary in the Developmental South African State* with preface by the then Minister of Justice, the Honourable Jeff Radebe, and published on line by the South African Department of Justice and Constitutional Development. Under the heading "Transformation of Society" and sub-heading "The role of the Constitutional Court in advancing social and judicial transformation", it is stated as follows: "[T]he Constitutional Court was

It stands to reason that even if the law does provide for the emancipation of its formerly oppressed population, such provisions of the law will only mature to find their full scope and ambit through the interpretation and application which the Courts will give to them. The rich jurisprudence created by the Constitutional Court of South Africa illustrates the various instances where and the manner in which the Court has applied and continues to apply human dignity. The recognition and enforcement of human dignity as a constitutional right started as from the first case[30] which the Constitutional Court heard. The Constitutional Court has applied the right to dignity in an array of cases which range from striking down the death penalty[31], declaring anti-sodomy laws unconstitutional[32] and imposing a mandatory duty on the State to provide a minimum standard of living to its citizens[33].

In the case of *Makwanyane*[34] which was decided under the Interim Constitution, O'Regan J explained the right to dignity as an acknowledgment of the intrinsic worth of human beings who are entitled to be treated as worthy of respect and concern[35]. The Constitutional held in the case of *Bogoshi*[36] that human dignity is to be considered as an important element when determining defamation cases. In *Bogoshi*, the Supreme Court of Appeal of South Africa referred to the case of *Hill* [37], a judgment of the Supreme Court of Canada, to illustrate the importance of human dignity. It was held in *Hill* that "the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the Charter rights. It follows that the protection of the good reputation of an individual is of fundamental importance to our democratic society." It is to be noted that reference by the South African Courts to foreign law and jurisprudence for the purposes of adjudication has been made possible by the introduction of specific provisions to that effect under both the Interim Constitution[38] and under the 1996

established with a view to championing the reform of the South African law and jurisprudence, which was influenced by the unjust laws of the erstwhile apartheid regime…. While it may be desirable to assess the impact of the decisions of the Supreme Court of Appeal and the High Court in relation to the transformation of society it is desirable to focus on the Constitutional Court, which is at the apex of the transformation agenda in relation to our evolving constitutional jurisprudence."
Available at https://www.justice.gov.za/docs/other-docs/20120228-transf-jud.pdf Accessed on 11 March 2021.

[30] *S v Makwanyane* 1995 (6) BCLR 665 (CC); *S v Makwanyane* 1995 (3) SA 391 (CC).

[31] *Makwanyane* at note 23 above.

[32] *National Coalition for Gay and Lesbian Equality V Minister of Justice and Others* 1999 (1) SA 1 (CC).

[33] *South Africa v. Grootboom* 2001 (1) SA 46 (CC) at 62 para. 23 (S. Afr.) where the Constitutional Court held that "[t]here can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter."

[34] *S v Makwanyane* n.13.

[35] Ibid. at para 328.

[36] *National Media Ltd. and Others v Bogoshi* (579/96) [1998] ZASCA 94; 1998 (4) SA 1196 (SCA); [1998] 4 All SA 347 (A).

[37] *Hill v Church of Scientology of Toronto* (1986) 26 DLR (4th) 129 at para 162.

[38] S 35 (i) of the Interim or 1993 Constitution of South Africa states as follows:
"In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international

Constitution[39].

Arguably, the most comprehensive analysis of human dignity by the Constitutional Court would be in the case of *Khumalo*[40] where the Constitutional Court compared and analysed human dignity as an enforceable right against the freedom of expression and information, more specifically the freedom of the press in relation to public figures, namely politicians. The Court compared defences open under South African common law and the Constitution and held that freedom of expression is integral to a democratic society because it is constitutive of the dignity and autonomy of human beings but more importantly, it allows citizens to make responsible political decisions thus enabling effective participation in public life. However, freedom of expression can be curtailed if it is used to unfairly bring into disrepute the opponent or a targeted party. Under the constitutional value of human dignity, reference is made to the case of *Dawood*[41] where the Court stated that "*[T]he Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels*". The Court explained the importance of dignity under common law, namely, *actio injuriarum* claims for damages are split into injury to reputation (*fama*) and injury to dignity (*dignitas*). *Dignitas* is assessed as the individual's self-worth based on his reputation through his achievements, in other words, what is his worth in his own eyes and what he is worth in the eyes of the public.

ii. India

The Constitution of India, like the Constitution of Mauritius and unlike the Constitution of South Africa, does not contain any provision specifically addressing human dignity. However, this has not fettered the Indian courts from addressing issues related to human dignity. Indeed, the Supreme Court of India has delivered landmark judgments by linking human dignity to Article 14, equality before law, and to Article 21, the right to life and personal liberty. Article 14 of the Constitution of India is found in Part III of the Constitution, "Fundamental Rights", under the sub-heading "Right to Equality". Article 14, entitled "Equality before law", reads as

law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law."

[39] S 233 of the 1996 Constitution of South Africa directs as follows:
"When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law".

[40] *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) CCT53/01.

[41] *Dawood and Another V Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 35.

follows: "14. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.". Article 21 of the Constitution is also found in Part III "Fundamental Rights" under the sub-heading "Right to Freedom". Article 21 is specifically labelled "Protection of life and personal liberty" and reads as follows: "21. No person shall be deprived of his life or personal liberty except according to procedure established by law." In the case of *Bandhua Mukti Morcha*[42], as well as in the case of *Maneka Gandhi*[43] the Supreme Court of India held that the right to life not only carries a physical right to live but also carries the intangible elements such as living in dignity. In the case of *Bandhua Mukti Morcha*, which is also a landmark case on human dignity, the Court also held that the State has a constitutional duty to protect weaker sections of the population who do not have adequate means to fight back against violations of their fundamental rights.

In all the above cases, the Supreme Court of India was following the principle laid down in the dissenting judgment of Field J in the case of *Munn v. Illinois*[44] as tested and expanded by the Supreme Court of India[45] in the case of *Kharak Singh v. The State of Uttar Pradesh & Ors*[46]. In the case of *Munn*, Field J., referring to the Fourteenth Amendment on the right to life, stated that "*[B]y the term 'life', as here used, something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world. The deprivation not only of life, but of whatever God has given to everyone with life, for its growth and enjoyment, is prohibited by the provision in question, if its efficacy has not been frittered away by judicial decision.*

By the term 'liberty', as used in the provision, something more is meant than mere freedom from physical restraint or the bounds of prison. It means equal rights of others, as his judgment may dictate for the promotion of his happiness; that is, to pursue such callings and avocations as may be most suitable to develop his capacities, and give to them their highest enjoyment."

In fact, Indian Courts did not always have that proactive approach towards constitutional

[42] *Bandhua Mukti Morcha v. Union of India & Ors* (1997) 10 SCC 549. The facts of the case are as follows: a public interest litigation case was entered against the Union of India, praying the Supreme Court of India to order the State of Uttar Pradesh to prohibit child labour under the age of 14 and provide children access to education, food and health facilities in an effort to abolish child labour.
[43] *Maneka Gandhi v Union of India* (1978) AIR 597, 1978 SCR (2) 621
[44] *Munn v. Illinois* October Term (1876) 94 U.S.113, 24 L.Ed. 77 at paras. 103 and 104.
[45] *Expanding & Ever-evolving: Article 21 of the Constitution 'Right to Life & Personal Liberty'* by Rahul Gupta, Practicing Advocate at Delhi High Court, available at https://www.latestlaws.com/articles/expanding-ever-evolving-article-21-of-the-constitution-of-india-right-to-life-personal-liberty/ Accessed on 26 March 2021.
[46] *Kharak Singh v. The State of Uttar Pradesh & Ors* 1963 AIR 1295, 1964 SCR (1) 332.

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interpretation. In the case of *A.K.Gopalan*[47] in 1950, the Supreme Court of India displayed a very limited view of the right to life when it affirmed that a legal procedure could deprive an individual of his right to life. This reasoning remained in place for more than two decades before it was overruled by the judgment of *Maneka Gandhi*[48]. Thereafter, many rights which have not been specifically addressed within the Constitution of India have been interpreted in connection with the right to equality or the right to life, in the true spirit of the Constitution. In the case of *Mohini Jain*[49] which was decided in 1992, the Supreme Court of India had held that charging a "capitation fee" by private educational institutions was a violation of the right to education which is implied in the right to life and human dignity and the right to equal protection of life. On the other hand, in the case of *Unni Krishnan*[50] it was held that every citizen has a fundamental right to education derived from Article 21 of the Constitution but such right only extends up to age 14 and it is not an absolute right. The Supreme Court also held that any individual may set a private educational institution however recognition and/or affiliation will only be subject to terms and conditions imposed by the State, University or such other authority and once such institution starts receiving Government aids and grants it will have to abide to all terms and conditions imposed by Government. The case was otherwise dismissed.

In the case of *Jain,* the Supreme Court had held, *inter alia,* that every citizen has a right to education under the Constitution and the State was under an obligation to establish educational institutions to enable citizens to enjoy the said right. The State could discharge its obligation through State-owned or State-recognised educational institutions. By granting recognition to the private educational institutions, the State created an agency to fulfil its obligation under the Constitution, therefore charging capitation fee in consideration of admission to educational institutions, was a patent denial of a citizen's right to education under the Constitution and that the State action in permitting capitation fee to be charged by State-recognised educational institutions was wholly arbitrary and, as such, in violation of Article 14 of the Constitution. The capitation fee brought to the fore a clear class bias; and that when the State permitted a private medical college to be set up and recognised its curriculum and degrees, then the said college was performing a function which under the Constitution had been assigned to the State and if the State permitted such institution to charge a higher fee from students, such a fee was

[47] *A.K. Gopalan v State of Madras. Union of India* 1950 AIR 27, 1950 SCR 88. See also Rahul Gupta's article at note 31 above.
[48] See the case of *Maneka Gandhi* at note 41 above.
[49] *Mohini Jain v State of Karnataka & Ors* (1992) 3 SCC p 666.
[50] *Unni Krishnan, J.P. And Ors. Etc. Etc vs State Of Andhra Pradesh And Ors. 1993 AIR 2178, 1993 SCR (1) 594, AIR 1993 SUPREME COURT 2178, 1993 (1) SCC 645, 1993 AIR SCW 863, 1993 ALL. L. J. 341, (1993) 1 SCR 594 (SC), (1993) 2 APLJ 73, 1993 (1) UJ (SC) 721, 1993 (1) SCR 594, (1993) 1 JT 474 (SC), (1993) 2 SCT 511, (1993) 1 SERVLR 743*

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not tuition fee, but in fact a capitation fee.

The Supreme Court of India has given a wide interpretation and expanded application to Article 21 of the Constitution thus creating a very rich jurisprudence. All such rights which the Learned Judges considered fundamental but which had not been specifically mentioned in the Bill of Rights of the Indian Constitution are applied under Article 21 to the extent that these rights find a fit. Thus, the following rights found their application under Article 21: the right to education[51], the right to State protection to practise one's religion with a duty on the State to provide such protection to the population of different faiths, caste and creed to co-exist harmoniously [52]. It is worthy of note that in 2002, after the cases of *Mohini Jain* and *Unni Krishnan,* the Constitution of India was amended to include **Article 21A Right to education. --**"The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."

Such rights that have a direct impact on the masses have been considered from various angles so as to allow a positive change and one such valid example is the right to a healthy environment. Since there is established jurisprudence to the effect that Article 21, the right to life carries the right to live with dignity, clearly this encompasses the right to live in a pollution-free environment, with pollution-free water and air[53]. Vehicular pollution[54], ecology and public health[55], ordering the suppression of housing projects to the detriment of a community park[56], all these issues have also been determined under the umbrella of the right to life hence the protection of the environment for the greater benefit of the people.

India has had the misfortune of being struck by major gas leak disasters causing numerous deaths and creating many health and associated issues. The first of these disasters known worldwide as the Bhopal Gas Disaster case or the Union Carbide case, happened in Bhopal in the night of 2 to 3 December 1984 when a massive gas leak from the Union Carbide Corporation plant killed more than 3000 people, mostly in their sleep, and left many surviving victims with

[51] Ibid.
[52] *S.S. Ahluwalia v Union of India & Ors* (2001) Supreme Court of India, available at https://indiankanoon.org/doc/821456/?__cf_chl_jschl_tk__=a38d832919f6ef0e8f3d26e9014d64bfd722d152-1616528909-0-AZzg1vjiRcQ2DRIWFjzn7c19J-9YLKypedRFK4T2Ahb-uzZaw5Is5ns6FEIMF1Pr4_Vv0Y-6uDHBik3e2M_k3AB2pdM5tWMoeiMinOHFJF82PP9Utfbix60qiSslTjq-fYh3o7Yf2TdDeIh4RKYuIpOfByYn0v3Md9zMnd_KTnmP3EobiiiaNQkleLWH6TnvB9lxs33aIHGoOrM7vNtU4iNdOIBHPFw_aeHV1MgGTUujwTCU2U6vZa9-2fz6NYpsRewAZbruIbV17pBF-JDs6LkPtISTQjJwp8YDlw4OlfGCM9UASZx5hoH3gwA1eYKV0iD79rRbdbL0ekstb1eOZkNboi7MqPRdYGI-s0Es3k9RjPVcO7Fd_63p3j91Nrx9rtDwGEOMyrR3NVrbyVP6sb0 Accessed on 23 March 2021.
[53] *Subhash Kumar v State of Bihar* 1991 AIR 420, 1991 SCR (1) 5.
[54] *M.C. Mehta v. Union of India* (1991) 2 SCC 353.
[55] *Ratlam Municipality v. Vardicha* (1980) 4 SCC 162.
[56] *Damodar Rao and Ors. v. The Special Officer, Municipal* AIR 1987 AP 171.

serious personal injuries and impairment[57]. The second disaster was in 1987, the leakage of oleum gas from a food processing company, and the case became known as the Oleum Gas Leakage case[58]. Cases related to such disasters were mostly entered by public interest litigation (PIL) under Article 21 – Right to Life and Personal Liberty. Consequently, the Supreme Court imposed a number of measures to address questions and issues which were raised by these disasters. Thus, in an endeavour to eliminate the delays in civil damages cases which defeat the purpose of awarding damages, the Supreme Court (a) ordered the setting up of an environment court with civil and criminal jurisdiction so as to deal with such environmental cases speedily[59] and (b) recommended the setting up of a special tribunal to ensure immediate relief to the victims by determining compensation to victims of industrial disaster or accident. A further recommendation was that the appeal to such determinations which would lie before the Supreme Court, would be limited to questions of law only and the appeal could be made only after the sum in payment of damages which had been determined by the tribunal was duly deposited[60]. The Supreme Court also applied the "polluter pays principle"[61] which dictates that the party responsible for the pollution must bear the costs of damages to man and environment. The "polluter pays principle" carries the absolute liability principle which applies regardless of whether the polluter has taken reasonable care or not, but rather taking into consideration the nature of the polluter's inherently dangerous activity. Thus the polluter not only pays for the damages done but also for reversing the damage to the eco-system[62].

iii. Mauritius

The Constitution of Mauritius does not contain specific provision for human dignity but one cannot therefore conclude that human dignity does not have any constitutional underpinning in Mauritius. If the reasoning in the case of *Munn v Illinois*[63] or the more recent jurisprudence from the Supreme Court of India such as *Hussainara Khatoon*[64] and *Javed*[65] where the reasoning in *Munn*[66] was followed, were to be applied in Mauritius, human dignity would be

[57] *Union Carbide Corporation v. Union of* India (1989) 1 SCC 674.
[58] *M.C. Mehta v. Union of India and Ors* (Oleum Gas Case 3)
1987 AIR 1086; 1987 SCR (1) 819; 1987 SCC (1) 395; JT 1987 (1) 1; 1986 SCALE (2) 1188.
[59] *Indian Council for Enviro-Legal Action v. Union of India* (1996) 3 SCC 212.
[60] *Charan Lal Sahu v. Union of India* (1989) SCR Supl. (2) 597.
[61] Justin Elliot, 'What Is the Polluter Pays Principle?' (*Grantham Research Institute on climate change and the environment*) http://www.lse.ac.uk/GranthamInstitute/faqs/what-is-the-polluter-pays-principle/
Accessed 28 March 2021.
[62] *M.C. Mehta v Union of India (Oleum Gas Link Case)* AIR 1987 SC 1086 Para 32. In this case the rule in the *Ryland v Fletcher* case was applied. See also the case of *Ryland v Fletcher* UKHL 1, (1868) LR 3 HL 330.
[63] *Munn v Illinois* at note 42 above.
[64] *Hussainara Khatoon & Ors vs Home Secretary, State of Bihar* 1979 AIR 1369, 1979 SCR (3) 532
[65] *Javed & Ors v. State of Haryana* AIR 2003 SC 3057.
[66] See the case of *Munn* at note 42 above.

interpreted and applied under the right to life. India interprets rights that are not specifically mentioned in the Indian Constitution under the umbrella of right to life[67] and equality[68]. It is argued here that fundamental principles which are not found on a stand-alone basis in the Constitution, can still be secured and interpreted under the right to life as is the case of India. But the concern in Mauritius is that the manner in which the right to life is protected is very limited and might not allow such a liberal interpretation. Section 4 of the Constitution of Mauritius, 'Right to Life', states as follows:

"**4. Protection of right to life**

1. No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted.
2. A person shall not be regarded as having been deprived of his life in contravention of this section, if he dies as a result of the use, to such extent and in such circumstances as are permitted by law, of such extent and in such circumstances as are permitted by law, of such force as is reasonably justifiable
    a. for the defence of any person from violence or for the defence of property;
    b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
    c. for the purpose of suppressing a riot, insurrection or mutiny; or
    d. in order to prevent the commission by that person of a criminal offence, or if he dies as the result of a lawful act of war."

It is highlighted here that death penalty in Mauritius was abolished in 1995 however section 4 of the Constitution has not been amended up to now.

Dignity has so far not been tested as an enforceable right on its own merits in any case in Mauritius therefore there is no set precedent or pronouncement on human dignity as yet. It cannot be denied that this is an issue in a country which follows the principle of *stare decisis* as a rule for interpretation. However, it is not prohibited to follow foreign precedents. The question may be asked as to why is it so important to make dignity an enforceable right. It is undeniable that human dignity is an inherent right with which every human being is born and as such it has to be protected. There is international consensus that human dignity has to be protected as is

[67] See the cases of *Bandhua Mukti Morcha* at note 40 and *Maneka Gandhi* at note 41 above, both decided under right to life.
[68] See the cases of *Kharak Singh* at note 44 and *Jain* at note 47 above, both decided under right to equality.

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borne by the various international treaties. Mauritius is a signatory to the following international Treaties: the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT); Optional Protocol of the Convention against Torture(CAT-OP); the International Covenant on Civil and Political Rights(CCPR), Convention on the Elimination of all forms of Discrimination against Women (CEDAW); the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); International Covenant on Economic, Social and Cultural Rights (CESCR); Convention on the Rights of the Child (CRC); Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (CRC-OP-AC); Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography (CRC-OP-SC); Convention on the Rights of Persons with Disabilities (CRPD). All the aforesaid treaties have an embedded element of protection of human dignity whether intrinsically or explicitly, hence, Mauritius is in duty bound to protect human dignity.

IV. CONCLUDING REMARKS

After comparing the constitutional underpinning and application of dignity in India, South Africa and Mauritius the following conclusion has been reached. In all three Constitutions, only the Constitution of South Africa explicitly provides for human dignity while the Constitution of India and of Mauritius do not contain any such provision. Application of these provisions has been very different in all three jurisdictions: dignity has so far not been presented nor tried as a justiciable right in Mauritius while the jurisprudence of both South Africa and India is rife with cases on dignity despite there being no specific provision in the Constitution of India. The present study has endeavoured to establish is that even if dignity has not been specifically mentioned in the Constitution of Mauritius, Mauritian lawyers could still recognise and give life to intrinsic fibre of human existence, as a distinct and actionable right which underpins the basis of our humanity.

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