

# Equality, dignity, and the politics of interpretation

*Henk Botha\**

## 1 Introduction

The equality standard articulated by South Africa's Constitutional Court<sup>1</sup> is premised on a substantive concept of equality, and purports to be sensitive to context and mindful of past patterns of discrimination, systemic inequality and the role of harmful social stereotypes. However, the emancipatory potential of the Court's general approach to equality is not always reflected in its judgments. In fact, the reasoning in some of these judgments strikes me as formalistic and uncritical of existing power relations.

The disjuncture between the constitutional promise and the reality of the enforcement of the equality guarantee, is a recurring theme in legal scholarship.<sup>2</sup> According to some authors, the dignity-based approach of the

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\*BLC LLM LLD. Professor, Department of Constitutional, International and Indigenous Law, Unisa.

<sup>1</sup>The Constitutional Court has placed the prohibition of unfair discrimination at the centre of the constitutional equality guarantee. In this article, I am interested primarily in the Court's interpretation of the right not be subjected to unfair discrimination. The Constitutional Court's equality jurisprudence has been developed, inter alia, in the following cases: *Brink v Kitshoff* 1996 4 SA 197; 1996 6 BCLR 752 (CC); *Fraser v Children's Court, Pretoria North* 1997 2 SA 261; 1997 2 BCLR 153 (CC); *President RSA v Hugo* 1997 4 SA 1; 1997 6 BCLR 708 (CC); *Prinsloo v Van der Linde* 1997 3 SA 1012; 1997 6 BCLR 759 (CC); *Harksen v Lane NO* 1998 1 SA 300; 1997 11 BCLR 1489 (CC); *Larbi-Odam v Member of Executive Council for Education* 1998 1 SA 745; 1997 12 BCLR 1655 (CC); *Pretoria City Council v Walker* 1998 2 SA 363; 1998 3 BCLR 257 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6; 1998 12 BCLR 1517 (CC); *Democratic Party v Minister of Home Affairs* 1999 3 SA 254; 1999 6 BCLR 611 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1; 2000 1 BCLR 39 (CC); *Hoffmann v South African Airways* 2001 1 SA 1; 2000 11 BCLR 1211 (CC); *Moseneke v The Master* 2001 2 SA 18; 2001 2 BCLR 103 (CC); *Satchwell v President of the RSA* 2002 6 SA 1; 2002 9 BCLR 986 (CC); *Du Toit v Minister for Welfare and Population Development* 2003 2 SA 198; 2002 10 BCLR 1006 (CC); *Jordan v S* 2002 6 SA 642; 2002 11 BCLR 1117 (CC); *J v Director-General, Department of Home Affairs* 2003 5 BCLR 463 (CC); and *Daniels v Campbell NO* 2004 7 BCLR 735 (CC).

<sup>2</sup>The Constitutional Court's interpretation of the equality and nondiscrimination guarantee has given rise to a large academic literature. My understanding of the relevant issues has been influenced by the following – by no means comprehensive list of – academic contributions:

Constitutional Court lies at the heart of the problem. In their view, the notion of dignity is not only completely indeterminate and thus allows judges to give almost any content to it, but the focus on dignity (rather than disadvantage) also results in an overly individualistic emphasis, which tends to blind judges to systemic inequality and material disadvantage. Others have countered that the notion of human dignity is not as devoid of meaning as claimed by the critics, and that there is nothing inherently individualistic about it.

In this article, I explore the gap between the promise of the Constitutional Court's equality rhetoric and its actual judgments from the perspective of the debate between advocates and critics of a dignity-based approach. I am particularly interested in the link made in the literature between a dignity-based approach and 'neutral principles', and the way the Constitutional Court has used a dignity-based interpretation of the right to equality to negotiate some of its conflicting commitments. I argue that a dignity-based approach is incapable of containing the politics of interpretation, and propose instead a complex vision of equality which recognises multiple forms of disadvantage and openly acknowledges the constitutive role of power in social relations as well as in law.

## 2 The gap between the promise and reality of the equality guarantee in the South African Constitution

The gap between the promise and reality of the constitutional equality guarantee is nowhere more evident than in the judgment of the majority of the Constitutional Court in *Jordan v S*.<sup>3</sup> In *Jordan*, the appellants argued that

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Ackermann 'Equality and the South African Constitution: The role of dignity' (2000) 63 *ZaöRV* 537; Albertyn and Kentridge 'Introducing the right to equality in the interim Constitution' (1994) 10 *SAJHR* 149; Albertyn and Goldblatt 'Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *SAJHR* 248; Carpenter 'Equality and non-discrimination in the new South African constitutional order (1): The early cases' (2001) 64 *THRHR* 409; 'Equality and non-discrimination in the new South African constitutional order (2): An important trilogy of decisions' (2001) 64 *THRHR* 619; 'Equality and non-discrimination in the new South African constitutional order (3): The saga continues' (2002) 65 *THRHR* 37; 'Equality and non-discrimination in the new South African constitutional order (4): Update' (2002) 65 *THRHR* 177; Cowen 'Can "dignity" guide South Africa's equality jurisprudence?' (2001) 17 *SAJHR* 34; Davis 'Equality: The majesty of legoland jurisprudence' (1999) 116 *SALJ* 398; De Vos 'Equality for all? A critical analysis of the equality jurisprudence of the Constitutional Court' (2000) 63 *THRHR* 62; Fagan 'Dignity and unfair discrimination: A value misplaced and a right misunderstood' (1998) 14 *SAJHR* 220; Jagwanth 'What is the difference? Group categorisation in *Pretoria City Council v Walker* 1998 2 SA 363 (CC)' (1999) 15 *SAJHR* 200; Jagwanth and Kalula eds *Equality law: reflections from South Africa and elsewhere* (2002); Van der Walt and Botha 'Coming to grips with the new constitutional order: Critical comments on *Harksen v Lane NO*' (1998) 13 *SAPR/PL* 17; Van Marle 'Equality: An ethical interpretation' (2000) 63 *THRHR* 595; and Van Reenen 'Equality, discrimination and affirmative action: An analysis of section 9 of the Constitution of the Republic of South Africa' (1997) 12 *SAPR/PL* 151.

<sup>3</sup>(N 1).

section 20(1)(aA) of the Sexual Offences Act violated the right to equality and non-discrimination.<sup>4</sup> The section makes it an offence to have ‘unlawful carnal intercourse’, or to commit ‘an act of indecency, with any other person for reward’. It was contended that the provision constituted unfair discrimination on the grounds of gender, to the extent that it criminalised only the conduct of the prostitute and not that of the client.

Ngcobo J, writing for the majority, found that the section did not constitute unfair discrimination in terms of section 8(2) of the interim Constitution.<sup>5</sup> His reasoning rested on seven premises. One, the impugned section is gender neutral, as it applies to male prostitutes as well as female prostitutes.<sup>6</sup> Two, there is a qualitative difference between the prostitute, who is engaged in the business of prostitution and who is likely to be a repeat offender, and the client, ‘who seeks the service of a prostitute only on occasion’.<sup>7</sup> Three, the client is an accomplice to the offence under common law, and is therefore not absolved from criminal prosecution. He is also liable to the same punishment as the prostitute in terms of the Riotous Assemblies Act.<sup>8</sup> Four, the purpose of the section is to prohibit commercial sex, not to protect the client.<sup>9</sup> Five, striking at the dealer and not at the client is a perfectly legitimate means of achieving this purpose, particularly in view of the fact that the client is also guilty of criminal conduct and that the distinction between merchant and dealer is often employed in criminal law.<sup>10</sup> Six, if and to the extent that the conviction of the prostitute carries a greater stigma than that of the client, ‘that is a social attitude and not the result of the law’. Moreover, such stigma attaches to them ‘not by virtue of their gender, but by virtue of the conduct they engage in’.<sup>11</sup> And seven, even if it is true that in practice only prostitutes are prosecuted and not clients, ‘that may point to a flaw in the application of the law but it does not establish a constitutional defect in it’.<sup>12</sup>

Ngcobo J concluded from the first ground that penalising the prostitute only and not the client does not amount to direct discrimination on the grounds of gender. He further found, on the basis of the remaining grounds, that the

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<sup>4</sup>There were also other challenges. The appellants argued that section 20(1)(aA) also infringed the rights to privacy and occupational freedom; and further attacked the constitutionality of sections in the Act relating to brothels. These challenges were rejected by both the majority and minority and will not be dealt with here. See Le Roux ‘Sex work, the right to occupational freedom and the constitutional politics of recognition’ (2003) 120 *SALJ* 452 for a critique of the Court’s reasoning in relation to the occupational freedom challenge. See also Carpenter ‘Of prostitutes, pimps and patrons – some still more equal than others?’ (2004) 19 *SAPR/PL* 231.

<sup>5</sup>Le Roux (n 4) 453-455 criticises the Court’s finding that the interim, rather than the final Constitution had to be applied.

<sup>6</sup>Para 9.

<sup>7</sup>Para 10.

<sup>8</sup>Paras 11-14.

<sup>9</sup>Para 12.

<sup>10</sup>Paras 10, 15.

<sup>11</sup>Para 16.

<sup>12</sup>Para 19.

impugned provision does not constitute indirect gender discrimination either. He added that, even if there is discrimination, it is not unfair, as the provision applies to male and female prostitutes (ground one), does not absolve the client from criminal liability (ground three), and pursues a legitimate and important purpose (ground four).

It is hard to square this reasoning with the Court's understanding, as articulated in previous judgments, that the Constitution seeks to achieve substantive equality and aims to redress systemic discrimination and past patterns of disadvantage.<sup>13</sup> The majority's emphasis on the gender neutrality of section 20(1)(aA) and the way in which it divorces the law from social attitudes and separates the inquiry into the constitutionality of the provision from questions of its enforcement, smack of a formal understanding of equality and a failure to situate its inquiry within a broader context of systemic gender discrimination. Its insistence that the stigma associated with prostitution is the result of personal choice and is unrelated to the role of law in apportioning blame and sustaining structural inequality and deeply ingrained patterns of disadvantage, is premised on ideas about individual freedom and the relationship between law and social attitudes that are highly problematic in the society we live in. It rests upon the idea – already discredited by the legal realists<sup>14</sup> – that there is a sphere of human belief and interaction which exists prior to and independently of the law, and is therefore a matter of purely personal choice which is untouched by institutional power relations. This idea is particularly problematic in a society characterised by massive inequality, in which the impact of past discriminatory laws and policies is likely to endure long after their repeal.

The dissenting judgment<sup>15</sup> of O'Regan and Sachs JJ exposes the sterility of the majority's approach. It situates the inquiry into the constitutionality of section 20(1)(aA) within the context of women's subordination, the dire financial need confronting many women who turn to prostitution, and sexual stereotyping and double standards. Moreover, it does not shy away from the role of the law in sustaining and reinforcing material inequality and sexual stereotypes. Its finding that the impugned provision constitutes indirect discrimination on the grounds of gender, is based on its 'markedly differential impact' on men and women, and the fact that it, by making the prostitute the primary offender, 'directly reinforces a pattern of sexual stereotyping which is itself in conflict with the principle of gender equality'.<sup>16</sup> Its rejection of the argument that the provision is not discriminatory, as the client is also criminally liable in terms of the common law and the Riotous Assemblies Act, evinces a concern with the actual impact of the differentiation, rather than with merely formal equality. As the judges demonstrate, '[t]he difference between

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<sup>13</sup>See eg *National Coalition for Gay and Lesbian Equality v Minister of Justice* (n 1) paras 60-62.

<sup>14</sup>See Singer 'Legal realism now' (1988) 76 *California LR* 465.

<sup>15</sup>Three other judges concurred in their dissent. The split between the majority and minority was thus a narrow 6:5.

<sup>16</sup>Para 60.

being a principal offender and an accomplice or co-conspirator may have little impact in formal legal terms. It does, however, carry a difference in social stigma and impact'.<sup>17</sup> This differential impact

tracks and reinforces in a profound way double standards regarding the expression of male and female sexuality. The differential impact is accordingly not accidental, just as the failure of the authorities to prosecute male customers as accomplices is entirely unsurprising. They both stem from the same defect in our justice system which hold women to one standard of conduct and men to another.<sup>18</sup>

The failure of the majority to situate section 20(1)(aA) within a context of sexual double standards, material inequality and systemic discrimination against women is puzzling, given the Court's insistence that the constitutional equality guarantee calls for a context-sensitive appraisal of the impact of the alleged discrimination, with due regard to the position of the complainants in society and whether they have been subject to past patterns of discrimination.<sup>19</sup> Their dismissal of the argument that the section constitutes indirect gender discrimination, in that it has a disproportionate impact on women, is difficult to square with the earlier judgment in *Walker*,<sup>20</sup> in which it was held that differentiation between historically black and historically white areas constituted indirect discrimination on the grounds of race. Moreover, the lack of sensitivity shown by the majority to the way in which the section reinforces sexual stereotypes and stigmatises those dealing in commercial sex – the overwhelming majority of which are women – and not those paying for it – the overwhelming majority of which are men – is surprising in view of the Court's insistence in previous judgments that the Constitution prohibits the state from basing its decisions on, or perpetuating, harmful stereotypes.<sup>21</sup>

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<sup>17</sup>Para 63, see also paras 64-65.

<sup>18</sup>Para 67.

<sup>19</sup>See eg *Hugo* (n 1) para 41 (Goldstone J), para 112 (O'Regan J concurring).

<sup>20</sup>(N 1 above) paras 30-35. But see also paras 105-118 (Sachs J dissenting).

<sup>21</sup>The Constitutional Court found in *National Coalition for Gay and Lesbian Equality v Minister of Justice* (n 1) that the outlawing of sex between consenting men stigmatised gay sex, reinforced existing prejudices against gays, and impaired their dignity, personhood and identity. See in particular paras 23, 28 (Ackermann J) and 108-109 (Sachs J, concurring). It was also found in *Hoffmann* (n 1) paras 35-37 that an organ of state may not base its treatment of people who are HIV positive on prejudice and stereotyping. Cf also the finding of Sachs J in his minority judgment in *Harksen* (n 1) (discussed below) that s 21 of the Insolvency Act reinforced a stereotypical view of marriage which is demeaning to both spouses; and the dissenting judgment of Kriegler J in *Hugo* (n 1), in which he described the assumption that women are the primary care givers of young children, upon which a Presidential pardon to mothers in prison was based, as 'a root cause of women's inequality in our society. It is both a result and a cause of prejudice; a societal attitude which relegates women to a subservient, occupationally inferior yet unceasingly onerous role. It is a relic and a feature of the patriarchy which the Constitution so violently condemns' (para 80). The majority conceded that the President's act rested upon a stereotype that was harmful to women, but found that the discrimination in question was not unfair, as South African mothers still generally bear far greater burdens than fathers in the rearing of children. See paras 109-115. See also the discussion of *Hugo* below.

And yet, at another level, the majority's failure in *Jordan* to translate the promise of its equality rhetoric into reality, and to extend the transformative potential of its judgments in cases dealing with discrimination against gays/lesbians<sup>22</sup> and people who are HIV positive<sup>23</sup> to new social contexts, is not entirely unsurprising. The Court has, in the past, been criticised for what is seen as a failure to engage critically with forms of discrimination that tend to confine men and women to stereotypical gender roles, or that adhere to and reinforce outdated conceptions of marriage. Its finding in *Hugo*<sup>24</sup> that a presidential decision to pardon all mothers – but not fathers – in prison with children under the age of twelve did not constitute unfair discrimination on the grounds of sex/gender, could be criticised for failing to challenge sexual stereotypes that confine women to the role of primary nurturers of children. But at least in *Hugo*, the Court grappled with the fact that the presidential pardon rested upon outmoded stereotypes which, in the words of the main judgment, make it 'more difficult for women to compete in the labour market' and which are among 'the root causes of women's inequality in society'.<sup>25</sup> The majority's conclusion that the discrimination in question was not unfair, rested not upon a denial of the harmful effects of this type of gender typecasting,<sup>26</sup> but upon the conviction that it may sometimes be legitimate for the state to rely on otherwise harmful generalisations where refusal to do so would lead to further disadvantage to vulnerable groups. As O'Regan J argued in a separate judgment (concurring in by seven judges):

[A]lthough the long-term goal of our constitutional order is equal treatment, insisting upon equal treatment in circumstances of established inequality may well result in the entrenchment of that inequality. ... In this case, mothers have been afforded an advantage on the basis of a proposition that is generally speaking true. There is no doubt that the goal of equality entrenched in our constitution would be better served if the responsibilities for child rearing were more fairly shared between fathers and mothers. The simple fact of the matter is that at present they are not. Nor are they likely to be more evenly shared in the near future. For the moment, then, and for some time to come, mothers are going to carry greater burdens than fathers in the rearing of children. We cannot ignore this crucial fact in considering the impact of discrimination in this case.<sup>27</sup>

But whereas the majority in *Hugo* half-grudgingly accepted the validity of the President's reliance on gender stereotypes, on the ground that it would result in further discrimination against women if the social reality of the unequal burden carried by mothers and fathers were to be simply ignored, the majority in

<sup>22</sup>*National Coalition for Gay and Lesbian Equality v Minister of Justice* (n 1); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (n 1); *Du Toit* (n 1); *Satchwell* (n 1).

<sup>23</sup>*Hoffmann* (n 1).

<sup>24</sup>(N 1). See Davis (n 2) 404-407 and Van Marle (n 2) 599-600 for criticisms of the majority judgment in *Hugo*.

<sup>25</sup>Para 38 (per Goldstone J).

<sup>26</sup>Of course, it could still be argued that the majority under-estimated the negative impact of reliance on such generalisations. See Kriegler J's dissent at paras 80, 83; Davis (n 2) 405-407.

<sup>27</sup>Paras 112, 113.

*Harksen*<sup>28</sup> seemed to be blind to the ways in which section 21 of the Insolvency Act entrenches stereotypical views of marriage. Section 21 provides that, upon the sequestration of the estate of an insolvent spouse, the property of the solvent spouse vests in the master of the Supreme Court or in the trustee of the insolvent estate. The majority held that, even though the section discriminates between the solvent spouse of an insolvent and other persons who may have had dealings or close relationships with the insolvent, such discrimination is not unfair. Their judgment not only underestimates the adverse impact of section 21 on the solvent spouse,<sup>29</sup> but also fails to come to terms with the power relations which underlie and are perpetuated by the provision. As Sachs J demonstrates in his dissent, section 21 is ‘manifestly patriarchal in origin’,<sup>30</sup> and promotes ‘a stereotyped and outdated view of marriage’ which ‘inhibits the capacity for self-realisation of the spouses, affects the quality of their relationship with each other as free and equal persons within the union, and encourages society to look at them not as “a couple” made up of two persons with independent personalities and shared lives, but as “a couple” in which each loses his or her individual existence’.<sup>31</sup>

In *Harksen*, as in *Jordan*, the majority failed to situate the relevant legislative provision within the context of the patriarchal society from which it emerged, and of deeply entrenched stereotypes which continue to frustrate the realisation of gender equality. This raises a number of questions. For instance, how does one explain the apparent tension between the Court’s readiness to challenge stereotypes that are demeaning to gays and lesbians, and its failure in *Harksen* and *Jordan* to do the same in relation to stereotypes that are inimical to the achievement of a nonsexist society? Why the reluctance to find indirect discrimination on the grounds of sex/gender, if the Court was prepared to make a finding of indirect discrimination on the grounds of race in *Walker*,<sup>32</sup> in which a disproportionate number of white people were adversely affected by a municipality’s (transitional) policy of charging differential rates in historically white and historically black areas? Could it be that the present Court is just not sufficiently gender conscious? Is there something about the equality standard enunciated by the Court that makes it impervious to claims based on gender equality? Or is the problem that gender discrimination is often more subtle and difficult to detect than other forms of discrimination?

It is instructive to compare the facts in *Harksen* and *Jordan* to those cases in which the impugned provisions were held to constitute unfair discrimination. In the former two cases, the provisions in question did not impose burdens or withhold benefits from persons directly on any of the enumerated grounds, such as sex or gender. This is in contrast to cases involving overt discrimination on the

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<sup>28</sup>(N 1). See Albertyn and Goldblatt (n 2) 261-263; Davis (n 2) 409-412; and Van der Walt and Botha (n 2) for criticisms of the majority judgment in *Harksen*.

<sup>29</sup>Cf the dissenting judgment of O’Regan J at paras 88, 96-100.

<sup>30</sup>Para 120.

<sup>31</sup>Para 124.

<sup>32</sup>(N 1).

grounds of race,<sup>33</sup> gender<sup>34</sup> or sexual orientation,<sup>35</sup> in which the disadvantage to blacks, women, or gays and lesbians was far more tangible. In these cases, the impugned provisions were blatantly discriminatory – clear relics of our apartheid and sexist past which unmistakably rested upon (and reinforced) the assumption that certain groups were inferior, or incapable of full and equal participation in economic life or of entering into meaningful sexual relationships.<sup>36</sup> The discrimination in *Harksen* and *Jordan*, by contrast, was more subtle, and the link between the respective legislative provisions and prevailing patterns of inequality and stigmatisation not quite as obvious.

It is perhaps, then, necessary to reformulate my initial set of questions: to ask not why the Court's jurisprudence in the area of, say, sexual orientation seems to be more in line with a transformative vision of the Constitution than its jurisprudence on discrimination on the grounds of sex/gender, but why the majority of judges seem to be unable to bring their supposedly substantive and context-sensitive approach to equality to bear on forms of discrimination that are no less pernicious, but more subtle and therefore more difficult to detect.

### 3 The dignity-based approach and its critics

The gap between the transformative potential of the Constitutional Court's substantive understanding of equality and its failure, in certain cases, to challenge forms of discrimination that are deeply embedded in social attitudes, practices and institutions, is often blamed on the Constitutional Court's dignity-based approach to the interpretation of the constitutional equality guarantee. The Court has placed the value of dignity at the centre of its analysis of the equality right. In the view of the Court, the idea that all human beings should be accorded equal dignity and respect is meant to guide the interpretation of the right not to be unfairly discriminated against.<sup>37</sup> In keeping with this emphasis, dignity features at three distinct stages in the equality test laid down in *Harksen*. In the first place, the question whether differentiation on unlisted grounds amounts to discrimination is answered with reference to

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<sup>33</sup>Eg *Moseneke* (n 1).

<sup>34</sup>Eg *Brink* (n 1).

<sup>35</sup>Eg *National Coalition for Gay and Lesbian Equality v Minister of Justice* (n 1); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (n 1); *Satchwell* (n 1); *Du Toit* (n 1).

<sup>36</sup>Of course, the same cannot be said of the *Walker* case, in which indirect discrimination on the grounds of race was found. However, the link in *Walker* between the differentiation in question (between formerly white and formerly black residential areas) and a listed ground (race) was so obvious, that an inquiry into systemic forms of discrimination or prevailing patterns of inequality was hardly needed. In fact, such an inquiry may well have resulted in the opposite conclusion – see the minority judgment of Sachs J at paras 105-118.

<sup>37</sup>Goldstone J proclaimed in *Hugo* (n 1) para 41: 'At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups'. See also *Prinsloo* (n 1) paras 31-33; *Harksen* (n 1) paras 46, 50, 51, 53 (Goldstone J) and 91-92 (O'Regan J dissenting).

the question whether ‘it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner’.<sup>38</sup> Secondly, whether discrimination on listed or unlisted grounds is found to be unfair, turns to a significant extent on the question whether it has led to an impairment of the complainants’ fundamental human dignity or constitutes an impairment of a comparably serious nature.<sup>39</sup> And thirdly, if an infringement of the right to equality or non-discrimination is found to exist, a court must establish whether the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

In the view of some authors, the Court’s emphasis on the value of dignity impedes the establishment of a transformative equality jurisprudence. Albertyn and Goldblatt<sup>40</sup> argue that the focus on dignity tends to result in an individualised conception of equality which does not take sufficient cognizance of the groups-based nature of discrimination and systemic forms of inequality. It is concerned primarily with the infringement of personal interests, rather than with material disadvantage. Although the authors recognise that the *Harksen* test can be used to challenge groups-based disadvantage to the extent that it expressly refers to the position of the complainants in society and past patterns of disadvantage, they argue that the emphasis on dignity creates too much room for an individualised understanding of equality, and that the weight to be attached to substantive considerations of disadvantage is made to depend almost entirely on the approach of an individual judge. In their view, the right to equality and nondiscrimination should be interpreted in the light of the value of equality, rather than the value of dignity. Such an interpretation would place ‘disadvantage, vulnerability and harm, and their connotation of groups-based prejudice’<sup>41</sup> at the centre of the equality right.

These concerns are echoed by Davis, who criticises the Court for its failure to develop a substantive vision of equality and for collapsing equality into dignity. He also notes that the Court’s interpretation of dignity is internally contradictory: it sometimes examines groups-based disadvantage and systemic discrimination under the rubric of dignity, which is an inherently individualistic notion. The Court, in his view, ‘has given dignity both a content and a scope that make for a piece of jurisprudential Legoland – to be used in whatever form and shape is required by the demands of the judicial designer’.<sup>42</sup> The dignity-based conception of equality accordingly lacks justificatory power, and fails to promote reasoned debate about the meaning and application of the foundational value of equality.

Not everyone believes that the dignity-based approach espoused by the Constitutional Court is irreconcilable with the ideal of a transformative equality jurisprudence. In the view of some authors, the individualism that

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<sup>38</sup>*Harksen* (n 1) para 46.

<sup>39</sup>Para 51.

<sup>40</sup>(N 2).

<sup>41</sup>*Id* 258.

<sup>42</sup>Davis (n 2) 413.

could potentially flow from a dignity-based interpretation of equality is held in check by the Court's emphasis on contextual considerations, the position of the complainants in society and whether they have been subject to past patterns of discrimination, and the impact of the discrimination. According to De Vos,<sup>43</sup> the Court's use of dignity is largely rhetorical and does not have a significant practical effect on the outcomes of cases.<sup>44</sup> Importantly, it does not detract from the Court's engagement with context and disadvantage.

Others deny that dignity is an inherently individualistic notion and that it is for that reason incapable of guiding a transformative equality jurisprudence. Cowen<sup>45</sup> argues that human dignity is rooted not in abstract notions of individualism, but in the individual as a social being, whose sense of self is forged within a social and communal context. Moreover, the value of dignity is closely bound up with material considerations, and can be relied upon to challenge material inequality and to justify state intervention aimed at a redistribution of wealth.

The Constitutional Court itself had occasion to engage with its critics in *National Coalition for Gay and Lesbian Equality v Minister of Justice*.<sup>46</sup> In this case, it was submitted on behalf of the amicus curiae that the Court should give a more substantive interpretation to section 9 of the final Constitution (FC) than the one given to section 8 of the interim Constitution (IC), and that the value of equality, rather than that of dignity, should be placed at the centre of the right. The Court rejected the contention, arguing that there were no material differences between sections 8 IC and 9 FC, and that its interpretation of section 8 IC had already evinced a commitment to substantive and remedial equality. The Court clearly felt that its reasoning in this case vindicated a dignity-based approach, and made nonsense of the claim that such an approach does not take sufficient heed of groups-based disadvantage and systemic discrimination. Its analysis of the ways in which the criminal prohibition of gay sodomy had reinforced anti-gay prejudice and affected the dignity, personhood and identity of gay men, appears to give credence to its view that a dignity-based approach is not at odds with a sensitivity to systemic discrimination and past patterns of disadvantage.

## 4 Justifications for the dignity-based approach

The judges of the Constitutional Court and academic commentators who favour a dignity-based interpretation of equality have offered a number of justifications for this approach. The first justification is a historical one. It is argued that, chief among the past ills whose recurrence the Constitution seeks to prevent, is the denial under apartheid of the equal worth and dignity of

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<sup>43</sup>(N 2).

<sup>44</sup>Fagan (n 2) agrees that the use of dignity in *Hugo* is merely a rhetorical flourish (221), but argues that this rhetoric came to haunt the Court in subsequent cases.

<sup>45</sup>(N 2) 49-54.

<sup>46</sup>(N 1) paras 58-64 (Ackermann J), 120-129 (Sachs J concurring).

sections of the population. The history of the discrimination and human rights abuses which characterised apartheid is, in this view, first and foremost one of the systematic denial of people's personhood and moral agency on the basis of the colour of their skin. It is this denial of dignity which lies at the root of the denial of freedom and equality.<sup>47</sup> It therefore makes sense to interpret both freedom and equality in the light of the value of fundamental dignity inherent in every human being.

A second justification which is offered for the Court's dignity-based approach is the connection that is sometimes made between equality and human dignity in international law and comparative constitutional law.<sup>48</sup> Mention is made inter alia of the preamble to the Universal Declaration of Human Rights, article 1 of the Convention on the Elimination of All Forms of Racial Discrimination,<sup>49</sup> the historical link between the denial of dignity and equality by the Nazi regime and the adoption of United Nations human rights instruments, the centrality of dignity to the German Basic Law, and the judgment of L'Heureux-Dubé J in *Egan v Canada*.<sup>50</sup>

While these reasons establish a plausible historical and conceptual link between equality and dignity, they do not explain adequately why the interpretation of the equality right should be informed by the value of dignity, rather than that of equality. It is of course true that apartheid constituted a pervasive and systematic denial of the dignity of the majority of the population, and that this fact accounts, at least in part, for the central role of dignity under the South African Constitution. But the denial of respect for people's dignity and personhood was not the only dimension of the inequality and discrimination of the apartheid era. There was also another side to it, which is better captured by the language of power and economic interest than by the language of morality. As much as the history of apartheid was characterised by the denial of human dignity, it was also one of economic exploitation and the systematic political and economic disempowerment of the majority of the population. It was a history of the establishment, through legal and other means, of the hegemony of a racial elite; of the economic dispossession of entire communities; of the relegation of the overwhelming majority of people

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<sup>47</sup>See Ackermann (n 2) 540-542.

<sup>48</sup>See *id* 539-540 n 4; Cowen (n 2) 48.

<sup>49</sup>'Discrimination between human beings on the grounds of race, colour or ethnic origin is an offence to human dignity'.

<sup>50</sup>124 DLR (4th) 609. The following passage from her judgment was quoted with approval in *Hugo* (n 1) para 41: 'This court [the Supreme Court of Canada] has recognized that inherent human dignity is at the heart of individual rights in a free and democratic society ... More than any other right in the *Charter*, s 15 gives effect to this notion ... Equality, as that concept is enshrined as a fundamental human right within s 15 of the *Charter* means nothing if it does not represent a commitment to recognizing each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity.'

to the fringes of the economy. It was a history of an attempt to divide and rule; to keep the black majority locked in a permanent state of serfdom; and thus to entrench white power and privilege.

To argue that equality cannot be subsumed under the value of dignity, is not to deny that there is a historical and conceptual link between violations of equality and dignity. The political and material inequality characterising South Africa's colonial and apartheid past were, after all, justified with reference to a crude racial ideology which denied that black people had the capacity for moral agency and autonomous self-realisation. And of course, economic deprivation and political disempowerment resulted in further deprivations of the fundamental human dignity of those affected. But to recognise that there is a connection between violations of equality and dignity, is not necessarily to accept that the one can be subsumed under the other. In fact, it seems relatively uncontroversial to argue that, in order to come to terms with the legacy of apartheid, we need to focus both on moral questions of personhood and individual autonomy, and on political and socio-economic considerations of power and disadvantage. It could, I think, be plausibly argued that the constitutional right to human dignity (and possibly, related rights such as privacy and the right not to be subjected to cruel or inhuman punishment) is the proper place for addressing the former, while the right to equality is better suited to an exploration of the latter.

If the first two reasons do not provide an adequate justification for preferring a dignity-based approach to an alternative approach based on disadvantage, what then is the decisive factor which, in the view of the Court, swings matters in favour of a dignity-based interpretation? I would suggest that the answer to this question lies in the third and fourth justifications, to which I now turn.

A third reason which is sometimes mooted in favour of a dignity-based approach, is based on Peter Westen's idea that equality is an empty form which has no substantive content of its own.<sup>51</sup> Although Cowen does not make express reference to Westen's article in her defence of the Constitutional Court's dignity-based approach, she argues that equality is a 'comparative concept' and that '[t]o value equality without saying more does not explain what outcome it is that we value. In Amartya Sen's language, it does not answer the question, "equality of what?"'<sup>52</sup> Cowen further suggests that, 'because of the distinctive comparative nature of equality as a concept, it does not seem to make sense to posit it and

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<sup>51</sup>Westen 'The empty idea of equality' (1982) 95 *Harvard LR* 537. Westen's idea is endorsed by Fagan (n 2) 222, 237-241. However, this leads him not to an endorsement of the Constitutional Court's dignity-based approach, but to an alternative understanding of the nondiscrimination provision which turns it into a mechanism for enhancing the protection of independently existing rights. Davis (n 2) 400-401 also engages with Westen's argument, but notes that it 'makes somewhat disturbing reading', particularly as the 'concept of equality lies at the centre of the South African constitutional idea'. He argues that equality should not be reduced to the value of dignity or the protection of independently existing rights, and that the Constitutional Court 'should have the courage to begin its search for an equality jurisprudence afresh' (414).

<sup>52</sup>(N 2) 40.

dignity against each other as two of the Court's choices in this debate'.<sup>53</sup> In other words, the right to equality and nondiscrimination necessarily has to be interpreted in the light of a value other than equality itself. And in view of South Africa's history and the larger constitutionalist tradition<sup>54</sup> which it has embraced, it makes sense to accord that role to dignity.

The fourth justification relates to the judiciary's weak institutional position and lack of democratic accountability. In an article on the relationship between equality and dignity, Justice Laurie Ackermann – the author of some of the Constitutional Court's most important equality judgments – stresses the dangers of undue judicial subjectivity in the exercise of the power to review the decisions of democratically elected legislatures, and underscores the need for 'constitutional decision making that is neutral and principled'.<sup>55</sup> He then turns to a discussion of Herbert Wechsler's call for neutral principles of constitutional law<sup>56</sup> – a call which he wholeheartedly endorses. Ackermann takes Wechsler's thesis to mean, *inter alia*, that a judge must state reasons for a decision 'that he would be willing to follow in other situations to which it applies', and that 'the principles must be adequately general and neutral and must "reach out beyond the narrow circumstances of the case"'.<sup>57</sup> He further suggests that neutral principles constitute 'an indispensable bridge' on South Africa's road to a culture of justification,<sup>58</sup> and that 'dignity, and its relationship to equality ... is an indispensable constituent in neutrally principled and correct adjudication on issues of unfair discrimination'.<sup>59</sup>

Justice Ackermann offers surprisingly little to substantiate his view that a dignity-based interpretation of the right to equality and nondiscrimination is indispensable to a neutrally principled approach to constitutional adjudication. He does state that dignity and its relationship to equality forms part of an 'irreducible minimum of common values', the acceptance of which, in the words of Isaiah Berlin, is not only 'intrinsic to human communication' but also 'ground[s] our conception of a normal human being'.<sup>60</sup> However, it is unclear how this appeal to common values takes matters forward. The contention that a dignity-based approach allows for neutral and principled reason-giving to the extent that it is

<sup>53</sup>*Id* 48.

<sup>54</sup>It is often asserted that the value of dignity is central to the new conception of constitutionalism which informs many of the constitutions that were adopted since the end of the second world war. See eg Weinrib 'Constitutional conceptions and constitutional comparativism' in Jackson and Tushnet eds *Defining the field of comparative constitutional law* (2002) 3.

<sup>55</sup>Ackermann (n 2) 554.

<sup>56</sup>Wechsler 'Toward neutral principles of constitutional law' (1959) 73 *Harvard LR* 1. Wechsler argued that to be legitimate, constitutional judgments have to be 'entirely principled'. He defined a principled decision as 'one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved'. *Id* 19. See also *id* 15.

<sup>57</sup>Ackermann (n 2) 555 (quoting from Greenawalt 'The enduring significance of neutral principles' (1978) 78 *Columbia LR* 982 at 985, 987).

<sup>58</sup>*Ibid*.

<sup>59</sup>*Id* 556.

<sup>60</sup>*Id* 556.

grounded in intersubjective agreement about the fundamental value of human dignity, fails to persuade in the absence of a plausible answer to the question: but how can agreement at such a high level of generality promote decision-making that is neutral and principled in a particular case?<sup>61</sup>

A more promising line of argument is suggested in the following passage: ‘The application of neutral principles should quite obviously not be seen as a mechanical exercise nor as an infallible route to correct decisions, but rather as a form of jurisprudential discipline and morality’.<sup>62</sup> The concern here seems to be not with finding a method that would render constitutional adjudication objectively determinate, but with the quality of the justifications offered for constitutional decisions. This suggests that a dignity-based approach is to be preferred, not because there can be no reasonable disagreement about the meaning of dignity or the application of a dignity-based equality standard,<sup>63</sup> but because there is something about the concept of dignity that makes an inquiry into its meaning and possible violation likely to be more conducive to a culture of justification than an inquiry based upon the value of equality. What it is about dignity that makes it an ideal contender for this role is, however, not spelled out.

## 5 Dignity as a ‘neutral principle’

Wechsler formulated the concept of neutral principles against the background of the increasing judicial activism of the Warren Court, and growing concern that there was no principled difference between that Court’s defence of personal freedom and equality and the *Lochner* Court’s earlier usurpation of legislative power in the name of economic freedom. For Wechsler, the challenge was to show that not all value-based reasoning rests simply upon personal preference. He sought to demonstrate that judicial decision-making can be made to rest upon neutrally principled reasoning; that review on substantive grounds does not inevitably involve the substitution of a judge’s will for that of the legislature. Wechsler did not believe that the Warren Court’s judgments always conformed to the ideal of neutrally principled reasoning. The challenge, in his view, was to come up with neutral justifications for the progressive outcomes of cases like

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<sup>61</sup>There are at least two problems here. First, even assuming widespread agreement about the importance of dignity and its historical link to equality, it does not necessarily follow that a dignity-based interpretation is the only plausible interpretation of the right to equality, or that it alone is capable of principled application. And second, agreement at the most general level about the importance of human dignity and its link to equality does not preclude the possibility of fundamental disagreement about the meaning of dignity and the precise nature of its relation to equality. In fact, some of the critics of a dignity-based approach seem to argue that the concept of dignity is so open to different interpretations that it can be invoked to justify almost any result. They thus suggest that a dignity-based approach is the very antithesis of neutrally principled adjudication.

<sup>62</sup>*Id* 555.

<sup>63</sup>See also Cowen (n 2) 45, 54-58.

*Shelley v Kraemer*<sup>64</sup> and *Brown v Board of Education of Topeka*;<sup>65</sup> to reformulate the holdings of these cases to affirm broader principles that reach beyond the narrow circumstances of the individual case.

The link established by Justice Ackermann between the Constitutional Court's equality jurisprudence and the idea of neutral principles suggests that the Court's choice for a dignity-based interpretation of equality was motivated by similar concerns.<sup>66</sup> The Constitutional Court regularly stresses that, even when judges are called upon to adjudicate politically contentious issues and are required to do so with express reference to the values enshrined in the Constitution and the context of our country's discriminatory and divided past, their function remains a legal and not a political one.<sup>67</sup> In Ackermann's view, a dignity-based approach allows judges to engage in substantive reasoning, to take due consideration of social context and past patterns of discrimination, and yet to remain faithful to the legal nature of their mandate by grounding their decisions in reasoned elaboration of the meaning of the Constitution. An alternative approach, he seems to imply, would allow judges to stray too far from the constraining effects of the constitutional text and a commitment to neutrally principled reason-giving, and is likely to give rise to decisions that rest upon 'personal subjective preference' or that are 'not demonstrably rooted in the Constitution'.<sup>68</sup>

Difficulties of interpretation notwithstanding,<sup>69</sup> a number of arguments can be derived from Justice Ackermann's lecture and from the work of other advocates of a dignity-based approach, in favour of the contention that a dignity-based

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<sup>64</sup>334 US 1 (1948). Wechsler (n 56) 29-31 criticised the reasoning in *Shelley* – in which it was held that a racially restrictive covenant was contrary to the equal protection clause on the basis that judicial enforcement of such a covenant constituted state action – for lacking neutrality and generality, as the Court would not possibly be prepared to extend this reasoning to all other situations in which it applied.

<sup>65</sup>347 US 483 (1954). According to Wechsler (n 56) 31-34, the holding in *Brown* was non-neutral to the extent that it preferred the associational interests of blacks who favoured integration over the associational interests of whites who favoured segregation.

<sup>66</sup>Justice Ackermann develops the idea of dignity as a neutral principle within the context of a discussion of the horizontal application of the constitutional equality right. He provides a number of examples to illustrate how a dignity-based interpretation of equality can be used to mediate conflicts between equality and freedom. See Ackermann (n 2) 551-554. The first of these examples is almost identical to the fact situation in *Kraemer*, while the second, like *Brown*, involves a conflict between racial equality and freedom of association. His choice of these examples is not surprising: they all involve pronounced conflicts between equality and freedom, which are often said to be incommensurable values.

<sup>67</sup>Cf eg *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744; 1996 10 BCLR 1253 (CC) para 27; and *United Democratic Movement v President of the RSA (1)* 2002 11 BCLR 1179 (CC) para 11.

<sup>68</sup>Ackermann (n 2) 554.

<sup>69</sup>Apart from the fact that Justice Ackermann does not fully develop the suggested link between neutral principles and a dignity-based approach, he also does not directly engage with the Court's critics or with suggested alternatives to the Court's interpretation of the equality right. The reader who wants to make sense of his suggestion that a dignity-based approach is indispensable to neutrally principled constitutional adjudication, inevitably has to read between the lines.

interpretation of the equality right is more likely – as compared to an alternative (equality-based) approach – to promote constitutional reasoning that is neutrally principled. First, despite the possibility of reasonable disagreement over the correct application of a dignity-based interpretation, participants in such a debate are at least constrained by a shared understanding of the types of laws and conduct that typically offend basic notions of dignity.<sup>70</sup> Second, that is more than one can say of an approach grounded in the value of equality, which is essentially a comparative concept that is devoid of substantive meaning.<sup>71</sup> Third, a dignity-based approach allows for sensitivity to context and careful attention to differences of degree, rather than sweeping generalisations which the court may be unwilling to follow in subsequent cases.<sup>72</sup> Fourth, a dignity-based interpretation of equality enables judges to adjudicate conflicts between freedom and equality in a principled manner, without reducing either of these constitutional values to a subordinate status. Justice Ackermann is clearly concerned that a less ‘nuanced’ understanding of equality might result, in cases involving a conflict between equality and, say, freedom of association or freedom of testation, in a serious diminution of the sphere of personal freedom. By contrast, a dignity-based approach to equality enables judges to make a principled distinction between instances of private discrimination that constitute a violation of somebody’s equal moral worth and citizenship, and legitimate exercises of personal and associational freedom.<sup>73</sup> And fifth, by focusing on dignity, a court is able to avoid the negative consequences that may otherwise flow from a consideration of the position of the complainants in society and the group(s) to which they belong. The dignity-based approach provides a focal point which allows the court to place group membership and disadvantage in the proper perspective – as important factors to be considered alongside others, but not as dispositive of the case. As Goldstone J stated in *Hugo*:<sup>74</sup>

The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups.

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<sup>70</sup>Cf Justice Ackermann’s appeal to common values (discussed under 4 above) and Cowen’s argument ((n 2) 42-45) that dignity has a determinate meaning at a general level.

<sup>71</sup>Cf the discussion of the third argument in favour of a dignity-based approach under 4 above.

<sup>72</sup>Cf Ackermann’s discussion of the horizontal application of the equality right at 552-554.

<sup>73</sup>Eg, it provides a principled basis for distinguishing between a racially restrictive condition in a contract of sale, on the one hand, and the right of the owner of a private residence to refuse, on racist grounds, to entertain certain people at his home. Ackermann clearly regards the first instance as one of unfair discrimination, but seems to think that the home owner should, in the second instance, be free to choose whom to invite.

<sup>74</sup>(N 1) para 41. Again, cf Ackermann’s discussion of the horizontal application of the equality right at 552-554. I suspect that Justice Ackermann may also have in mind a sixth, more conceptual connection, which can be expressed as follows: The concept of dignity goes to the heart of a culture of justification. A culture of justification presupposes that all individuals are worthy of equal respect; that everyone whose interests are affected by exercises of public power, is entitled to reasons. By grounding its equality analysis in dignity, a court seeks to ensure that all parties that are represented before it, either directly or indirectly, are shown the basic respect of being given reasons for its judgment – reasons, that is, that are not reducible to mere expressions of personal preference or sympathy for one group rather than another.

It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.

Put differently, a dignity-based approach is thought to enable judges to stay clear of two distinct dangers, which can be presented as opposite poles. At the one end, there is the danger of a formal conception of equality which insists on equal treatment despite material differences between individuals. Initial appearances notwithstanding, such an approach entrenches existing inequality and is thus skewed in favour of the beneficiaries of past discrimination. At the other end of the spectrum is the idea of an equality of outcome, which negates the differences between individuals and would be too invasive of individual liberty. A dignity-based approach, in the view of the Court, requires judges both to take account of past patterns of disadvantage and systemic discrimination, and to guard against a conception of equality that tends to reduce individuals to a bland and restrictive sameness. An alternative approach based on the value of equality, on the other hand, is suspected of being too close to the second pole: it is feared that its focus on material and groups-based disadvantage may degenerate into a non-neutral jurisprudence which is based on judges' personal preferences for the claims of certain groups and which threatens respect for individual autonomy.

Inherent in the dignity-based approach, is an attempt to neutralise the politics of adjudication; to ground the Court's equality jurisprudence in a form of substantive reasoning which is indifferent to the identity of the winner. A dignity-based approach is thought to enable judges to provide reasoned and neutrally principled justifications for their decisions, and thus to dispel suspicions that their judgments rest upon personal preference, or upon their belief that the Constitution favours one group/class over another.

## 6 Can neutral principles contain the politics of interpretation?

Justice Ackermann's reliance on Wechsler's notion of neutral principles to ground a substantive and transformative vision of equality is ironic, given Wechsler's own impoverished and highly formal understanding of equality and the proceduralism of his approach. Wechsler contested the idea that the issue in *Brown* was one of discrimination. For him, it was rather a case of the denial of black people's freedom of association, which came into conflict with the freedom of whites not to associate with them. He argued that there was inconclusive proof that black children were harmed by school segregation, that it was impermissible to inquire into the motive of the legislature, and that it was equally problematic

to make the measure of validity of legislation the way it is interpreted by those who are affected by it[.] In the context of a charge that segregation *with equal*

*facilities* is a denial of equality, is there not a point in *Plessy*<sup>75</sup> in the statement that if ‘enforced separation stamps the colored race with a badge of inferiority’ it is simply because its members choose ‘to put that construction upon it’?<sup>76</sup>

Not only does this statement show a blatant disregard for the disadvantage suffered by blacks and the systemic nature of racial discrimination, but it also makes it clear that Wechsler would have rejected the idea that dignity could serve as a neutral principle of constitutional adjudication. Dignity, in his view, would be far too subjective to ground a neutrally principled approach. To base a finding of racial or sexual discrimination on the impairment of the complainants’ dignity, would be to privilege the subjective experience and social understanding of, say, black people or women over those of white people or men. In Wechsler’s view, an inquiry into actual relations of social inequality and domination fall outside the province of reasoned judicial elaboration and should be undertaken, if at all, by the political branches of government.

Ackermann’s identification of dignity as a neutral principle should perhaps, then, be seen as an attempt to strip the idea of neutral principles of the formalism and proceduralism that characterised Wechsler’s thought,<sup>77</sup> and to reconceive it in terms that are consonant with a substantive constitutional jurisprudence and a more sophisticated understanding of the separation of powers. Ackermann, like Wechsler, is concerned about the separation of powers between the legislature and judiciary, and insists that judges should justify their decisions with reference to reasons that transcend the immediate result of the particular case. However, unlike Wechsler, he believes that an inquiry into actual relations of inequality does not invariably take judges out of the realm of law into that of politics. A judge, in his view, can consider material disadvantage and systemic power relations and still act in a principled way – as long as her inquiry into these issues is filtered through the neutral principle of dignity.

Whether the dignity-based approach has been, or indeed can be, successful in grounding an equality jurisprudence that is neutrally principled is, however, debatable. Critics of such an approach are likely to point out that the Court often concludes its inquiry into the question whether differentiation has the potential to impair the fundamental dignity of the complainants, or whether discrimination has led to an impairment of their human dignity, rather summarily, without engaging in a careful contextual analysis of the impact of the differentiation on those affected, and without providing reasons for its conclusion that are sufficiently general to guide judges in subsequent cases.<sup>78</sup>

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<sup>75</sup>*Plessy v Ferguson* 163 US 537, 551 (1896), the case in which the ‘separate but equal’ doctrine was adopted.

<sup>76</sup>Wechsler (n 56) 33.

<sup>77</sup>See Peller ‘Neutral principles in the 1950’s’ (1988) 21 *Journal of Legal Reform* 561; Horwitz *The transformation of American law, 1870-1960* (1992) 265-268 on the formalism and proceduralism of Wechsler’s appeal to neutral principles.

<sup>78</sup>Cf Davis’s argument (n 2) 413 that the dignity-based approach results in a ‘Legoland’ jurisprudence, ‘to be used in whatever form and shape is required by the demands of the judicial

They may also point out that the identity of the applicants often does matter; that the fact that the application in a case involving discrimination on the grounds of sex, gender or marital status is brought by a prostitute or the wife of a controversial businessman,<sup>79</sup> sometimes has a direct bearing on the outcome of the case.

Even if we assume, with defenders of the dignity-based approach, that these problems are not insurmountable, that they can be overcome through greater judicial elaboration of the meaning of human dignity<sup>80</sup> and better explication of the grounds for the courts' equality decisions, it remains difficult to escape the suspicion that there is something profoundly political about what judges do. Consider, for instance, the *Jordan* case. Both the majority and minority judgments can be justified in terms of principles that are general and neutral. For instance, the majority judgment can be explained as follows:

Facially neutral differentiation which affects more members of one sex than the other, does not constitute indirect discrimination on the grounds of sex or gender if it serves a legitimate purpose, is rational, and does not have the potential to impair the dignity of the complainants, by virtue of the fact that it does not impose a significantly greater burden or disadvantage on one group than the other, or that the impairment of the complainants' dignity is a result of their own choice,

while the principle governing the minority judgment can be expressed thus:

Facially neutral differentiation which has a disproportionate impact on either males or females, constitutes indirect discrimination on the grounds of sex or gender if it has the potential to impair the dignity of the complainants, by virtue of the fact that it is based on and reinforces sexual stereotypes which are demeaning to either of the sexes.

Not only are both principles general and neutral, but both seem unobjectionable – even from the other side's perspective. However, the crunch comes with the application of these principles. The majority, I think, would deny that the provision in question reinforces stereotypes that are demeaning to either sex. The minority would contest the finding that it does not impose a significantly greater burden or disadvantage on women, or that the impairment of the complainants' dignity is simply a result of their own choice. Underlying and informing the split between the majority and minority are not irreconcilably different principles or differences in methodology, but widely divergent assumptions about power, individual choice and responsibility, social stigma and moral blame, and the relation between law and social attitudes.

It is difficult to see how neutral principles can serve as a significant constraint on judicial reasoning if, as in *Jordan*, the split between the majority and minority has more to do with different social visions and underlying moral

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designer'.

<sup>79</sup>See Albertyn and Goldblatt (n 2) 263, who criticise the inability of the majority in *Harksen* to 'see beyond the particular litigant before it to appreciate the situation of others affected by the provision'.

<sup>80</sup>See eg Cowen (n 2) 54.

and political assumptions than with differences about the appropriate principle governing the case. The idea that the politics of law can be contained through reliance on neutral principles seems rather fanciful if opposite outcomes are the result not of reliance on significantly different principles, but of different ways of looking at actual facts situations and of perceiving our social world.

The inability of neutral principles to neutralise the politics of law should not come as a surprise. In fact, the very idea of ‘neutral principles’ is not as ideologically innocent as it may at first appear. It has been pointed out by various authors that what is considered general, neutral and principled is itself a function of a particular legal culture and is historically and socially contingent. There is therefore something circular about neutral principles: to qualify as neutrally principled, a decision must rest on ‘the conventional understandings and values that characterise the culture’.<sup>81</sup> Those understandings themselves reflect a particular hegemony, and may serve to render certain forms of disadvantage ‘invisible’, to ‘naturalise’ and ‘neutralise’ them. In the words of Patricia Williams:<sup>82</sup>

Racial discrimination is powerful precisely because of its frequent invisibility, its felt neutrality ... Racism inscribes culture with generalized preferences and routinized notions of propriety ... It empowers the mere familiarity and comfort of the status quo by labelling that status quo as ‘natural’.

The point, therefore, is not only that judges are often able to appeal to the same ‘neutral principles’ to justify opposite outcomes but, more fundamentally, that the perceived generality and neutrality of those principles are themselves a function of social power. Seen thus, the politics of law is not only at work when judges base their decisions simply on their own, subjective preferences, but also manifests itself in judges’ reliance upon ‘neutral principles’. In fact, as Steven Winter<sup>83</sup> argues, the politics of law ‘is most pronounced precisely when judges are acting in good faith, unaware of the normative entailments of the conceptual materials with which they work’.

## 7 Moral and political conceptions of equality

The belief that a dignity-based interpretation of equality is indispensable to neutrally principled adjudication, must be seen against the background of the Constitutional Court’s struggle to establish its institutional legitimacy through a combination of courage *and* restraint, tough-minded independence *and* cooperation with and deference to the other branches of government, and, most pertinent to the present discussion, a commitment to a substantive and transformative vision of the Constitution *and* a resolve not to be seen to stray from

<sup>81</sup>Winter *A clearing in the forest: Law, life, and mind* (2001) 325, with reference to Deutsch ‘Neutrality, legitimacy, and the Supreme Court: Some intersections between law and political science’ (1968) 20 *Stanford LR* 169.

<sup>82</sup>*Metro Broadcasting, Inc v FCC*: Regrouping in singular times’ in Crenshaw *et al* eds *Critical race theory: The key writings that formed the movement* (1995) 198.

<sup>83</sup>Winter (n 81) 331.

its judicial mandate into the realm of politics.<sup>84</sup> A dignity-based approach seems to enable the Court to reconcile some of the conflicting normative and institutional commitments embodied in the Constitution. It allows judges to make sense of the commitment to social *and* individual justice; substantive and remedial equality *and* respect for the individual, regardless of her membership of particular social groups; and the ideal of a nonracist and nonsexist society *and* the recognition that the adoption of race-conscious and gender-conscious measures is indispensable to the creation of such a society. It does so by requiring judges to consider past patterns of discrimination and systemic forms of disadvantage, yet to situate their inquiry within the broader framework of a dignity-based approach. It does not deny the possibility of reasonable disagreement or the role played by judges' own convictions and life experience, but seeks to contain such political disagreement within acceptable bounds by structuring the inquiry in terms of a unifying discourse centred around the concept of dignity.

Central to the dignity-based approach is the assumption that, unless translated into moral harm, judicial consideration of material disadvantage and structural power is bound to lapse into politics, which is by definition nonneutral and unprincipled. However, critics of a dignity-based approach are concerned that material and groups-based disadvantage may not always be capable of being expressed in moral terms. Even though the minority judgment in *Jordan* suggests that a dignity-based inquiry can be stretched to allow for a consideration of these forms of disadvantage, the moralism of the majority judgment points to serious problems inherent in a dignity-based approach. Because they conceive harm in moral and individual terms, the majority assume that it must consist, if at all, in an impairment of the prostitutes' reputation. However, since prostitutes knowingly accept the risk of lowering their social standing in the eyes of the community when they offer sex for reward, they cannot complain about the stigmatising effects of legislation that punishes only the prostitute. In the view of the majority, the stigma attaching to prostitutes is the product of their own choice and of social attitudes, and cannot be imputed to legislative distinctions.

The key to the majority judgment lies in the shift from a consideration of disadvantage to a discourse on moral agency, choice and reputation. This shift is facilitated by the focus on moral harm which is inherent in a dignity-based interpretation of the right to equality. The dignity-based approach, it could be argued, is at least partly to blame for the moralism, individualistic conception of power and disregard for systemic inequality characterising the majority judgment in *Jordan* – even if this approach is flexible enough to allow for a more transformative jurisprudence, as is evidenced by the minority judgment.

In an essay on racial justice in the United States, Kendall Thomas<sup>85</sup> criticises the dominant discourse of racial moralism and proposes instead a political

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<sup>84</sup>See Klug *Constituting democracy: Law, globalism and South Africa's political reconstruction* (2000) for an incisive analysis of the ways in which the Court has negotiated these conflicting normative and institutional commitments.

<sup>85</sup>'Racial justice' in Sarat et al eds *Looking back at law's century* (2002) 78.

understanding of racial equality. According to Thomas, the moral model of racial justice, with its emphasis on moral consensus, neutral rules and the reputation of different race groups,

fails to capture the distinctive and constitutive role of the political in racial claims-making. ... The moral concept of racial justice tries to capture and control the explosive, agonistic conflicts that characterize American racial politics. If it cannot altogether remove questions of racial power from its agenda, the racial moralism model can aspire to confine them within the dispassionate discursive boundaries of juridical settlement, bureaucratic administration, and deliberative legislation. If contemporary history teaches us anything about our racial dilemma, it is that conflicts over the forms and substance of racial injustice have been primarily contests about access to the means of political power, about social relations of domination, subordination, and resistance. These distinctively political dimensions of race in America resist the normative logic of the moral view that continues to predominate in public debates about racial justice.<sup>86</sup>

Thomas shows how a preoccupation with the moral dimensions of racial justice blinds analysts to the ways in which forms of discrimination that are facially neutral, such as the sentencing disparity between crack and powder cocaine violations, diminish the political power of African-American civic publics.<sup>87</sup> In his view, the best way of responding to the political dimension of racial justice is by openly confronting it, not by seeking to contain it within supposedly neutral decision-making procedures. A political understanding of racial equality concerns itself with questions of racial subjugation, political citizenship, and the capacity of vulnerable racial groups to form 'oppositional counterpublics' which are able to develop 'oppositional ideas about racial justice'.<sup>88</sup>

Thomas's critique of a moral understanding of racial equality resembles the criticism that a dignity-based interpretation of the constitutional equality right is overly individualistic and not sensitive enough to material and groups-based disadvantage. The political concept of racial justice that he proposes, resists attempts to ground equality in moral consensus or neutral principles, or to reduce it to individual dignity, personhood or (group) reputation. Instead, it seeks to ground the equal protection right in the United States Constitution in the values of equality and democratic citizenship. It is rooted in a radical pluralist conception of democracy, which views conflict as constitutive of social relations and seeks to remind us that any apparent agreement on the rules of the political game or the correct interpretation of political values such as freedom, equality and democracy is the result of a particular hegemony which always remains (and should remain) open to challenge. In fact, these values can be kept alive only to the extent that they are the subject of an open and robust political discourse which precludes any particular consensus from ossifying into a 'final' understanding of social relations.<sup>89</sup>

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<sup>86</sup>*Id* 84.

<sup>87</sup>*Id* 91-98.

<sup>88</sup>*Id* 87.

<sup>89</sup>See Mouffe *The return of the political* (1993).

The majority judgment in *Jordan* illustrates the way in which relations of subordination can be legitimated in the name of supposedly 'neutral' principles that rest upon social understandings that are themselves the result of a particular hegemony. The majority's insistence that the stigma associated with prostitution is the result of the prostitute's own choice, rests upon a highly conventional understanding of sexual relations. 'Normal' sexual relations, on this understanding, occur within a sphere of intimacy that is far removed from the world of money and power. The prostitute, in this view, chooses to take her sexuality out of this intimate sphere, to enter a world in which sexual relations are mediated by the cold and impersonal calculus of money.

By rejecting *Jordan's* claim, the majority legitimated this conventional discourse of sexuality, and prevented oppositional ideas from entering mainstream public discourse.<sup>90</sup> I can only speculate about what such an oppositional discourse[s] of sexuality might look like, but it seems fairly certain that it would challenge the construction of autonomy, choice and consent that informs conventional thinking,<sup>91</sup> provide alternative interpretations of gender equality and the relation between sex, power and poverty; promote understanding for alternative lifestyles; and contest the idea that all 'legitimate' expressions of sexuality should be based on the same standard. Instead of encouraging the emergence of 'counterpublics' which are able to develop such oppositional ideas, the majority effectively drove them underground by portraying their sexuality as aberrant and their plight as exceptional and the product of their own choice.

## 8 Complex equality

The minority judgment in *Jordan* suggests that a dignity-based interpretation of the right to equality need not necessarily result in the moralism and

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<sup>90</sup>Of course, there is a long history of state attempts to confine prostitution to the margins of society, and thus to prevent such oppositional ideas from entering mainstream discourse. This history includes the regulation of prostitution, as in nineteenth-century Great Britain and France. Drucilla Cornell quotes a nineteenth-century French social scientist as saying: 'prostitutes are as inevitable, in an agglomeration of men, as sewers, garbage-heaps, and refuse-dumps; the conduct of the authorities ought to be the same with regard to one as to the other; the duty is to watch over, to diminish by all possible means the inconveniences inherent in them, and, certainly, to hide them, to relegate them to the darkest corners, to make their presence as unnoticed as possible.' Cornell *At the heart of freedom: Feminism, sex, and equality* (1998) 48.

<sup>91</sup>It would not only challenge the view that money and power play a negligible role in 'normal' sexual relations, but would also question the assumption that prostitutes surrender their autonomy by engaging in sex work. Cornell argues, on the basis of interviews conducted with prostitutes, that for some women prostitution is 'a representation of [their] sexual being, a persona that [they have] to live out'. *Id* 55. '[I]n a world of abuse some women will take on the life of a prostitute in order to work through their incestuous and violent pasts'. *Id* 56. It would therefore be wrong simply to equate prostitution with sexual slavery and to treat it as an abandonment of the self. Even though sex workers are subjected to degradation and alienation, they have not renounced their right to establish their own autonomous identity. 'State-enforced moralism hinders what we as feminists should seek: the psychic, political, and ethical space for women to represent themselves.' *Id* 58.

conservatism characterising the majority judgment. On one view, the majority judgment is simply a perversion of the dignity-based approach. From this perspective, the majority's failure to situate the inquiry within a context of systemic gender inequality points not to serious problems inherent in the dignity-based approach, but to flaws in its application. It could, moreover, be argued that, far from being a natural outgrowth of the dignity-based approach, the moralism of the majority judgment flows from a failure to recognise the intrinsic dignity of every human being, regardless of the circumstances in which she may find herself.<sup>92</sup>

Others believe that we should not let the dignity-based approach off the hook too easily; that even if it does not necessarily result in a moralistic and overly individualistic approach, there may be something about it which makes it easier for judges to fall back uncritically onto conventional understandings and 'commonsense' assumptions, which may themselves be problematic in view of the Constitution's transformative aspirations. Even if dignity can be rooted in a conception of our selves as social beings, even if it can be interpreted to encompass both public and private autonomy and be used to challenge material inequality, these are not the connotations which have traditionally been attached to it. Traditionally, in our law, the concept of dignity has carried more individualistic meanings and has been taken to refer to personality interests, such as one's reputation. That these connotations continue to inform legal discourse, is evident from legal fields as diverse as equality litigation and the law of defamation.

My own analysis of *Jordan* and of the idea of dignity as a neutral principle suggests that the dignity-based approach facilitates the moralism and subjectivism of the majority judgment – even if it does not necessitate it. It further suggests that the quest for neutral principles of adjudication may be misconceived, and that a more political understanding of equality is called for.

However, simply calling for the abandonment of the dignity-based approach and its replacement by an alternative approach may not be the best way forward. In the first place, it seems unlikely that the Constitutional Court will abandon its dignity-based interpretation of equality in the foreseeable future. Secondly, even though the limits of a dignity-based approach have been revealed in certain areas, this approach has, in the majority of cases, resulted in context-sensitive and transformative judgments. And thirdly, it may be possible to exploit the tensions inherent in the Court's equality jurisprudence to allow for a greater focus on material and political disadvantage.

What needs to be done, is to infuse the Court's equality standard with an understanding of the complexity of equality. This understanding should rest, *inter alia*, on the following premises: First of all, equality cannot and should not be reduced to a single value, such as human dignity. An awareness of the

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<sup>92</sup>As Drucilla Cornell pointed out at a seminar held in Pretoria in August 2004, the majority conflated the ideal of human dignity with the notion of a dignified existence.

interrelatedness of equality and dignity can, admittedly, assist us in giving content to the right to equality, and in subjecting certain forms of discrimination to a transformative critique. But the same is true of the relationship between equality and democracy, or between equality and social justice. What is needed, is a more adequate understanding of the moral, political *and* material dimensions of equality.

Secondly, such an understanding of equality must recognise the possibility that different forms of discrimination may require different types of analysis. It is, for instance, likely that certain forms of discrimination can be more easily captured in the language of moral harm than others. It appears that discrimination on the grounds of sexual orientation can often be expressed quite powerfully in terms of this type of moral analysis, as discrimination against gays and lesbians is usually rooted in moral disapproval and results directly in an affront to their dignity and identity.<sup>93</sup> In other areas, like gender, a focus on moral issues may be less helpful, and may serve to obscure the power relations at work. Here, it could be argued, questions of political disempowerment and material disadvantage should loom large in the Court's inquiry. Rather than focusing predominantly on issues of personhood and identity, the Court should concentrate on questions of domination and access to the means of political and economic power.

Thirdly, a vision of complex equality would not be satisfied merely with generalisations about the different types of analysis that are best suited to different grounds of discrimination. It would resist the conclusion that a single criterion is suitable to a particular ground of discrimination, such as gender, and require sensitivity to the concrete life experiences of those affected, the intersectional nature of disadvantage,<sup>94</sup> and the different considerations that may be applicable in different spheres, such as education, employment, welfare and citizenship.<sup>95</sup>

What is likely to emerge from such a vision of equality, is a complex web of factors and principles which relate differently to different forms of disadvantage.<sup>96</sup> Not only may gender discrimination require a different focus

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<sup>93</sup>As Sachs J wrote in *National Coalition for Gay and Lesbian Equality v Minister of Justice* (n 1) para 128, with reference to an article by Edwin Cameron: '[P]recisely because neither power nor specific resource allocation are at issue, sexual orientation becomes a moral focus in our constitutional order. For this same reason, the question of dignity is in this context central to the question of equality.'

<sup>94</sup>This refers both to the ways in which economic disadvantage, political invisibility and moral stigma intersect to constitute relations of domination, and the ways in which patterns of subordination, such as racism, sexism and poverty intersect to subordinate black or poor women (or poor black women) in ways experienced neither by white women or black men. See Crenshaw 'Mapping the margins: Intersectionality, identity politics, and violence against women of color' in Crenshaw et al eds *Critical race theory: The key writings that formed the movement* (1995) 357.

<sup>95</sup>See Walzer *Spheres of justice: A defense of pluralism and equality* (1983).

<sup>96</sup>Writing from a political-theory perspective, Nancy Fraser argues that gender equity is best understood as 'a complex notion comprising a plurality of distinct normative principles'. Fraser 'Gender equity and the welfare state: A postindustrialist thought experiment' in Benhabib ed *Democracy and difference: Contesting the boundaries of the political* (1996) 218 at 221. She

from racial discrimination, but the focus may also vary, depending on whether the women affected are black or white (or rich or poor), and whether the alleged discrimination occurred in the field of employment or welfare. Judges would be required to explain the relevance of different factors and criteria to the fact situation at hand. In doing so, they would have to articulate and substantiate their own understandings of different forms of disadvantage, the intersections between them, and the ways in which they manifest in different areas of life.

Such an approach has several advantages. In the first place, its recognition of multiple forms of disadvantage is likely to result in a nuanced approach, which would make it easier to detect and interrogate forms of discrimination that are more subtle, or that are not easily captured in the language of moral harm.

Secondly, it would deepen our understanding of the relation between equality, dignity, democracy and social justice. By asking, for instance, whether a particular differentiation diminishes the capacity of vulnerable groups to form oppositional counter-publics which are able to develop oppositional ideas, we should be able to get a clearer vision of the ways in which systemic forms of disadvantage impede access to the means of political power and impoverish democratic debate. We should also gain important insights into the relation between public and private autonomy, between democracy and dignity, and between collective and individual self-realisation. We would become more sensitive to the ways in which individual autonomy and the right to organise collectively hang together. Returning to *Jordan*, we would be better able to see how material disadvantage, sexual double standards and an official policy of relegating sex work to the darkest corners of society,<sup>97</sup> combine to deprive women of their dignity and to keep them locked in a state of vulnerability and disadvantage.

Thirdly, the concept of complex equality advocated here, could enable a more nuanced understanding of the relationship between equality and difference. Proponents of a dignity-based approach are concerned that other interpretations of the right to equality would negate the differences between individuals, and impose upon them a dull and mindless conformity. However, it is my contention that a focus on questions of access to the means of political and economic power – in addition to the question whether there has been an impairment of the complainants' human dignity – may result in even greater sensitivity to difference and respect for diversity. This is so because the vision of complex equality developed in this section is concerned with the protection of difference, not merely as a 'private' attribute, but as a means of creating and

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identifies seven such principles: the antipoverty principle, the antiexploitation principle, the principles of income equality, leisure-time equality and equality of respect, the antimarginalisation principle and the antiandrocentrism principle. She notes that she developed this account of gender equality with 'the specific purpose of evaluating alternative pictures of a postindustrial welfare state', and recognises that '[f]or issues other than welfare, a somewhat different package of norms might be called for'. *Id* 222.

<sup>97</sup>See (n 90).

safeguarding a public space which is characterised by robust political debate and the existence of a plurality of democratic visions.

Despite its focus on the material position and social power of groups, this concept of equality does not presuppose a homogeneity of viewpoints and/or interests among particular racial, cultural or religious groups, or among gays or women. However, it acknowledges that members of disadvantaged and marginalised groups are likely to have certain experiences, outlooks, tastes, worldviews and survival strategies in common, which may appear curious, immoral, irrational or bizarre from the perspective of the dominant culture. These departures from middle-class sensibilities are often branded illegitimate in the name of a supposedly universalistic philosophy which asserts the equal moral worth of all individuals. However, on closer inspection, it appears that this philosophy is itself the expression of a particular set of contingent assumptions and experiences; that what appears to be a celebration of the differences between individuals, may really amount to the imposition of a 'corporate group identity, radically constraining any sense of individuality, and silently advancing the claims of that group identity'.<sup>98</sup> The complex vision of equality proposed in this section, recognises that every individual is entitled to a 'psychic, political and ethical space' within which she can develop her own autonomous identity.<sup>99</sup> It further recognises that the creation of such spaces is the stuff of political action as much as of personal growth and discovery, and depends on the ability of a plurality of groups to participate in an ongoing process of democratic contestation.

Finally, the approach advocated here does not require a rejection of the equality standard enunciated in *Harksen* but, rather, its modification and re-interpretation.<sup>100</sup> The *Harksen* test should be re-interpreted to allow for a consideration of different forms of disadvantage; it should be 'opened up' to enable a careful, contextual evaluation of the factors and normative principles that are relevant in a particular area of discrimination. This can be done by exploiting the tensions and ambiguities in the *Harksen* test. For instance, the references in *Harksen* to the impact of the differentiation/discrimination and the question whether it has led to an impairment of the complainants' fundamental human dignity *or an impairment of a comparably serious nature* (or has the potential to do so), can be utilised to create more room for the consideration of material disadvantage and political disempowerment.<sup>101</sup> Moreover, the references to the social context and the nature

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<sup>98</sup>Williams (n 82) 194.

<sup>99</sup>Cornell (n 90) 58.

<sup>100</sup>As indicated in (n 1), I am interested here in the Court's approach to the question of unfair discrimination (in terms of s 9(3)). Whether criticisms of the Court's interpretation of s 9(1) (equality before the law and equal protection and benefit of the law) are justified, and whether any deficiencies in the Court's interpretation of that subsection can be cured by means of a re-interpretation and modification of the existing test, are questions for another day. The same goes for the Court's understanding of the relation between ss 9(3) and 36(1) (the general limitation clause).

<sup>101</sup>It is true that the current formulation 'privileges' the impairment of human dignity, as it is held up as the standard against which other forms of harm should be measured. However, material disadvantage and political disempowerment could be given an independent status

of the provision or power in question, can be used to elaborate different factors and principles which are relevant to different forms of discrimination and different life spheres.

## 9 Concluding remarks

The concept of equality proposed in the previous section is in many respects similar to the Constitutional Court's dignity-based interpretation of the equality right. However, there are also important differences. While the two approaches share a commitment to substantive equality and an engagement with context and disadvantage, they differ on the best way of conceptualising such an approach. Drawing inter alia on the criticisms and proposals of Davis and Albertyn and Goldblatt, as well as the political conception of racial equality proposed by Thomas, I argue for a conception of equality which stresses its moral, political and material dimensions, which does not seek to reduce material disadvantage and political disempowerment to moral harm, and which recognises the ways in which economic disadvantage, political invisibility and moral stigma intersect to constitute relations of domination.

Secondly, the two conceptions of equality are informed by different understandings of the politics of interpretation.<sup>102</sup> The idea of dignity as a neutral principle is based on the fear of judicial subjectivity – a fear which has shaped much of the discourse on the 'counter-majoritarian dilemma', and has resulted in a quest for adjudicative methods that would defuse the politics of legal interpretation. My own view is that the quest for 'neutral' methods of adjudication both over-estimates and under-estimates the politics of interpretation. The fear that constitutional adjudication would, in the absence of a neutral method underpinning it, rest simply on the subjective preferences and prejudices of individual judges, exaggerates the dangers of judicial subjectivity and fails to account for the constraints to which judges are subject by virtue of their socialisation into a legal universe. At the same time, the assumption that the politics of law can be defused through neutral adjudicative methods or procedures, under-estimates the extent to which legal interpretation is – inevitably – informed by ideological presuppositions and contestable normative assumptions.

An approach which is more overtly 'political' and which does not seek to filter the consideration of material disadvantage and political power through 'neutral' principles, is not necessarily more 'subjective' than one based on dignity. Such an approach requires judicial candour and a willingness to explain the reasons for decisions as fully as possible. It openly acknowledges the ubiquity of power, and is ready to confront the ways in which lawyerly and judicial discourses are themselves shaped by power relations.

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through judicial elaboration of the meaning of the phrase 'or an impairment of a comparably serious nature'.

<sup>102</sup>See Botha 'Democracy and rights: Constitutional interpretation in a postrealist world' (2000) 63 *THRHR* 561; 'Freedom and constraint in constitutional adjudication' (2004) 20 *SAJHR* 249.