

# **WHAT IS UNFAIR DISCRIMINATION?**

## **A Study of the South African Constitutional Court's Unfair Discrimination Jurisprudence**

**Chris McConnachie**

**Lincoln College**

**DPhil**

**Trinity Term**

**2014**

## ABSTRACT

### What is Unfair Discrimination? A Study of the South African Constitutional Court's Unfair Discrimination Jurisprudence

Chris McConnachie, Lincoln College, Trinity Term 2014

This thesis offers an original account of the South African Constitutional Court's reasoning in identifying unfair discrimination perpetrated by the state. I use this account to develop proposals for improving the Court's jurisprudence, in line with its stated aim of addressing patterns of group disadvantage.

The Court's *Harksen* test for unfair discrimination makes dignity the touchstone for identifying this wrong. However, the Court has not explained what is required to prove a violation of dignity or how dignity fits with its concern for group disadvantage. I demonstrate that three necessary conditions must be satisfied for the Court to conclude that dignity has been violated: there must be a) unfavourable treatment on the basis of protected grounds; b) that threatens to create or perpetuate patterns of group disadvantage; and c) that lacks adequate justification. I also investigate important features of the Court's reasoning that have been overlooked in the existing literature, including its concern for messages expressed by discrimination and the fluctuating intensity with which it reviews justifications.

Among my proposals for developing this reasoning, I argue that the Court should remove human dignity from the *Harksen* test and openly acknowledge the considerations doing the work in its decisions. I also provide a detailed critique of five of the Court's most controversial decisions where it found discrimination to be fair despite clear indications that it entrenched patterns of disadvantage. I show that in all five cases the Court applied an indefensibly weak intensity of review, falling below the baseline level of scrutiny which ought to be applied in unfair discrimination cases. I contend that consistent application of this baseline will help to make the Court better at preventing and addressing patterns of group disadvantage.

I conclude with a restatement of the *Harksen* test that consolidates the Court's reasoning and my proposals.

Word count: 98,735

## ACKNOWLEDGEMENTS

I am deeply grateful to my supervisor, Tarunabh Khaitan, for his guidance and support over the last three years. His incisive questions and comments gave shape to my early thoughts and inspired my central arguments. I owe the development of my thinking to him.

My heartfelt thanks go to Sandra Fredman for her mentorship and for allowing me to join her research group. Thank you to the group's 'good-hearted [people] of action': Shreya Atrey, Meghan Campbell, Barbara Havelková, Laura Hilly, Galina Kostadinova, Jaakko Kuosmanen, Karl Laird, Yishai Mishor, and Anup Surendranath, for their constant support. I am also thankful to Justice Kate O'Regan and Justice Dhaya Pillay, honorary members of the group, who gave me valuable advice during their time in Oxford.

I am truly grateful to friends who have read, commented on, or otherwise helped develop my thinking in this thesis, including Gautam Bhatia, Janice Bleazard, Érik Labelle Eastaugh, Alice Irving, Dave Watson, and Emma Webber.

This thesis has greatly benefitted from the input and advice of my examiners at the different stages of the DPhil. Thank you to Cathi Albertyn and Denise Réaume for their insightful comments on the final version of this thesis and for making the viva such a rewarding challenge. I am also indebted to Nicholas Bamforth and Rory O'Connell who helped me to focus and refine this work.

I spent my last Oxford summer in the Grahamstown winter finalising this thesis. Thank you to Rósaan Krüger, Graham Glover, Helen Kruuse, and the faculty and staff of the Rhodes University Faculty of Law for their encouragement during these months. I am also grateful to Sarah Sephton and the staff and interns at the Grahamstown office of the Legal Resources Centre for giving me the ideal space to write. A special thank you to John Gouws for his support during this time.

The Rhodes Trust funded my studies in Oxford and I will be forever grateful for this life-changing opportunity. I am also thankful to the Oppenheimer Memorial Trust, Fountain Court Chambers, and Lincoln College for their generous financial assistance in my final year. Lincoln College also provided support for a productive research trip to South Africa. Sheryl Luthuli, Head Librarian of the Constitutional Court Library, deserves special thanks for her invaluable assistance during this time.

My deepest thanks go to my housemates and dearest friends Stephanie Bell, Liz Fouksman, Alice Irving, Eva Lam, Libby Longino, Josh Makepeace, and Howard McDonald for their companionship and encouragement over the last three years.

This thesis would not have been possible without my partner, Ioanna Tsakiropoulou, whose love, kindness, and countless hours of proofreading have made all the difference. Finally, an enormous thank you my parents, John and Kary, and my sister Kathryn for their love and support.

Chapter 3 and paragraphs in chapters 4, 5, and 7 are adapted from a recently published article, Chris McConnachie, 'Human Dignity, "Unfair Discrimination" and Guidance' (2014) 34 OJLS 609, with the kind permission of Oxford University Press. I am grateful to Julie Dickson and Justice Edwin Cameron for their comments on drafts of this article which helped to refine my thinking in this thesis.

# TABLE OF CONTENTS

TABLE OF ABBREVIATIONS AND SHORT FORMS .....	ix
TABLE OF CASES .....	xii
TABLE OF STATUTES.....	xix
<b>CHAPTER 1: INTRODUCTION .....</b>	<b>1</b>
1.1 Situating the Thesis.....	3
1.1.1 The Constitutional Court’s Jurisprudence .....	3
1.1.2 The Academic Response: The ‘Constructive Project’ .....	7
1.1.3 Advancing the Constructive Project.....	12
1.2 Methodology.....	13
1.2.1 Scope.....	14
1.2.2 Doctrinal Analysis .....	16
1.2.3 Normative Analysis.....	19
1.2.4 Comparative Law .....	21
1.2.5 Analytic Philosophy .....	23
1.3 Argument and Chapter Structure .....	25
1.3.1 The Central Argument.....	25
1.3.2 Chapter Structure .....	27
<b>PART 1: GROUNDWORK</b>	
<b>CHAPTER 2: BACKGROUND .....</b>	<b>32</b>
2.1 Introduction.....	32
2.2 Equality and Unfair Discrimination .....	33
2.2.1 The Section 9 Enquiry.....	34

2.2.2 Statutory Prohibitions of Unfair Discrimination.....	36
2.3 The Development of the <i>Harksen</i> Test.....	38
2.3.1 The Early Cases .....	39
2.3.2 The <i>Harksen</i> Test.....	40
2.4 The Canadian Court’s Case Law.....	44
2.4.1 Development and Disagreement .....	46
2.4.2 <i>Andrews</i> .....	47
2.4.3 <i>Egan, Miron</i> and <i>Thibaudeau</i> .....	48
2.4.4 The <i>Law</i> Test .....	52
2.4.5 The <i>Kapp</i> Test .....	53
2.5 Conclusion .....	55
<b>CHAPTER 3: HUMAN DIGNITY AND GUIDANCE .....</b>	<b>57</b>
3.1 Introduction.....	57
3.2 The Prospect of Guidance.....	59
3.3 Human Dignity.....	62
3.3.1 The Broad Concept.....	62
3.3.2 The Narrow Concept.....	68
3.3.3 Other Concepts .....	69
3.4 A Different Route to Guidance.....	69
<b>PART 2: UNDERSTANDING THE COURT’S REASONING</b>	
<b>CHAPTER 4: CONNECTING THE CONCEPTS .....</b>	<b>73</b>
4.1 Introduction.....	73
4.2 Conceptions of Equality .....	74
4.2.1 Sketching the Concept of Equality.....	75

4.2.2 Formal Conceptions .....	78
4.2.3 Substantive Conceptions.....	80
4.2.4 The Court's Multiple Conceptions of Equality.....	84
4.3 Patterns of Group Disadvantage.....	85
4.4 Human Dignity and Patterns of Group Disadvantage.....	89
4.4.1 Expressive Concerns .....	92
4.4.2 Socio-Economic Disadvantage .....	97
4.4.3 Necessary but Not Sufficient.....	100
4.5 Conclusion .....	101
<b>CHAPTER 5: APPLYING THE <i>HARKSEN</i> TEST .....</b>	<b>102</b>
5.1 Introduction.....	102
5.2 Discrimination.....	104
5.2.1 Differentiation .....	105
5.2.2 On the Basis of One or More Listed or Analogous Grounds.....	110
5.2.3 Analogous Grounds.....	113
5.2.4 Summary.....	114
5.3 Unfairness: Impact and Justification.....	114
5.3.1 Impact.....	115
5.3.2 Justification.....	121
5.3.3 The <i>Harksen</i> and <i>Van Heerden</i> Tests .....	128
5.4 Unfairness: Analysing the Case Law .....	130
5.4.1 Five Split Decisions .....	132
5.4.2 Three Themes.....	151
5.5 Conclusion .....	158

**CHAPTER 6: MESSAGES AND MEANINGS ..... 160**

6.1 Introduction..... 160

6.2 The Nature of the Messages..... 163

    6.2.1 Linguistic Meaning..... 163

    6.2.2 Non-Linguistic Meaning ..... 167

    6.2.3 Summary..... 172

6.3 Identifying the Messages..... 173

    6.3.1 Identifying Sentence-Meaning Messages ..... 173

    6.3.2 Identifying Non-Linguistic Messages ..... 181

6.4 Messages and Patterns of Group Disadvantage..... 189

6.5 Conclusion ..... 190

**PART 3: DEVELOPING THE COURT’S REASONING**

**CHAPTER 7: DIGNITY, DISADVANTAGE, AND JUSTIFICATIONS ..... 194**

7.1 Introduction..... 194

7.2 Human Dignity..... 196

7.3 Patterns of Group Disadvantage ..... 201

    7.3.1 Political Marginalisation ..... 203

    7.3.2 Social Marginalisation ..... 206

    7.3.3 Cultural Domination..... 208

    7.3.4 Violence and Victimisation..... 212

    7.3.5 Summary..... 214

7.4 Justification ..... 215

    7.4.1 The Debate over Justification ..... 215

    7.4.2 Developing the Justification Analysis..... 220

7.5 Conclusion .....	223
<b>CHAPTER 8: LEARNING FROM THE CONTROVERSIAL CASES .....</b>	<b>224</b>
8.1 Introduction.....	224
8.2 Impact Analysis .....	227
8.2.1 Doctrinal Errors .....	228
8.2.2 Errors of Proof.....	230
8.2.3 Conceptual Errors.....	239
8.2.4 Is Dignity to Blame? .....	249
8.3 Justification Analysis.....	253
8.3.1 The Doctrine of Deference and the Baseline Intensity of Review .....	254
8.3.2 Duty to Present a Justification .....	260
8.3.3 Proportionality, Not Rationality.....	264
8.3.4 Applying the Full Proportionality Analysis .....	266
8.3.5 The Evidential and Argumentative Burden.....	270
8.3.6 The Baseline and Beyond.....	275
8.4 Conclusion .....	276
<b>PART 4: CONSOLIDATION</b>	
<b>CHAPTER 9: THE <i>HARKSEN</i> TEST REVISITED .....</b>	<b>279</b>
9.1 Introduction.....	279
9.2 Grounds of Discrimination.....	280
9.2.1 The Role of Protected Grounds .....	280
9.2.2 Identifying Analogous Grounds .....	284
9.3 Unfairness .....	293
9.3.1 Impact.....	294

9.3.2 Justification.....	296
9.4 The <i>Harksen</i> Test: A Restatement .....	297
9.4.1 The Restatement.....	298
9.4.2 Guidance and the Future Development of the Case Law.....	304
<b>CHAPTER 10: CONCLUSION.....</b>	<b>305</b>
<b>BIBLIOGRAPHY .....</b>	<b>314</b>

## TABLE OF ABBREVIATIONS AND SHORT FORMS

Canadian Court	Supreme Court of Canada
Cal Law Rev	California Law Review
Can Bar Rev	Canadian Bar Review
CJLJ	Canadian Journal of Law and Jurisprudence
CJWL	Canadian Journal of Women and the Law
CLJ	Cambridge Law Journal
Con Court Rev	Constitutional Court Review
CUP	Cambridge University Press
Dalhousie J Legal Stud	Dalhousie Journal of Legal Studies
EHRLR	European Human Rights Law Review
Equality Act	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
Ga J Intl & Comp L	Georgia Journal of International and Comparative Law
Harv L Rev	Harvard Law Review
HRLRev	Human Rights Law Review
ICON	International Journal of Constitutional Law
IJDL	International Journal of Discrimination and the Law
ILJ	Industrial Law Journal
JAL	Journal of African Law
J L & Equality	Journal of Law and Equality
J L Med & Ethics	Journal of Law, Medicine and Ethics
J Pol Phil	Journal of Political Philosophy
JSAS	Journal of Southern African Studies

La L Rev	Louisiana Law Review
L & Ineq	Law and Inequality
LQR	Law Quarterly Review
LS	Legal Studies
LT	Legal Theory
Mich L Rev	Michigan Law Review
MLR	Modern Law Review
NILQ	Northern Ireland Legal Quarterly
NWU L Rev	Northwestern University Law Review
NYU Rev L & Soc Change	New York University Review of Law and Social Change
OJLS	Oxford Journal of Legal Studies
Osgoode Hall L J	Osgoode Hall Law Journal
Ottawa L Rev	Ottawa Law Review
OUP	Oxford University Press
PL	Public Law
PULP	Pretoria University Law Press
QLJ	Queen's Law Journal
Rev Const Stud	Review of Constitutional Studies
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal
SA Merc LJ	South African Mercantile Law Journal
SAPL	South African Public Law
SCLR	Supreme Court Law Review
South African Court	Constitutional Court of South Africa
Stell L Rev	Stellenbosch Law Review

THRHR	Tydsrif vir Hedendaagse Romeins-Hollandse Reg
Transnatl L & Contemp Probs	Transnational Law and Contemporary Problems
U Chi Legal F	University of Chicago Legal Forum
U Pa J Const L	University of Pennsylvania Journal of Constitutional Law
U Pa L Rev	University of Pennsylvania Law Review
U New Brunswick LJ	University of New Brunswick Law Journal
UTLJ	University of Toronto Law Journal
Windsor YB Access Justice	Windsor Yearbook of Access to Justice
Yale LJ	Yale Law Journal
ZaöRV	Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht

## TABLE OF CASES

### SOUTH AFRICA

<i>Amod v Multilateral Vehicle Accident Fund</i> 1999 (4) SA 1319 (SCA) .....	210
<i>August v Electoral Commission</i> 1999 (3) SA 1 (CC) .....	60, 204, 218
<i>Barkhuizen v Napier</i> 2007 (5) SA 323 (CC) .....	61
<i>Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism</i> 2004 (4) SA 490 (CC) .....	37, 83, 123, 257
<i>Bel Porto School Governing Body v Premier of the Western Cape Province</i> 2002 (3) SA 265 (CC) .....	4
<i>Bhe v Magistrate, Khayelitsha</i> 2005 (1) SA 580 (CC) .....	8, 87, 92, 112, 118, 130, 168, 171, 175, 211, 243
<i>Brink v Kitsboff</i> NO 1996 (4) SA 197 (CC) .....	4, 39, 81, 85, 240, 243
<i>Carmichele v Minister of Safety and Security</i> 2001 (4) SA 938 (CC) .....	212
<i>Christian Education South Africa v Minister of Education</i> 2000 (4) SA 757 (CC) .....	205, 210
<i>City Council of Pretoria v Walker</i> 1998 (2) SA 363 (CC) .....	41, 90, 104, 111, 116, 120, 130, 153, 154, 170, 179, 187, 218, 232
<i>Da Silva v Road Accident Fund</i> 2014 (5) SA 573 (CC) .....	38, 131, 261
<i>Daniels v Campbell</i> NO 2004 (5) SA 331 (CC) .....	210, 245
<i>Dawood v Minister of Home Affairs</i> 2000 (3) SA 936 (CC) .....	60, 63, 110
<i>Democratic Alliance v President of the Republic of South Africa</i> 2013 (1) SA 248 (CC) .....	257
<i>Democratic Party v Minister of Home Affairs</i> 1999 (3) SA 254 (CC) .....	111, 142
<i>Doctors for Life International v Speaker of the National Assembly</i> 2006 (6) SA 416 (CC) .....	203, 204
<i>Du Plessis v De Klerk</i> 1996 (3) SA 850 (CC) .....	257
<i>Du Toit v Minister of Welfare and Population Development</i> 2003 (2) SA 198 (CC) .....	8
<i>East Zulu Motors v Empangeni/ Ngwelezane Transitional Local Council</i> 1998 (2) SA 61 (CC) .....	126

<i>Ferreira NO v Levin</i> 1996 (1) SA 984 (CC) .....	20, 116
<i>Fraser v Children’s Court, Pretoria North, and Other</i> 1997 (2) SA 261 (CC) .....	39
<i>Geldenbuys v National Director of Public Prosecutions</i> 2009 (1) SACR 231 (CC) .....	8, 92, 168, 169
<i>Gory v Kolver NO</i> 2007 (4) SA 97 (CC) .....	8
<i>Government of the Republic of South Africa v Grootboom</i> 2001 (1) SA 46 (CC) .....	60, 64, 97
<i>Gumede v President of the Republic of South Africa</i> 2009 (3) SA 152 (CC) .....	8, 117, 211, 245
<i>Harksen v Lane NO</i> 1998 (1) SA 300 (CC) .....	
2, 4, 6, 34, 38, 40, 41, 42, 43, 46, 51, 52, 82, 92, 102, 105, 113, 114, 119, 120, 121, 130, 137,	
138, 140, 152, 155, 157, 167, 168, 170, 197, 224, 228, 231, 233, 238, 239, 240, 241, 268,	
269, 276, 277, 280, 285, 290, 293, 297	
<i>Hassam v Jacobs NO</i> 2009 (5) SA 572 (CC) .....	107, 112, 210, 245
<i>HOD, Department of Education, Free State Province v Welkom High School</i> 2014 (2) SA 228 (CC)	
.....	203
<i>Hoffmann v South African Airways</i> 2001 (1) SA 1 (CC) .....	
.....	8, 34, 62, 79, 96, 107, 110, 113, 115, 117, 207, 218, 221, 283, 289
<i>Hugo v President of the Republic of South Africa</i> 1996 (4) SA 1012 (D) .....	52, 274
<i>Ismail v Ismail</i> 1983 (1) SA 1006 (A) .....	210
<i>J v Director General, Department of Home Affairs</i> 2003 (5) SA 621 (CC) .....	8
<i>Jooste v Score Supermarket Trading (Pty) Ltd</i> 1999 (2) SA 1 (CC) .....	79, 126
<i>Khosa v Minister of Social Development</i> 2004 (6) SA 505 (CC) .....	
.....	86, 92, 95, 97, 100, 111, 113, 125, 130, 156, 165, 177, 204, 220, 238, 263, 285, 288, 290
<i>Khumalo v Holomisa</i> 2002 (5) SA 401 (CC) .....	61, 64
<i>Larbi-Odam v Member of the Executive Council for Education</i> 1998 (1) SA 745 (CC) .....	
.....	8, 92, 107, 110, 113, 115, 117, 197, 204, 285, 287, 290
<i>Le Roux v Dey</i> 2011 (3) SA 274 (CC) .....	64, 172
<i>Louw v Golden Arrow Bus Services (Pty) Ltd</i> (2000) 21 ILJ 188 (LC) .....	111

<i>Mabaso v Law Society, Northern Provinces</i> 2005 (2) SA 117 (CC) .....	8, 91, 92, 98, 263
<i>Manong &amp; Associates (Pty) Ltd v City Manager, City of Cape Town</i> 2011 (2) SA 90 (SCA) .....	111
<i>Masiya v Director of Public Prosecutions, Pretoria</i> 2007 (5) SA 30 (CC).....	213
<i>Matatiele Municipality v President of the Republic of South Africa</i> 2006 (5) SA 47 (CC).....	20, 238
<i>Mayelane v Ngwenyama</i> 2013 (4) SA 415 (CC) .....	197, 211, 238
<i>Mazibuko v City of Johannesburg</i> 2010 (4) SA 1 (CC).....	37, 38, 100
<i>MEC for Education, Kwa-Zulu Natal v Pillay</i> 2008 (1) SA 474 (CC) .....	
.....	37, 38, 87, 92, 105, 111, 113, 121, 123, 171, 209, 210, 288
<i>Minister of Finance v Van Heerden</i> 2004 (6) SA 121 (CC) .....	
.....	4, 15, 16, 34, 35, 40, 81, 82, 84, 85, 90, 92, 116, 128, 129, 132, 154, 168, 234, 311
<i>Minister of Health v Treatment Action Campaign</i> 2002 (5) SA 721 (CC).....	257
<i>Minister of Home Affairs v Fourie</i> 2006 (1) SA 524 (CC) .....	
.....	8, 77, 78, 92, 94, 109, 110, 130, 157, 164, 165, 211, 221, 231
<i>Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders</i> 2005 (3) SA 280 (CC).....	263, 270, 271
<i>Moseneke v Master of the High Court</i> 2001 (2) SA 18 (CC) .....	8, 107, 171, 175
<i>Mphahlele v First National Bank</i> 1999 (2) SA 667 (CC).....	20
<i>Mrumvu v Minister of Transport</i> 2011 (2) SA 473 (CC).....	8, 38, 131, 260
<i>National Coalition for Gay and Lesbian Equality v Minister of Home Affairs</i> 2000 (2) SA 1 (CC).....	
.....	8, 57, 78, 95, 112, 158, 167, 169, 211, 245
<i>National Coalition for Gay and Lesbian Equality v Minister of Justice</i> 1999 (1) SA 6 (CC) .....	
.....	5, 8, 33, 34, 35, 36, 40, 57, 62, 77, 78, 81, 82, 87, 90, 92, 110, 112, 116, 156, 165, 166, 200, 202, 205, 211, 213, 221, 231, 261, 280
<i>New National Party v Government of the Republic of South Africa</i> 1999 (3) SA 191 (CC).....	112, 204
<i>Omar v Government of the Republic of South Africa</i> 2006 (2) SA 289 (CC).....	212

<i>Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte Application of the President of the Republic of South Africa</i> 2000 (2) SA 674 (CC) .....	20
<i>Poverty Alleviation Network v President of the Republic of South Africa</i> 2010 (6) BCLR 520 (CC) .....	171, 257
<i>President of the Republic of South Africa v Hugo</i> 1997 (4) SA 1 (CC) .....	9, 40, 46, 96, 120, 132, 133, 134, 135, 136, 137, 152, 155, 218, 224, 230, 231, 232, 233, 236, 237, 247, 248, 274, 276, 277
<i>President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd</i> 2005 (5) SA 3 (CC).....	218
<i>Prince v President of the Law Society of the Cape of Good Hope</i> 2002 (2) SA 794 (CC).....	127, 205
<i>Prinsloo v Van der Linde</i> 1997 (3) SA 1012 (CC) .....	34, 40, 41, 43, 46, 51, 57, 77, 79, 110, 113, 197, 198, 282
<i>Ramakatsa v Magashule</i> 2013 (2) BCLR 202 (CC) .....	204
<i>Richter v Minister of Home Affairs</i> 2009 (3) SA 615 (CC) .....	204
<i>Robinson v Volks NO</i> 2004 (6) SA 288 (C) .....	262
<i>S v Baloyi</i> 2000 (2) SA 425 (CC) .....	212
<i>S v Bhulwana</i> 1996 (1) SA 388 (CC).....	125, 264
<i>S v Dodo</i> 2001 (3) SA 382 (CC).....	60
<i>S v Jordan</i> 2002 (6) SA 642 (CC).. ..	9, 92, 104, 130, 141, 142, 143, 144, 155, 156, 165, 168, 189, 199, 216, 224, 231, 233, 234, 242, 244, 261, 264, 295
<i>S v Lawrence</i> 1997 (4) SA 1176 (CC).....	176, 179
<i>S v Makwanyane</i> 1995 (3) SA 391 (CC) .....	20, 60, 63, 124, 189, 264
<i>S v Manamela</i> 2000 (3) SA 1 (CC) .....	124, 125, 269
<i>S v Ntuli</i> 1996 (1) SA 1207 (CC) .....	34, 79
<i>S v Steyn</i> 2001 (1) SA 1146 (CC).....	271
<i>S v Thunzi</i> 2011 (3) BCLR 281 (CC).....	238

<i>Sali v National Commissioner of the South African Police Service</i> 2014 (9) BCLR 997 (CC).....	37
<i>SANDU v Minister of Defence</i> 2007 (5) SA 400 (CC) .....	37
<i>Satchwell v President of the Republic of South Africa</i> 2002 (6) SA 1 (CC) .....	8, 261
<i>Satchwell v President of the Republic of South Africa</i> 2003 (4) SA 266 (CC) .....	8
<i>Seedat's Executors v The Master (Natal)</i> 1917 AD 302 .....	210
<i>Shilubana v Nwamitwa</i> 2009 (2) SA 66 (CC).....	8, 211, 238
<i>South African Police Service v Solidarity obo Barnard</i> [2014] ZACC 23 (2 September 2014) .....	
.....	5, 15, 16, 35, 63, 81, 83, 129, 200, 265
<i>Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development</i> 2013 (12) BCLR 1429 (CC) .....	271
<i>Union of Refugee Women v Director: Private Security Industry Regulatory Authority</i> 2007 (4) SA 395 (CC)....	
.....	9, 92, 95, 96, 100, 104, 110, 113, 130, 148, 149, 152, 155, 157, 164, 167, 168, 177, 186, 187, 189, 212, 214, 217, 220, 224, 228, 229, 231, 237, 238, 248, 249, 268, 276, 277, 289, 295
<i>Van der Merwe v Road Accident Fund</i> 2006 (4) SA 230 (CC).....	34, 87
<i>Van der Walt v Metcash Trading Ltd</i> 2002 (4) SA 317 (CC) .....	105
<i>Volks NO v Robinson</i> 2005 (5) BCLR 446 (CC).....	
.....	9, 92, 121, 130, 144, 145, 152, 155, 157, 169, 216, 224, 229, 230, 231, 232, 233, 235, 240, 241, 242, 244, 246, 262, 264, 276, 277, 295
<i>Weare v Ndebele</i> NO 2009 (1) SA 600 (CC) .....	113, 197, 282
<i>Zondi v MEC for Traditional and Local Government Affairs</i> 2005 (3) SA 589 (CC).....	8, 171

## CANADA

<i>Andrews v Law Society of British Columbia</i> [1989] 1 SCR 143 .....	
.....	47, 48, 54, 77, 105, 113, 122, 204, 282, 289
<i>Auton (Guardian ad litem of) v British Columbia (Attorney General)</i> [2004] 3 SCR 657.....	106

<i>Benner v Canada (Secretary of State)</i> [1997] 1 SCR 358 .....	50
<i>Brooks v Canada Safeway Ltd</i> [1989] 1 SCR 1219 .....	244
<i>Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)</i> [2004] 1 SCR 76 .....	93, 164, 183, 184, 185
<i>Corbiere v Canada (Minister of Indian and Northern Affairs)</i> [1999] 2 SCR 203 .....	93, 168, 169, 283, 288, 289
<i>Eaton v Brant County Board of Education</i> [1997] 1 SCR 241 .....	50, 210
<i>Egan v Canada</i> [1995] 2 SCR 513.....	46, 47, 48, 49, 170, 180, 243, 280
<i>Eldridge v British Columbia (Attorney General)</i> [1997] 3 SCR 624.....	50, 206
<i>Gosselin v Quebec (Attorney General)</i> [2002] 4 SCR 429.....	98, 182, 273, 274
<i>Granovsky v Canada (Minister of Employment and Immigration)</i> [2000] 1 SCR 703 .....	98, 176
<i>Hodge v Canada (Minister of Human Resources Development)</i> [2004] 3 SCR 357 .....	105, 106
<i>Lavoie v Canada</i> [2002] 1 SCR 769 .....	117, 168, 177, 244, 283
<i>Law v Canada (Minister of Employment and Immigration)</i> [1999] 1 SCR 497 .....	52, 53, 93, 98, 117, 119, 160, 167, 168, 177, 180, 182, 190
<i>Little Sisters Book and Art Emporium v Canada (Minister of Justice)</i> [2000] 2 SCR 1120.....	166
<i>M v H</i> [1999] 2 SCR 3 .....	174
<i>Miron v Trudel</i> [1995] 2 SCR 418.....	46, 48, 49
<i>Newfoundland (Treasury Board) v NAPE</i> [2004] 3 SCR 381 .....	99, 222
<i>Nova Scotia (Attorney General) v Walsh</i> [2002] 4 SCR 325 .....	169, 182, 242, 246, 253
<i>Nova Scotia (Workers' Compensation Board) v Martin</i> [2003] 2 SCR 504.....	167, 168, 182, 186
<i>Quebec (Attorney General) v A</i> [2013] 1 SCR 6154, 55, 93, 99, 106, 118, 122, 160, 166, 182, 251, 252, 253, 289	
<i>R v Kapp</i> [2008] 2 SCR 483 .....	46, 53, 54, 64, 93, 99, 118, 160, 182, 196, 200, 251
<i>R v Oakes</i> [1986] 1 SCR 103.....	124
<i>R v Turpin</i> [1989] 1 SCR 1296.....	119

<i>Thibaudeau v Canada</i> [1995] 2 SCR 627 .....	47, 48, 49
<i>Trociuk v British Columbia (Attorney General)</i> [2003] 1 SCR 835 .....	174
<i>Vriend v Alberta</i> [1998] 1 SCR 493 .....	50, 164, 166, 175
<i>Withler v Canada</i> [2011] 1 SCR 396 .....	54, 105, 106, 182, 251, 252, 289

## **UNITED STATES**

<i>Brown v Board of Education of Topeka Shawnee County</i> 347 US 483 (1954).....	109, 177
<i>Cleburne v Cleburne Living Centre Inc</i> 473 US 432 (1985) .....	176
<i>Fisher v University of Texas</i> 570 US ___ (2013).....	83
<i>Plessy v Ferguson</i> 163 US 537 (1896).....	177
<i>United States v Carolene Products Company</i> 304 US 144 (1938).....	204

## TABLE OF STATUTES

Black Administration Act 38 of 1927 .....	175
Canadian Charter of Rights and Freedoms.....	21, 44, 45, 51, 53, 98, 122, 124, 181
Civil Union Act 17 of 2006 .....	8, 109
Constitution of the Republic of South Africa Act 200 of 1993.....	1, 3, 33, 232
Constitution of the Republic of South Africa, 1996 .....	
.....	1, 3, 33, 42, 51, 60, 97, 121, 125, 232, 234, 249, 261, 262
Constitution Seventeenth Amendment Act 72 of 2012.....	1
Employment Equity Act 55 of 1998.....	14, 37
Immorality Act 5 of 1927 .....	164
Immorality Amendment Act 21 of 1950.....	164
Insolvency Act 24 of 1936.....	138
Intestate Succession Act 81 of 1987 .....	107
Labour Relations Act 66 of 1995 .....	36
Maintenance of Surviving Spouses Act 27 of 1990 .....	144, 157, 235, 262
Marriage Act 25 of 1961 .....	107, 109
Private Security Regulation Act 56 of 2001 .....	148
Prohibition of Mixed Marriages Act 55 of 1949 .....	164
Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.....	
.....	14, 37, 38, 42, 105, 108, 109, 111, 263, 298, 310
Sexual Offences Act 23 of 1957 .....	141

## CHAPTER 1: INTRODUCTION

The prohibition of ‘unfair discrimination’ in the South African Constitution<sup>1</sup> has profound significance in light of South Africa’s history and the unfair discrimination that still exists in South African society. Over the last two decades, the Constitutional Court of South Africa<sup>2</sup> has made important strides in interpreting and applying this constitutional provision. The Court has repeatedly emphasised that the prohibition of unfair discrimination aims to prevent and address ‘patterns of group disadvantage’,<sup>3</sup> a statement of purpose that has been applauded by commentators in South Africa and abroad.<sup>4</sup> The Court has also established a strong record in striking down unfairly discriminatory laws and state actions that entrenched patterns of group disadvantage.<sup>5</sup> In doing so, it has produced a string of landmark judgments, including its celebrated line of cases addressing unfair discrimination on the basis of sexual orientation.<sup>6</sup>

While the Constitutional Court has achieved a great deal, two significant concerns with the Court’s reasoning remain unresolved. First, there is still much uncertainty over what

---

<sup>1</sup> South Africa has had two post-apartheid constitutions which both contain prohibitions of unfair discrimination. See s 8(2) of the Constitution of the Republic of South Africa Act 200 of 1993 (interim Constitution) and ss 9(3) and 9(4) of the Constitution of the Republic of South Africa, 1996 (1996 Constitution). The Court’s interpretation of unfair discrimination has remained consistent across both provisions, see chapter 2, n 3. All references to the ‘Constitution’ in this thesis are to the 1996 Constitution, unless otherwise indicated.

<sup>2</sup> The Constitutional Court was created in 1994 as the highest court on all constitutional matters. The Constitution Seventeenth Amendment Act 72 of 2012, brought into force on 23 August 2013, has since made the Constitutional Court the apex court in all matters. See further Hugh Corder and Jason Brickhill, ‘The Constitutional Court’ in Cora Hoexter and Morné Olivier (eds), *The Judiciary in South Africa* (Juta 2014) 375–77.

<sup>3</sup> See text to nn 18–21 below.

<sup>4</sup> See n 30 below.

<sup>5</sup> See text to nn 33–39 below.

<sup>6</sup> See nn 38–39 below.

is required to prove unfair discrimination. The Court's '*Harksen* test'<sup>7</sup> for unfair discrimination makes human dignity the touchstone for identifying this wrong. However, the Court has never clearly explained what is required to prove a violation of human dignity or how human dignity relates to the aim of preventing patterns of group disadvantage. This has left litigants, lower courts, and current members of the Court with limited guidance.

The second concern is that, in a small but significant set of decisions, the Court has found discriminatory laws and state actions to be fair despite clear indications that they entrenched patterns of group disadvantage.<sup>8</sup> This inconsistency between aims and outcomes requires further attention.<sup>9</sup>

This thesis seeks to address these concerns through a detailed study of the Constitutional Court's reasoning in applying the *Harksen* test to laws and state actions.<sup>10</sup> Two primary questions will guide this study: how does the Court identify unfair discrimination? And how should its reasoning be developed? My central aim is to provide guidance for identifying unfair discrimination in a way that will enable the Court to be better and more consistent in addressing patterns of group disadvantage.

In pursuing this aim, I will make several substantial contributions to the existing literature on the Constitutional Court's unfair discrimination jurisprudence. I will present a novel account of the Court's reasoning that will expose important features that have been largely overlooked in the existing literature. I will then use this clearer understanding of the Court's reasoning to present focused proposals for how this reasoning ought to develop. In particular, I will offer extensive analysis of how the Court should address the inconsistency

---

<sup>7</sup> Developed in *Harksen v Lane* NO 1998 (1) SA 300 (CC). I will use the term '*Harksen* test' to refer to the specific test for unfair discrimination, rather than the general enquiry that the Court applies to section 9 equality claims, discussed further in chapter 2, text to nn 4–17.

<sup>8</sup> See text to nn 40–44 below.

<sup>9</sup> See text to n 45ff.

<sup>10</sup> As I explain at text to n 71 below, the Court has not yet considered a case of discrimination between private individuals.

between aims and outcomes that has appeared in its case law. I will conclude with a restatement of the Court's *Harksen* test that captures the Court's reasoning and my proposals.

In this chapter, I outline my aims, methods, arguments, and contributions in greater detail. In section 1.1, I introduce the Constitutional Court's unfair discrimination jurisprudence, the academic response to this jurisprudence, and the contributions that I will make in this thesis. Section 1.2 presents a detailed overview of my methodology. Section 1.3 outlines my central arguments and explains how I will develop these arguments in the chapters to follow.

## **1.1 SITUATING THE THESIS**

The Constitutional Court has produced a rich body of unfair discrimination case law which has been the subject of much academic scrutiny. This section situates this thesis by providing an overview of the Court's unfair discrimination jurisprudence, the literature on this jurisprudence, and how my thesis will advance this literature.

### **1.1.1 The Constitutional Court's Jurisprudence**

South Africa's transition to democracy in 1994 saw the introduction of a new Constitution<sup>11</sup> containing a detailed Bill of Rights. The right to equality<sup>12</sup> is the first right listed in the Bill of Rights and contains the prohibition of 'unfair discrimination' by the state and private individuals in all contexts.<sup>13</sup>

---

<sup>11</sup> See n 1 above.

<sup>12</sup> Section 8 of the interim Constitution and s 9 of the 1996 Constitution. See above n 1. These provisions are discussed further in chapter 2, text to nn 1–3.

<sup>13</sup> 1996 Constitution, ss 9(3) and 9(4).

South Africa's history provided the impetus for the prohibition of unfair discrimination<sup>14</sup> and has shaped the Court's interpretation of this wrong.<sup>15</sup> More than three centuries of officially sanctioned racial discrimination, beginning with colonial rule and culminating in apartheid, left deep-rooted patterns of group disadvantage along racial lines.<sup>16</sup> Patriarchy, homophobia, religious intolerance, and many other forms of group-based oppression and marginalisation added their own lasting marks to South African society.<sup>17</sup> In *Brink*,<sup>18</sup> the Constitutional Court's first unfair discrimination decision, the Court held that the constitutional prohibition of unfair discrimination and the broader right to equality are to be understood 'in the light of [this] history and the enduring legacy that it bequeathed'.<sup>19</sup> Drawing on this history, the Court explained that these provisions were adopted—

in the recognition that discrimination against people who are members of disfavoured groups can lead to *patterns of group disadvantage* and harm. Such discrimination is unfair: it builds and entrenches inequality amongst different groups in our society.<sup>20</sup>

In this spirit, the Court has consistently emphasised that the purpose of the prohibition of unfair discrimination is to prevent and address patterns of group disadvantage.<sup>21</sup> The Court

---

<sup>14</sup> For a general overview of South Africa's history and its influence on the interim and 1996 Constitutions, see Heinz Klug, *The Constitution of South Africa: A Contextual Analysis* (Hart 2010) ch 1.

<sup>15</sup> On the role of history and social context in South African constitutional interpretation, see Pierre de Vos, 'A Bridge Too Far? History as Context in the Interpretation of the South African Constitution' (2001) 17 SAJHR 1; Lourens du Plessis, 'Interpretation' in Stuart Woolman and others (eds), *Constitutional Law of South Africa* (2nd edn, Juta 2008).

<sup>16</sup> *Brink v Kitsboff NO* 1996 (4) SA 197 (CC) [40]–[42] (O'Regan J). See further Noël Mostert, *Frontiers: The Epic of South Africa's Creation and the Tragedy of the Xhosa People* (Jonathan Ball 1992); Nigel Worden, *The Making of Modern South Africa: Conquest, Apartheid, Democracy* (Blackwell 2007).

<sup>17</sup> *Brink* *ibid* [41].

<sup>18</sup> *ibid*.

<sup>19</sup> *ibid* [40].

<sup>20</sup> *ibid* [42] (emphasis added).

<sup>21</sup> See, for example, *Harksen* (n 7) [50] (Goldstone J), [92] (O'Regan J); *Bel Porto School Governing Body v Premier of the Western Cape Province* 2002 (3) SA 265 (CC) [153] (Mokgoro and Sachs JJ); *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) [27] (Moseneke J) (*Van Heerden*).

and commentators generally refer to this aim as ‘substantive equality’.<sup>22</sup> As I will explain further in chapter 4, the prevention of patterns of group disadvantage is a particular conception of substantive equality. However, substantive equality is so broad a term that I will prefer the relative specificity of ‘patterns of group disadvantage’ in this thesis.

The Constitutional Court has never fully explained what it means by ‘patterns of group disadvantage’. The Court perhaps feels that South Africa’s history and current reality lend it a raw intelligibility that cannot easily be reduced to a neat definition. One of the tasks of this thesis is to explore the Court’s use of this concept and to offer suggestions for how it can be enriched. As a result, its meaning will become clearer as this thesis progresses. Nevertheless, it is necessary to offer a brief outline of this idea to help anchor the discussion to follow.

The concept of ‘patterns of group disadvantage’ has three constitutive parts.<sup>23</sup> First, it is concerned with disadvantage experienced by ‘groups’ rather than disadvantage that is only experienced by individuals. We will see that this concern for group disadvantage does not necessarily commit the Court to the belief that groups have interests independent of the interests of their members. Instead, it reflects the concern that particularly severe harms to individuals arise when disadvantage is distributed along group lines. Second, the idea of ‘patterns’ of group disadvantage captures three important concerns: a) a concern for disadvantage that is ‘patterned’ along group lines, in the sense that members of some groups experience greater disadvantage than other groups; b) a concern that this disadvantage ‘patterns’ the lives of group members, seriously disadvantaging group members in similar ways across multiple areas of their lives; and c) a concern that this group-based disadvantage ‘patterns’ society, in the sense that it shapes and becomes embedded in legal, social,

---

<sup>22</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) [60] (Ackermann J) (*Sodomy Case*); *Van Heerden* *ibid*; *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23 (2 September 2014) [29] (Moseneke ACJ) (*Barnard*).

<sup>23</sup> Discussed further in chapter 4, text to n 41ff.

economic, and political institutions and behaviour, compounding and entrenching group disadvantage in multiple ways over a sustained period of time. Finally, ‘disadvantage’ can have many different meanings. We will see that the Court has primarily been concerned with disadvantage arising from prejudice and stereotyping. It has also shown some concern for socio-economic disadvantage. In chapter 7, I will argue that the Court should pay greater attention to other forms of disadvantage in its unfair discrimination analysis.

While maintaining that the prohibition of unfair discrimination seeks to prevent and address patterns of group disadvantage, the Constitutional Court proceeded to develop its *Harksen*<sup>24</sup> test for unfair discrimination, based on the value of human dignity.<sup>25</sup> As I will explain further in chapter 2, the *Harksen* test involves two-stages: a) determining whether there is discrimination; and b) establishing whether the discrimination is unfair.<sup>26</sup> The concept of human dignity is central to both stages of this test. In identifying discrimination, the Court considers whether there has been ‘differentiation’ based on grounds listed in section 9(3) of the Constitution or on grounds that are ‘analogous’ to these listed grounds. Differentiation on listed or analogous grounds is said to have the *potential* to violate human dignity.<sup>27</sup> The Court establishes whether the discrimination is unfair by considering whether it *actually* violates dignity.<sup>28</sup>

The difficulty with the *Harksen* test is that the Court has not offered much explicit guidance as to what is required to prove a violation of human dignity. It has provided a

---

<sup>24</sup> Above n 7.

<sup>25</sup> The Court adds that unfair discrimination may also involve violations that are ‘comparably serious’ to a violation of human dignity, although it has not given content to this qualification. I discuss this further in chapter 2, text to nn 46–48.

<sup>26</sup> *Harksen* (n 7) [54] (Goldstone J).

<sup>27</sup> *ibid* [47].

<sup>28</sup> *ibid* [51].

rough list of considerations to take into account,<sup>29</sup> but no clear indication of how these considerations are connected to dignity. In addition, the Court has offered few explanations of how this dignity-based test is connected to the broader aim of preventing patterns of group disadvantage. As I will explain in a moment, this connection has been the subject of much critical scrutiny and debate.

### 1.1.2 The Academic Response: The ‘Constructive Project’

Academic commentators in South Africa and abroad have commended the Constitutional Court for stating its commitment to addressing patterns of group disadvantage.<sup>30</sup> A central theme in this literature on the Court’s unfair discrimination case law is the desire to hold the Court to this commitment. Commentators have presented analysis and criticism of its decisions with the goal of assisting the Court to develop a jurisprudence that is better able to address patterns of group disadvantage.<sup>31</sup> This is what I will refer to as the ‘constructive project’ that has dominated this literature.

The Court’s ability to prevent and address patterns of group disadvantage depends, of course, on a host of variables. These include issues of access to courts, judicial selection and training, the available remedies, the state’s willingness to implement court orders, and

---

<sup>29</sup> These considerations are outlined in chapter 2, text to n 53.

<sup>30</sup> See, for example, Titia Loenen, ‘The Equality Clause in the South African Constitution: Some Remarks from a Comparative Perspective’ (1997) 13 SAJHR 401, 403–405; Cathi Albertyn and Beth Goldblatt, ‘Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality’ (1998) 14 SAJHR 248, 251–54, 256–57, 272; Pierre de Vos, ‘Equality For All? A Critical Analysis of the Equality Jurisprudence of the Constitutional Court’ (2000) 63 THRHR 62, 66–68; Evadné Grant and Joan Small, ‘Disadvantage and Discrimination: The Emerging Jurisprudence of the South African Constitutional Court’ (2000) 51 NILQ 174, 176–78; Pierre de Vos, ‘Substantive Equality After *Grootboom*: The Emergence of Social and Economic Context as a Guiding Value in Equality Jurisprudence’ [2001] Acta Juridica 52, 53; Saras Jagwanth, ‘Expanding Equality’ [2005] Acta Juridica 131, 132–34; Catherine Albertyn, ‘Substantive Equality and Transformation in South Africa’ (2007) 23 SAJHR 253, 254; Evadné Grant, ‘Dignity and Equality’ (2007) 7 HRLRev 299, 300; Rósaan Krüger, ‘Equality and Unfair Discrimination: Refining the *Harksen* Test’ (2011) 128 SALJ 479, 489–90. For a rare note of caution on this aim see Warren Freedman, ‘Understanding the Right to Equality’ (1998) 115 SALJ 243, 251.

<sup>31</sup> See, for example, authors cited in nn 46–52 below.

broader questions about law's ability to effect social change.<sup>32</sup> These variables all deserve greater attention in taking the constructive project forward. However, it is important not to lose sight of the variable that is most within the Constitutional Court's control: how it identifies unfair discrimination in the cases before it. This variable is the focus of this thesis.

The Court has established a good record in identifying and striking down unfair discrimination that threatens to entrench patterns of group disadvantage.<sup>33</sup> Significant achievements over the past two decades include dismantling racially discriminatory apartheid-era laws;<sup>34</sup> recognising new grounds of discrimination, including citizenship<sup>35</sup> and HIV status;<sup>36</sup> taking steps to address gender discrimination in African customary law;<sup>37</sup> and producing a celebrated line of cases on gay and lesbian rights,<sup>38</sup> resulting in the legalisation of same-sex marriage.<sup>39</sup>

---

<sup>32</sup> See further Albertyn, 'Substantive Equality and Transformation' (n 30) 253–54, 276; Sandra Fredman, 'Gender and Transformation in the South African Constitutional Court' in Oscar Vilhena, Upendra Baxi and Frans Viljoen (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (PULP 2013) 245–46.

<sup>33</sup> For broadly positive appraisals of the Court's record see, for example, Joan Small and Evadne Grant, 'Dignity, Discrimination, and Context: New Directions in South African and Canadian Human Rights Law' (2005) 6 HRLRev 25, 54; Grant, 'Dignity and Equality' (n 30) 325–29; Anne Smith, 'Constitutionalising Equality: The South African Experience' (2008) 9 IJDL 203; Fredman *ibid* 247–55.

<sup>34</sup> See, for example, *Moseneke v Master of the High Court* 2001 (2) SA 18 (CC); *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC); *Mabaso v Law Society, Northern Provinces* 2005 (2) SA 117 (CC); *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC); *Mvumvu v Minister of Transport* 2011 (2) SA 473 (CC).

<sup>35</sup> See *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* 1998 (1) SA 745 (CC); *Khosa & others v Minister of Social Development & others* 2004 (6) SA 505 (CC).

<sup>36</sup> *Hoffmann v South African Airways* 2001 (1) SA 1 (CC).

<sup>37</sup> *Bhe* (n 34); *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC); *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC).

<sup>38</sup> *Sodomy Case* (n 22); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC); *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC); *Satchwell v President of the Republic of South Africa* 2003 (4) SA 266 (CC); *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC); *J v Director General, Department of Home Affairs* 2003 (5) SA 621 (CC); *Gory v Kolver* NO 2007 (4) SA 97 (CC); *Geldenhuys v National Director of Public Prosecutions* 2009 (1) SACR 231 (CC).

<sup>39</sup> *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC), which resulted in the Civil Union Act 17 of 2006.

While the Court has achieved a great deal, a central concern has been the Court's failure to address patterns of group disadvantage in a small but significant number of cases. Critical attention has largely focused on a set of five decisions: *Hugo*,<sup>40</sup> *Harksen*,<sup>41</sup> *Jordan*,<sup>42</sup> *Volks*,<sup>43</sup> and *Union of Refugee Women*.<sup>44</sup> I will refer to these as the 'controversial cases' and they will feature prominently in this thesis. In these five cases, slim majorities found discrimination to be fair despite clear indications that it entrenched wider patterns of group disadvantage. These decisions have led many commentators to express their frustration at what Henk Botha<sup>45</sup> has described as 'the gap between the promise and the reality' of the Court's jurisprudence.<sup>46</sup> Other decisions have been criticised for the Court's flawed reasoning in reaching otherwise laudable outcomes,<sup>47</sup> or for identifying unfair discrimination where some argue that it should not have done so.<sup>48</sup> However, critical attention has rightly focused on the five controversial cases as the failure to address patterns of group

---

<sup>40</sup> *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).

<sup>41</sup> Above n 7.

<sup>42</sup> *S v Jordan* 2002 (6) SA 642 (CC).

<sup>43</sup> *Volks NO v Robinson* 2005 (5) BCLR 446 (CC).

<sup>44</sup> *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 (4) SA 395 (CC).

<sup>45</sup> Henk Botha, 'Equality, Dignity, and the Politics of Interpretation' (2004) 19 SAPL 724.

<sup>46</sup> See also Albertyn and Goldblatt, 'Facing the Challenge' (n 30) 261–62; Saras Jagwanth and Christina Murray, 'Ten Years of Transformation: How Has Gender Equality in South Africa Fared?' (2002) 14 CJWL 255, 282–84; Michelle O'Sullivan and Christina Murray, 'Brooms Sweeping Oceans? Women's Rights in South Africa's First Decade of Democracy' [2005] Acta Juridica 1, 16; Jagwanth, 'Expanding Equality' (n 30) 135; Albertyn, 'Substantive Equality and Transformation' (n 30) 258, 276; Catherine Albertyn, 'Equality' in Elsje Bonthuys and Cathi Albertyn (eds), *Gender, Law and Justice* (Juta 2007) 103–105; Elsje Bonthuys, 'Institutional Openness and Resistance to Feminist Arguments: The Example of the South African Constitutional Court' (2008) 20 CJWL 1, 4–5, 17ff; Fredman (n 32) 255ff.

<sup>47</sup> See, for example, Albertyn, 'Substantive Equality and Transformation' *ibid* 270–73, for criticism of the heteronormativity displayed in the Court's sexual orientation decisions.

<sup>48</sup> See the criticism of *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) in Albertyn and Goldblatt, 'Facing the Challenge' (n 30) 259–60; Saras Jagwanth, 'What is the Difference? Group Categorisation in *Pretoria City Council v Walker* 1998 (2) SA 363 (CC)' (1999) 15 SAJHR 200.

disadvantage is, in almost all cases, a more serious concern than imperfect achievement of this aim.

Commentators have attempted to diagnose and fix this ‘gap’ between the Court’s aims and its decisions.<sup>49</sup> Particular attention has been given to human dignity’s role in the Court’s reasoning. Many have argued that dignity is a malleable norm that facilitates wildly fluctuating reasoning,<sup>50</sup> or that it is an individualistic value that is inconsistent with a broader focus on group disadvantage.<sup>51</sup> Others have come to the defence of human dignity, arguing that it is capable of being understood in ways that are sensitive to group disadvantage.<sup>52</sup> The nature of human dignity and its place in the Court’s reasoning are important issues that I will return to at various points in this thesis.<sup>53</sup>

The constructive project in the unfair discrimination literature reflects a broader commitment to ‘transformative constitutionalism’ in South African constitutional scholarship.<sup>54</sup> First popularised by Karl Klare,<sup>55</sup> ‘transformative constitutionalism’ refers to the use of constitutional law to undo the harmful legacy of apartheid by advancing equality, accountability, democracy, and related values.<sup>56</sup> The precise aims and methods of the

---

<sup>49</sup> See, for example, Albertyn and Goldblatt, ‘Facing the Challenge’ *ibid* 261–62, 272–74; Botha (n 45) 743–46, 751; Albertyn, ‘Substantive Equality and Transformation’ (n 30) 261–70; Bonthuys (n 46) 17–30; Marius Pieterse, ‘Finding for the Applicant? Individual Equality Plaintiffs and Group-Based Disadvantage’ (2008) 24 SAJHR 397, 418–23; Fredman (n 32) 255–64.

<sup>50</sup> See, for example, Dennis Davis, ‘Equality: The Majesty of Legoland Jurisprudence’ (1999) 116 SALJ 398, 413.

<sup>51</sup> See, for example, Albertyn and Goldblatt, ‘Facing the Challenge’ (n 30) 257–58.

<sup>52</sup> See Susie Cowen, ‘Can “Dignity” Guide South Africa’s Equality Jurisprudence?’ (2001) 34 SAJHR 34; Grant, ‘Dignity and Equality’ (n 30); Laurie Ackermann, *Human Dignity: Lodestar for Equality in South Africa* (Juta 2012).

<sup>53</sup> Discussed further in chapters 3, 4, 7, and 8.

<sup>54</sup> See generally Oscar Vilhena, Upendra Baxi and Frans Viljoen (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (PULP 2013). Not all contributors to the unfair discrimination literature are South African, but arguably all have been influenced by this transformative approach.

<sup>55</sup> Karl E Klare, ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 SAJHR 146.

<sup>56</sup> See Klare *ibid* 150; Marius Pieterse, ‘What Do We Mean When We Talk About Transformative Constitutionalism?’ (2005) 20 SAPL 155; Pius Langa, ‘Transformative Constitutionalism’ (2006) 3 *Stell L Rev* 351, 351–54.

transformative approach to constitutional scholarship are open to debate,<sup>57</sup> but it is possible to distil at least two central characteristics.<sup>58</sup> The first is the firm belief that constitutional scholarship has a role to play in promoting the transformation of South African society. The implicit idea underpinning this scholarship is that there is value in pursuing understanding for its own sake, and truth should never be sacrificed for usefulness, but understanding has greatest value where it assists in solving concrete problems. Second, academic analysis and criticism of judgments is seen as an important way of holding judges to a transformative understanding of the Constitution.<sup>59</sup> As a result, members of the Constitutional Court and the wider judiciary are part of the intended audience of this scholarship and have also been active contributors to it in their extra-judicial writing.<sup>60</sup> This approach is by no means unique to South Africa, but it dominates South African constitutional scholarship to an extent that few other jurisdictions have matched. The scholarship on unfair discrimination pioneered this transformative approach<sup>61</sup> and continues to reflect its key characteristics.<sup>62</sup>

This thesis seeks to contribute to the constructive project and will reflect these characteristics of transformative constitutional scholarship. Like most commentators, I share the assumption that the prevention of patterns of group disadvantage ought to be the central aim of the prohibition of unfair discrimination. I also agree that the Court has generally been

---

<sup>57</sup> Dikgang Moseneke, 'Transformative Adjudication' (2002) 18 SAJHR 309, 315. See further Theunis Roux, 'Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction Without a Difference?' (2009) 20 *Stell L Rev* 258.

<sup>58</sup> There has been surprisingly little self-reflective analysis on what the transformative approach to constitutional scholarship entails. What follows are general impressions derived from a broad reading of this literature.

<sup>59</sup> See Pieterse, 'What Do We Mean When We Talk About Transformative Constitutionalism?' (n 56) 164, who refers to judges and scholars as part of a common 'community of legal interpreters'.

<sup>60</sup> In the context of unfair discrimination, see, for example, Ackermann (n 52); Catherine O'Regan, 'Undoing Humiliation, Fostering Equal Citizenship: Human Dignity in South Africa's Sexual Orientation Equality Jurisprudence' (2013) 37 *NYU Rev L & Soc Change* 307.

<sup>61</sup> See, in particular, Albertyn and Goldblatt, 'Facing the Challenge' (n 30); Albertyn, 'Substantive Equality and Transformation' (n 30).

<sup>62</sup> For a more recent contribution, see Fredman (n 32).

on the right track in advancing this aim. Furthermore, I share the concern over the Court's deviation from this aim in its controversial cases. My central contribution will be to provide a deeper understanding of the Court's reasoning than is offered in the existing literature. I will then use this understanding to offer focused proposals for how the Court's reasoning ought to develop. I will briefly explain these intended contributions in more depth.

### 1.1.3 Advancing the Constructive Project

Given the Constitutional Court's generally impressive record thus far, it will be valuable to understand and distil its reasoning. While the Court has reached laudable outcomes, it has offered litigants and lower courts little explicit guidance in identifying unfair discrimination, leaving them with the difficult task of sifting through its case law in search of direction. The current members of the Constitutional Court face a similar challenge, as the original pioneers of the Court's unfair discrimination jurisprudence have long since retired.<sup>63</sup> The central problem is that while the Court has made human dignity the basis of its *Harksen* test, it has offered no clear explanation of what is required to prove a violation of human dignity.

The current literature on the Court's case law has offered limited insights into how the Court reaches the conclusion that human dignity has been violated. A sizeable body of doctrinal scholarship has emerged that offers a helpful collation and summary of the Court's existing case law.<sup>64</sup> However, contributors have not attempted to offer a complete account of the Court's reasoning and, as I will show, have often overlooked key features of this reasoning. Much of the other scholarship is explicitly normative. These contributions start by developing theories of how we ought to understand equality, human dignity, or unfair

---

<sup>63</sup> They include Chaskalson CJ, Langa CJ, Ngcobo CJ, Goldstone, Ackermann, O'Regan, Mokgoro, and Sachs JJ.

<sup>64</sup> See, for example, Gretchen Carpenter, 'Equality and Non-Discrimination in the New South African Constitutional Order (1): The Early Cases' (2001) 64 THRHR 409 (one of four articles in a series); Iain Currie and Johan De Waal, *The Bill of Rights Handbook* (6th edn, Juta 2013) ch 9; Catherine Albertyn and Beth Goldblatt, 'Equality' in Stuart Woolman and others (eds), *Constitutional Law of South Africa* (2nd edn, Juta 2008); Krüger (n 30).

discrimination and then proceed to evaluate and criticise a selection of the Court's judgments against these theories.<sup>65</sup> In the process, they offer an incomplete understanding of how the Court has been reasoning in its existing case law. This is no criticism of these contributions. This scholarship remains essential in supporting the development of a nascent unfair discrimination jurisprudence. But a different type of contribution is now necessary and possible. The Court has developed a sizeable body of case law in the 17 years since establishing its *Harksen* test, allowing for more detailed work to understand precisely how it has been reasoning. I seek to offer this account in this thesis.

A deeper understanding of the Court's reasoning will allow for focused proposals for how the Court's reasoning ought to develop. In particular, I will build and extend upon the criticisms of the five controversial cases in the existing literature. I will offer a clearer diagnosis of the problems in these cases and fresh prescriptions for how to address these problems. I will go on to use this understanding of the Court's reasoning and these proposals to offer a restatement of the *Harksen* test that will offer better guidance for identifying unfair discrimination.

With these intended contributions in mind, I will now explain my methodology in greater detail.

## 1.2 METHODOLOGY

My methodology primarily involves *doctrinal* and *normative* analysis of the Constitutional Court's case law. In addition, I will use *comparative law* and *analytic philosophy* as aids to this work. In this section, I will explain these four components of my methodology. Before doing so, I will briefly outline the scope of my enquiry in more detail.

---

<sup>65</sup> See, for example, Albertyn and Goldblatt, 'Facing the Challenge' (n 30); Karen van Marle, 'Equality: An Ethical Interpretation' (2000) 63 THRHR 595; Sandra Fredman, 'Redistribution and Recognition: Reconciling Inequalities' (2007) 23 SAJHR 214; Albertyn, 'Substantive Equality and Transformation' (n 30); Henk Botha, 'Equality, Plurality and Structural Power' (2009) 25 SAJHR 1.

### 1.2.1 Scope

This thesis studies the Constitutional Court's application of the *Harksen* test in identifying unfair discrimination perpetrated by the state. I have made six key choices in defining the scope of this enquiry.

First, I will investigate the Constitutional Court's case law rather than lower court decisions. As the highest court in South Africa,<sup>66</sup> the Constitutional Court has taken the lead in giving content to the constitutional prohibition of unfair discrimination and lower courts have closely followed 'the trends and patterns of reasoning' it has set.<sup>67</sup>

Second, I focus on the constitutional prohibition of unfair discrimination rather than the statutory prohibitions.<sup>68</sup> As I explain further in chapter 2, the Constitutional Court's constitutional jurisprudence has shaped how these statutory prohibitions have been interpreted and applied by lower courts, making it important to develop a better understanding of the Court's reasoning.

Third, my analysis addresses unfair discrimination by organs of state,<sup>69</sup> a restriction made necessary by the fact that the Court has not yet dealt with claims of unfair discrimination between private persons.<sup>70</sup> Furthermore, the horizontal application of this prohibition raises its own particular issues and challenges which I will leave for a future project.<sup>71</sup>

---

<sup>66</sup> See n 2 above.

<sup>67</sup> Bonthuys (n 46) fn 9.

<sup>68</sup> Employment Equity Act 55 of 1998, s 6 and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, ss 6 and 14.

<sup>69</sup> As defined in s 239 of the Constitution.

<sup>70</sup> See Albertyn and Goldblatt, 'Equality' (n 64) 35-83 (OS 03-07).

<sup>71</sup> See further Ackermann (n 52) ch 5.

Fourth, my analysis concentrates on the direct application of the prohibition of unfair discrimination rather than its indirect application in interpreting other constitutional rights and legislation, or in developing the common law.<sup>72</sup> The indirect application cases are still of interest and I will discuss some of the most notable decisions along the way, but my principal concern is to understand how the Court identifies unfair discrimination using its *Harksen* test.

Fifth, my analysis focuses on how the Court goes about identifying unfair discrimination rather than how it fashions appropriate remedies. The two topics are interlinked, but a full discussion of remedies is beyond the scope of this thesis.

Finally, my analysis will touch on affirmative action, but I will leave further analysis of how the Court ought to scrutinise affirmative action for future work. As I will explain in chapter 2, the Court has created a separate test for legitimate affirmative action, the *Van Heerden*<sup>73</sup> test. If an affirmative action measure passes this test it is shielded from further scrutiny under the *Harksen* test. I will show that the *Van Heerden* test and the Court's broader reflections on affirmative action help to cast some light on its approach to unfair discrimination. However, the *Van Heerden* test remains ill-defined, as it has only been applied in two cases,<sup>74</sup> making it difficult to evaluate the Court's approach. The most recent application of this test was in the Court's much anticipated judgment in *Barnard*,<sup>75</sup> delivered in September 2014. This judgment was expected to clarify the content and application of the *Van Heerden* test, but the majority judgment offered limited analysis of this test and the

---

<sup>72</sup> Constitution, s 39. On the distinction between direct and indirect application in South African constitutional law, see Stuart Woolman, 'Application' in Stuart Woolman and others (eds), *Constitutional Law of South Africa* (Juta 2008); Currie and De Waal (n 64) ch 3.

<sup>73</sup> Above n 21.

<sup>74</sup> *Van Heerden* (n 21) and *Barnard* (n 22).

<sup>75</sup> Above n 22. A challenge to the National Police Commissioner's decision not to promote a white woman to a vacant position, made in pursuit of racial representation targets set out in the South African Police Service's employment equity plan. The Court dismissed the challenge.

separate concurring judgments each applied different standards of review, adding to the confusion.<sup>76</sup> As a result, the Court's test for legitimate affirmative action remains something of a moving target. Therefore, my thesis will concentrate on understanding the Court's far more extensive body of case law applying the *Harksen* test as this will lay the basis for further work on the *Van Heerden* test.

I will now turn to explain the four components of my methodology.

### 1.2.2 Doctrinal Analysis

My efforts to understand the Court's reasoning in its unfair discrimination cases will primarily involve doctrinal analysis. At its core, doctrinal analysis involves turning disorganised and often fragmentary case law and other legal materials (the 'doctrine') into something more 'intelligible'.<sup>77</sup> This task is typically associated with textbook-style description, categorisation, and summarising of legal materials. However, those who use doctrinal analysis generally hold higher ambitions, aiming to develop theories about laws or areas of law.<sup>78</sup>

In broad terms, a theory of a law or area of law is a 'coherent set of true, general and salient propositions' about these phenomena.<sup>79</sup> Doctrinal analysis can be used in building many kinds of theories, from justificatory theories that find the set of principles that best

---

<sup>76</sup> Moseneke ACJ, writing for the majority, suggested that the *Van Heerden* test applies in assessing the validity of affirmative action measures, such as employment equity plans, but indicated that a different test is required in assessing their implementation. He indicated that this test requires rationality, as a bare minimum ([39]), but refrained from deciding the content of the test as he held that the issue of implementation was not properly before the Court. Cameron J, Froneman J, and Majiedt AJ suggested that a 'fairness' analysis is required in assessing implementation ([98]ff). In contrast, Van der Westhuizen J applied the *Van Heerden* test to this question, but suggested that an additional proportionality analysis is also required ([142]ff).

<sup>77</sup> Christopher McCrudden, 'Legal Research and the Social Sciences' [2006] LQR 632, 634; Mark Van Hoecke, 'Preface' in Mark Van Hoecke (ed), *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline?* (Hart 2011) vi.

<sup>78</sup> Mark Van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Mark Van Hoecke (ed), *Methodologies of Legal Research* (Hart 2011) 15.

<sup>79</sup> Tarunabh Khaitan, 'Prelude to a Theory of Discrimination Law' in Deborah Hellman and Sophia R Moreau (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013) 157–58.

justify a particular law or area of law, to historical theories that explain how and why the law came to be the way it is. I am interested in developing a theory of the Court's reasoning in unfair discrimination cases that reveals precisely how the Court goes about identifying unfair discrimination.

The broad aim of my doctrinal analysis and theory-building is to make the best sense of the Court's reasoning. This involves presenting an account of the Court's reasoning that both *fits* the case law and gives it a degree of *coherence*.<sup>80</sup> Fit requires that my theory must accord with the settled and central features of the Court's reasoning, although it need not square with every last detail in the case law.<sup>81</sup>

Coherence is a more complex idea.<sup>82</sup> At its most basic, it requires that my account of the Court's reasoning should not be internally contradictory. At a deeper level, coherence involves showing the link between the Court's reasoning and its stated purpose of preventing and addressing patterns of group disadvantage. There is a degree of back-and-forth here as a better understanding of this purpose will offer a better understanding of the Court's reasoning and vice versa.<sup>83</sup> Several qualifications are necessary though. First, to say that addressing patterns of group disadvantage is the purpose of the prohibition is not to say that every feature of the Court's reasoning is directed at attaining this purpose.<sup>84</sup> The Court's

---

<sup>80</sup> This reflects Dworkin's influential account of theory-building in Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) chs 2–3. However, I disagree with Dworkin's view that legal theories must not only *fit* the legal practice but must also *justify* it (48, 53, 66, 190, 225–26). See further Khaitan *ibid* 154–57. I disagree that theories of law are necessarily justificatory. I happen to believe that the Constitutional Court's approach to unfair discrimination is generally justified, but it is not necessary to hold this belief to develop a theory of its Court's reasoning.

<sup>81</sup> Dworkin *ibid* 66.

<sup>82</sup> See further Julie Dickson, 'Interpretation and Coherence in Legal Reasoning' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Stanford 2001) <<http://plato.stanford.edu/archives/spr2010/entries/legal-reas-interpret/>> accessed 29 September 2014.

<sup>83</sup> This has parallels with Rawls' account of the 'reflective equilibrium', see John Rawls, *A Theory of Justice* (OUP 1999) 19.

<sup>84</sup> In Hart's terms, we can distinguish between the 'general justifying aim' of the prohibition of unfair discrimination and the reasons for particular aspects of the Court's reasoning in applying this prohibition. HLA Hart, 'Prolegomenon to the Principles of Punishment' (1959) 60 *Proceedings of the Aristotelian Society* 1, 8–

reasoning is also influenced by a host of other considerations and institutional constraints which shape its approach in various ways. Second, coherence does not involve plastering over cracks in the Court's reasoning. My analysis will show that there are times where the Court's commitment to addressing group disadvantage has wavered. I will also indicate where the Court's reasoning needs to be developed and revised to be more consistent with this purpose. Third, coherence does not mean overlooking deficiencies in the Court's reasoning, but it does require a degree of 'interpretive charity'.<sup>85</sup> I understand charity to require that where the Court's reasoning is ambiguous, an interpretation that is most consistent with the stated aim of preventing patterns of group disadvantage (or other intelligible purposes) should be preferred.<sup>86</sup>

As is evident from this discussion, my doctrinal analysis will be laden with many evaluative judgments about what makes the best sense of the Court's case law. The question is whether and to what extent these evaluative judgments may tip over into silent judgments about what the case law ought to be.<sup>87</sup> This is the subject of great debate in the literature on doctrinal analysis,<sup>88</sup> a debate that has its roots in deeper disputes in general jurisprudence.<sup>89</sup> I cannot hope to and will not attempt to resolve these debates here. Instead, I proceed from the largely uncontroversial position that the task of understanding the Court's reasoning is not the same task as stating how the Court ought to be reasoning, although there are

---

10. This idea is developed further in Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015) (forthcoming) ch 1.

<sup>85</sup> See Frank I Michelman, 'On the Uses of Interpretive "Charity": Some Notes on Application, Avoidance, Equality and Objective Unconstitutionality from the 2007 Term of the Constitutional Court of South Africa' (2008) 1 Con Court Rev 1, 3–5.

<sup>86</sup> *ibid* 4–5.

<sup>87</sup> As Dickson points out, not all evaluative judgments about the law are judgments about its moral merits or what it ought to be. See Julie Dickson, *Evaluation and Legal Theory* (Hart 2001) ch 3, especially 51–57.

<sup>88</sup> See, for example, the debate between Jaap Hage, 'The Method of a Truly Normative Legal Science' and Anne Ruth Mackor, 'Explanatory Non-Normative Legal Doctrine: Taking the Distinction between Theoretical and Practical Reason Seriously' in Mark Van Hoecke (ed), *Methodologies of Legal Research* (Hart 2011).

<sup>89</sup> For an overview of these debates see Dickson, *Evaluation and Legal Theory* (n 87) ch 2.

overlaps in practice. While there is a distinction to be made between my doctrinal and normative analysis, my doctrinal work will not take place in a normative vacuum, as I will now explain.

### **1.2.3 Normative Analysis**

This thesis involves two types of normative judgments. First, a set of normative assumptions provide the rationale for my doctrinal work. I assume that the Court's stated goal of preventing and addressing patterns of group disadvantage is the appropriate purpose for the prohibition of unfair discrimination.<sup>90</sup> I also assume that the Court has generally been effective in advancing this purpose in that it has successfully identified and invalidated unfair discrimination that threatened to create or entrench patterns of group disadvantage. This is what makes the detailed doctrinal analysis that I will provide so worthwhile, as a firmer grasp of the Court's reasoning will give lower courts and the Constitutional Court itself greater guidance in maintaining this admirable record. Second, having gained a better understanding of the Court's reasoning, I will evaluate central features of the Court's reasoning and offer proposals for how it ought to develop.

These proposals for developing the Court's reasoning will be based on two primary values: the need to address patterns of group disadvantage and the importance of developing a 'culture of justification'. I briefly discussed the need to address patterns of group disadvantage above,<sup>91</sup> but the concept of a 'culture of justification' requires further elaboration. Etienne Mureinik popularised this idea in his influential characterisation of the South African Constitution as marking a shift from an apartheid-era 'culture of authority' to

---

<sup>90</sup> Text to nn 30ff.

<sup>91</sup> Text to nn 23ff above.

a post-apartheid ‘culture of justification’,<sup>92</sup> a characterisation that the Court has repeatedly endorsed.<sup>93</sup> This ‘culture of justification’ requires that all constitutional rights and provisions should be interpreted and applied in ways that hold the state accountable, requiring it to justify its actions by presenting reasons rather than mere assertions of authority. In this vein, the Constitutional Court insists that all exercises of public power are subject to ‘constitutional control’,<sup>94</sup> with the result that courts can, at minimum, insist that the state give reasons for all its actions.<sup>95</sup> The Constitutional Court has stressed that the need for justification extends to the courts, requiring judges to provide transparent, convincing reasoning for their decisions.<sup>96</sup> Former Chief Justice Langa emphasised that this transparency is—

vital if respect for court decisions is to flow from the honesty and cogency of the reasons given for them rather than the authority with which they are given.<sup>97</sup>

I will build on these ideas to show how the Court needs to do more to hold other branches of state to account, and to ensure greater accountability and transparency in its own reasoning.

The values of preventing and addressing patterns of group disadvantage and promoting accountability both leave much room for debate over their meaning and application. In the chapters to follow, I will advance arguments for how these values should

---

<sup>92</sup> Etienne Mureinik, ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 SAJHR 31. See further David Dyzenhaus, ‘Law as Justification: Etienne Mureinik’s Conception of Legal Culture’ (1998) 14 SAJHR 11; Catherine O’Regan, ‘A Forum for Reason: Reflections on the Role and Work of the Constitutional Court’ (2012) 28 SAJHR 116.

<sup>93</sup> See, for example, *S v Makwanyane* 1995 (3) SA 391 (CC) [156] (Ackermann J); *Ferreira NO v Levin* 1996 (1) SA 984 (CC) [51] (Ackermann J); *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) [25] (Ackermann, O’Regan, and Sachs JJ); *Matatiele Municipality v President of the Republic of South Africa* 2006 (5) SA 47 (CC) [107]–[110] (Sachs J).

<sup>94</sup> *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte Application of the President of the Republic of South Africa* 2000 (2) SA 674 (CC) [20].

<sup>95</sup> *ibid* [90]. This flows from the founding value of the rule of law, contained in s 1(c) of the Constitution.

<sup>96</sup> *Mphahlele v First National Bank* 1999 (2) SA 667 (CC) [12].

<sup>97</sup> Langa (n 56) 353.

be understood and how they require the Court to develop its reasoning. Comparative law and analytic philosophy will serve as useful aids in making these normative arguments, in addition to assisting with my doctrinal analysis.

#### 1.2.4 Comparative Law

The comparative law component of my thesis will use the Supreme Court of Canada's discrimination<sup>98</sup> jurisprudence under section 15 of the Canadian Charter<sup>99</sup> to better understand and develop the South African Court's reasoning.<sup>100</sup>

As I explain in greater detail in chapter 2, the Canadian Court's case law has had a significant influence on the South African Court's jurisprudence.<sup>101</sup> This has produced many similarities in the way that the Canadian and South African Courts go about identifying the wrongs of 'discrimination' and 'unfair discrimination' respectively. However, the South African Court's jurisprudence is by no means a copy of the Canadian approach. As I will show, the South African Court was always selective in what it took from the Canadian case law and many important differences have emerged between the two bodies of case law over the years.

---

<sup>98</sup> As I explain further in chapter 2, the Canadian Court has interpreted 'discrimination' in a similar way to the South African Constitutional Court's interpretation of 'unfair discrimination', meaning distinctions on the basis of protected grounds that are wrongful. In contrast, the South African Court understands discrimination as any distinction on the basis of protected grounds, whether wrongful or not. I will use the South African meaning of discrimination in this thesis, unless the context indicates otherwise.

<sup>99</sup> Charter of Rights and Freedoms, enacted in Part I of the Constitution Act 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11.

<sup>100</sup> I will refer to the Constitutional Court of South Africa and the Supreme Court of Canada as the 'South African Court' and 'Canadian Court' in this thesis.

<sup>101</sup> Discussed further in chapter 2, text to n 60ff. Section 39(1) of the South African Constitution expressly invites courts to look to comparative law for guidance in interpreting and applying the Bill of Rights:

When interpreting the Bill of Rights, a court, tribunal or forum—

...

- (b) must consider international law; and
- (c) *may consider foreign law*. (emphasis added)

Comparisons with the Canadian Court's discrimination case law will assist my doctrinal analysis in three primary ways. First, we can gain a better understanding of the South African Court's approach by studying the selective way in which it has drawn on the Canadian Court's jurisprudence. What Canadian judgments it cited, what features of the Canadian approach it adopted, and what judgments and approaches it ignored will all be revealing.<sup>102</sup> Second, comparisons between the South African and Canadian approaches will help to cast the South African Court's reasoning in sharper relief. Its approach to human dignity, comparators, grounds of discrimination, and justification, among many others, will all become clearer through comparative analysis. This is one of the most common uses of comparative law as a tool for sharpening one's understanding, drawing attention to features of the case law that may be taken for granted if the jurisdiction was studied in isolation.<sup>103</sup> Third, comparisons will assist in understanding common phenomena in the South African and Canadian Courts' reasoning. This will prove particularly useful in understanding the Courts' shared 'expressive concerns'; concerns over the meanings and messages expressed by laws and actions that appear in their case law.<sup>104</sup>

I will also use the Canadian case law in my normative analysis of the South African Court's reasoning. Differences between the South African and Canadian approaches present an opportunity to assess the relative merits of the South African Court's reasoning, such as its use of human dignity, its methods in identifying messages and meanings, and its understanding of patterns of group disadvantage. Furthermore, the rich academic commentary on the Canadian case law offers helpful insights for evaluating and developing

---

<sup>102</sup> These so-called acts of 'nonborrowing' can help to reveal the judges' implicit preferences. See further Lee Epstein and Jack Knight, 'Constitutional Borrowing and Nonborrowing' (2003) 1 *ICON* 196, 197–98.

<sup>103</sup> Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Tony Weir tr, 3rd edn, OUP 1998) 21; Esin Örucü, 'Developing Comparative Law' in Esin Örucü and David Nelken (eds), *Comparative Law: A Handbook* (Hart 2007) 53–54.

<sup>104</sup> The subject of chapter 6.

the South African jurisprudence.<sup>105</sup> However, I will remain mindful of the dangers of evaluative comparisons.<sup>106</sup> What may have merit in Canada may not have merit in South Africa, requiring a constant awareness of the particular demands of the South African constitutional text and context.<sup>107</sup>

My analysis covers a broader range of issues than the existing comparative literature on the South African and Canadian Courts' jurisprudence, which largely concentrates on the merits of human dignity.<sup>108</sup> While my analysis will be more extensive, it bears repeating that the focus of this thesis is the South African Constitutional Court's unfair discrimination jurisprudence. I will analyse the Canadian Court's jurisprudence and engage with the attendant literature only so far as this is capable of contributing a better understanding and evaluation of the South African Court's reasoning. My thesis may reflect some light back on the Canadian jurisprudence, but this is not my primary aim.

### **1.2.5 Analytic Philosophy**

At various points I will draw on analytic philosophy, especially the growing literature on the philosophical foundations of discrimination law,<sup>109</sup> to assist my doctrinal and normative analysis of the South African Court's reasoning.

---

<sup>105</sup> For a helpful overview of the Canadian case law and key debates in the literature, see Jennifer Koshan and Jonnette Watson Hamilton, 'The Continual Reinvention of Section 15 of the Charter' (2013) 64 U New Brunswick L J 19.

<sup>106</sup> See further Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 MLR 1.

<sup>107</sup> *ibid* 27.

<sup>108</sup> See, for example, Small and Grant (n 33); Grant, 'Dignity and Equality' (n 30); Rory O'Connell, 'The Role of Dignity in Equality Law: Lessons from Canada and South Africa' (2008) 6 ICON 267; Andrew Foster, 'The Role of Dignity in Canadian and South African Gender Equality Jurisprudence' (2008) 17 Dalhousie J Legal Stud 73; Murray Wesson, 'Contested Concepts: Equality and Dignity in the Case-Law of the Canadian Supreme Court and the South African Constitutional Court' in András Sajó and Renáta Uitz (eds), *Constitutional Topography: Values and Constitutions* (Eleven International 2010).

<sup>109</sup> See generally Deborah Hellman and Sophia R Moreau, 'Introduction' in Deborah Hellman and Sophia R Moreau (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013).

Analytic philosophy is characterised by the use of conceptual analysis to ‘clarify the content of our concepts and to make explicit the assumptions and implications’ involved in adopting particular conceptions.<sup>110</sup> The Constitutional Court’s unfair discrimination jurisprudence is thick with complex concepts such as human dignity, equality, and patterns of group disadvantage. To understand the Court’s reasoning we need to understand how it has given content to and connected these concepts. This requires an awareness of the broad structure of these concepts and the different choices that the Court has made in giving content to them:

[T]he meaning which . . . judges give to key concepts, and the consequent boundaries which they draw around terms such as ‘discrimination’ and ‘equality’, will depend in part on theoretical and extra-legal notions of these concepts. Clarity about the meaning of these concepts will be necessary for any critical understanding of their use in legal doctrine.<sup>111</sup>

This clarity is not only helpful in making sense of concepts that the Court explicitly uses in its case law. It will also assist in understanding aspects of its reasoning that are not articulated or explained in any detail, such as its concern for the messages expressed by discrimination. In this way, analytic philosophy will lend my analysis a degree of depth going beyond what is offered in the existing literature on the Court’s unfair discrimination jurisprudence.

Analytic philosophy is not only useful for understanding the Court’s reasoning, but it also offers insights for developing it. Sophia Moreau suggests that by making explicit the different choices that are available in giving content to our concepts we can ‘make more informed choices about which meanings are most appropriate in a particular legal context’.<sup>112</sup> My normative analysis in this thesis will only scratch the surface of the rich debates in the

---

<sup>110</sup> Sophia R Moreau, ‘Analytic Philosophy and the Interpretation of Constitutional Rights’ in Logan Atkinson and Diana Majury (eds), *Law, Mystery, and the Humanities* (University of Toronto Press 2008) 67. On the concept/conception distinction, see Dworkin (n 80) 70–72, 74.

<sup>111</sup> Nicholas Bamforth, Maleiha Malik and Colm O’Cinneide, *Discrimination Law: Theory and Context* (Sweet & Maxwell 2008) 171.

<sup>112</sup> Moreau (n 110) 68.

philosophical foundations of discrimination law literature. Nevertheless, this thesis will help to indicate where further philosophical work is required.

Having outlined the components of my methodology, I will now explain my argument and the structure of the chapters to follow.

## **1.3 ARGUMENT AND CHAPTER STRUCTURE**

### **1.3.1 The Central Argument**

I argue that it is possible to extract a clear account of the Constitutional Court's reasoning in its unfair discrimination case law that leads to focused proposals for improving this reasoning. This account will offer guidance for identifying unfair discrimination in a way that will enable the Court to be better and more consistent in preventing and addressing patterns of group disadvantage. This argument has three substantive components, encompassing further sub-arguments.

#### **(a) Understanding the Court's Reasoning**

I will present a detailed, original account of the Court's reasoning, highlighting three key features.

First, I show that the Court has used human dignity as a placeholder in its *Harksen* test, standing in for a set of necessary conditions that must be satisfied to prove unfair discrimination. These conditions are: a) unfavourable treatment on the basis of protected grounds; b) that threatens to create or perpetuate group disadvantage; and c) that lacks adequate justification. The Court has not fully and explicitly acknowledged that it is reasoning in this way. Furthermore, while commentators have noted some of these features of its reasoning, none have drawn these insights together into a coherent picture.

Second, while the Court has demonstrated broad agreement on the necessary conditions that must be proved, there has been disagreement and inconsistency in

establishing whether these necessary conditions have been satisfied in particular cases. I will show that in the five controversial cases, disagreement centred on necessary conditions b) and c). One of my key contributions will be to reveal the fluctuating intensity with which the Court applies the justification analysis within this unfairness enquiry. The Court adopts different standards of review without explanation and varies the intensity with which it applies these standards. This leads to novel proposals for how to address the problems in the five controversial cases, as I will explain in a moment.

Third, I will demonstrate that the Court conceives of patterns of group disadvantage as consisting of two primary forms of disadvantage: disadvantage caused by prejudice and stereotyping, and socio-economic disadvantage. In determining whether discrimination perpetuates prejudice and stereotyping, the Court primarily focuses on the messages expressed by this discrimination. I will explain that two types of messages appear in the Court's case law which are identified in different ways. These expressive concerns have been almost entirely overlooked in the existing literature. As a result, my analysis will illuminate this important but neglected aspect of the Court's reasoning.

### **(b) Developing the Court's Reasoning**

This understanding of the Court's reasoning will lead to a set of focused proposals for developing this reasoning.

First, I argue that the Court should remove human dignity from the test for unfair discrimination. This would serve to recognise that dignity does no substantive work in the Court's reasoning, it would be an inducement to greater transparency in the Court's reasoning, and it would guard against potential risks posed by dignity's malleability.

Second, I argue that the Court should expand its understanding of patterns of group disadvantage to give greater recognition to other forms of disadvantage, including political marginalisation, social marginalisation, cultural exclusion, and violence and victimisation.

Third, I argue that a justification analysis is appropriate within the unfair discrimination analysis, provided that it is conducted openly and in a way that gives proper weight to the aim of preventing and addressing patterns of group disadvantage.

Finally, I argue that the inconsistency between the Court's aim of preventing and addressing patterns of group disadvantage and the majority judgments in the five controversial cases can be attributed to basic errors of adjudication. Existing commentary has focused almost entirely on errors in the Court's analysis of the impact of the discrimination. I develop this analysis and then go further by demonstrating the significant flaws in the way in which the Court conducted the justification analysis in these cases. These flaws have been almost entirely overlooked in the existing literature. I show that in all five majority judgments, the justification analysis fell far below the 'baseline' intensity of review:<sup>113</sup> the basic threshold level of scrutiny which, I argue, ought to be applied in all unfair discrimination cases. I contend that consistent application of this baseline will help to make the Court better at preventing and addressing patterns of group disadvantage in future decisions.

### **(c) Guidance**

I will use this clearer understanding of the Court's reasoning and my proposals for developing this reasoning to offer a restatement of the *Harksen* test. This will offer better guidance for identifying unfair discrimination in a way that will sustain and improve the Court's record.

### **1.3.2 Chapter Structure**

I will develop these arguments in four parts.

---

<sup>113</sup> Here I draw on the terminology used by Cora Chan, 'Proportionality and Invariable Baseline Intensity of Review' (2013) 33 LS 1.

Part 1, consisting of chapters 2 and 3, lays the groundwork for the analysis to follow. Chapter 2 provides further background to the Court's unfair discrimination jurisprudence. I will explain the place of the constitutional prohibition of unfair discrimination within the broader constitutional and statutory equality scheme; the development and content of the human dignity-based *Harksen* test for unfair discrimination; and the connection between the South African and Canadian discrimination jurisprudence.

Given the centrality of human dignity to the *Harksen* test, chapter 3 considers whether a richer theory of human dignity could offer precise guidance for identifying unfair discrimination. I will cast some doubt on whether this can offer such guidance. I contend that the surer route to guidance is to study how the Constitutional Court reasons to the conclusion that dignity has been violated in its unfair discrimination case law.

In part 2, containing chapters 4 to 6, I explore this reasoning in greater depth. Chapter 4 analyses how the Court has given content to and connected the concepts of equality, patterns of group disadvantage, unfair discrimination, affirmative action, and human dignity. This is an important first step, as the complexity of these concepts and their connections poses a formidable barrier to understanding the Court's reasoning. A central conclusion is that one of the necessary conditions for proving human dignity violations is that the discrimination must threaten to create or perpetuate patterns of group disadvantage.

Having examined the broad concepts, chapter 5 focuses on how the Court applies the *Harksen* test in identifying unfair discrimination. This will demonstrate the full set of necessary conditions for proving a violation of human dignity: there must be a) unfavourable treatment or impact on the basis of protected grounds; b) that threatens to create or perpetuate patterns of group disadvantage; and c) that lacks adequate justification. This analysis indicates that the Court does not adopt a particular concept or conception of human dignity in its reasoning, but instead uses human dignity as a placeholder for these three necessary conditions. I will also show how the Court goes about establishing whether these

necessary conditions have been satisfied. In particular, I draw attention to the fluctuating intensity with which the Court reviews the justifications for discrimination.

In chapter 6, I explore the Court's expressive concerns in greater detail. In the preceding chapters, I show that the Court primarily establishes that discrimination threatens to create or entrench patterns of group disadvantage by focusing on the messages expressed by the discrimination. This discussion will show that the Court is concerned with two types of messages which are uncovered using two different methods. This analysis will offer greater guidance for navigating this complex, unexplored feature of the Courts reasoning.

Part 3, consisting of chapters 7 and 8, will use the clearer understanding of the Court's reasoning developed in part 2 to show how the Court's reasoning should be developed. In chapter 7, I discuss the implications of uncovering the necessary conditions for establishing a violation of human dignity. First, I argue that the Court should now dispense with human dignity in its test for unfair discrimination, as dignity obscures its real focus on the three necessary conditions. Second, I argue that the Court should give greater attention to other forms of disadvantage in its analysis. Finally, I argue that it is legitimate for the Court to engage in a justification analysis within the unfair discrimination enquiry, provided that it does so with appropriate sensitivity to the aim of preventing patterns of group disadvantage.

Chapter 8 demonstrates where the majority judgments went wrong in the five controversial cases and how these errors should be addressed. Using my analysis of the Court's reasoning in part 2, I will locate the errors in the Court's unfairness analysis, specifically its assessment of the impact of discrimination and its justification. A key conclusion here is that the Court must apply a baseline intensity of review to tame the fluctuating intensity with which it applies its justification analysis.

Part 4 consolidates the insights gained from parts 2 and 3 to offer more precise guidance for identifying unfair discrimination in future decisions. In chapter 9, I will offer a

restatement of the *Harksen* test that better captures the Court's reasoning and my proposals for developing this reasoning.

Chapter 10 provides a brief conclusion to the thesis as a whole, summarising the central arguments in each chapter and identifying directions for future research.

Taken as a whole, this thesis will contribute significantly to the existing academic literature on the South African Court's unfair discrimination jurisprudence and the constructive project that has animated this literature.

## **PART 1: GROUNDWORK**

## CHAPTER 2: BACKGROUND

### 2.1 INTRODUCTION

The two central questions posed in this thesis are: how does the Court identify unfair discrimination? And how should its reasoning be developed? In answering these questions, I seek to offer better guidance for identifying unfair discrimination. Part 1 of this thesis, including this chapter and the next, lays the groundwork for exploring these questions. In this chapter, I will provide some additional background to the Constitutional Court's unfair discrimination jurisprudence in preparation for a deeper examination of the case law in the chapters to follow. Chapter 3 consider the possibility that a richer understanding of human dignity could offer courts and litigants clear and appropriate guidance in identifying unfair discrimination. I will cast doubt on this possibility, arguing that the better route to guidance is to begin with a close examination of the Court's reasoning in its unfair discrimination cases.

This chapter will address three topics. In section 2.2, I locate the constitutional prohibition of unfair discrimination within the broader right to equality and statutory discrimination law. Section 2.3 traces the development of the Constitutional Court's *Harksen* test for unfair discrimination, showing how the Court has placed human dignity at the centre of this test. Finally, section 2.4 discusses the connections between the Constitutional Court's unfair discrimination jurisprudence and the Supreme Court of Canada's case law. This will lay the basis for further comparative discussions in the chapters to follow.

## 2.2 EQUALITY AND UNFAIR DISCRIMINATION

The prohibition of unfair discrimination is found in sections 9(3) and 9(4) of the Constitution.<sup>1</sup> Section 9 provides that:

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

This provision was preceded by section 8 of the interim Constitution.<sup>2</sup> While there are some textual differences between these provisions, the Court has applied its section 8 jurisprudence to section 9 without any material changes.<sup>3</sup>

---

<sup>1</sup> Constitution of the Republic of South Africa, 1996. See chapter 1, n 1.

<sup>2</sup> Constitution of the Republic of South Africa, Act 200 of 1993. Section 8 provides:

- (1) Every person shall have the right to equality before the law and to equal protection of the law.
- (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.
- (3) (a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.  
(b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.
- (4) Prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.

<sup>3</sup> See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) [15] (*Sodomy Case*) where Ackermann J noted that the Court's s 8 jurisprudence 'is applicable equally to s 9 of the 1996 Constitution, notwithstanding certain differences in the wording of these provisions.'

As indicated in chapter 1, the Court has not yet dealt with unfair discrimination by private individuals under section 9(4). As a result, my analysis will be confined to the prohibition of unfair discrimination by the state under section 9(3).

### 2.2.1 The Section 9 Enquiry

The Constitutional Court has outlined a four stage enquiry for dealing with challenges to laws or state actions under section 9 of the Constitution.<sup>4</sup>

At the first stage, the Court subjects impugned laws or state actions to a rationality analysis under section 9(1), determining whether the law or action differentiates ‘between people or categories of people’ in a way that bears ‘a rational connection to a legitimate government purpose’.<sup>5</sup> The Court has also indicated that section 9(1) requires consistent application of the law and equal treatment in the legal process,<sup>6</sup> as I will discuss further in chapter 4. In practice, the Court often bypasses the section 9(1) analysis,<sup>7</sup> proceeding directly to the test for unfair discrimination.<sup>8</sup>

Second, where differentiation has the purpose of protecting or advancing groups that have been disadvantaged by unfair discrimination, the Court assesses whether it complies with section 9(2) of the Constitution. The Court is averse to describing such measures as

---

<sup>4</sup> *Harksen v Lane* NO 1998 (1) SA 300 (CC) [53] (Goldstone J), supplemented by *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) (*Van Heerden*). For further discussion of this enquiry, see Catherine Albertyn and Beth Goldblatt, ‘Equality’ in Stuart Woolman and others (eds), *Constitutional Law of South Africa* (2nd edn, Juta 2008). As indicated in chapter 1, this section 9 enquiry is often referred to as the ‘*Harksen* test’, but for my purposes I will use this label to refer to the specific test for unfair discrimination.

<sup>5</sup> *Harksen* *ibid* [43] and [54] (Goldstone J).

<sup>6</sup> See *S v Ntuli* 1996 (1) SA 1207 (CC) [18]; *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) [22] (Ackermann, O’Regan, and Sachs JJ).

<sup>7</sup> See, for example, *Sodomy Case* (n 3) [18] (Ackermann J); *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) [26].

<sup>8</sup> A notable exception is *Van der Merwe v Road Accident Fund* 2006 (4) SA 230 (CC), where the Court applied the rationality analysis in striking down a provision in road accident compensation legislation that discriminated on the basis of gender.

‘affirmative action’, preferring to call them ‘remedial’ or ‘restitutionary’ measures.<sup>9</sup> However, I will refer to affirmative action in this thesis, as it is a term with wider currency. To comply with section 9(2), affirmative action measures must satisfy a three-part test devised in *Van Heerden*.<sup>10</sup> First, the measure must ‘[target] persons or categories of persons who have been disadvantaged by unfair discrimination’, requiring that members of historically disadvantaged groups should make up an ‘overwhelming majority’ of the beneficiaries of the measure.<sup>11</sup> Second, the measure must be ‘designed to protect or advance such persons or categories of persons’, meaning that it must be conducted for the purpose of benefitting disadvantage groups, it must not be ‘arbitrary, capricious or display naked preference’, and it must be ‘reasonably likely’ to achieve its goal.<sup>12</sup> Third, it must ‘promote the achievement of equality’, requiring some degree of balancing of the benefits to the historically disadvantaged group against the harms to those who are excluded.<sup>13</sup> However, the precise nature of this balancing exercise remains unclear.<sup>14</sup> If it satisfies this test then it is shielded from further scrutiny under section 9.<sup>15</sup>

If the differentiation does not have an ameliorative purpose or if it fails the *Van Heerden* test, the Court considers whether it amounts to unfair discrimination under section 9(3). This is the third stage of the section 9 enquiry. Here the Court applies its two-stage *Harksen* test which involves determining whether there is discrimination and whether it

---

<sup>9</sup> *Sodomy Case* (n 3) [61] (Ackermann J); *Van Heerden* (n 4) [29] (Moseneke J).

<sup>10</sup> *ibid.*

<sup>11</sup> *ibid* [38], [40]. This accommodates cases of indirect affirmative action, where measures are not explicitly targeted at particular disadvantaged groups, but have the purpose and effect of benefitting disadvantaged group.

<sup>12</sup> *ibid* [41]–[43].

<sup>13</sup> *ibid* [44]–[45]. See further Jason Brickhill, ‘Testing Affirmative Action under the Constitution and the Equality Act’ [2006] ILJ 2004, 2013.

<sup>14</sup> For further discussion, see Van der Westhuizen J’s separate concurring judgment in *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23 (2 September 2014) [150]–[156].

<sup>15</sup> *Van Heerden* (n 4) [36] (Moseneke J).

is unfair. Where discrimination has occurred on the basis of the grounds listed in section 9(3), section 9(5) of the Constitution requires that it must be presumed to be unfair.

Having identified unfair discrimination, the Court then proceeds to the fourth stage of the enquiry: a justification analysis under the section 36 general limitations clause. As I will discuss in chapter 5, this analysis is often cursory and repeats the analysis presented in the unfairness enquiry.<sup>16</sup>

Unfair discrimination has been the focal point of the Court's section 9 jurisprudence as the vast majority of these cases have been decided at this stage.<sup>17</sup> As a result, this thesis seeks to develop a clearer understanding of how the Court goes about identifying unfair discrimination under section 9(3) of the Constitution and how this reasoning ought to be improved in future. While the section 9(3) prohibition of unfair discrimination has been supplemented by statutory prohibitions, this has not diminished the importance of the Court's constitutional jurisprudence. This requires a brief explanation of the interaction between the constitutional prohibition of unfair discrimination and these statutory provisions.

### **2.2.2 Statutory Prohibitions of Unfair Discrimination**

Two primary statutes contain prohibitions of unfair discrimination'.<sup>18</sup> The Employment Equity Act<sup>19</sup> applies to all unfair discrimination in employment policies or practices while the

---

<sup>16</sup> Chapter 5, text to n 94ff.

<sup>17</sup> See *Sodomy Case* (n 3) [121] (Sachs J), discussing the centrality of unfair discrimination in the Court's broader equality jurisprudence.

<sup>18</sup> Giving effect to Constitution, s 9(4). Text to n 1 above.

<sup>19</sup> 55 of 1998, s 6. See also Labour Relations Act 66 of 1995, s 187(1)(f) which regards unfair discrimination as grounds for automatically unfair dismissal.

Equality Act<sup>20</sup> applies to unfair discrimination by the state and individuals in all other contexts.<sup>21</sup>

In theory, most unfair discrimination challenges must now be litigated ‘within the four corners’ of these statutes rather than relying directly on the constitutional prohibition.<sup>22</sup> This follows from the principle of ‘subsidiarity’ in South African constitutional law which holds that when there is legislation giving effect to a constitutional right, direct reliance on the right is only permissible in order to challenge the content of that legislation.<sup>23</sup> However, this principle has not reduced the need for a clearer understanding of the Constitutional Court’s section 9(3) jurisprudence.

In respect of the Employment Equity Act, its prohibition of unfair discrimination<sup>24</sup> largely mirrors the wording of section 9(3) of the Constitution. As a consequence, labour courts have been heavily reliant on the Constitutional Court’s *Harksen* test in interpreting and applying this provision and would benefit from a clearer understanding of the Court’s reasoning.<sup>25</sup> This statutory prohibition is also limited to unfair discrimination in employment policies and practices. Therefore, litigants must rely directly on section 9(3) of the Constitution in challenging legislation.<sup>26</sup>

---

<sup>20</sup> Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000, ss 6 and section 14.

<sup>21</sup> Equality Act, s 5(3).

<sup>22</sup> *MEC for Education, Kwa-Zulu Natal v Pillay* 2008 (1) SA 474 (CC) [40] (Langa CJ) (*Pillay*).

<sup>23</sup> See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) [22]–[26]; *SANDU v Minister of Defence* 2007 (5) SA 400 (CC) [52]; *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) [73]–[76].

<sup>24</sup> Section 6(1).

<sup>25</sup> See generally John Grogan, *Dismissal, Discrimination & Unfair Labour Practices* (2nd edn, Juta 2007).

<sup>26</sup> Employment Equity Act, s 6(1). See further *Sali v National Commissioner of the South African Police Service* 2014 (9) BCLR 997 (CC) [16] (Jafta J).

The Equality Act has also not displaced the Constitutional Court’s jurisprudence.<sup>27</sup> To date, *Pillay*<sup>28</sup> is the only case in which the Constitutional Court has applied the Act since it came into force in 2003. The Court has continued to hear and decide unfair discrimination challenges on the basis of section 9(3) and the *Harksen* test,<sup>29</sup> in part, because the Equality Act also cannot be used to challenge discriminatory legislation.<sup>30</sup> The Equality Act has also come in for criticism for its cumbersome and confusing wording.<sup>31</sup> In *Pillay*, O’Regan J noted that the Act is ‘not a model of clarity, nor is it particularly helpful for a court faced with the determination of what constitutes fairness’.<sup>32</sup> As Rósaan Krüger argues, a deeper understanding of the Constitutional Court’s section 9(3) jurisprudence is therefore essential in making sense of the Equality Act’s convoluted provisions.<sup>33</sup>

Given the continued need for a clearer understanding of the Constitutional Court’s reasoning, I will now turn to discuss the development and content of the Court’s *Harksen* test.

### 2.3 THE DEVELOPMENT OF THE *HARKSEN* TEST

The *Harksen* test for unfair discrimination, formulated in 1997, was an ambitious development for its time. The newly created Constitutional Court had only produced four

---

<sup>27</sup> See Shadrack Gutto, *Equality and Non-Discrimination in South Africa* (New Africa Books 2001) 138.

<sup>28</sup> Above n 22.

<sup>29</sup> Recent examples include *Mazibuko* (n 23); *Mvumvu v Minister of Transport* 2011 (2) SA 473 (CC); and *Da Silva v Road Accident Fund* 2014 (5) SA 573 (CC) which make no mention of the Equality Act.

<sup>30</sup> Equality Act, s 21 makes no provision for declarations of invalidity in respect of legislation. See further Catherine Albertyn, Beth Goldblatt and Chris Roederer (eds), *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (Witwatersrand University Press 2001) 31.

<sup>31</sup> Grete S Vogt, ‘Non-Discrimination on the Grounds of Race in South Africa—With Special Reference to the Promotion of Equality and the Prevention of Unfair Discrimination Act’ (2001) 45 JAL 196, 202–204; Rósaan Krüger, ‘Equality and Unfair Discrimination: Refining the *Harksen* Test’ (2011) 128 SALJ 479.

<sup>32</sup> *Pillay* (n 22) [168].

<sup>33</sup> Krüger (n 31) 479–80.

unfair discrimination decisions prior to *Harksen*,<sup>34</sup> offering limited material to draw on. The issues addressed in these early cases—insurance, adoption, presidential pardons, fire control, and insolvency—were only distantly connected with the severe forms of discrimination and oppression that have featured so prominently in South Africa’s history. The complainants were also overwhelmingly white and middle class.<sup>35</sup> This was hardly the stuff to inspire feats of judicial creativity. Nevertheless, the Court made admirable efforts to outline a test for unfair discrimination that would direct future decisions. The trouble is that the guidance offered by the *Harksen* test has proved to be limited and the Court has made no attempts to revisit the test in the intervening years.

### 2.3.1 The Early Cases

The Constitutional Court’s unfair discrimination jurisprudence had a tentative start in its first two decisions. In *Brink*,<sup>36</sup> the Court found that a law regulating the effects of insolvency on life insurance policies was unfairly discriminatory on the basis of gender. *Fraser*<sup>37</sup> was also a successful gender discrimination challenge, overturning a law allowing children born outside of marriage to be put up for adoption without their fathers’ consent. In both cases, the Court offered brief reasoning and shied away from offering a test to guide future decisions. *Brink* is significant, however, for O’Regan J’s reflections on the broad purpose of the right to equality and the prohibition of unfair discrimination.<sup>38</sup> As discussed in chapter 1, O’Regan J emphasised that the prohibition of unfair discrimination seeks to prevent and address

---

<sup>34</sup> Text to nn 36-44 below.

<sup>35</sup> A trend that has persisted in the unfair discrimination cases reaching the Court, see Sandra Fredman, ‘Gender and Transformation in the South African Constitutional Court’ in Oscar Vilhena, Upendra Baxi and Frans Viljoen (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (PULP 2013) 247.

<sup>36</sup> *Brink v Kitsboff* NO 1996 (4) SA 197 (CC).

<sup>37</sup> *Fraser v Children’s Court, Pretoria North, and Other* 1997 (2) SA 261 (CC).

<sup>38</sup> *ibid* [40]–[42].

‘patterns of group disadvantage’ in society,<sup>39</sup> a passage that has been consistently endorsed by the Court.<sup>40</sup>

The Court sought to lay down greater guidance for the adjudication of unfair discrimination in *Hugo*<sup>41</sup> and *Prinsloo*,<sup>42</sup> two judgments delivered on the same day in 1997. In *Hugo*, the Court dismissed a challenge to the President’s decision to pardon incarcerated mothers of young children, launched by an aggrieved single father.<sup>43</sup> *Prinsloo* saw the Court reject the claim that fire control legislation unfairly discriminated by imposing a presumption of negligence where fires are started on land outside designated fire control areas. In these decisions, the Court set out the considerations that would later be consolidated in the *Harksen* test. Most significantly, the Court announced that unfair discrimination involves ‘treating persons differently in a way which impairs their fundamental dignity as human beings’.<sup>44</sup>

### 2.3.2 The *Harksen* Test

In *Harksen*,<sup>45</sup> a failed unfair discrimination challenge against provisions in insolvency law, the Court distilled the analysis in *Hugo* and *Prinsloo*. It offered a two-stage test for unfair discrimination, the *Harksen* test, making human dignity the touchstone for identifying this wrong. The Court has always added the qualification that unfair discrimination may involve

---

<sup>39</sup> *ibid* [42].

<sup>40</sup> See, for example, *Sodomy Case* (n 3) [16] (Ackermann J); *Van Heerden* (n 4) [27] (Moseneke J).

<sup>41</sup> *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).

<sup>42</sup> Above n 6.

<sup>43</sup> Discussed further in chapter 5, text to n 146ff.

<sup>44</sup> *Prinsloo* (n 6) [31] (Ackermann, O’Regan, and Sachs JJ); *Hugo* (n 41) [41].

<sup>45</sup> Above n 4. Discussed further in chapter 5, text to n 167ff.

harms that are ‘comparably serious’ to dignity violations.<sup>46</sup> However, the Court has not relied on this qualification, barring a brief reference to comparably serious violations in *Walker*.<sup>47</sup> Writing in a personal capacity, Justice Ackermann<sup>48</sup> describes this as an ‘obfuscatory qualification’ that should not draw attention away from the Court’s real focus on human dignity. In this light, I will proceed on the understanding that unfair discrimination is equated with the violation of human dignity in the Court’s existing case law.

Human dignity is given a central role in both stages of the *Harksen* test. At the first stage, the Court determines whether there has been discrimination, which it defines as ‘differentiation’ based directly or indirectly on one or more of the grounds of discrimination listed in section 9(3), or on unlisted characteristics that are ‘analogous’ to these grounds.<sup>49</sup> The Court holds that differentiation on the basis of these listed and analogous grounds has the ‘*potential* to impair the fundamental human dignity of persons as human beings’.<sup>50</sup> As a result, to understand the listed grounds and to identify new analogous grounds we need to understand what constitutes a *potential* violation of dignity.

At the second stage, the Court determines whether discrimination is unfair, which involves determining whether the discrimination *actually* violates dignity.<sup>51</sup> Section 9(5) of the Constitution provides that discrimination on listed grounds is presumed to be unfair, while complainants bear the burden of proof where discrimination has occurred on analogous

---

<sup>46</sup> *Prinsloo* (n 6) [33] (Ackermann, O’Regan, and Sachs JJ); *Harksen* *ibid* [51] (Goldstone J).

<sup>47</sup> *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) [81] (Langa DP). Discussed further in chapter 5, text to nn 29–33 and 234–240.

<sup>48</sup> LWH Ackermann, ‘Equality and Non-Discrimination: Some Analytical Thoughts’ (2006) 22 SAJHR 597, 599.

<sup>49</sup> *Harksen* (n 4) [47] (Goldstone J).

<sup>50</sup> *ibid* [47] (emphasis added).

<sup>51</sup> *ibid* [51].

grounds.<sup>52</sup> The Court has developed an open-list of considerations for determining whether dignity has been violated, involving an assessment of:

- (a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage;
- (b) the nature of the provision or power and the purpose sought to be achieved by it . . . ;
- (c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.<sup>53</sup>

These considerations are all broad and open-ended, with little indication of how they assist in identifying dignity violations.

The dignity-based *Harksen* test has all the trappings of substantive, maximalist reasoning as the Court connected its test to a deeper value and seemingly offered clear guidance for deciding unfair discrimination cases.<sup>54</sup> However, this substance and guidance has proved limited as the Court has never clearly explained what must be proved to establish a violation of dignity. Without this explanation, the *Harksen* test is barely more than a template for structuring judgments rather than a clear guide to identifying unfair discrimination. Furthermore, the Court has offered few insights into how this human dignity-based test is connected with its stated aim of preventing and addressing patterns of group disadvantage. This leaves lower courts, practitioners, members of the public, and the Court itself with limited direction in understanding or identifying unfair discrimination.

It is understandable that the Court did not offer more concrete guidance in its early formulation of the *Harksen* test. At the time, the Court faced all the pressures and

---

<sup>52</sup> Constitution, s 9(5). See further Equality Act, s 13(2) which applies the presumption of unfairness to discrimination on listed and analogous grounds.

<sup>53</sup> *Harksen* (n 4) [52] (Goldstone J).

<sup>54</sup> See Cass R Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard University Press 1999) ch 1. For further discussion of maximalism and minimalism and the related, but not identical, distinction between substantive and formalist reasoning in the South African context, see Alfred Cockrell, 'Rainbow Jurisprudence' (1996) 12 SAJHR 1; Iain Currie, 'Judicious Avoidance' (1999) 15 SAJHR 138.

uncertainties of giving content to a new constitutional text in a new democracy.<sup>55</sup> As a result, it was perhaps too much to expect the Court to offer a fully-formed, precise test for such a contested and elusive wrong so early in the development of its jurisprudence. Nevertheless, having framed such an open-ended test, it was incumbent on the Court to add greater precision and guidance as its body of case law grew.<sup>56</sup> The Court recognised this in *Harksen*, warning that the test should be treated as a preliminary framework, in need of refinement over time.<sup>57</sup> However, in the 17 years and more than 30 unfair discrimination judgments since *Harksen*, the Court has made little attempt to revise or update this test. The Court simply reproduces it in each judgment as if it were a source of precise guidance and the final word on the matter.<sup>58</sup>

In this thesis, I will demonstrate that we can extract greater guidance for identifying unfair discrimination through a close examination of the Court's reasoning. In turn, I will use this deeper understanding of the Court's reasoning to offer proposals for how its reasoning ought to develop. I will ultimately use this understanding and these proposals to reformulate the *Harksen* test to offer greater direction for the litigation and adjudication of unfair discrimination claims. In this way, I hope to advance the literature on the Court's jurisprudence and the constructive project that has animated these contributions.<sup>59</sup>

As I discussed in chapter 1, comparisons with the Supreme Court of Canada's case law will be useful in understanding and evaluating the South African Court's reasoning. In

---

<sup>55</sup> For further discussion of the Court's first decade, see Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (CUP 2013) especially chs 1, 4–5.

<sup>56</sup> See further Denise Réaume, 'Of Pigeonholes and Principles: A Reconsideration of Discrimination Law' (2002) 40 *Osgoode Hall L J* 113, 121, on the need for courts to revisit open-ended legal principles over time as doctrine develops.

<sup>57</sup> *Harksen* (n 4) [52] (Goldstone J). See also *Prinsloo* (n 6) [20] (Ackermann, O'Regan, and Sachs JJ) where the Court stressed:

[T]his Court should be astute not to lay down sweeping interpretations at this stage but should allow equality doctrine to develop slowly and, hopefully, surely.

<sup>58</sup> See *Kruger* (n 30) 479–80.

<sup>59</sup> Discussed in chapter 1, text to n 30ff.

the next section, I will discuss how the South African Court drew inspiration from the Canadian case law in developing the *Harksen* test. I will also show how broad similarities and differences have emerged in the South African and Canadian approaches over the years.

## 2.4 THE CANADIAN COURT'S CASE LAW

The Supreme Court of Canada's discrimination jurisprudence under section 15 of the Charter<sup>60</sup> has been an important source of inspiration for the South African Court in developing its unfair discrimination jurisprudence.<sup>61</sup> As a result, there are many parallels between the Courts' case law. One difference, however, is immediately noticeable: the different meanings given to the term 'discrimination'. Section 15(1) of the Charter prohibits 'discrimination', which the Canadian Court interprets as differentiation on the basis of protected grounds that *is wrongful*. In contrast, the South African Constitution prohibits 'unfair discrimination', with discrimination interpreted to mean any differentiation based on protected grounds, whether *wrongful or not*.<sup>62</sup> In this thesis, I will use the South African meaning of discrimination unless the context indicates otherwise. Aside from this terminological difference, the South African and Canadian Courts have defined the wrongs

---

<sup>60</sup> Section 15 provides:

- (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
- (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

<sup>61</sup> See further LWH Ackermann, 'Constitutional Comparativism in South Africa' (2006) 123 SALJ 497, 510–13; Albie Sachs, 'Equality Jurisprudence: The Origin of Doctrine in the South African Constitutional Court' (1999) 5 Rev Const Stud 76; Edwin Cameron, 'Dignity and Disgrace: Moral Citizenship and Constitutional Protection' in Christopher McCrudden (ed), *Understanding Human Dignity* (OUP 2013) 475.

<sup>62</sup> See text to nn 45–50 above.

of ‘unfair discrimination’ and ‘discrimination’ in similar ways and have employed broadly similar methods in identifying these wrongs.

The close connection between the South African and Canadian discrimination jurisprudence is, in large part,<sup>63</sup> a product of the strong genetic links between the Canadian Charter and the South African Constitution. The drafters of the South African Constitution were heavily influenced by the structure and content of the Charter,<sup>64</sup> with the result that the Constitutional Court has often turned to the Canadian Court’s case law for inspiration.<sup>65</sup>

While the *Harksen* test was influenced by the Canadian Court’s case law, it is by no means a copy. In this section, I will explain how the South African Court drew inspiration from the Canadian Court’s case law at a time when the Canadian jurisprudence was in a state of flux. The South African Court was highly selective in what it took from the Canadian case law and its selectiveness highlights important features of its approach to unfair discrimination. I will go on to explain the broad similarities and differences that have emerged in the South African and Canadian Courts’ tests as their case law developed. The Canadian Court’s discrimination jurisprudence has been through a tumultuous three decades, with many open disagreements over the correct approach to identifying discrimination and several about-turns.<sup>66</sup> Most recently, the Canadian Court abandoned its human dignity-based

---

<sup>63</sup> For discussion of courts’ other possible motivations for drawing on comparative law, see Christopher McCrudden, ‘A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights’ (2000) 20 OJLS 499, 516–527.

<sup>64</sup> See further Jeremy Sarkin, ‘The Effect of Constitutional Borrowings on the Drafting of South Africa’s Bill of Rights and Interpretation of Human Rights Provisions’ (1998) 1 U Pa J Const L 178, 181, 184–87; Francois Du Bois and Daniel Visser, ‘The Influence of Foreign Law in South Africa’ (2003) 13 Transnatl L & Contemp Probs 593, 646; Adam M Dodek, ‘Canada as Constitutional Exporter: The Rise of the “Canadian Model” of Constitutionalism’ (2007) 36 SCLR 309, 324–27; Ursula Bentele, ‘Mining for Gold: The Constitutional Court of South Africa’s Experience with Comparative Constitutional Law’ (2009) 37 Ga J Intl & Comp L 219, 228.

<sup>65</sup> Ackermann (n 61) 510; Dennis Davis, ‘Constitutional Borrowing: The Influence of Legal Culture and Local History in the Reconstitution of Comparative Influence: The South African Experience’ (2003) 1 ICON 181, 191–92, 195.

<sup>66</sup> See further Jennifer Koshan and Jonnette Watson Hamilton, ‘The Continual Reinvention of Section 15 of the Charter’ (2013) 64 U New Brunswick L J 19.

test for discrimination in *Kapp*,<sup>67</sup> producing further disagreement and debate over how to approach discrimination claims. By contrast, the South African Court's unfair discrimination jurisprudence is notable for its relative 'methodological unity' as the Court has consistently affirmed and applied the *Harksen* test.<sup>68</sup> Tracing the similarities and differences that have emerged between the South African and Canadian Courts' approaches will lay the groundwork for further comparative discussions in this thesis.<sup>69</sup>

#### 2.4.1 Development and Disagreement

The South African Court regularly cited the Canadian Court's mid-1990s case law in developing the *Harksen* test. In *Hugo*, *Prinsloo*, and *Harksen*, the South African Court drew support for its dignity-based approach from L'Heureux-Dubé J's judgment in *Egan*<sup>70</sup> where she stated that:

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.<sup>71</sup>

L'Heureux-Dubé J's judgment, and this passage in particular, was cited more often than any other foreign decision in the South African Court's early unfair discrimination case law. However, L'Heureux-Dubé J cut a lonely figure on the Canadian Court at the time.

In *Miron*,<sup>72</sup> *Egan*,<sup>73</sup> and *Thibaudeau*,<sup>74</sup> a trio of Canadian Supreme Court decisions released on the same day in 1995, L'Heureux-Dubé J authored three minority judgments. In

---

<sup>67</sup> *R v Kapp* [2008] 2 SCR 483.

<sup>68</sup> David Robertson, *Judge As Political Theorist: Contemporary Constitutional Review* (Princeton University Press 2010) 317–326.

<sup>69</sup> For further explanation of my comparative methodology, see chapter 1, text to n 98ff.

<sup>70</sup> *Egan v Canada* [1995] 2 SCR 513. Cited with approval in *Hugo* (n 41) [41]; *Prinsloo* (n 6) [32] (Ackermann, O'Regan, and Sachs JJ); and *Harksen* (n 4) [51] (Goldstone J).

<sup>71</sup> *Egan* *ibid* [36].

<sup>72</sup> *Miron v Trudel* [1995] 2 SCR 418.

these decisions, the Court split three ways over the correct test for discrimination. No test gained a majority and L'Heureux-Dubé J was the solitary defender of her approach. The South African Court made no mention of this controversy in its references to the Canadian case law, nor did it adopt L'Heureux-Dubé J's preferred test, as I will explain in a moment. To understand these divisions on the Canadian Court and to see how selective the South African Court was in drawing inspiration from its case law, it is necessary to begin with the Canadian Court's 1989 judgment in *Andrews*<sup>75</sup> which set the scene for the turbulent jurisprudence that followed.

#### **2.4.2 *Andrews***

*Andrews* was the Canadian Court's first attempt at interpreting section 15 of Canadian Charter. The Court struck down a law which denied non-citizens admission to the British Columbia bar and, in so doing, it laid the foundations for its interpretation of discrimination. The Court noted that not all distinctions are discriminatory.<sup>76</sup> Instead, it held that discrimination involves distinctions on the basis of the grounds listed in section 15(1) or on analogous grounds.<sup>77</sup> Some interpreted *Andrews* as suggesting that this was sufficient to prove this wrong.<sup>78</sup> However, the Canadian Supreme Court added the further qualification that not all distinctions based on listed or analogous grounds are discriminatory, requiring courts to scrutinise the impact of the discrimination.<sup>79</sup>

---

<sup>73</sup> Above n 70.

<sup>74</sup> *Thibaudeau v Canada* [1995] 2 SCR 627.

<sup>75</sup> *Andrews v Law Society of British Columbia* [1989] 1 SCR 143.

<sup>76</sup> *ibid* 164–65 (McIntyre J).

<sup>77</sup> *ibid* 174.

<sup>78</sup> Peter Hogg, *Constitutional Law of Canada* (5th edn, Carswell 2007) 55-26 (2009 – Rel 1).

<sup>79</sup> *Andrews* (n 75) 174–5, 182 (McIntyre J).

Denise Réaume summarises the *Andrews* Court’s approach as recognising that ‘there is something about the use of some kinds of personal characteristics that can make their use in legislative line drawing objectionable’, but that not all distinctions, even on listed grounds, are discriminatory.<sup>80</sup> This left two questions largely unanswered: how should courts identify analogous grounds? And when do distinctions on the basis of listed or analogous grounds become discriminatory?

### **2.4.3 *Miron, Egan, and Thibaudeau***

In *Miron, Egan, and Thibaudeau*, disagreement came to a head over how to answer the two questions left open in *Andrews*. The Court split three ways, with no approach gaining a majority.

One group of judges endorsed a ‘relevance’ approach,<sup>81</sup> holding that discrimination involves distinctions on the basis of listed or analogous grounds that are irrelevant ‘to the functional values underlying the law’.<sup>82</sup> This involved a rationality test, assessing whether the distinction was capable of advancing a legitimate purpose. On this approach, analogous grounds are those characteristics ‘commonly used to make distinctions which have little or no rational connection with the subject matter’ of the distinction.<sup>83</sup>

A second group adopted a human dignity-based approach in identifying discrimination and gave substantial weight to the listed and analogous grounds in this

---

<sup>80</sup> Denise Réaume, ‘Discrimination and Dignity’ (2003) 63 La L Rev 1, 12.

<sup>81</sup> Gonthier J (Lamer CJ, La Forest, and Major JJ concurring) in *Miron*; La Forest J (Lamer CJ, Gonthier, and Major JJ concurring) in *Egan*; Gonthier J, with La Forest and Sopinka JJ concurring in a separate judgment, in *Thibaudeau*.

<sup>82</sup> *Miron* (n 72) [15] (Gonthier J). See also *Egan* (n 70) [13] (La Forest J); *Thibaudeau* (n 74) [106] (Gonthier J).

<sup>83</sup> *Miron* *ibid* [23].

enquiry.<sup>84</sup> Led by McLachlin J in *Miron*, they held that the prohibition of discrimination is aimed at protecting human dignity, primarily by preventing stereotyping.<sup>85</sup> As a result, McLachlin J held that discrimination is established where there is a distinction on the basis of listed or analogous grounds that violates human dignity through the ‘stereotypical application of presumed group characteristics, rather than on the basis of merit, capacity or circumstance.’<sup>86</sup> This approach placed great emphasis on the listed or analogous grounds, as McLachlin J held that the grounds are ‘ready indicators’ of discrimination because distinctions on the basis of these grounds are ‘typically stereotypical’.<sup>87</sup>

L’Heureux-Dubé J was the sole proponent of the third approach. She agreed that the purpose of the prohibition of discrimination is to protect human dignity.<sup>88</sup> However, she differed from the McLachlin-led approach by articulating a broader understanding of human dignity violations, extending beyond stereotyping, and by placing less emphasis on the listed and analogous grounds. L’Heureux-Dubé J stressed that distinctions are discriminatory where they are ‘capable of either promoting or perpetuating the view that the individual adversely affected by the distinction is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society’.<sup>89</sup> She stressed that this assessment is to be made from the ‘subjective-objective’ perspective, the perspective of a reasonable person from the claimant’s group, possessing the claimant’s attributes, and fully apprised of the

---

<sup>84</sup> McLachlin J (Sopinka, Cory, and Iacobucci JJ concurring) in *Miron*; Cory J (Iacobucci, McLachlin, and Sopinka JJ concurring); Cory and Iacobucci JJ, with a separate judgment by McLachlin J adopting the same approach but disagreeing in the application, in *Thibault*.

<sup>85</sup> *Miron* (n 72) [131]. See also *Egan* (n 70) [128] (Cory J); *Thibault* (n 74) [177] (McLachlin J).

<sup>86</sup> *Miron* *ibid.*

<sup>87</sup> *ibid* [132].

<sup>88</sup> *Egan* (n 70) [36].

<sup>89</sup> *ibid* [56].

circumstances.<sup>90</sup> Furthermore, L'Heureux-Dubé J argued that the grounds of discrimination are useful diagnostic tools in identifying dignity violations, but not indispensable requirements.<sup>91</sup>

After *Miron*, *Egan*, and *Thibault*, the Canadian Court remained split over the correct approach to identifying discrimination. The majority agreed that discrimination involves a violation of dignity, but disagreed over how to go about identifying dignity violations. A minority of four clung to the relevance approach. In the judgments that followed, the Court was unable to resolve these differences.<sup>92</sup>

As a consequence, when the South African Court was developing its *Harksen* test in 1997, the Canadian Court's jurisprudence presented a confusing tangle of alternative approaches. In a lecture delivered in 1999, Justice Sachs recounted that he and the other judges were well aware of these conflicting approaches in the Canadian case law.<sup>93</sup> He explained that while the Constitutional Court took inspiration from these judgments, it did not seek to replicate any single approach.<sup>94</sup>

This selectiveness is evident in the *Harksen* test which combines elements of all three of the divergent Canadian tests. The South African Court used human dignity as the touchstone for its test for unfair discrimination, quoting L'Heureux-Dubé J with approval.<sup>95</sup> However, it did not share her scepticism about using the grounds of discrimination, as the South African Court held that the grounds are an essential part of the discrimination

---

<sup>90</sup> *ibid.*

<sup>91</sup> *ibid* [82].

<sup>92</sup> See *Benner v Canada (Secretary of State)* [1997] 1 SCR 358; *Eaton v Brant County Board of Education* [1997] 1 SCR 241; *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624; *Vriend v Alberta* [1998] 1 SCR 493.

<sup>93</sup> Sachs (n 61).

<sup>94</sup> *ibid* 80–82.

<sup>95</sup> See text to n 71 above.

enquiry,<sup>96</sup> the first stage of the *Harksen* test.<sup>97</sup> The South African Court has also not expressly adopted her ‘subjective-objective’ test, as I will discuss further in chapter 6.<sup>98</sup> While the South African Court adopted a grounds-based approach in identifying unfair discrimination, it placed less emphasis on the grounds than the McLachlin-led approach, as it left more work for its unfairness analysis. Finally, the South African Court implicitly rejected the relevance approach in assessing unfair discrimination, but retained a place for a rationality analysis in its separate section 9(1) enquiry.<sup>99</sup>

This shows that the South African Court was highly discerning in using the Canadian jurisprudence in developing its *Harksen* test. The standard metaphors of judicial ‘borrowing’ or ‘transplants’,<sup>100</sup> with their connotations of wholesale appropriation, do not adequately describe this process.<sup>101</sup> Instead, the South African Court was doing something novel rather than seizing on a ready-made Canadian test. As a result, terms such as ‘inspiration’ and ‘influence’ better capture the contribution that the Canadian case law made in the development of the *Harksen* test.

---

<sup>96</sup> *Prinsloo* (n 6) [23]–[24] (Ackermann, O’Regan, and Sachs JJ).

<sup>97</sup> *Harksen* (n 4) [54] (Goldstone J).

<sup>98</sup> Chapter 6, text to nn 50 and 83ff.

<sup>99</sup> See text to n 5 above. This difference reflects the fact that s 15(1) of the Canadian Charter combines the equal protection and benefit clause with its prohibition of discrimination, while s 9 of the South African Constitution separates this clause (s 9(1)) from the prohibition of unfair discrimination (s 9(3)).

<sup>100</sup> See, for example, *Davis* (n 65).

<sup>101</sup> For further criticism of the ‘borrowing’ metaphor in comparative law scholarship see Kim Lane Scheppele, ‘Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models’ (2003) 1 *ICON* 296, 296–97; Sujit Choudhry, ‘Migration as a New Metaphor in Comparative Constitutional Law’ in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (CUP 2006) 19–21.

#### 2.4.4 The *Law* Test

The Canadian Supreme Court finally agreed on a single test for discrimination in its 1999 decision in *Law*,<sup>102</sup> almost a year and a half after the South African Court had outlined its *Harksen* test for unfair discrimination.<sup>103</sup> Iacobucci J, writing for a unanimous Supreme Court, confirmed that human dignity is the touchstone for identifying discrimination under section 15(1).<sup>104</sup> He proceeded to set out a three-part test. First, there must be differentiation. Second, this differentiation must be on the basis of listed or analogous grounds. Third, it must violate human dignity.<sup>105</sup>

Iacobucci J agreed with L'Heureux-Dubé J that the determination whether human dignity has been violated must be undertaken from the 'subjective-objective' perspective.<sup>106</sup> He identified an open list of four 'contextual' considerations to assist in identifying these dignity violations:

- a) Pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue. . . .
- b) The correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others. . . .
- c) The ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society. . . .
- d) The nature and scope of the interest affected by the impugned law.<sup>107</sup>

Like the South African Court in *Harksen*, Iacobucci J provided limited explanation of how these contextual factors assist in identifying violations of human dignity.

There are many other parallels in the structure and content of the *Law* and *Harksen* tests. Both define the wrong as distinctions on the basis of listed or analogous grounds that

---

<sup>102</sup> *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497.

<sup>103</sup> Judgment in *Harksen* was handed down on 7 October 1997. *Law* was decided on 25 March 1999.

<sup>104</sup> *Law* (n 102) [51], [88].

<sup>105</sup> *ibid* [88].

<sup>106</sup> *ibid* [59]–[60], [88].

<sup>107</sup> *ibid* [88], summarising [62]–[75].

violate human dignity. Furthermore, the three unfairness considerations outlined in *Harksen* and the four contextual considerations outlined in *Law* are very similar. In the chapters to follow, I will discuss some of the other similarities that emerged in the application of these tests. These include both Courts' concern for the messages expressed by discriminatory laws and actions,<sup>108</sup> their similar methods of uncovering these messages,<sup>109</sup> and their use of a justification analysis within these tests.<sup>110</sup> I will also explore some of the important differences that emerged between the Courts' jurisprudence, including different understandings of what constitutes a violation of human dignity,<sup>111</sup> different approaches to comparators,<sup>112</sup> different burdens of proof,<sup>113</sup> and different ways of identifying analogous grounds,<sup>114</sup> among others.

The *Law* test was not the end of the matter. In 2008, the Canadian Court formulated a new test for discrimination, creating further disagreement and uncertainty.

#### 2.4.5 The *Kapp* Test

In *Kapp*,<sup>115</sup> the Canadian Court set about reformulating its test for discrimination in a surprising obiter dictum. The Court addressed the mounting criticism of its human dignity-based *Law* test, acknowledging that—

---

<sup>108</sup> See chapter 4, text to n 76ff and chapter 6.

<sup>109</sup> See chapter 6.

<sup>110</sup> See chapter 5, text to n 98ff and chapter 6, text to n 92ff.

<sup>111</sup> See chapter 4, text to n 110.

<sup>112</sup> See chapter 5, text to n 6ff.

<sup>113</sup> As discussed above, section 9(5) of the South African Constitution creates a presumption of unfairness where discrimination occurs on listed grounds. This is in contrast with section 15(1) of the Charter which contains no such presumption.

<sup>114</sup> See chapter 9, text to n 34ff.

<sup>115</sup> Above n 67.

human dignity is an abstract and subjective notion that, even with the guidance of the four contextual factors, cannot only become confusing and difficult to apply; it has also proven to be an additional burden on equality claimants, rather than the philosophical enhancement it was intended to be.<sup>116</sup>

As a result, the Court held that it would be inappropriate to continue to use human dignity as the *legal test* for discrimination.<sup>117</sup> It affirmed that dignity is still a ‘central value underlying the s 15 equality guarantee’ and is the ‘lodestar’ for the ‘protection of all rights guaranteed by the Charter’.<sup>118</sup> However, it suggested that human dignity could not assist in identifying discrimination. The Court went on to reformulate its test, jettisoning human dignity. This was billed as a return to the *Andrews* test,<sup>119</sup> but in substance it is a largely new approach.

The *Kapp* Court held that discrimination now requires proof of: a) adverse distinctions based on listed or analogous ground; b) that are discriminatory in that they either i) ‘have the effect of perpetuating group disadvantage and prejudice’ or ii) ‘impose disadvantage on the basis of stereotyping.’<sup>120</sup> The second leg of this test generated great uncertainty and speculation over how it ought to be interpreted and applied.<sup>121</sup> This led to an attempt at clarification in the later judgment in *Withler*<sup>122</sup> and outright disagreement in the recent judgment in *Quebec v A*.<sup>123</sup>

In *Quebec v A*, the Canadian Court considered whether it was discriminatory to exclude cohabiting heterosexual partners from certain patrimonial consequences of marriage.

---

<sup>116</sup> *ibid* [22].

<sup>117</sup> *ibid* [21].

<sup>118</sup> *ibid*.

<sup>119</sup> *ibid* [18], [24].

<sup>120</sup> *ibid* [17], [25], [37].

<sup>121</sup> See Sophia R Moreau, ‘R v Kapp: New Directions for Section 15’ (2009) 40 Ottawa L Rev 283, 286, 291–92; Hogg (n 78) 55-32–55-33 (2011 – Rel 1); Jennifer Koshan and Jonnette Watson Hamilton, ‘Meaningless Mantra: Substantive Equality after *Withler*’ (2011) 16 Rev Const Stud 31, 48–51.

<sup>122</sup> *Withler v Canada* [2011] 1 SCR 396.

<sup>123</sup> *Quebec (Attorney General) v A* [2013] 1 SCR 61.

Abella J, supported by the majority, found that this exclusion was discriminatory.<sup>124</sup> In doing so, she held that the *Kapp* test should be interpreted to mean that proof that a distinction on the basis of protected grounds perpetuates group disadvantage is sufficient to establish discrimination.<sup>125</sup> Proof of prejudice or stereotyping may be relevant to this enquiry, but it is not a necessary condition.<sup>126</sup> Le Bel J, supported by three other judges, took a contrary view. He held that the *Kapp* test requires proof of prejudice or stereotyping in all cases.<sup>127</sup> Time will tell whether Abella J's interpretation of the *Kapp* test settles the matter or whether the minority's interpretation will resurface again.

The Canadian Court's decision to abandon its human dignity-based test for discrimination and the uncertainty and skirmishing surrounding the *Kapp* test raise interesting questions for the South African case law. In the next chapter, I will ask whether human dignity can offer precise guidance in identifying unfair discrimination. This will lay the basis for a broader argument, developed over several chapters, that the South African Court should follow the Canadian Court's example by removing human dignity from its *Harksen* test. However, the post-*Kapp* case law gives a warning that simply removing human dignity will not be a panacea for the broader problems in the South African jurisprudence, as I will explain further in chapter 8.

## 2.5 CONCLUSION

This chapter has laid the basis for a deeper examination of the Constitutional Court's unfair discrimination case law in the next chapters. As I outlined in chapter 1, one of the central

---

<sup>124</sup> In a separate judgment, McLachlin CJ went on to hold the discrimination was justified under the section 1 general limitations clause, resulting in a slim 5–4 majority dismissing the challenge.

<sup>125</sup> *Quebec v A* (n 123) [332].

<sup>126</sup> *ibid* [325]–[330].

<sup>127</sup> *ibid* [179]–[180].

problems that this thesis seeks to address is the lack of explicit guidance for identifying unfair discrimination in the Court's case law. The Court has made human dignity the touchstone for identifying unfair discrimination but has offered little indication of what must be proved to establish a dignity violation. This raises the possibility that a richer understanding of human dignity could offer this guidance. I will now turn to explore this possibility.

## CHAPTER 3: HUMAN DIGNITY AND GUIDANCE\*

### 3.1 INTRODUCTION

In this thesis, I seek to develop better guidance for identifying unfair discrimination. As I outlined in chapter 1, I will do so by providing a close study of the Constitutional Court's reasoning which will allow for focused proposals for how this reasoning ought to develop. Before beginning this analysis, this chapter will explain why I choose to avoid a different route to guidance.

The *Harksen* test for unfair discrimination implies this alternative route. By making human dignity the touchstone for identifying unfair discrimination, the Constitutional Court seems to suggest that a sufficiently detailed theory of human dignity could offer courts and litigants precise guidance in identifying this wrong.

Justice Ackermann explicitly endorses this suggestion in his recent book, *Human Dignity: Lodestar for Equality in South Africa*.<sup>1</sup> Ackermann was one of the architects of the Constitutional Court's unfair discrimination jurisprudence<sup>2</sup> and has remained one of the strongest defenders of its human dignity-based test.<sup>3</sup> He argues that human dignity can and does play a 'crucial'<sup>4</sup> and 'determinative role'<sup>5</sup> in identifying unfair discrimination; that it is an

---

\* This chapter is adapted from a recently published article, Chris McConnachie, 'Human Dignity, "Unfair Discrimination" and Guidance' (2014) 34 OJLS 609.

<sup>1</sup> Laurie Ackermann, *Human Dignity: Lodestar for Equality in South Africa* (Juta 2012) (*Lodestar*).

<sup>2</sup> See *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) (joint judgment produced with Sachs and O'Regan JJ); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) (*Sodomy Case*); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC).

<sup>3</sup> See, for example, LWH Ackermann, 'Equality and the South African Constitution: The Role of Dignity' (2000) 63 ZaöRV 537; LWH Ackermann, 'Equality and Non-Discrimination: Some Analytical Thoughts' (2006) 22 SAJHR 597.

<sup>4</sup> Ackermann, *Lodestar* (n 1) 6.

<sup>5</sup> *ibid* 179, 251.

‘essential element’ in this enquiry;<sup>6</sup> and can be given ‘detailed and practically usable content’.<sup>7</sup> In *Lodestar*, Ackermann sets out to provide this content. He ranges from the heights of moral philosophy to the fine-grained details of the Constitutional Court’s case law and comparative jurisprudence to develop a fleshed-out theory of dignity. This theory, he suggests, could offer greater guidance for identifying unfair discrimination.

*Lodestar* is the most extensive examination yet of human dignity and its role in South African discrimination law. As a result, Ackermann’s account of dignity and his suggested path to guidance deserve attention. If Ackermann is correct, then the guidance I seek in this thesis could be found in his account or by developing some other theory of human dignity. Ackermann offers few details of how his understanding of dignity can be translated into this ‘practically usable’ guidance. Nevertheless, *Lodestar* sustains the hope that guidance can be derived in this way.

In this chapter, I argue that this route to guidance is considerably less promising than it may appear. I will do so by examining two concepts of human dignity, what I will term the ‘broad’ and ‘narrow’ concepts. Ackermann seeks to give content to the ‘broad’ concept of human dignity: the idea that human beings possess equal and inherent moral worth and are entitled to respect consistent with that worth. I will argue that this concept of dignity and its many possible conceptions cannot offer courts and litigants precise guidance for identifying unfair discrimination. I will then consider the ‘narrow’ concept of human dignity which casts dignity as a precise interest or wrong rather than a broad expression of human beings’ inherent moral worth. While narrow conceptions may offer guidance, I argue that the guidance they offer is problematic, as they may undermine a broader focus on patterns of group disadvantage. These broad and narrow concepts of human dignity do not exhaust this value’s many possible meanings. As a result, I do not dismiss all possibility that precise and

---

<sup>6</sup> *ibid* 166.

<sup>7</sup> *ibid* 340.

appropriate guidance could be derived from other theories of human dignity. Nevertheless, my analysis will show that this route to guidance holds far less promise than the human dignity-based *Harksen* test implies and Ackermann claims.

I argue that the more promising way to develop guidance is to begin with a close analysis of the Court's reasoning in its unfair discrimination case law. We need to trace the steps in the Court's reasoning to determine how it concludes that human dignity has been violated. Doing so will provide a better understanding of how the Court identifies unfair discrimination and will allow for a more focused evaluation and critique of this reasoning. That will be the task for parts 2 and 3 of this thesis.

My analysis in this chapter focuses on whether human dignity *can* offer precise and appropriate guidance for identifying unfair discrimination. I will postpone for a moment the related questions of what role *does* human dignity play in the Court's reasoning and what role *should* it play. Nonetheless, my analysis here has relevance to these questions, as my doubts about dignity will be reflected in my later arguments that dignity does little work in the Court's reasoning and that it ought to be removed from the *Harksen* test. Those arguments also lie ahead in parts 2 and 3.

This chapter proceeds in three sections. In section 3.2, I explain why the prospect of deriving guidance from a richer understanding of human dignity seems so tantalising. Section 3.3 shows that this route to guidance is less promising than it may appear. In section 3.4, I explain the different route to guidance that I will take in this thesis.

### **3.2 THE PROSPECT OF GUIDANCE**

There is an understandable appeal to the idea that a richer theory of human dignity might provide clear guidance for the adjudication of unfair discrimination cases. The vast body of case law, legal analysis, and philosophical writing on human dignity creates the expectation

that a more precise account of dignity could be distilled from these materials that would give greater content to the *Harksen* test.

The Constitutional Court has developed a sizeable human dignity jurisprudence, reflecting the many references to dignity in the South African Constitution.<sup>8</sup> Human dignity is enshrined in the Constitution both as a value and a self-standing right.<sup>9</sup> As a value, section 1(a) proclaims that ‘human dignity, the achievement of equality and the advancement of human rights and freedoms’ are founding values of the Constitution. Similar invocations of dignity are found in many other provisions, making human dignity central to the interpretation of the Bill of Rights, legislation, and the development of the common law.<sup>10</sup> Human dignity is also listed as a self-standing right as section 10 provides that ‘[e]veryone has inherent dignity and the right to have their dignity respected and protected’.<sup>11</sup>

Aside from the Court’s use of human dignity as the basis of its test for unfair discrimination, the Court has also used human dignity in its interpretation of a host of other rights. These include the right to life;<sup>12</sup> freedom from cruel, inhuman or degrading treatment;<sup>13</sup> the right to vote,<sup>14</sup> and socio-economic rights,<sup>15</sup> among many others.<sup>16</sup> It has also

---

<sup>8</sup> See further Drucilla Cornell and others (eds), *The Dignity Jurisprudence of the Constitutional Court of South Africa: Cases and Materials* (Fordham University Press 2013) vols I and II.

<sup>9</sup> Explained further in *Davood v Minister of Home Affairs* 2000 (3) SA 936 (CC) [35].

<sup>10</sup> See Constitution, ss 7(1), 36(1), 39(1)(a) and 39(2).

<sup>11</sup> It is also a component of s 35(2)(e) which provides that ‘conditions of detention must be consistent with human dignity.’

<sup>12</sup> See *S v Makwanyane* 1995 (3) SA 391 (CC) [84].

<sup>13</sup> *ibid* [57]–[62]; *S v Dodo* 2001 (3) SA 382 (CC) [35].

<sup>14</sup> See *August v Electoral Commission* 1999 (3) SA 1 (CC) [17].

<sup>15</sup> See *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) [44], [83]. See further Sandra Liebenberg, ‘The Value of Human Dignity in Interpreting Socio-Economic Rights’ (2005) 21 SAJHR 1.

<sup>16</sup> See Cornell and others (n 8) vol II.

invoked human dignity in interpreting and developing areas of the common law as diverse as contract law<sup>17</sup> and defamation.<sup>18</sup>

Academic commentators have increasingly sought to catalogue and theorise these diverse uses of human dignity, producing a growing literature on the Constitutional Court's jurisprudence.<sup>19</sup> Aside from the South African case law and writing, there is also much comparative law on human dignity, particularly from Canada and Germany, with its own detailed commentary.<sup>20</sup> Beyond these legal materials, there is a wealth of philosophical and theological analysis of human dignity, presenting many rich accounts.<sup>21</sup>

In *Lodestar*, Ackermann delves into this case law, comparative law, and some of the philosophical and theological material to construct a theory of human dignity.<sup>22</sup> The result is the most extensive examination yet of human dignity in the South African literature. While Ackermann makes an important contribution to understanding human dignity, I disagree with the assumption animating this work: that his deeper understanding of human dignity or similar accounts could translate into 'determinative' and 'practically usable' guidance for identifying unfair discrimination in concrete cases.<sup>23</sup> I argue that the particular concept of human dignity that Ackermann works with cannot offer courts and litigants this type of precise guidance. While this does not dismiss all possibility of deriving guidance from

---

<sup>17</sup> See *Barkhuizen v Napier* 2007 (5) SA 323 (CC) [57].

<sup>18</sup> See *Khumalo v Holomisa* 2002 (5) SA 401 (CC) [27].

<sup>19</sup> See, for example, Stuart Woolman, 'Dignity' in Stuart Woolman and others (eds), *Constitutional Law of South Africa* (2nd edn, Juta 2008); AJ Barnard-Naudé, Drucilla Cornell and Francois du Bois (eds), *Dignity, Freedom and the Post-Apartheid Legal Order: The Critical Jurisprudence of Laurie Ackermann* (Juta 2009); Cornell and others (n 8) vol I; Anne Hughes, *Human Dignity and Fundamental Rights in South African and Ireland* (PULP 2014).

<sup>20</sup> On the Canadian case law, see Denise Réaume, 'Discrimination and Dignity' (2003) 63 La L Rev 1; Jennifer Koshan and Jonnette Watson Hamilton, 'The Continual Reinvention of Section 15 of the Charter' (2013) 64 U New Brunswick L J 19. On German dignity jurisprudence see, for example, Henk Botha, 'Human Dignity in Comparative Perspective' (2009) 2 Stell L Rev 171.

<sup>21</sup> See generally the contributions in Christopher McCrudden (ed) *Understanding Human Dignity* (OUP 2013).

<sup>22</sup> Ackermann, *Lodestar* (n 1) chs 2–3.

<sup>23</sup> Above nn 4–7.

dignity, my analysis will show that this route to guidance holds far less promise than first impressions suggest. To see why this is so, we need to explore the idea of human dignity a little further.

### **3.3 HUMAN DIGNITY**

Human dignity captures the important idea that all human beings are owed respect by virtue of being human. This idea has different ‘strands’ of meaning,<sup>24</sup> which present different accounts of what this respect entails. I will focus here on two prominent strands, what I will term the ‘broad’ and the ‘narrow’ concepts of human dignity.<sup>25</sup> Ackermann’s account of human dignity is concerned with the broad concept. Consequently, I will give it the most attention.

#### **3.3.1 The Broad Concept**

The broad concept of human dignity expresses the idea that all human beings possess some inherent and equal moral worth and are entitled to be treated in a manner consistent with that worth.<sup>26</sup> This is reflected in the Constitutional Court’s descriptions of human dignity as an acknowledgement of ‘the value and worth of all individuals’,<sup>27</sup> requiring that ‘all human beings, regardless of their position in society, must be accorded equal dignity.’<sup>28</sup> Christopher McCrudden explains that this concept of human dignity can be broken down into two

---

<sup>24</sup> See further Michael Rosen, *Dignity: Its History and Meaning* (Harvard University Press 2012) ch 1, 61–62.

<sup>25</sup> It is debateable whether these are distinct concepts or just different conceptions of human dignity. I consider them to be so different in structure that it is better to discuss them as separate concepts.

<sup>26</sup> Ackermann, *Lodestar* (n 1) 4.

<sup>27</sup> *Sodomy Case* (n 2) [28] (Ackermann J).

<sup>28</sup> *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) [27].

related claims.<sup>29</sup> First, human dignity makes a claim about the nature of human beings, the ‘*ontological claim*’ that all human beings possess some inherent moral value.<sup>30</sup> Second, human dignity makes a claim about how human beings ought to be treated or situated; the ‘*relational claim*’ that some forms of conduct or situations are ‘inconsistent with, or required by, respect for this . . . worth.’<sup>31</sup> Different conceptions of this broad concept of human dignity make different ontological and relational claims, locating human beings’ inherent moral worth in different sources and offering different accounts of what is required or prohibited to show appropriate respect for this worth.<sup>32</sup> These claims are connected, as the imputed source of inherent moral worth provides the basis for deriving these relational claims.<sup>33</sup>

The prohibition of unfair discrimination can be seen as a manifestation of human dignity’s ‘relational claim’ as unfair discrimination is one way in which dignity can be violated. However, if human dignity is a broad assertion of human beings’ inherent moral worth and all that entails, then it follows that most, if not all, serious wrongs against human beings are also inconsistent with the respect that is owed to others as moral equals. This is reflected in the Constitutional Court’s broader human dignity jurisprudence as the Court has suggested that potentially all rights violations are a violation of human dignity.<sup>34</sup> The death penalty,<sup>35</sup> the denial of a family life,<sup>36</sup> socio-economic deprivation,<sup>37</sup> defamation,<sup>38</sup> and

---

<sup>29</sup> Christopher McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19 EJIL 655, 679. McCrudden adds a third claim, the ‘limited-state’ claim, which is not directly relevant for my purposes.

<sup>30</sup> *ibid* 679 (emphasis added).

<sup>31</sup> *ibid*.

<sup>32</sup> See further Réaume (n 20) 32–34.

<sup>33</sup> Discussed further at text to nn 45–47 below.

<sup>34</sup> *Dawood* (n 9) [35]; *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23 (2 September 2014) [172] (Van der Westhuizen J). See further Arthur Chaskalson, ‘Human Dignity as a Foundational Value of Our Constitutional Order’ (2000) 16 SAJHR 193, 204.

<sup>35</sup> *Makwanyane* (n 12) [84] (Chaskalson P).

<sup>36</sup> *Dawood* (n 9) [37].

insults,<sup>39</sup> among a host of other wrongs, have all been found to be inconsistent with human dignity in some way. The range of wrongs covered here indicates that human dignity violations are not confined to specific interests nor do they involve a particular way of violating these interests. Instead, human dignity violations potentially involve *all* violations of fundamental human interests. This is to be expected from such a broad and all-encompassing value.

Given its scope, this broad concept of human dignity cannot offer courts precise guidance in identifying the particular wrong of unfair discrimination.<sup>40</sup> As a broad statement of human beings' moral equality and an exhortation to treat others accordingly, human dignity serves as an important reminder of the need to show appropriate moral concern for others. It would be a step too far to expect this assertion of moral equality to provide precise guidance in identifying unfair discrimination.

The Canadian Supreme Court recognised this in *Kapp*,<sup>41</sup> where it abandoned human dignity as the basis of its test for discrimination. As discussed in chapter 2, the Canadian Court affirmed that human dignity is still a 'central value underlying the s 15 equality guarantee' and is the 'lodestar' for the 'protection of all rights guaranteed by the [Canadian] Charter'.<sup>42</sup> However, it concluded that dignity could not serve as the *legal test* for discrimination, in large part, because it is 'too abstract'.<sup>43</sup> In rejecting dignity as the legal test

---

<sup>37</sup> *Grootboom* (n 15) [44].

<sup>38</sup> *Khumalo* (n 18) [50].

<sup>39</sup> *Le Roux v Dey* 2011 (3) SA 274 (CC) [138] (Brand AJ), [175] (Froneman and Cameron JJ).

<sup>40</sup> Similar arguments have been made in the Canadian literature. See, for example, Donna Greschner, 'The Purpose of Canadian Equality Rights' (2002) 6 *Rev Const Stud* 291, 316-17; Sophia R Moreau, 'The Promise of *Law v Canada*' (2007) 57 *UTLJ* 415, 423.

<sup>41</sup> *R v Kapp* [2008] 2 SCR 483 [22].

<sup>42</sup> *ibid* [21].

<sup>43</sup> *ibid* [22].

for discrimination the Canadian Court was neither rejecting human dignity as an expression of human beings' moral equality, nor was it disputing that the wrong of discrimination under the Charter constitutes a violation of dignity.<sup>44</sup> It was simply rejecting the idea that the broad concept of human dignity offers courts any clear guidance in identifying this wrong.

It may be contended that a sufficiently detailed *conception* of this broad concept could provide this precise guidance. Ackermann devotes a significant portion of his book to developing such a conception. As outlined above, this involves giving content to dignity's 'ontological' and 'relational' claims by identifying the source of human beings' inherent moral worth and then determining what this means for our treatment of others.

Ackermann's conception of human dignity is inspired by Kantian ethics. His 'ontological claim' is that human beings' equal and inherent moral worth stems from our 'human intellectual and moral' capacities, reflecting Kant's view that human worth arises from our 'rational nature'.<sup>45</sup> Ackermann proceeds to derive a range of entitlements from this ontological claim, including entitlements to 'exercise judgment', to 'have self-worth', 'to exercise self-determination', and to 'achieve self-fulfilment', among many others.<sup>46</sup> This is his 'relational claim', as it specifies what is required to respect this equal and inherent moral worth. Ackermann develops this account of dignity through an extensive exploration of theology, philosophy, and comparative law. He further argues that this conception of dignity animates the 'personality rights' in South African common law and the rights contained in the Bill of Rights.<sup>47</sup> No doubt, Ackermann's account will spark further debate on the merits of this conception of dignity and whether it fits the South African case law. I will not engage

---

<sup>44</sup> *ibid* [21].

<sup>45</sup> See Immanuel Kant, *Groundwork of the Metaphysics of Morals* (CUP 1997) 4:439.

<sup>46</sup> Ackermann, *Lodestar* (n 1) 23–24, 86.

<sup>47</sup> *ibid* ch 3.

with the merits of this conception here. Instead, I am interested in whether it takes us any further in providing a basis for the test for unfair discrimination.

In this respect, Ackermann's fleshed out conception of human dignity faces the same difficulties encountered above. Unfair discrimination may be one way in which individuals are denied important entitlements such as self-development, self-fulfilment, or self-worth. However, it is still just one of many ways in which these entitlements may be denied. It tells us little about how to identify analogous grounds of discrimination or how to determine whether discrimination is unfair, the two things that human dignity is meant to determine in the *Harksen* test.

As it stands, Ackermann's conception casts the net too wide. When it comes to identifying analogous grounds, all unfavourable treatment on the basis of personal characteristics has some potential to undermine individuals' self-worth and their capacity for self-determination, among other interests that Ackermann identifies. Similarly, in determining unfairness, all discrimination on the basis of listed or analogous grounds could be said to impair these interests in some way. To distinguish between grounds that are worthy of protection and those that are not, or to tell fair from unfair discrimination, courts need to pin down the particular wrong that the prohibition of unfair discrimination ought to address. We can see this process at work in the Constitutional Court's statements that unfair discrimination seeks to prevent and address patterns of group disadvantage and in its attempts to outline rough considerations to guide its analysis. In doing so, the Court is not trying to identify the source of human beings' inherent moral worth or to derive relational claims from such an account. Instead, it is working from the ground up to form a clearer understanding of the particular wrong of unfair discrimination. Unfair discrimination is a violation of the broad concept of human dignity, as are potentially all other serious wrongs, but the broad concept of dignity provides no precise guidance in defining its contours.

This is not to say that Ackermann's conception of dignity offers courts no guidance at all. It could serve as a broad moral reference point, orienting although not determining judges' decisions. In this way, human dignity could be the 'lodestar' of Ackermann's title: a distant guiding light but not a source of specific guidance. However, this does not give human dignity the 'determinative role' in the adjudication of unfair discrimination claims or make it the 'essential element' of this inquiry,<sup>48</sup> as Ackermann claims and as the Court's dignity-based *Harksen* test makes it out to be.

This argument does not rule out the possibility of more detailed philosophical accounts of the broad concept of human dignity that could allow for the derivation of precise principles for identifying unfair discrimination. However, as Ackermann's account indicates, the task of developing and applying such a conception of dignity would require exceptionally complex and controversial work,<sup>49</sup> going far beyond what even the most ardent maximalist could reasonably expect of a court.<sup>50</sup> No court could be asked to resolve the difficult questions of where human beings' inherent worth comes from or to engage in the painstaking task of deriving a precise account of what respect for this worth requires in concrete cases. This is not to denigrate the philosophical abilities of judges, but to recognise the limits and purpose of the judicial role in identifying unfair discrimination.<sup>51</sup>

---

<sup>48</sup> Text to nn 4–7 above.

<sup>49</sup> On the complexities of this task, see Jeremy Waldron, 'Is Dignity the Foundation of Human Rights?' (2013) Working Paper No. 12-73 NYU Public Law & Legal Theory Research Paper Series 16–18 <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2196074](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2196074)> accessed 29 September 2014.

<sup>50</sup> See further Cass R Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard University Press 1999) ch 1.

<sup>51</sup> For a brief analysis of the role of judges and the role of philosophers, see John Gardner, 'How to Be a Good Judge: Review of *The Rule of Law* by Tom Bingham' *London Review of Books* (London, 8 July 2010).

### 3.3.2 The Narrow Concept

The broad concept is not the only way of understanding human dignity. Rather than talking about human dignity as an expression of human beings' equal and inherent moral worth and all that entails, we could instead define human dignity as a precise interest or wrong; injuries to feelings, say, or stigma, among a host of other contenders. This is the narrow concept of human dignity, with an infinite array of possible conceptions. Human dignity could offer precise guidance for identifying unfair discrimination if it is whittled down in this way, but there are serious difficulties with narrow conceptions and the guidance they provide.

First, using a narrow conception of human dignity to guide the test for unfair discrimination makes human dignity both redundant and potentially disingenuous. If human dignity is pared down to a precise interest or wrong then it is no longer clear why we need to talk of human dignity when the interest or a wrong is perfectly comprehensible without this label. Human dignity becomes a mere rhetorical device. There may be some value in this rhetoric in other contexts. However, when it comes to giving content to the legal test for unfair discrimination, it is important to be clear about the interests or wrongs that we are seeking to protect or prevent. In this setting, the rhetoric of dignity may serve to gloss over confusion or to vest a particular interest with an undeserved air of inviolability.<sup>52</sup>

Moreover, the guidance that narrow conceptions of human dignity could offer is problematic. The more precisely we define the interest or wrong that human dignity seeks to protect or prevent, the more the prohibition of unfair discrimination may drift away from the broader aim of addressing patterns of group disadvantage. As I will discuss in the next chapter, many South African commentators feared that the South African Court would define human dignity in a narrow way, undermining this focus on group disadvantage.<sup>53</sup> This

---

<sup>52</sup> Similar criticisms are found throughout the dignity literature. For a brief survey, see Christopher McCrudden, 'In Pursuit of Human Dignity: An Introduction to Current Debates' in Christopher McCrudden (ed), *Understanding Human Dignity* (OUP 2013) 10–13.

<sup>53</sup> Chapter 4, text to nn 56–62.

raises the questions of what constitutes a pattern of group disadvantage and what forms of disadvantage are of greatest concern. I will provide some answers in the chapters to follow.

### 3.3.3 Other Concepts

The broad and narrow concepts of human dignity do not exhaust human dignity's potential meanings. For example, Jeremy Waldron<sup>54</sup> suggests that human dignity is best thought of as a status rather than as a particular type of wrong or a claim about human beings' inherent moral worth.<sup>55</sup> On this account, dignity involves attributing the status once reserved for the highest ranking members of society to all human beings, a levelling up of respect and esteem rather than a levelling down. Denise Réaume has recently considered how this understanding of human dignity could be translated into greater guidance for discrimination law.<sup>56</sup> There may be potential in this idea or similar work in developing other accounts of human dignity.<sup>57</sup> I do not rule out all possibility of finding clear and appropriate guidance in this way. However, my analysis has shown that this route to guidance is much more difficult than it may first appear. I propose to pursue what I consider to be a more promising path to guidance.

## 3.4 A DIFFERENT ROUTE TO GUIDANCE

Instead of developing increasingly sophisticated theories of human dignity, a more promising way of seeking guidance is to explore the Court's reasoning in unfair discrimination cases in

---

<sup>54</sup> Jeremy Waldron, 'Dignity and Rank' in Jeremy Waldron and Meir Dan-Cohen (eds), *Dignity, Rank, and Rights* (OUP 2012).

<sup>55</sup> *ibid* 23–28.

<sup>56</sup> Denise Réaume, 'Dignity, Equality, and Comparison' in Deborah Hellman and Sophia R Moreau (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013) 22–27.

<sup>57</sup> See, for example, accounts of human dignity as an 'expressive harm', concerned exclusively with the meanings and messages that laws and actions convey. Tarunabh Khaitan, 'Dignity as an Expressive Norm: Neither Vacuous Nor a Panacea' (2012) 32 OJLS 1; Rosen (n 24) 61–62, ch 3 ('dignity as respectfulness').

greater detail. We need to understand precisely how the Court reasons to the conclusion that dignity has been violated. This will then allow for a more focused evaluation and critique of its reasoning.

In analysing the Court's reasoning, I will delve into the questions of what role dignity actually plays in the Court's reasoning and what role it ought to play in future. Some of my scepticism about whether dignity *can* offer precise and appropriate guidance will be reflected in my analysis of these questions.

I will show that the Court has used human dignity as a placeholder for a set of considerations that it has not fully articulated in its existing case law. The Court does not start with a particular conception of human dignity and then proceed to identify analogous grounds or determine that discrimination is unfair with reference to that conception. Instead, the finding that human dignity has been violated and that discrimination is unfair is a conclusion rather than a premise in the Court's reasoning. This has been noted in existing commentaries on the Court's case law. In his analysis of the Court's early jurisprudence, Anton Fagan argued that dignity is a 'rhetorical flourish' added to the Court's reasoning.<sup>58</sup> Pierre de Vos has also suggested that dignity does not operate as a 'rigid litmus test' for unfair discrimination but is simply a 'rhetorical device'.<sup>59</sup> Rory O'Connell reaches a similar conclusion, noting that human dignity generally does no 'substantive work' in the judgments.<sup>60</sup> Beyond making these broad observations, commentators have not gone further to uncover the reasoning process behind the Court's conclusions that human dignity has or has not been violated. In part 2, I will do this work to draw out the Court's reasoning.

---

<sup>58</sup> See Anton Fagan, 'Dignity and Unfair Discrimination: A Value Misplaced and a Right Misunderstood' (1998) 14 SAJHR 220, 224.

<sup>59</sup> Pierre de Vos, 'Equality For All? A Critical Analysis of the Equality Jurisprudence of the Constitutional Court' (2000) 63 THRHR 62, 66.

<sup>60</sup> Rory O'Connell, 'The Role of Dignity in Equality Law: Lessons from Canada and South Africa' (2008) 6 ICON 267, 276–79. O'Connell does go on to argue that where dignity does feature in the Court's reasoning it tends to be used to mask the 'reflexive assertion of accepted social norms' (283).

In part 3, I will go on to argue that the Court should follow the Canadian example by removing human dignity from its test for unfair discrimination.<sup>61</sup> I will contend that this would be a more accurate reflection of the Court's current reasoning and it would promote greater transparency. I will also argue that it would help to safeguard against some of the risks posed by human dignity's malleability. In particular, it would help to prevent the Court importing narrow conceptions of dignity into its analysis that may conflict with the broader aim of preventing and addressing patterns of group disadvantage.

In presenting these arguments, I will take a different line to many of the standard critiques of the Constitutional Court's use of human dignity. I do not believe that human dignity has played as much of a role in the Court's reasoning as many critics suggest. I also do not believe that its removal will achieve as much as many hope for. I ultimately agree that human dignity does not belong in the *Harksen* test, but this change is unlikely to be a panacea for the broader problems in the Court's reasoning. This analysis all lies in store.

The key conclusion from this chapter is that the search for guidance for identifying unfair discrimination needs to begin with a close examination of the Court's reasoning. I will now move on to this task in part 2.

---

<sup>61</sup> Chapter 7, text to n 2ff.

## **PART 2: UNDERSTANDING THE COURT'S REASONING**

## CHAPTER 4: CONNECTING THE CONCEPTS

### 4.1 INTRODUCTION

Part 1 laid the groundwork for the chapters to follow. In chapter 2, I provided necessary background to the Constitutional Court's unfair discrimination jurisprudence. We have seen that the Court has made human dignity the basis of its *Harksen* test for unfair discrimination, yet it has not clearly explained what is required to prove a violation of human dignity. In chapter 3, I considered whether more sophisticated theorising of human dignity could produce better guidance for identifying unfair discrimination. I showed that this route to guidance holds less promise than first impressions may suggest. Instead, the surer route to guidance is to begin with a close examination of the Court's reasoning in its unfair discrimination cases, focusing on how it identifies dignity violations. This is the task I undertake in part 2.

Part 2 consists of three chapters that will focus on different facets of the Court's reasoning. This chapter begins by forming a clearer picture of some of the complex concepts that infuse the Court's judgments. Chapter 5 goes on to explore how the Court applies the *Harksen* test. In chapter 6, I investigate a significant but under-examined feature of the Court's reasoning: its concern for the messages expressed by discrimination.

To understand how the Court identifies unfair discrimination we first need to piece together some of the difficult concepts that are scattered across its case law. The prohibition of unfair discrimination is part of the broader right to equality, which also includes a guarantee of equal protection and benefit of the law and the authorisation of affirmative action. The Court insists that the purpose of the prohibition of unfair discrimination is to prevent and address patterns of group disadvantage, yet it has gone on to base the test for unfair discrimination on human dignity. This leads to the question of how equality, patterns of group disadvantage, affirmative action, unfair discrimination, and human dignity are

connected in the Court's reasoning, if at all. Without some sense of these concepts and their connections it will be difficult to make further headway in understanding the Court's reasoning.

In this chapter, I show that close study of the case law reveals a largely coherent picture of these concepts and their connections. The Court is not in the habit of offering lengthy explanations of these concepts, but there is coherence to be found with the help of some conceptual analysis. Piecing together this conceptual picture will offer important insights into how the Constitutional Court goes about identifying unfair discrimination, clearing the way for further examination of the Court's reasoning in the next chapters.

I will develop this analysis in three sections. Section 4.2 explores the multiple conceptions of equality that have emerged in the Court's interpretation of the section 9 right to equality. I will demonstrate that the aim of preventing and addressing patterns of group disadvantage is one of at least four different conceptions of equality that appear in the case law. These conceptions are not in conflict with each other as they serve different roles, underpinning different parts of the section 9 right. I will explain that the aim of preventing and addressing patterns of group disadvantage grounds the prohibition of unfair discrimination and the authorisation of affirmative action. In section 4.3, I analyse the concept of patterns of group disadvantage in greater depth. Section 4.4 examines how the Court has connected this concept with human dignity. I show that a necessary condition for the Court to conclude that discrimination violates dignity is that it must threaten to create or perpetuate patterns of group disadvantage.

## **4.2 CONCEPTIONS OF EQUALITY**

As we saw in chapter 2, the section 9 right to equality has multiple components. Section 9(1) provides for the 'equal protection and benefit of the law'; section 9(2) stipulates that equality includes the 'full and equal enjoyment of right and freedoms' and authorises affirmative

action; and sections 9(3) and 9(4) prohibit unfair discrimination by the state and private parties, with section 9(5) creating a presumption of unfairness where discrimination occurs on listed grounds. Given these multiple components, it is no surprise that the Court has used multiple conceptions of equality in interpreting and applying this section 9 right. In this section, I show that four conceptions of equality appear in the case law, giving content to different parts of the right and offering different levels of protection.

Teasing out these different conceptions of equality will give us a better understanding of how the Court conceives of the relationship between equality, the prevention of patterns of group disadvantage, affirmative action, and unfair discrimination. This will clear the way for a deeper examination of the Court's reasoning. In the process, we will see that the Court has done some deft work, avoiding some of the conceptual tangles and dead-ends that have troubled other jurisdictions.

#### 4.2.1 Sketching the Concept of Equality

Equality is, in Canadian Chief Justice McLachlin's well-worn phrase, the 'most difficult right' in large part because of its conceptual complexity.<sup>1</sup> As a result, I will begin by briefly sketching the outline of this concept as this will allow for a better grasp of the different ways that the South African Court has given it content.

Equality, used in its normative sense,<sup>2</sup> prescribes that a *designated class* of people ought to be treated or situated equally *in some respect*.<sup>3</sup> This provides the broad conceptual

---

<sup>1</sup> Beverley McLachlin, 'Equality: The Most Difficult Right' (2001) 14 SCLR 17.

<sup>2</sup> On the distinction between descriptive and normative uses of equality, see Bernard Williams, 'The Idea of Equality' in Geoffrey Hawthorn (ed), *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Princeton University Press 2005) 97.

<sup>3</sup> Stefan Goseparth, 'Equality' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Stanford 2011) <<http://plato.stanford.edu/entries/equality/>> accessed 29 September 2014; Laurie Ackermann, *Human Dignity: Lodestar for Equality in South Africa* (Juta 2012) 21–23. Aristotle's famous maxim, that 'likes should be treated alike', is one way of restating this formulation, see Aristotle, *Nicomachean Ethics* (Roger Crisp tr, CUP 2000) Book 3, 1131a10–b15.

framework of equality. To give content to this framework, we have to answer two questions: ‘equality for whom?’ and ‘equality in respect of what?’<sup>4</sup> Different conceptions of equality supply different answers to these questions. These conceptions can be usefully categorised as those requiring ‘equal treatment’ and those requiring ‘equal situations’.<sup>5</sup>

‘Equal treatment’ conceptions are concerned with the way that people ought to be treated, irrespective of the consequences or how they are currently situated. For example, a norm requiring that the state should treat all people with an equal degree of courtesy could be loosely classified as an equal treatment conception, as it prescribes a certain type of treatment rather than a certain type of outcome. In contrast, ‘equal situation’ conceptions are concerned with how people are currently situated or how they end up. For instance, an equal situation norm could prescribe that all should have an equal distribution of some good and that steps should be taken to address existing distributions where they deviate from this.<sup>6</sup>

When the Constitutional Court and commentators distinguish between ‘formal’ and ‘substantive’ conceptions of equality they primarily have this distinction between equal treatment and equal situation in mind. However, these ‘formal’ and ‘substantive’ labels are also used in a looser way. ‘Formal equality’ is often used pejoratively to dismiss all conceptions of equality or approaches to unfair discrimination that are deemed inappropriate. By contrast, ‘substantive equality’ is used to praise those conceptions and approaches that are considered good. This sweeping use of these terms causes confusion as it elides many important nuances and distinctions.<sup>7</sup> In the discussion that follows, I will

---

<sup>4</sup> Or, in Sen’s more succinct phrasing, ‘equality of what?’ Amartya Sen, *Inequality Reexamined* (OUP 1992) 12. See further Ackermann *ibid* 17–21.

<sup>5</sup> The analysis that follows is influenced by Elisa Holmes, ‘Anti-Discrimination Rights Without Equality’ (2005) 68 MLR 175 and 178–79 in particular. Holmes adds further layers of complexity to the distinction between equal treatment and equal situation that are unnecessary for my purposes.

<sup>6</sup> Equal situation norms may also address situations that are not easily framed in distributive terms, such as social interactions.

<sup>7</sup> Holmes (n 5) 179.

prefer to use the ‘formal’ and ‘substantive’ labels to refer to the particular distinction between equal treatment and equal situation conceptions of equality.

This distinction between equal treatment (formal) and equal situation (substantive) conceptions is useful in categorising the Constitutional Court’s ideas about equality. We now need to explore how the Court has answered the questions of ‘equality for whom?’ and ‘equality in respect of what?’

The South African Constitution provides a straightforward answer to the question of ‘equality for whom?’ as it specifies that the right to equality applies to ‘anyone’ and ‘everyone’ who qualifies for the Constitution’s protection.<sup>8</sup> The trickier question is ‘equality in respect of what?’

One way to answer this question is to insist that equality requires that everyone should be treated or situated identically: ‘equality-as-sameness’. The South African Court has rightly rejected this conception, pointing out that it would be impossible to govern without making differentiations<sup>9</sup> and that ‘levelling down’ or ‘homogenisation’ can often cause great harm.<sup>10</sup> As a result, it has stressed that ‘equality should not be confused with uniformity’ as ‘uniformity can be the enemy of equality’.<sup>11</sup> There are, of course, circumstances where equality may require that people be treated or situated identically, such as the requirement that men and women should receive equal pay for work of equal value.<sup>12</sup> Nonetheless, the

---

<sup>8</sup> Section 9(1) applies to ‘everyone’ (s 9(1) while the ss 9(3) and 9(4) prohibitions of unfair discrimination apply to ‘anyone’.

<sup>9</sup> *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) [24] (Ackermann, O’Regan, and Sachs JJ).

<sup>10</sup> *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) [60] (Sachs J) (*Fourie*).

<sup>11</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) [132] (Sachs J) (*Sodomy Case*), see also [22] (Ackermann J); see further *Fourie* *ibid.* The Canadian Court adopted a similar approach in *Andrews v Law Society of British Columbia* [1989] 1 SCR 143, 167 where McIntyre J noted that ‘a law [will not] necessarily be bad because it makes distinctions.’

<sup>12</sup> See further Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011) 156–66.

Court recognises that it is neither possible nor permissible to insist that all should be treated or situated identically in all circumstances.

While equality does not require sameness, the Court insists that it requires ‘equal concern and respect’ for all, irrespective of difference.<sup>13</sup> The Court sees this as an expression of the broad concept of human dignity discussed in the previous chapter: the idea that all human beings possess equal and inherent moral worth and are entitled to be treated accordingly.<sup>14</sup> Like the broad concept of human dignity, this idea of ‘equal concern and respect’ potentially encompasses all fundamental interests and all serious wrongs against human beings. As a result, it cannot serve as a precise guide for identifying specific wrongs such as unfair discrimination.

The Court’s other conceptions of equality can be seen as specifications of this abstract requirement of ‘equal concern and respect’, pin-pointing particular respects in which people ought to be treated or situated equally in recognition of their moral equality. In doing so, these conceptions offer more precise answers to the question of ‘equality in respect of what?’ Two answers reflect formal conceptions, concerned with equal treatment, while the other two are substantive conceptions, prescribing that people should be equally situated in some respects.

#### **4.2.2 Formal Conceptions**

The Constitutional Court’s two formal conceptions of equality, concerned with equal treatment in some respects, both appear in its interpretation of the section 9(1) right to equality ‘before the law . . . and equal protection and benefit of the law.’

---

<sup>13</sup> See, for example, *Sodomy Case* (n 11) [132] (Sachs J); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) [54] (*Immigration Case*); *Fourie* (n 10) [60] (Sachs J).

<sup>14</sup> *ibid.* See further Catherine Albertyn and Beth Goldblatt, ‘Equality’ in Stuart Woolman and others (eds), *Constitutional Law of South Africa* (2nd edn, Juta 2008) 35-9 (OS 03-07); Catherine Albertyn, “‘The Stubborn Persistence of Patriarchy’? Gender Equality and Cultural Diversity in South Africa’ (2009) 2 Con Court Rev 165, 187–88.

First, the Court has interpreted section 9(1) as requiring that everyone be treated equally in accordance with the law's requirements: 'equality-as-consistency'. This conception was evident in *Prinsloo*<sup>15</sup> where Ackermann, O'Regan, and Sachs JJ explained that section 9(1) 'makes it clear that no-one is above or beneath the law and that all persons are subject to law impartially applied and administered.'<sup>16</sup> Consistency of treatment in accordance with the law's requirements is an important dimension of the rule of law, but it is still capable of producing appalling treatment and outcomes. The apartheid regime's meticulous efforts to ensure that its racially discriminatory policies were legally enacted and consistently applied are proof of this.<sup>17</sup> Furthermore, because equality-as-consistency is an equal treatment norm, it is largely blind to individuals' existing circumstances or the consequences of legally consistent treatment. As a result, additional layers of protection are needed.

The Court's second formal conception of equality builds on equality as consistency by providing that all are equally entitled to rational treatment at the hands of the state; what I will term 'equality-as-rationality'. As explained in chapter 2, the Court has made this conception of equality the primary focus of the section 9(1) right.<sup>18</sup> Equality-as-rationality adds additional protections to equality-as-consistency, but these protections are still very weak. Like equality-as-consistency, it is also an equal treatment norm that has little to say about unequal situations. Furthermore, it sets a low threshold for permissibility as it simply requires a legitimate purpose and some likelihood that the law or action will advance this purpose.<sup>19</sup> For example, in *Hoffmann*,<sup>20</sup> a challenge to the national airline's policy of barring

---

<sup>15</sup> Above n 9.

<sup>16</sup> *ibid* [22], expanding on Didcott J's dictum in *S v Ntuli* 1996 (1) SA 1207 (CC) [18].

<sup>17</sup> See further David Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality* (OUP 2010) ch 1.

<sup>18</sup> *Prinsloo* (n 9) [25] (Ackermann, O'Regan, and Sachs JJ).

<sup>19</sup> See *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC) [17].

<sup>20</sup> *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) [25]–[26].

HIV-positive people from being hired as cabin attendants, the Court skirted around the fact that refusing to hire HIV-positive people may, albeit very tenuously, be capable of realising the legitimate goal of having a healthy workforce. This action was a violation of the section 9 right to equality, but its impermissibility did not lie in its irrationality. It is therefore unacceptable to conceive of equality *solely* as a safeguard against irrationality, as a minority on the Supreme Court of Canada attempted to do in the mid-1990s.<sup>21</sup> In contrast, the South African Court has given equality more expansive, substantive content in addition to this concern for rationality, as I will discuss in the next section.

While equality-as-consistency and equality-as-rationality afford weak protections, this does not mean that they have no value and no place in section 9. They establish a minimum level of protection without exhausting the content of section 9. Differences in treatment or situation can still fall foul of the substantive conceptions of equality that underpin other parts of section 9.

#### **4.2.3 Substantive Conceptions**

Substantive conceptions of equality give a more robust, equal situation-focused answer to the question of ‘equality in respect of what?’ The Constitutional Court’s case law reveals at least two closely related substantive conceptions which underpin the prohibition of unfair discrimination and the authorisation of affirmative action.

The first conception is made explicit in section 9(2) of the Constitution which provides that ‘[e]quality includes the full and equal enjoyment of all rights and freedoms’. The Court regards this as an explicit statement of the Constitution’s commitment to substantive equality as it specifies that people must not merely be treated equally by being afforded rights and freedoms on paper, but that they should also be equally situated in their

---

<sup>21</sup> See chapter 2, text to nn 81–83.

enjoyment of these rights and freedoms.<sup>22</sup> This is an important safeguard against any tendency to think of the right to equality exclusively in formal, equal treatment terms. Nevertheless, this conceptualisation of equality is broad and lacking in specificity, encompassing all manner of wrongs and all other rights violations. The Court's second substantive conception is more focused as it identifies a particularly serious way in which the equal enjoyment of rights and freedoms may be denied.

This second conception is reflected in the Court's consistent emphasis that equality is opposed to 'patterns of group disadvantage'. It emerged in the Court's first unfair discrimination decision in *Brink*<sup>23</sup> where O'Regan J, writing for a unanimous Court, held that the right to equality and the prohibition of unfair discrimination were adopted—

in the recognition that discrimination against people who are members of disfavoured groups can lead to patterns of group disadvantage and harm. Such discrimination is unfair: it builds and entrenches inequality amongst different groups in our society.<sup>24</sup>

The Court endorsed this conception of equality in *Van Heerden*,<sup>25</sup> its first decision on affirmative action under section 9(2):

[The] substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage.<sup>26</sup>

Understood in this way, this substantive conception of equality aims to *prevent* and *eradicate* patterns of group disadvantage. This reflects an equal situation norm as it requires groups to

---

<sup>22</sup> *Sodomy Case* (n 11) [62] (Ackerman J); *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) [31] (Moseneke J); *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23 (2 September 2014) [28]–[29], [35] (Moseneke J).

<sup>23</sup> *Brink v Kitsboff NO* 1996 (4) SA 197 (CC).

<sup>24</sup> *ibid* [42].

<sup>25</sup> Above n 22.

<sup>26</sup> *ibid* [27] (Moseneke J).

be situated equally in the sense that they should all be free from patterns of group disadvantage.<sup>27</sup> It raises the interesting question whether the elimination of patterns of group disadvantage requires groups to be equally situated in other respects (such as resources, opportunities, or social status) or, conversely, whether equality in such respects is necessary to prevent patterns of group disadvantage from forming. I will leave these empirical and conceptual puzzles for another time.<sup>28</sup>

This conception of equality underpins the prohibition of unfair discrimination and the authorisation of affirmative action. In *Harksen*,<sup>29</sup> Goldstone J explained that the prohibition of unfair discrimination—

seeks to prevent the unequal treatment of people based on such criteria which may, amongst other things, result in the construction of patterns of disadvantage such as has occurred only too visibly in our history.<sup>30</sup>

While the prohibition of unfair discrimination primarily exists to prevent the creation or perpetuation of patterns of group disadvantage, the authorisation of affirmative action measures aims to ‘dismantle’ existing patterns of group disadvantage.<sup>31</sup> In the *Sodomy Case*,<sup>32</sup> Ackermann affirmed the importance of affirmative action as part of this substantive conception of equality, holding as follows:

Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof

---

<sup>27</sup> It is open for debate whether concern for patterns of group disadvantage is an egalitarian concern or is better explained in sufficientarian or prioritarian terms. This debate has limited significance for my project.

<sup>28</sup> Some form of distributive equality may be necessary to prevent or eliminate patterns of group disadvantage. See further TM Scanlon, ‘The Diversity of Objections to Inequality’ in Matthew Clayton and Andrew Williams (eds), *The Ideal of Equality* (Palgrave 2000) 41; Kate Pickett and Richard Wilkinson, *The Spirit Level: Why Greater Equality Makes Societies Stronger* (Bloomsbury 2010).

<sup>29</sup> *Harksen v Lane* NO 1998 (1) SA 300 (CC).

<sup>30</sup> *ibid* [50].

<sup>31</sup> *Van Heerden* (n 22) [27] (Moseneke J).

<sup>32</sup> Above n 11.

are eliminated, and unless remedied, may continue for a substantial time and even indefinitely.<sup>33</sup>

Viewed in this way, the prohibition of unfair discrimination and the authorisation of affirmative action are not in opposition. Instead, they are different tools, and not the only tools,<sup>34</sup> to achieve the common goal of preventing and addressing patterns of group disadvantage.

This understanding of the connection between unfair discrimination and affirmative action avoids some of the conceptual difficulties that other jurisdictions have encountered when dealing with affirmative action claims.<sup>35</sup> When equality is understood simply as the avoidance of differential treatment on the basis of protected grounds it is difficult to understand how affirmative action could be equality enhancing.<sup>36</sup> However, if equality is seen as an overarching goal, seeking to prevent and address patterns of group disadvantage, then it encompasses both anti-discrimination norms and affirmative action measures.

While the South African Court has avoided these conceptual difficulties, this is not to say that the relationship between unfair discrimination and affirmative action is beyond dispute. There is ongoing debate<sup>37</sup> over the merits of having separate tests for legitimate affirmative action (the *Van Heerden* test) and unfair discrimination (the *Harksen* test).<sup>38</sup> For

---

<sup>33</sup> *ibid* [26] (Ackermann J). See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) [74] (Ngcobo J).

<sup>34</sup> *Barnard* (n 22) [33] (Moseneke J). See further Sandra Liebenberg and Beth Goldblatt, 'The Interrelationship between Equality and Socio-Economic Rights Under South Africa's Transformative Constitution' (2007) 23 SAJHR 335.

<sup>35</sup> See further Sandra Fredman, *Comparative Study of Anti-Discrimination and Equality Laws of the US, Canada, South Africa and India* (European Commission, 2012) 63–67.

<sup>36</sup> For a striking example, see Thomas J's separate concurrence in the United States Supreme Court's decision in *Fisher v University of Texas* 570 US \_\_\_ (2013), equating affirmative action in universities with the racial segregation of schools in the 1950s.

<sup>37</sup> See further JL Pretorius, 'R v Kapp: A Model for South African Affirmative Action Jurisprudence?' (2009) 126 SALJ 398; JL Pretorius, 'Fairness in Transformation: A Critique of the Constitutional Court's Affirmative Action Jurisprudence' (2010) 26 SAJHR 536.

<sup>38</sup> Discussed in chapter 2, text to n 9–15.

some, this bifurcated approach is inconsistent with the understanding that both tests serve the common purpose of addressing patterns of group disadvantage.<sup>39</sup> However, a common purpose does not require a common test, as long as there are good reasons for this division. As I will discuss in the next chapter, there are indeed good reasons, the most significant being that the *Van Heerden* test avoids the anomalous result of holding all affirmative action to be presumptively unfair under section 9(5) of the Constitution.<sup>40</sup> The most pressing question is how the *Van Heerden* test should be applied to ensure appropriate judicial oversight while also preventing undue judicial obstruction of affirmative action. As I signalled in chapter 1, I will not enter into this debate in this thesis. Nevertheless, my analysis of the Court's reasoning in applying the *Harksen* test will lay useful foundations for deeper analysis of the Court's approach to affirmative action in future work.

#### **4.2.4 The Court's Multiple Conceptions of Equality**

To briefly summarise the discussion so far, we have seen that the Court interprets the section 9 right to equality as encompassing at least four conceptions of equality that work side-by-side. It has interpreted section 9(1) as embodying formal, equal treatment norms of 'equality-as-consistency' and 'equality-as-rationality'. In contrast, the section 9(2) affirmative action provision and the sections 9(3) and 9(4) prohibitions of unfair discrimination are underpinned by two substantive conceptions of equality: the idea that equality includes the 'full and equal enjoyment' of rights and freedoms and the idea that it is opposed to patterns of group disadvantage. The latter conception figures most prominently in the Court's understanding of unfair discrimination and affirmative action. On this account, the prohibition of unfair discrimination aims to prevent the creation or perpetuation of these

---

<sup>39</sup> See Sachs J's separate concurring judgment in *Van Heerden* (n 22) [139]. See also Pretorius, 'Fairness in Transformation' (n 37) 568–69.

<sup>40</sup> *Van Heerden* ibid [33] (Moseneke J).

patterns of disadvantage while affirmative action measures are aimed at dismantling existing patterns of disadvantage.

This account gives a better sense of how the Court has conceived of the connection between equality, patterns of group disadvantage, the prohibition of unfair discrimination, and affirmative action. Further work is now needed to understand this concept of patterns of group disadvantage.

### 4.3 PATTERNS OF GROUP DISADVANTAGE

As I noted in chapter 1, the Constitutional Court has not sought to explain the concept of patterns of group disadvantage in much depth, preferring instead to let South Africa's history and current reality provide an explanation.<sup>41</sup> The Court's references to patterns of group disadvantage generally appear against the backdrop of broader reflections on the nature and consequences of apartheid and the centuries of racial oppression that preceded it.<sup>42</sup> While this history of racial oppression features most prominently in the Court's discussions, the Court has always been quick to add that it is equally concerned with other patterns of group-based disadvantage:

Although our history is one in which the most visible and most vicious pattern of discrimination has been racial, other systematic motifs of discrimination were and are inscribed on our social fabric. In drafting [the right to equality], the drafters recognised that systematic patterns of discrimination on grounds other than race have caused, and many continue to cause, considerable harm.<sup>43</sup>

The central concern is that disadvantage is particularly invidious when it is patterned along group lines, as this spawns further harms.

---

<sup>41</sup> See chapter 1, text to nn 14–20 for discussion of the role of South Africa's history in the Court's interpretation of s 9.

<sup>42</sup> See, for example, *Brink* (n 23) [40]–[41] (O'Regan J); *Van Heerden* (n 22) [26] (Moseneke J).

<sup>43</sup> *Brink* *ibid* [41].

This concern for patterns of group disadvantage is variously described in the equality literature as ‘structural’ or ‘systemic’ inequality,<sup>44</sup> ‘group-disadvantage’,<sup>45</sup> or ‘caste-like’<sup>46</sup> status, among many other labels. I will now draw on some of the broad themes in this literature to give greater shape to the Court’s understanding of patterns of group disadvantage.

The concept of patterns of group disadvantage has three key parts. First, it reflects a concern for disadvantage experienced by *groups* rather than disadvantage that is solely experienced by individuals. Here we can understand groups as those who share or are perceived to share certain characteristics, understood broadly to include all traits, behaviours, practices, beliefs, customs, and other attributes that could be used to identify people. This concern for group disadvantage does not mean that the Court conceives of groups as entities with interests independent of the interests of their individual members. Instead, the Court is concerned that group members face particularly severe harms when disadvantage is distributed along group lines. For instance, the denial of social welfare grants to those in need is harmful to individuals, irrespective of whether this denial affects others. However, individuals are exposed to greater harms when this denial is based on group membership. The Court recognised this in *Kbosa*,<sup>47</sup> a case involving the exclusion of non-citizens from social welfare. The Court held that this exclusion ‘sends the message’ that non-citizens are ‘second-class’ members of society which inevitably leads to further ostracism and exclusion.<sup>48</sup>

---

<sup>44</sup> See Cathi Albertyn and Beth Goldblatt, ‘Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality’ (1998) 14 SAJHR 248, 251–54; Iris Marion Young, ‘Equality of Whom? Social Groups and Judgments of Injustice’ (2001) 9 J Pol Phil 1, 9–15; Hugh Collins, ‘Discrimination, Equality and Social Inclusion’ (2003) 66 MLR 16, 26–31; Catherine Albertyn, ‘Substantive Equality and Transformation in South Africa’ (2007) 23 SAJHR 253, 254–61.

<sup>45</sup> Owen M Fiss, ‘Groups and the Equal Protection Clause’ (1976) 5 Philosophy & Public Affairs 107.

<sup>46</sup> Cass R Sunstein, ‘The Anticaste Principle’ (1994) 92 Mich L Rev 2410.

<sup>47</sup> *Kbosa v Minister of Social Development* 2004 (6) SA 505 (CC) [74] (Mokgoro J). Discussed further in text to nn 92–93 and 103–107 below.

<sup>48</sup> *ibid.*

In this way, group-based disadvantage has a multiplier effect, spawning further disadvantage for the wider group, as I explain further in chapter 7.<sup>49</sup>

Second, the idea of *patterns* of group disadvantage captures three intertwined concerns. First, it is a concern for disadvantage that is patterned along group lines, affecting some groups more severely than others. For example, the Court has often noted that poverty remains patterned along racial and gender lines, as black South Africans, and black women in particular, bear the brunt of poverty.<sup>50</sup> Second, this is a concern that group-based disadvantage ‘patterns’ the lives of group members, affecting group members in similar, albeit not identical, ways across many facets of their lives. For instance, in the *Sodomy Case*,<sup>51</sup> the decision in which the Court declared the criminalisation of all anal intercourse between men to be unfairly discriminatory, the Court reflected on the myriad ways in which gay men were affected by this offence and the stigma it perpetuated. These harms ranged from psychological trauma and shame, through to reduced employment opportunities and police harassment.<sup>52</sup> Third, the idea of patterns of group disadvantage captures the concern that group-based disadvantage ‘patterns’ society, in the sense that it becomes engrained in laws, institutions, geography, and many other areas of social life.<sup>53</sup> Once it is so engrained, this group disadvantage often becomes normalised and difficult to dislodge, producing serious, long-term harms. This is illustrated in *Pillay*,<sup>54</sup> a challenge to a historically white school’s code

---

<sup>49</sup> Chapter 7, text to n 30ff.

<sup>50</sup> See, for example, *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) [91]–[93] (Langa DCJ); *Van der Merwe v Road Accident Fund* 2006 (4) SA 230 (CC) [67]; *MEC for Education, Kwa-Zulu Natal v Pillay* 2008 (1) SA 474 (CC) [121]–[124] (O’Regan J).

<sup>51</sup> Above n 11.

<sup>52</sup> *ibid* [23] (Ackermann J). Quoting Edwin Cameron, ‘Sexual Orientation and the Constitution: A Test Case for Human Rights’ (1993) 110 SALJ 450, 455.

<sup>53</sup> See further Young (n 44) 14; Collins (n 44) 30–31.

<sup>54</sup> Above n 50.

of conduct which banned all jewellery, apart from wrist-watches and stud earrings. As a result of this code of conduct, the complainants' daughter was barred from wearing a nose ring in observance of her South Indian, Tamil, and Hindu cultural practices and religious beliefs. As the Court recognised, the code was distantly connected with the segregation of schools under apartheid which saw whites-only schools develop rules and traditions that reflected predominantly white, Christian norms. These rules and traditions continued to marginalise other racial, religious, and cultural groups long after desegregation in the early 1990s. The code of conduct at issue in *Pillay* was a clear example of this. As Langa CJ emphasised, the code was 'not neutral but enforces mainstream and historically privileged forms of adornment'.<sup>55</sup>

Finally, there is the question of what constitutes *disadvantage*. In the next section, I will show that the Court is principally concerned with two forms of disadvantage. It has given the greatest attention to disadvantage arising from prejudice and stereotyping, but it has also shown some concern for socio-economic disadvantage. In chapter 7, I argue that the Court needs to give greater attention to other forms of disadvantage, including political marginalisation, social marginalisation, cultural domination, and violence and victimisation.

In this light, we can say that the concern for patterns of group disadvantage reflects a concern for disadvantage that affects some groups more severely than others, affecting those who belong to these groups in similar ways across many areas of their lives, and is deeply engrained in society, producing long-term harm. This is by no means an exhaustive account, but it does introduce a greater degree of clarity to this important concept. Now that we have a better understanding of this concept, I will turn to consider how it fits with the Court's human dignity-based test for unfair discrimination.

---

<sup>55</sup> *ibid* [44].

#### 4.4 HUMAN DIGNITY AND PATTERNS OF GROUP DISADVANTAGE

Commentators have widely applauded the Court's statements that the prohibition of unfair discrimination aims to prevent and address patterns of group disadvantage.<sup>56</sup> However, many have argued that there is a tension between this aim and the Court's use of human dignity as the basis of the *Harksen* test. In an article published in 1998, Cathi Albertyn and Beth Goldblatt argued that dignity is inherently incompatible with this aim as it is exclusively concerned with complainants' feelings.<sup>57</sup> Differently described, their criticism was that the Court applied a narrow conception of human dignity, defining dignity as a precise interest or wrong that is inconsistent with a broader concern for group disadvantage.<sup>58</sup> In response, others argued that human dignity can be interpreted in ways that are sensitive to this concern.<sup>59</sup> The Court's subsequent successes in addressing patterns of group disadvantage led to a different line of criticism.<sup>60</sup> Commentators no longer argue that human dignity is inherently incompatible with a focus on group disadvantage. However, many argue that its malleability 'facilitates'<sup>61</sup> incompatible reasoning as it provides an entry-point for disparate values and judicial whims.<sup>62</sup>

---

<sup>56</sup> Discussed further in chapter 1, text to n 30ff.

<sup>57</sup> Albertyn and Goldblatt, 'Facing the Challenge' (n 44) 257–58.

<sup>58</sup> I discussed this distinction between the narrow and broad concepts of dignity in chapter 3.

<sup>59</sup> See Susie Cowen, 'Can "Dignity" Guide South Africa's Equality Jurisprudence?' (2001) 34 SAJHR 34; Sandra Liebenberg, 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 SAJHR 1.

<sup>60</sup> See Catherine Albertyn, 'Equality' in Elsje Bonthuys and Cathi Albertyn (eds), *Gender, Law and Justice* (Juta 2007) 107–109; Marius Pieterse, 'Finding for the Applicant? Individual Equality Plaintiffs and Group-Based Disadvantage' (2008) 24 SAJHR 397, 421.

<sup>61</sup> Henk Botha, 'Equality, Dignity, and the Politics of Interpretation' (2004) 19 SAPL 724, 747.

<sup>62</sup> See, for example, Dennis Davis, 'Equality: The Majesty of Legoland Jurisprudence' (1999) 116 SALJ 398, 413; Albertyn, 'Equality' (n 60) 111; Rory O'Connell, 'The Role of Dignity in Equality Law: Lessons from Canada and South Africa' (2008) 6 ICON 267, 279, 283; Catherine Albertyn, 'Constitutional Equality in South Africa' in Ockert Dupper and Christoph Garbers (eds), *Equality in the Workplace: Reflections from South Africa and Beyond* (Juta 2009) 89–92.

I agree that human dignity is malleable and poses the risk of being interpreted in narrow ways that may conflict with the broader aim of addressing patterns of group disadvantage. However, I disagree that human dignity has played as great a role in the Court's reasoning as many commentators suggest. One is hard-pressed to find cases where the Court has actually based its decisions on a specific conception of dignity.<sup>63</sup> The Court occasionally outlines narrow conceptions of dignity in its abstract musings on the concept.<sup>64</sup> But, when it comes to determining whether a ground is analogous or deciding that discrimination is unfair, the Court does not start with a particular idea of dignity and then proceed to derive conclusions from it. Instead, as many have noticed, human dignity appears as a conclusion in the Court's reasoning rather than as a premise.<sup>65</sup>

In this chapter and the next, I will show that three necessary conditions must be satisfied for the Court to conclude that human dignity has been violated in its unfair discrimination decisions. There must be: a) unfavourable treatment on the basis of protected grounds; b) that threatens to create or perpetuate patterns of group disadvantage; and c) that lacks adequate justification. The Court has used human dignity as a placeholder for these considerations rather than as a fully-fledged component of its reasoning. In this section, I will demonstrate the link between human dignity and patterns of group disadvantage, the second necessary condition in my formulation. Chapter 5 will reveal the full set of necessary conditions at work in the Court's reasoning.

The connection between human dignity and patterns of group disadvantage is evident in the way that the Court frames the conclusion that discrimination has violated

---

<sup>63</sup> One commonly cited example of the Court basing its decision on a narrow conception of human dignity is *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) [81]. I address this example in chapter 5, text to nn 234–240.

<sup>64</sup> See, for example, *Sodomy Case* (n 11) [124] (Sachs J); *Immigration Case* (n 13) [41]; *Van Heerden* (n 22) [146] (Sachs J).

<sup>65</sup> See authors cited in chapter 3, text to nn 58–60. See also Joan Small and Evadné Grant, 'Dignity, Discrimination, and Context: New Directions in South African and Canadian Human Rights Law' (2005) 6 HRLRev 25, 51.

dignity and is unfair. This link was made explicit in *Mabaso*,<sup>66</sup> a case involving discrimination against residents of former ‘homeland’ areas, separate ‘states’ and self-governing territories created by the apartheid regime as an instrument of control over black South Africans. Attorneys in former ‘homeland’ areas were barred from making use of a short-cut procedure to enrol in High Courts in other provinces. O’Regan J, writing for a unanimous Court, held that this was unfairly discriminatory, framing this conclusion as follows:

This discrimination reinforces and perpetuates a pattern of disadvantage which exists between ‘homeland’ areas and the rest of South Africa. Accordingly, the discrimination has the potential to impair the fundamental human dignity of those adversely affected. Our Constitution expressly seeks to avoid the perpetuation of such patterns of disadvantage and the concomitant impairment of human dignity.<sup>67</sup>

Here the Court’s conclusion that the discrimination violated dignity is explicitly based on the fact that it perpetuated a pattern of group disadvantage. The Court is seldom so clear and direct, but other cases reveal an equally strong connection between these ideas. As I will now show, the Court frames the conclusion that discrimination violates dignity in two primary ways. First, it often reflects on the messages expressed by discrimination and whether these messages perpetuate stereotyping and prejudice in society. Second, it also considers whether discrimination entrenches socio-economic disadvantage. These conclusions identify different ways in which patterns of group disadvantage are created or sustained, indicating that proof that discrimination creates or entrenches such disadvantage is a necessary condition for finding that it violates dignity.

---

<sup>66</sup> *Mabaso v Law Society, Northern Provinces* 2005 (2) SA 117 (CC).

<sup>67</sup> *ibid* [38] (footnotes omitted).

#### 4.4.1 Expressive Concerns

The Constitutional Court most commonly concludes that discrimination violates human dignity and is unfair because of the message conveyed by the discriminatory law or action.

Here are a few examples:

The message and impact [of allowing opposite sex spouses of permanent residents to join their spouses in the country but denying this benefit to same-sex partners] are clear. . . . The message is that gays and lesbians lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected. It serves in addition to perpetuate and reinforce existing prejudices and stereotypes. The impact constitutes a crass, blunt, cruel and serious invasion of their dignity.<sup>68</sup>

[T]he exclusion of foreigners from state welfare programmes not only operates to stamp them with a ‘badge of inferiority’ but marginalises them by sending a message of second-class status in the communities in which they reside.<sup>69</sup>

The exclusion of same-sex couples from the benefits and responsibilities of marriage . . . represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings . . .<sup>70</sup>

The case law is filled with similar concerns over the ‘messages’,<sup>71</sup> ‘premises’,<sup>72</sup> ‘inferences’,<sup>73</sup> ‘imputations’,<sup>74</sup> or ‘statements’<sup>75</sup> expressed by laws or actions. I will refer to these collectively as the Court’s ‘expressive concerns’.

---

<sup>68</sup> *Immigration Case* (n 13) [54].

<sup>69</sup> *Khosa* (n 47) [74] (Mokgoro J).

<sup>70</sup> *Fourie* (n 10) [71] (Sachs J).

<sup>71</sup> *Sodomy Case* (n 11) [23] (Ackermann J); *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 (4) BCLR 339 (CC) [116] (Mokgoro and O’Regan JJ); *Pillay* (n 50) [85] (Langa CJ).

<sup>72</sup> *Harksen* (n 29) [121] (Sachs J); *Union of Refugee Women* ibid [118]; *Van Heerden* (n 22) [116] (Ngcobo J).

<sup>73</sup> *S v Jordan* 2002 (6) SA 642 (CC) [65] (O’Regan and Sachs JJ); *Bhe* (n 50) [92] (Langa DCJ); *Geldenbuys v National Director of Public Prosecutions* 2009 (1) SACR 231 (CC) [36].

<sup>74</sup> *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* 1998 (1) SA 745 (CC) [20].

<sup>75</sup> *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) [62] (Skweyiya J), [226] (Sachs J); *Fourie* (n 10) [71] (Sachs J); *Mabaso* (n 66) [36].

These expressive concerns are not unique to the South African case law. They are also a prominent feature of the Supreme Court of Canada's judgments. In *Law*,<sup>76</sup> the Canadian Court explained that a law or action violates dignity, resulting in a finding of discrimination under section 15(1), where it—

has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration.<sup>77</sup>

This appeared to make proof of impermissible messages a necessary condition for establishing dignity violations.<sup>78</sup> The Canadian Court has since removed dignity from its test for discrimination,<sup>79</sup> but expressive concerns are likely to remain a feature of its case law. In her concurring judgment in *Quebec v A*,<sup>80</sup> McLachlin CJ suggested that the fact that a law has the effect of 'of perpetuating or promoting the view that the individual is less capable or worthy' remains relevant to the enquiry. However, Abella J cautioned that this consideration should not be elevated to a necessary condition for proving discrimination.<sup>81</sup>

The South African and Canadian Courts share the concern that these messages may promote or entrench prejudice and stereotyping in society, affecting how the disfavoured group is treated and how the members of the group think of themselves.<sup>82</sup> Prejudice is the erroneous belief, either consciously or unconsciously held, that the interests of those who

---

<sup>76</sup> *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497.

<sup>77</sup> *ibid* [88].

<sup>78</sup> See, for example, *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)* [2004] 1 SCR 76 [224] (Deschamps J); *Corbiere v Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203 [18] (McLachlin and Bastarache JJ).

<sup>79</sup> *R v Kapp* [2008] 2 SCR 483. Discussed in chapter 2, text to n 115ff.

<sup>80</sup> *Quebec (Attorney General) v A* [2013] 1 SCR 61 [417].

<sup>81</sup> *ibid* [325]–[330].

<sup>82</sup> For further discussion of expressive concerns in the Canadian context, see Denise Réaume, 'Discrimination and Dignity' (2003) 63 La L Rev 1, 35–41.

belong to a certain group count for less merely by virtue of their group membership.<sup>83</sup> For instance, in *Fourie*,<sup>84</sup> quoted above, the South African Court<sup>85</sup> was concerned that the exclusion of same-sex couples from marriage would send a message to society, entrenching the prejudice that same-sex couples' 'need for affirmation and protection of their intimate relations' is less important because of their sexual orientation.<sup>85</sup>

Broadly defined, stereotypes involve the belief that those who belong to particular groups are more likely to possess characteristics that are perceived to be an appropriate basis for different treatment.<sup>86</sup> Stereotypes can be negative (associating group members with undesirable characteristics) or positive (attaching valued traits to group membership) and can have varying degrees of accuracy. Negative stereotypes are a form of stigma and I will use these terms interchangeably in the rest of this thesis.<sup>87</sup> Concern for negative stereotyping was also evident in *Fourie*,<sup>88</sup> as the Court feared that the exclusion of same-sex couples from marriage would reinforce the 'wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings'.

A difference in emphasis in the Canadian and South African expressive concerns is that the South African Court often goes further to consider how impermissible messages will entrench broader patterns of group disadvantage. Ackermann J expressed this most clearly in

---

<sup>83</sup> Here I draw on Larry Alexander, 'What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies' (1992) 141 U Pa L Rev 149, 158-59, 192 (Alexander prefers to speak of 'bias' rather than prejudice). Prejudice is often associated with feelings of enmity towards groups and an intention to cause them harm, see Sophia R Moreau, 'The Wrongs of Unequal Treatment' (2004) 54 UTLJ 291, 302-303. However, these emotional and conative states are symptomatic of underlying prejudiced beliefs.

<sup>84</sup> Above n 10.

<sup>85</sup> Text to n 70 above.

<sup>86</sup> Alexander (n 83) 167ff; Rósaan Krüger, 'Equality and Unfair Discrimination: Refining the *Harksen* Test' (2011) 128 SALJ 479, 509-10.

<sup>87</sup> Not all stigma involves stereotyping, although all negative stereotypes are a form of stigma. See Monica Biernat and John F Dovidio, 'Stigma and Stereotypes' in Todd F Heatherton and others (eds), *The Social Psychology of Stigma* (Guilford Press 2003) 90. See generally Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Penguin 1968).

<sup>88</sup> Above n 10 [71].

his judgment in the *Immigration Case*,<sup>89</sup> involving immigration legislation that discriminated against same-sex life partners. Reflecting on the ‘patterns of disadvantage’ that gay and lesbian people experience, he explained that this disadvantage stems from the ‘message’ that they are ‘inferior’ which—

all too quickly and insidiously degenerates into a denial of humanity and leads to inhuman treatment by the rest of society in many other ways.<sup>90</sup>

These concerns are echoed throughout the Court’s sexual orientation cases,<sup>91</sup> but they are not confined to these decisions. In *Khosa*,<sup>92</sup> the case involving the exclusion of non-citizens from social welfare grants, the Court held that this exclusion stamped non-citizens with a ‘badge of inferiority’ by ‘sending a message of second-class status in the communities in which they reside’ that would contribute to their further marginalisation.<sup>93</sup> Similarly, in *Union of Refugee Women*,<sup>94</sup> concerning a law barring refugees from registering as security guards using ordinary procedures, the minority concluded that this conveyed the ‘message’ and the ‘silent premise’ that refugees are inherently untrustworthy,<sup>95</sup> which would ‘inevitably foster a climate of xenophobia’.<sup>96</sup> This indicates that the South African Court’s expressive concerns identify one way in which patterns of group disadvantage are created or perpetuated.

A question that arises is why focus on the messages expressed by the discrimination rather than simply asking whether it is *actually* based on prejudice or stereotyping? The South African Court has identified actual prejudice and stereotyping in some of its decisions. For

---

<sup>89</sup> Above n 13.

<sup>90</sup> *ibid* [42].

<sup>91</sup> See cases cited in chapter 1, n 38.

<sup>92</sup> Above n 47.

<sup>93</sup> *ibid* [74].

<sup>94</sup> Above n 71.

<sup>95</sup> *ibid* [118]–[119].

<sup>96</sup> *ibid* [122].

instance, in *Hugo*,<sup>97</sup> the President expressly relied on the stereotype that mothers play a special nurturing role in caring for children as a justification for his decision to pardon mothers of young children but not fathers. Another example is *Hoffmann*,<sup>98</sup> where the national airline justified its refusal to hire HIV-positive cabin attendants by appealing to stereotypes about the dangers that HIV-positive people posed to passengers. Where the state does not make prejudice or stereotyping explicit in this way, it is extremely difficult for courts to identify the actual motives for discriminating. As I explain further in chapter 6, there are significant evidential difficulties in uncovering actual motives, not to mention the potential for political controversy.<sup>99</sup> Focusing on the messages expressed by discrimination is therefore a way of avoiding these complications. In addition, even where a law or action is actually based on stereotypes, not all stereotypes carry the same risk of entrenching group disadvantage. For instance, in *Union of Refugee Women*,<sup>100</sup> one of the justifications for barring refugees from the general registration process for private security guards was that refugees do not possess the necessary documentation to prove their trustworthiness. This was a stereotype, but it carried less risk of creating or perpetuating patterns of group disadvantage than the stereotype that refugees are untrustworthy. In their minority judgment, Mokgoro and O'Regan JJ found that the exclusion of refugees expressed this pernicious message,<sup>101</sup> suggesting that laws and actions can perpetuate harmful stereotypes even when they are explicitly based on more benign reasons.

These expressive concerns raise many other puzzling questions. What is the nature of these messages? How does the Court identify them? And how does it determine that they

---

<sup>97</sup> *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC). Discussed further in chapter 5, text to n 146ff.

<sup>98</sup> Above n 20 [7].

<sup>99</sup> See chapter 6, text to n 51ff.

<sup>100</sup> Above n 71 [38] and [61]. Discussed in greater depth in chapter 5, text to n 215ff.

<sup>101</sup> *ibid* [122].

will create or perpetuate patterns of group disadvantage? I explore these questions in greater detail in chapters 5 and 6.

While the South African Court commonly concludes that discrimination violates dignity because of the messages it expresses, this is not the only way that it reaches this conclusion. The Court's case law also reveals a concern for socio-economic disadvantage.

#### 4.4.2 Socio-Economic Disadvantage

In some cases, the Constitutional Court has concluded that discrimination violates human dignity where it threatens to perpetuate socio-economic disadvantage. This link between dignity and socio-economic disadvantage is less common in the unfair discrimination case law than it is in the Court's socio-economic rights decisions.<sup>102</sup> Nevertheless, this link adds an important dimension to the Court's reasoning.

This concern for socio-economic disadvantage was prominent in *Kbosa*<sup>103</sup> where the Court held that the exclusion of permanent residents<sup>104</sup> from receiving social welfare benefits was unfairly discriminatory on the basis of citizenship.<sup>105</sup> The Court found that the impoverishing effects of this exclusion violated dignity,<sup>106</sup> in addition to the stigmatising messages that this exclusion conveyed.<sup>107</sup>

---

<sup>102</sup> Albertyn, 'Constitutional Equality in South Africa' (n 62) 90. See, for example, *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) [44], [83].

<sup>103</sup> Above n 47.

<sup>104</sup> In text to n 121 below, I explain why this finding was confined to permanent residents and did not apply to all non-citizens.

<sup>105</sup> The Court nested the unfair discrimination enquiry within its broader enquiry into the violation of the right to social assistance under s 27(1)(a) of the Constitution. On the relationship between socio-economic rights and unfair discrimination, see further Murray Wesson, 'Equality and Social Rights: An Exploration in Light of the South African Constitution' [2007] PL 748; Liebenberg and Goldblatt (n 34); Sandra Fredman, 'Redistribution and Recognition: Reconciling Inequalities' (2007) 23 SAJHR 214.

<sup>106</sup> *Kbosa* (n 47) [80] (Mokgoro J).

<sup>107</sup> See text to nn 92-93 above.

Concern for socio-economic disadvantage was also apparent in *Mabaso*,<sup>108</sup> concerning the restriction placed on attorneys in former ‘homeland’ areas. Viewed in isolation, this restriction did not have ruinous consequences, but the Court recognised that it ‘reinforces and perpetuates’ the broader ‘impoverishing effects of the [homeland policy]’, resulting in a violation of dignity.<sup>109</sup>

The South African Court’s recognition that socio-economic disadvantage can itself constitute a violation of human dignity distinguishes it from the Canadian Court’s approach under the *Law* test.<sup>110</sup> Canadian commentators urged the Court to recognise socio-economic deprivation as a violation of dignity.<sup>111</sup> However, the Court resisted this idea. This resistance reflects the fact that the Canadian Charter makes no express provision for socio-economic rights, making the Court reluctant to introduce these entitlements via section 15.<sup>112</sup> This was demonstrated in *Gosselin*,<sup>113</sup> where the Canadian Court dismissed a challenge to social welfare laws that offered significantly lower benefits to adults under 30. Despite clear indications that this age-based distinction impoverished many under-30s, the majority was unwilling to recognise this as a dignity violation, holding that—

the differential treatment does not reflect or promote the notion that young people are less capable or less deserving of concern, respect, and consideration.<sup>114</sup>

---

<sup>108</sup> Above n 66.

<sup>109</sup> *ibid* [38].

<sup>110</sup> *Law* (n 76) [88].

<sup>111</sup> See, for example, Réaume (n 82) 42ff; Gwen Brodsky and Shelagh Day, ‘Denial of the Means of Subsistence as an Equality Violation’ [2005] *Acta Juridica* 149.

<sup>112</sup> Sandra Fredman, ‘Providing Equality: Substantive Equality and the Positive Duty to Provide’ (2005) 21 *SAJHR* 163, 180ff; Murray Wesson, ‘Contested Concepts: Equality and Dignity in the Case-Law of the Canadian Supreme Court and the South African Constitutional Court’ in András Sajó and Renáta Uitz (eds), *Constitutional Topography: Values and Constitutions* (Eleven International 2010) 275.

<sup>113</sup> *Gosselin v Quebec (Attorney General)* [2002] 4 SCR 429.

<sup>114</sup> *ibid* [73]. See also *Granovsky v Canada (Minister of Employment and Immigration)* [2000] 1 SCR 703 [58].

Even in cases where differential treatment causing socio-economic disadvantage was found to be a violation of dignity, the Canadian Court framed this conclusion in terms of the message it expressed. This was evident in *NAPE*.<sup>115</sup> In an effort to cut back on spending, the Newfoundland government reneged on its obligations to implement pay equity measures for men and women employed in the province's healthcare services. The Court found that this violated women's dignity, but this conclusion was based on the messages that the government's action conveyed about women rather than the socio-economic disadvantage it perpetuated.<sup>116</sup>

There are signs that the Canadian Court will take a different approach to socio-economic disadvantage under the dignity-free *Kapp* test.<sup>117</sup> In *Quebec v A*,<sup>118</sup> Abella J, writing for the majority on the discrimination issue, held that it was a violation of section 15(1) to exclude unmarried couples from claiming maintenance and a division of assets on the dissolution of the relationship. In doing so, she indicated that the socio-economic hardship caused by this exclusion was enough to establish that it threatened to perpetuate group disadvantage,<sup>119</sup> the new standard for determining whether differentiation on protected grounds is discriminatory.<sup>120</sup>

By contrast, the South African Court has always recognised that socio-economic disadvantage is of concern in itself. Nevertheless, the South African Court does give greater attention to impermissible messages and the prejudice and stereotyping that they perpetuate. In chapter 7, I argue that the Court should rectify this imbalance and that it should also give

---

<sup>115</sup> *Newfoundland (Treasury Board) v NAPE* [2004] 3 SCR 381.

<sup>116</sup> *ibid* [49]. See further Judy Fudge, 'Substantive Equality, the Supreme Court of Canada, and the Limits to Redistribution' (2007) 23 SAJHR 235.

<sup>117</sup> *Above* n 79.

<sup>118</sup> *Above* n 80.

<sup>119</sup> *ibid* [349].

<sup>120</sup> *ibid* [332].

greater attention to other forms of disadvantage. I will also argue that the Court's lopsided focus on prejudice and stereotyping reflects the influence of a narrow conception of dignity on its reasoning. While the Court does not expressly base its decisions on this narrow conception, this conception does subtly distort the Court's understanding of patterns of group disadvantage.

#### 4.4.3 Necessary but Not Sufficient

This analysis indicates that proof that discrimination threatens to create or perpetuate patterns of group disadvantage is a necessary condition for establishing that it violates human dignity. However, the Court does not treat this as a sufficient condition. For example, in *Kbosa*,<sup>121</sup> the Court was concerned that the exclusion of all non-citizens from social welfare grants would stigmatise them and condemn them to poverty and dependence. Nonetheless, it was only prepared to find that this violated the dignity of one category of non-citizens: permanent residents. Mokgoro J recognised that other categories of non-citizens are likely to be as stigmatised and materially disadvantaged, if not more so, by this exclusion. However, she was not prepared to conclude that it violated their human dignity.<sup>122</sup> A similar approach has been adopted in other cases, as the stigmatising or impoverishing effects of discrimination have not been enough to establish a dignity violation.<sup>123</sup> In the next chapter, I will show that the Court also requires that the discrimination must lack adequate justification.

---

<sup>121</sup> Above n 69.

<sup>122</sup> *ibid* [58]. Discussed further in chapter 5, text to n 231ff.

<sup>123</sup> See, for example, *Union of Refugee Women* (n 71); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) [154] concerning alleged unfair discrimination in the provision of water in Johannesburg.

## 4.5 CONCLUSION

In this chapter I have analysed how the Court has connected the concepts of equality, patterns of group disadvantage, unfair discrimination, affirmative action, and human dignity in its reasoning. I showed that the Court has developed four conceptions of equality that underpin different facets of the section 9 right. The aim of preventing and addressing patterns of group disadvantage is one of these conceptions and it serves as the guiding purpose for the prohibition of unfair discrimination. The Court's human dignity-based test for unfair discrimination reflects this aim. This is seen, I have argued, in how the Court frames the conclusion that human dignity has been violated, leading to a finding of unfair discrimination. To establish that discrimination violates dignity, it appears necessary to prove that the discrimination threatens to create or perpetuate a pattern of group disadvantage. The Court most often focuses on whether discrimination perpetuates prejudice and stereotyping, which it establishes by analysing the messages expressed by discrimination. It has also shown some concern for socio-economic disadvantage.

Understanding these complex concepts and their connections is a useful start in understanding the Court's reasoning. In the next chapter, I will build on this work by delving deeper into the Court's interpretation and application of the *Harksen* test.

## CHAPTER 5: APPLYING THE *HARKSEN* TEST

### 5.1 INTRODUCTION

This chapter continues the work begun in chapter 4 in understanding the Constitutional Court's reasoning. Chapter 4 explored how the Court has drawn a link between equality, patterns of group disadvantage, unfair discrimination, affirmative action, and human dignity. This revealed a necessary, albeit not sufficient, condition for establishing that discrimination violates human dignity and is unfair: it must threaten to create or perpetuate patterns of group disadvantage. I demonstrated this by examining how the Court frames the conclusion that dignity has been violated in its unfair discrimination case law. In this chapter, I will analyse how it *arrives* at this conclusion.

This will involve a deeper exploration of how the Court has interpreted and applied the two-stage *Harksen* test.<sup>1</sup> Section 5.2 investigates the Court's reasoning in establishing discrimination, involving differentiation on the basis of listed or analogous grounds that has the *potential* to violate human dignity. In sections 5.3 and 5.4, I analyse the unfairness leg of the test, where the Court identifies *actual* dignity violations. The unfairness analysis is generally the focus of the Court's attention and its disagreements, meriting a more extensive examination.

In analysing the Court's reasoning, I will seek to answer two questions: *what* is the full set of necessary conditions that must be satisfied for the Court to conclude that human dignity has been violated? And, *how* does the Court establish that these conditions have or have not been satisfied?

I will demonstrate that three necessary conditions must be established to arrive at this conclusion: there must be a) unfavourable treatment on the basis of protected grounds;

---

<sup>1</sup> *Harksen v Lane* NO 1998 (1) SA 300 (CC).

b) that threatens to create or perpetuate patterns of group disadvantage; and c) that lacks adequate justification. The Court has not fully and explicitly indicated that it is reasoning in this way. While the existing literature on the Court's case law has noted some of these features of its reasoning, no commentator has yet drawn these insights together into a coherent picture.

I will also cast greater light on how the Court determines that these necessary conditions have been satisfied. In section 5.2, I discuss and clarify the various factors involved in identifying discrimination, including the role of comparators in the Court's reasoning, the nature of the grounds, and how the Court identifies analogous grounds. In sections 5.3 and 5.4, I uncover the various considerations involved in the unfairness analysis. Section 5.3 will outline the impact and justification analyses that make up the unfairness enquiry. Together, these analyses assist in determining whether discrimination threatens to create or perpetuate patterns of group disadvantage without adequate justification. Section 5.4 will show this unfairness enquiry in action through a close study of five split decisions, the 'controversial cases' mentioned in chapter 1. These cases show that the Court's reasoning and its disagreements are not based on particular conceptions of human dignity. Instead, the conclusion that human dignity has or has not been violated flows from the determination whether the necessary conditions have been satisfied. While there is apparent consensus on the necessary conditions, there is great variability in how the Court determines that these conditions have been satisfied. This is seen in the Court's inconsistent approach to the impact and justification analyses. In the course of this discussion, we will also gain deeper insights into the Court's 'expressive concerns', an important feature of the Court's reasoning that I identified in chapter 4.

The clearer understanding of the Court's reasoning that I will develop here will assist in evaluating and critiquing the Court's case law in part 3. In particular, understanding the fluctuations in the Court's unfairness analysis will be essential in determining how the Court

erred in its controversial cases and how its reasoning ought to be fixed, the topic of chapter 8.

I will now turn to the Court's reasoning, starting with the discrimination stage of the two-stage *Harksen* test.

## 5.2 DISCRIMINATION

As outlined in chapter 2, the Constitutional Court defines discrimination as differentiation that occurs directly or indirectly on the basis of one or more listed grounds or on grounds determined to be analogous to the listed grounds. Identifying these analogous grounds involves establishing that differentiation on an unlisted ground has the potential to violate dignity. In practice, the Court spends little time establishing discrimination or identifying analogous grounds, and it has generally had little trouble in doing so. Thus far, *Walker*<sup>2</sup> and *Jordan*<sup>3</sup> are the only cases where the members of the Court have openly disagreed about the presence of discrimination. The Court's efforts and its internal disagreements are instead focused on the unfairness stage of the enquiry.<sup>4</sup> Often the Court simply assumes that discrimination has been established, moving swiftly on to assess whether it is unfair.<sup>5</sup> While the Court's reasoning is relatively brief, we can extract a clearer understanding of how it identifies discrimination. I will do this by considering the components of the discrimination enquiry in turn: identifying differentiation, establishing that differentiation has occurred on the basis of listed or analogous grounds, and identifying analogous grounds.

---

<sup>2</sup> *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC). Discussed in text to nn 29-31 below.

<sup>3</sup> *S v Jordan* 2002 (6) SA 642 (CC). Discussed in text to n 180ff below.

<sup>4</sup> Catherine Albertyn and Beth Goldblatt, 'Equality' in Stuart Woolman and others (eds), *Constitutional Law of South Africa* (2nd edn, Juta 2008) 35-46 (OS 03-07); Evadne Grant, 'Dignity and Equality' (2007) 7 HRLRev 299, 318.

<sup>5</sup> See, for example, *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 (4) SA 395 (CC) [45]. Discussed further in text to n 215ff below.

### 5.2.1 Differentiation

The first component of discrimination is ‘differentiation’, which the Constitutional Court describes as differences in treatment between individuals or groups.<sup>6</sup> Described in this way, the Court seems to suggest that a comparator analysis is necessary, requiring proof that the complainant or broader disfavoured group<sup>7</sup> has been or would have been treated less favourably than another individual or group (a comparator). However, the Court has never insisted on the identification of comparators<sup>8</sup> and it has not openly reflected on the role of comparators in its unfair discrimination analysis.<sup>9</sup>

The South African Court’s silence about the role of comparators in its judgments is in stark contrast with the Supreme Court of Canada’s explicit use of comparators in identifying discrimination and its relatively extensive reflections on the nature of comparator analysis.<sup>10</sup> A brief discussion of the Canadian Court’s more self-conscious use of comparators will help to draw attention to aspects of the South African Court’s approach that would otherwise go unnoticed.

The Canadian Court has attempted different approaches to identifying comparators. In *Hodge*,<sup>11</sup> decided in 2004, the Canadian Court’s experimentation led to a strict, ‘mirror

---

<sup>6</sup> *Harksen* (n 1) [42], [53] (Goldstone J).

<sup>7</sup> I will use the term ‘disfavoured group’ to refer to those who have been or could be treated unfavourably by the discrimination and who belong to groups identified by the ground or grounds on which the discrimination is based.

<sup>8</sup> With the exception of Ngcobo J’s dissenting judgment in *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC) [49].

<sup>9</sup> In *MEC for Education, Kwa-Zulu Natal v Pillay* 2008 (1) SA 474 (CC) [42]–[44] (Langa CJ) (*Pillay*) the Court declined to decide whether comparator analysis is necessary under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (Equality Act).

<sup>10</sup> See, for example, *Andrews v Law Society of British Columbia* [1989] 1 SCR 143, 164 (McIntyre J); *Hodge v Canada (Minister of Human Resources Development)* [2004] 3 SCR 357 [1], [20]ff; *Witbler v Canada* [2011] 1 SCR 396 [41]ff. See further Daphne Gilbert and Diana Majury, ‘Critical Comparisons: The Supreme Court of Canada Doooms Section 15’ (2006) 24 Windsor YB Access Justice 111; Sophia R Moreau, ‘Equality Rights and the Relevance of Comparator Groups’ (2006) 5 J L & Equality 81 Peter Hogg, *Constitutional Law of Canada* (5th edn, Carswell 2007) 55-34–55-34.5 (2011 – Rel 1); Denise Réaume, ‘Dignity, Equality, and Comparison’ in Deborah Hellman and Sophia R Moreau (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013).

<sup>11</sup> *Hodge* *ibid.*

comparator’ requirement. This required a complainant to identify a single individual or group that was treated more favourably than the complainant and was identical to the complainant in all relevant respects, except for the protected ground that was the basis of the discrimination claim.<sup>12</sup> This convoluted and confusing requirement caused great difficulties for complainants, often resulting in claims which otherwise had good prospects of success being dismissed for lack of an appropriate comparator.<sup>13</sup> In its 2011 decision in *Withler*,<sup>14</sup> the Court responded to extensive criticism of this approach, abandoning the ‘mirror comparator’ requirement in favour of a more flexible approach. This flexible approach has two key features. First, the Court has adopted a less stringent standard for identifying comparators, as it indicates that comparators need not be identical to the complainant in all relevant respects and the analysis is not necessarily restricted to a single comparator.<sup>15</sup> Second, the Court has tentatively signalled that while discrimination will inevitably result in some being treated less favourably than others, it is not always necessary to identify a comparator to prove discrimination.<sup>16</sup> Comparator analysis will often be useful in doing so,<sup>17</sup> but it is ‘not indispensable’.<sup>18</sup>

These two features of the Canadian Court’s new, flexible approach to comparators describe what the South African Court has been doing all along, albeit without expressly labelling or explaining this comparator analysis in its judgments.

---

<sup>12</sup> *ibid* [23].

<sup>13</sup> See *Hodge* *ibid*; *Anton (Guardian ad litem of) v British Columbia (Attorney General)* [2004] 3 SCR 657. See further Réaume (n 10) 16–18 and other commentary cited in n 10 above.

<sup>14</sup> Above n 10 [55]ff.

<sup>15</sup> *ibid* [63].

<sup>16</sup> *ibid* [64]–[65]. See further *Quebec (Attorney General) v A* [2013] 1 SCR 61 [167]–[169] and [189]–[191] (Le Bel J).

<sup>17</sup> *Withler* (n 10) [65].

<sup>18</sup> *Quebec v A* (n 16) [191] (Le Bel J).

First, where the South African Court has drawn comparisons, it has not restricted its analysis to a comparator, nor has it required comparators to ‘mirror’ the disfavoured group in all relevant respects. For example, in *Hassam*,<sup>19</sup> the Court found that the exclusion of widows in polygynous Muslim marriages from the protection of the Intestate Succession Act<sup>20</sup> was unfairly discriminatory on the intersecting grounds of religion, gender, and marital status.<sup>21</sup> The Court compared this group with no less than three other groups of women who were protected under the Act: women married under the Marriage Act,<sup>22</sup> women in monogamous Muslim marriages, and women in polygynous marriages under African customary law.<sup>23</sup> It is doubtful that any of these comparators would have been admitted under a Canadian-style mirror comparator approach, given the many possibilities for finding relevant differences between these groups.

Second, the South African Court has often identified unfair discrimination without needing to engage in a comparator analysis. For instance, in *Hoffmann*,<sup>24</sup> the national airline’s recruitment policy expressly excluded HIV-positive people from being employed as cabin attendants. Therefore, no comparison was necessary to show that the complainant had been denied the job on the basis of his HIV status.<sup>25</sup> *Hoffmann* is representative of other judgments where comparisons have played little role in identifying unfair discrimination.<sup>26</sup> This suggests

---

<sup>19</sup> *Hassam v Jacobs NO 2009 (5) SA 572 (CC)*.

<sup>20</sup> 81 of 1987.

<sup>21</sup> See text to n 54 below for further discussion of intersectionality in the South African case law.

<sup>22</sup> 25 of 1961.

<sup>23</sup> *ibid* [31]–[32].

<sup>24</sup> *Hoffmann v South African Airways 2001 (1) SA 1 (CC)*.

<sup>25</sup> *ibid* [29].

<sup>26</sup> See, for example, *Larbi-Odam v Member of the Executive Council for Education (North-West Province) 1998 (1) SA 745 (CC)*, where the Court invalidated regulations that prevented non-citizens from being permanently employed as teachers in state schools; *Moseneke v Master of the High Court 2001 (2) SA 18 (CC)*, where the Court struck down provisions of surviving apartheid-era legislation that that created racially segregated systems for administering the estates of those who died intestate.

that comparators are occasionally useful analytical devices for identifying unfair discrimination, but not necessary requirements. I will leave a fuller study of when and why comparators may prove useful in identifying unfair discrimination to another time.

The drafters of the Equality Act<sup>27</sup> appear to have taken their cue from the Court's flexible approach to comparators in defining discrimination as—

any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly—

- (a) imposes burdens, obligations or disadvantage on; or
- (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds . . .<sup>28</sup>

Here proof of discrimination does not necessarily require proof that the complainant or group has been treated *less favourably* than another individual or group, although this comparison may often be useful. This reflects the Court's practice in applying the constitutional prohibition of unfair discrimination.

While 'differentiation' does not necessitate proof of less favourable treatment than a comparator, it does require proof of some *unfavourable treatment*. The case law suggests that unfavourable treatment can involve the imposition of burdens or the withholding of benefits. This is illustrated in *Walker*.<sup>29</sup> Mr Walker, a white resident of Pretoria, claimed that the city council indirectly discriminated on the basis of race by charging residents of predominantly white suburbs a consumption-based rate for water and electricity, and by strictly enforcing claims for arrears in these suburbs. In contrast, residents of predominantly black suburbs were charged a lower, flat rate and were not actively pursued for arrears. The Court was unanimous in finding that the differential rates were discriminatory but not unfair, but there was disagreement over the selective debt collection policy. Sachs J, writing in dissent, held that there was no indirect discrimination as he argued that white residents had

---

<sup>27</sup> Above n 9. Discussed in chapter 2, text to n 20ff.

<sup>28</sup> Equality Act, s 1.

<sup>29</sup> Above n 2.

not been subjected to ‘identifiable disabilities, burdens or inconveniences’ by being required to pay for the water and electricity they had consumed.<sup>30</sup> In contrast, the majority indicated that no proof of burdensome treatment is necessary. The fact that white residents had been denied a benefit that had been afforded to black residents was sufficient to establish discrimination.<sup>31</sup> This broad understanding of unfavourable treatment is reflected in the definition of discrimination in the Equality Act, quoted above,<sup>32</sup> which encompasses the imposition of ‘burdens, obligations or disadvantage’ and the withholding of ‘benefits, opportunities or advantages’ from persons.

There is strong indication in the Court’s case law that unfavourable treatment need not have immediate, tangible consequences, but can also take the form of impermissible messages. In *Walker*,<sup>33</sup> Sachs J recognised that ‘the symbolic effect of a measure’, may be sufficient to find that discrimination has occurred. The Court endorsed this approach in *Fourie*<sup>34</sup> where it declared the exclusion of same-sex couples from marriage to be unfairly discriminatory on the basis of sexual orientation. The Court ultimately left it to the Legislature to decide on the appropriate legal regime for recognising same-sex marriage. However, Sachs J stressed that separate legal regimes would be impermissible, even if same-sex couples were afforded all the material and legal benefits of marriage. Separation is invidious, he held, when it ‘implies repudiation, connotes distaste or inferiority and perpetuates a caste-like status’.<sup>35</sup>

---

<sup>30</sup> *ibid* [113].

<sup>31</sup> *ibid* [35] (Langa DP).

<sup>32</sup> Text to n 28 above.

<sup>33</sup> Above n 2 [129].

<sup>34</sup> *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC).

<sup>35</sup> *ibid* [152]. Drawing on the United States Supreme Court’s landmark decision on racially segregated schooling in *Brown v Board of Education of Topeka Shawnee County* 347 US 483 (1954). The Legislature’s response to *Fourie* was to enact the Civil Union Act 17 of 2006 which operates in parallel with the heterosexual-only Marriage Act 25 of 1961. While the Civil Union Act extends all the legal consequences of marriage to civil unions and

Based on this discussion we can conclude that ‘differentiation’ involves some form of unfavourable treatment of the disfavoured group, whether tangible or symbolic. It does not necessarily require proof of less favourable treatment relative to some identifiable comparator, nor does it require a mirror comparator.

### 5.2.2 On the Basis of One or More Listed or Analogous Grounds

To amount to discrimination, unfavourable treatment must occur ‘on the basis’ of one or more listed or analogous grounds of discrimination. This distinguishes unfair discrimination from other violations of human dignity. For example, the Court holds that impermissible restrictions on family life violate dignity,<sup>36</sup> but such restrictions could only amount to unfair discrimination if they were based on a ground of discrimination.<sup>37</sup>

‘Grounds’ are personal characteristics or combinations of characteristics that identify or are perceived to identify groups in society.<sup>38</sup> Section 9(3) of the Constitution lists a range of grounds<sup>39</sup> and the Court has also recognised a number of analogous grounds, including citizenship,<sup>40</sup> HIV status,<sup>41</sup> and refugee status.<sup>42</sup> I will refer to these listed and analogous grounds collectively as ‘protected grounds’.

---

provides that they may be called marriages, there is still basis to challenge this bifurcated scheme on the grounds suggested in *Fourie*.

<sup>36</sup> See *Danood v Minister of Home Affairs* 2000 (3) SA 936 (CC) [37].

<sup>37</sup> See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) [124] (Sachs J) (*Sodomy Case*).

<sup>38</sup> See *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) [31] (Ackermann, O’Regan, and Sachs JJ). See further Tarunabh Khaitan, ‘Prelude to a Theory of Discrimination Law’ in Deborah Hellman and Sophia R Moreau (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013) 144.

<sup>39</sup> See chapter 2, text to n 1.

<sup>40</sup> *Larbi-Odam* (n 26).

<sup>41</sup> *Hoffmann* (n 24).

<sup>42</sup> *Union of Refugee Women* (n 5).

Unfavourable treatment can take place ‘on the basis’ of protected grounds in one of two ways, referred to as direct or indirect discrimination.<sup>43</sup> Direct discrimination occurs where a protected ground is used as a criterion for unfavourable treatment, such as in *Khosa*<sup>44</sup> where social welfare legislation expressly made citizenship a prerequisite for receiving welfare benefits. Direct discrimination will not always be made explicit in this way. Lower courts have grappled with the conceptual<sup>45</sup> and evidential<sup>46</sup> complexities involved in identifying direct discrimination that has not been made explicit, but the Constitutional Court has not yet had to address these difficult issues.

Indirect discrimination occurs where burdens are imposed or benefits withheld on the basis of neutral criteria (criteria that are not protected grounds) that nonetheless impacts certain groups disproportionately to others. This was evident in *Walker*,<sup>47</sup> discussed above, where the city’s differential rates scheme and debt collection policy applied to different suburbs of Pretoria, but affected white residents disproportionately to black residents.<sup>48</sup> Precisely what must be proved to show disproportionate impact and how this must be proved remains unclear in the Court’s case law. In *Democratic Party*,<sup>49</sup> an unfair discrimination challenge to voter registration laws, the Court held that the complainant must present proof that a law has actually caused a disproportionate impact rather than merely having the

---

<sup>43</sup> Failures to make reasonable accommodation—the unreasonable failure to accommodate an individual or group’s different needs or interests—are not treated as a separate cause of action but are regarded as a form of direct or indirect discrimination. See *Pillay* (n 9).

<sup>44</sup> *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC).

<sup>45</sup> See, for example, *Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 21 ILJ 188 (LC) [26]–[36], where the Labour Court engaged in lengthy analysis of the ‘but for’ test for direct discrimination developed in UK discrimination law.

<sup>46</sup> See, for example, *Manong & Associates (Pty) Ltd v City Manager, City of Cape Town* 2011 (2) SA 90 (SCA) [54]–[56], dealing with the burden of proof in establishing direct discrimination under the Equality Act.

<sup>47</sup> Above n 2.

<sup>48</sup> See text to nn 29–31.

<sup>49</sup> *Democratic Party v Minister of Home Affairs* 1999 (3) SA 254 (CC).

*likelihood* of doing so.<sup>50</sup> In an apparent contradiction, the Court went on to suggest that evidence of how a law has been implemented and applied is irrelevant to determining its validity.<sup>51</sup> These issues of proof will require further analysis and development in future cases.

Discrimination can also be multiple or intersectional, involving unfavourable treatment on the basis of more than one protected ground or on a combination of grounds. As Sachs J recognised in the *Sodomy Case*,<sup>52</sup> many cases of discrimination cannot be adequately captured by focusing on a single ground or discrete grounds:

[B]lack foreigners in South Africa might be subject to discrimination in a way that foreigners generally, and blacks as a rule, are not; it could in certain circumstances be a fatal combination. The same might possibly apply to unmarried mothers, or homosexual parents, where nuanced rather than categorical approaches would be appropriate.<sup>53</sup>

This recognition of multiple and intersectional discrimination is reflected in many of the Court's other decisions.<sup>54</sup> However, the Court has been criticised for not doing more to develop its intersectional analysis and for not applying this analysis consistently in the unfairness enquiry,<sup>55</sup> a point I will return to in chapter 8.

---

<sup>50</sup> *ibid* [12]. See also *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC).

<sup>51</sup> *ibid* [16]. See further Johan de Waal, 'Equality and the Constitutional Court' (2002) 14 SA Merc LJ 141, 152–53.

<sup>52</sup> Above n 37.

<sup>53</sup> *ibid* [113].

<sup>54</sup> See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) (*Immigration Case*); *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC); *Hassam* (n 19).

<sup>55</sup> See generally Marius Pieterse, 'Finding for the Applicant? Individual Equality Plaintiffs and Group-Based Disadvantage' (2008) 24 SAJHR 397, 405–408, 419–20.

### 5.2.3 Analogous Grounds

To identify analogous grounds, it must be proved that unfavourable treatment on the basis of an unlisted ground has the potential to violate dignity.<sup>56</sup> The Court has drawn inspiration from the Canadian Court, particularly its decision in *Andrews*,<sup>57</sup> in identifying considerations to assist in this enquiry. These considerations include: a) whether the ground in question is associated with current or historical patterns of group disadvantage;<sup>58</sup> b) whether it is associated with political minorities;<sup>59</sup> and c) whether it is ‘immutable’. The Court understands immutability to mean that the characteristic is either not changeable or not changeable without ‘unacceptable cost’ to the individual,<sup>60</sup> such as characteristics that involve fundamental choices.<sup>61</sup> However, the Court has not discussed these considerations in much depth and has offered little explanation of how they assist in establishing potential dignity violations. In some cases the Court has accepted<sup>62</sup> or rejected<sup>63</sup> grounds without any reasoning at all, simply making summary statements that they either have or do not have the potential to violate dignity. As a consequence, we can only fully understand how the Court identifies potential dignity violation once we understand the necessary conditions for proving an actual dignity violation. Therefore, we should turn our attention to the unfairness enquiry in which the Court determines whether discrimination has actually violated dignity. I will

---

<sup>56</sup> *Harksen* (n 1) [47] (Goldstone J).

<sup>57</sup> Above n 10, where the Canadian Supreme Court recognised citizenship as an analogous ground. Cited in *Larbi-Odam* (n 26) [19].

<sup>58</sup> *Harksen* (n 1) [50] (Goldstone J); *Larbi-Odam* ibid [19]–[20].

<sup>59</sup> *Larbi-Odam* ibid [19]; *Kbosa* (n 44) [71] (Mokgoro J).

<sup>60</sup> *Larbi-Odam* ibid; *Harksen* (n 1) [50] (Goldstone J); *Kbosa* ibid.

<sup>61</sup> See *Pillay* (n 9) [61]–[67] (Langa CJ).

<sup>62</sup> *Harksen* (n 1) [62] (Goldstone J); *Hoffmann* (n 24) (the Court by-passed the analogous grounds enquiry entirely and proceeded directly to the unfairness analysis); *Union of Refugee Women* (n 5) [45] (Kondile AJ).

<sup>63</sup> *Prinsloo* (n 38) [41] (Ackermann, O’Regan, and Sachs JJ); *Weare v Ndebele* NO 2009 (1) SA 600 (CC) [75]. Discussed in chapter 9, text to nn 9–10.

return to discuss analogous grounds in greater depth in chapter 9, once we have a better understanding of the Court's reasoning.

#### 5.2.4 Summary

From this overview, we can conclude that discrimination involves unfavourable treatment on the basis of protected grounds. This is the first necessary condition for establishing a violation of human dignity in unfair discrimination cases. I will now consider how the Court identifies unfairness, which involves identifying actual dignity violations. This enquiry occupies the bulk of the Court's reasoning and will be the focus of the next two sections.

### 5.3 UNFAIRNESS: IMPACT AND JUSTIFICATION

The unfairness stage of the *Harksen* test seeks to establish whether discrimination has actually violated human dignity. This analysis is assisted by the section 9(5) presumption of unfairness where discrimination has occurred on listed grounds. As indicated in chapter 2, the Court considers an open list of three considerations in its unfairness analysis (the unfairness considerations) to determine whether discrimination has violated human dignity:

- (a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage;
- (b) the nature of the provision or power and the purpose sought to be achieved by it . . .;
- (c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.<sup>64</sup>

The Court tends to apply these considerations in a mechanical, check-box fashion, offering little explanation of how they are connected.

---

<sup>64</sup> *Harksen* (n 1) [52] (Goldstone J).

In this section and the next, I show that the Court is engaging in two different types of analysis when it applies these considerations: an impact analysis and a justification analysis. In turn, these analyses reveal two necessary conditions for the finding that discrimination violates human dignity and is unfair: that it a) threatens to create or perpetuate a pattern of group disadvantage; and b) lacks adequate justification. The Court does not clearly and openly state that it is reasoning in this way, but, as I will show, this account best captures its reasoning.

In this section, I discuss the content of the impact and justification analyses, extracting insights from across the Court's case law. In the next, I present five detailed case studies, showing these analyses in action.

As we will see, these analyses are intertwined in the Court's reasoning and are not neatly demarcated. They are also logically connected. The impact analysis is central to the justification analysis, as a more severe impact will require a stronger justification. I will also show that the justification analysis often assists the Court in determining whether discrimination expresses impermissible messages that entrench patterns of group disadvantage. While these analyses are connected, it will be useful to discuss each in turn.

### **5.3.1 Impact**

The Constitutional Court insists that impact is the sole focus of the unfairness enquiry. 'In the final analysis,' the Court emphasised in *Harksen*,<sup>65</sup> 'it is the impact of the discrimination . . . that is the determining factor'. The Court opens many of its unfairness analyses with a statement to this effect.<sup>66</sup> These statements are misleading as the Court's unfairness analysis also contains a thinly veiled justification analysis. Nevertheless, these statements do emphasise that impact must occupy a central role in the unfairness enquiry.

---

<sup>65</sup> Above n 1 [51].

<sup>66</sup> See, for example, *Larbi-Odam* (n 26) [23]; *Hoffmann* (n 24) [27].

Impact analysis involves determining the effect of the discrimination on the rights and interests of the disfavoured group and whether this threatens to create or perpetuate a pattern of group disadvantage. Moseneke J captured this in *Van Heerden*<sup>67</sup> where he explained that unfairness is concerned with whether discrimination ‘ameliorates or adds to group disadvantage in real life context.’ The Court has consistently emphasised this contextual approach to the impact enquiry, requiring a broad awareness of history and social conditions to adequately assess the impact.<sup>68</sup> More specifically, this contextual analysis requires two things: a) an assessment of the impact on the broader disfavoured group in addition to the impact on individual complainants; and b) that this assessment should take place in light of the current or historical patterns of disadvantage experienced by the group, or the group’s vulnerability to such disadvantage.

#### **(a) Complainants and Disfavoured Groups**

The Court’s unfairness considerations outlined in *Harksen* speak only of the impact on the ‘complainants’.<sup>69</sup> However, the Court’s case law indicates that it is concerned with the impact of discrimination on the broader disfavoured group,<sup>70</sup> rather than focusing solely on the individual litigants before it. This is in line with the Court’s doctrine of objective constitutional invalidity which holds that the validity of laws and state conduct is to be considered in light of the circumstances of all who are potentially affected by it, not merely the individual complainants before the Court.<sup>71</sup>

---

<sup>67</sup> *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) [27].

<sup>68</sup> *Walker* (n 2) [26], [46] (Langa DP); *Sodomy Case* (n 37) [125]–[127] (Sachs J). See further Cathi Albertyn and Beth Goldblatt, ‘Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality’ (1998) 14 SAJHR 248, 260–61.

<sup>69</sup> Text to n 64 above.

<sup>70</sup> Defined in n 7 above.

<sup>71</sup> *Ferreira NO v Levin* 1996 (1) SA 984 (CC) [26] (Ackermann J). See further Pieterse (n 55) 399.

This broader concern is illustrated in *Hoffmann*.<sup>72</sup> The challenge was brought by a single complainant, Mr Hoffmann, whose application to be employed as a cabin attendant was refused because of his HIV status. Ngcobo J did not confine his impact analysis to Mr Hoffmann's circumstances. Instead, he considered the broader impact of such discrimination on HIV-positive people:

In view of the prevailing prejudice against HIV positive people, any discrimination against them can, to my mind, be interpreted as a fresh instance of stigmatisation . . . The impact of discrimination on HIV positive people is devastating. It is even more so when it occurs in the context of employment.<sup>73</sup>

. . .

[HIV-positive people] must not be condemned to 'economic death' by the denial of equal opportunity in employment.<sup>74</sup>

Concern for the impact on the broader disfavoured group is a constant feature across the Court's decisions, ranging from the exclusion of permanent residents from permanent teaching posts<sup>75</sup> through to the effects of discrimination on the basis of gender.<sup>76</sup>

The South African Court has been more unequivocal in its focus on the broader disfavoured group than the Canadian Court. In *Law*,<sup>77</sup> Iacobucci J spoke of section 15(1) of the Charter as 'an individual right, asserted by a specific claimant with particular traits and circumstances' requiring a focus on the circumstances of individuals. This approach was reflected in Arbour J's separate concurrence in *Lavoie*,<sup>78</sup> a challenge to a law which created a preference for Canadian citizens in filling civil service posts. In assessing the impact of the measure, she called for greater focus on the 'particularity of the complainant[s]' and their

---

<sup>72</sup> Above n 24.

<sup>73</sup> *ibid* [27].

<sup>74</sup> *ibid* [38].

<sup>75</sup> *Larbi-Odam* (n 26) [23].

<sup>76</sup> See, for example, *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC) [35]–[36].

<sup>77</sup> *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 [59].

<sup>78</sup> *Lavoie v Canada* [2002] 1 SCR 769.

circumstances rather than focusing on non-citizens more broadly.<sup>79</sup> The new *Kapp*<sup>80</sup> test now appears to require a more group-focused impact analysis, evident in Abella J's decision in *Quebec v A*<sup>81</sup> where she emphasised that discrimination is established where state conduct is shown to 'widen the gap between the historically disadvantaged group and the rest of society'.

While the South African Court is focused on the impact on the broader group, this is not to suggest that the circumstances of the individual complainant have no relevance. As Warren Freedman suggests, the complainants' circumstances are often an important 'window' on the impact experienced by the broader disfavoured group.<sup>82</sup> This was evident in *Bhe*,<sup>83</sup> a challenge to the rule of male primogeniture in the African customary law of succession which provided that where a person dies intestate their assets are inherited by their eldest male relative, excluding extra-marital children. The effects of this rule on Ms Bhe and her daughters cast the broader impact in stark relief. They had been living with her partner in his home in a Cape Town slum. On her partner's death, his father inherited the home and attempted to sell it with no regard for Ms Bhe and her daughters. Historically, the impact of this rule was somewhat offset by strong social pressures on heirs to act as custodians, holding the deceased's property for the benefit of surviving dependants.<sup>84</sup> However, Ms Bhe's circumstances showed—

---

<sup>79</sup> *ibid* [104]–[106].

<sup>80</sup> *R v Kapp* [2008] 2 SCR 483.

<sup>81</sup> Above n 16 [332].

<sup>82</sup> Warren Freedman, 'Understanding the Right to Equality' (1998) 115 SALJ 243, 251. See further Pieterse (n 55) 423.

<sup>83</sup> Above n 54.

<sup>84</sup> *ibid* [75]–[76] (Langa CJ).

that the application of the customary-law rules of succession in circumstances vastly different from their traditional setting causes much hardship.<sup>85</sup>

In this light, the Court concluded that the discrimination against women and extra-marital children was unfair as it ‘entrenches past patterns of disadvantage among a vulnerable group’.<sup>86</sup>

### **(b) Past, Present, or Future Disadvantage**

The Court assesses the impact of discrimination in light of the disfavoured group’s past or existing patterns of group disadvantage, or its vulnerability to such disadvantage. This is reflected in the first *Harksen* unfairness consideration, calling for an assessment of the ‘position of the complainants in society and whether they suffered from past patterns of disadvantage’.<sup>87</sup>

The Court holds that the existence of past or present patterns of group disadvantage is a ‘compelling factor’ in the impact analysis, as it makes it ‘logical to conclude’ that further discrimination ‘will have a more severe impact on [the disfavoured group], since they are already vulnerable.’<sup>88</sup> As Sachs J observed in *Harksen*,<sup>89</sup> patterns of group disadvantage seldom arise from ‘grand exercise[s] of naked power’, but are more commonly created and sustained by smaller disadvantages which, viewed in isolation, ‘might be so minor as to risk escaping immediate attention, especially by those not disadvantaged by them’. This reflects the Canadian Court’s statement in *Turpin*,<sup>90</sup> that the impact analysis requires ‘a search for

---

<sup>85</sup> *ibid* [83].

<sup>86</sup> *ibid* [91], [93].

<sup>87</sup> *Harksen* (n 1) [52] (Goldstone J). Text to n 64 above.

<sup>88</sup> *Law* (n 77) [63]. Quoted with approval in *Immigration Case* (n 54) [44].

<sup>89</sup> Above n 1 [124].

<sup>90</sup> *R v Turpin* [1989] 1 SCR 1296, 1331–32. Quoted with approval in *Harksen* *ibid*; *Jordan* (n 3) [68] (O’Regan and Sachs JJ).

disadvantage that exists apart from and independent of the particular legal distinction [or action] being challenged.’

While the existence of past or current patterns of group disadvantage is an important consideration in the impact analysis, the South African Court stresses that this is not a necessary condition for a finding of unfairness.<sup>91</sup> The Court has recognised that some groups may be vulnerable to future disadvantage. This was evident in *Walker*<sup>92</sup> where the majority noted that while white South Africans continue to enjoy substantial privilege, they are vulnerable ‘in a political sense’. The Court cautioned, however, that it is important to distinguish genuine claims of unfair discrimination, seeking to prevent the creation of patterns of group disadvantage, from attempts to ‘protect pockets of privilege’.<sup>93</sup>

### **(c) Summary**

The Constitutional Court’s statements and its practice reveal clear principles for applying the impact analysis, requiring the impact analysis to be given a central place in the unfairness enquiry and to be appropriately contextualised. As I will demonstrate in section 5.4, the Court has failed to apply the impact analysis in this way in a small but significant minority of its decisions. These cases do not reflect a concerted effort to change the established impact analysis. In these decisions, the Court still paid lip service to the need for a stringent impact analysis. As a result, we will see that these cases represent failures of application rather than doctrinal shifts. By contrast, the Court has offered few indications of how the justification analysis ought to be applied, in part because the Court does not openly acknowledge that it is applying this analysis.

---

<sup>91</sup> *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) [41] (Goldstone J); *Harksen* (n 1) [64] (Goldstone J); *Walker* (n 2) [47] (Langa DP).

<sup>92</sup> *Walker* *ibid* [48].

<sup>93</sup> *ibid*.

### 5.3.2 Justification

The Constitutional Court insists that the unfairness analysis is about the impact of the discrimination and that justificatory considerations should be left to the section 36 general limitations analysis.<sup>94</sup> However, many commentators have recognised that the lines between the unfairness and section 36 analyses are blurred in practice.<sup>95</sup> Stuart Woolman and Henk Botha point out that after the Court has found discrimination to be unfair, its section 36 analysis is mere repetition.<sup>96</sup> This is evident in the fact that there has not been a single majority judgment in which the Court has found discrimination to be unfair but justified. In this light, Rósaan Krüger has argued that the Court should simply abandon the pretence and combine the unfairness and general limitations enquiries in a ‘fairness-cum-justification’ analysis.<sup>97</sup>

This is another similarity with the Supreme Court of Canada’s discrimination jurisprudence. Many Canadian commentators have pointed out that the Canadian Court’s discrimination analysis is also saturated with justificatory considerations,<sup>98</sup> a point I will

---

<sup>94</sup> *Harksen* (n 1) [51]–[52] (Goldstone J); *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) [209] (Sachs J); *Pillay* (n 9) [70]. Section 36(1) provides:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

<sup>95</sup> See, for example, Murray Wesson, ‘Discrimination Law and Social Rights: Intersections and Possibilities’ (2007) 13 *Juridica* 74, 76; Albertyn and Goldblatt, ‘Equality’ (n 4) 35-80–35-82 (OS 03-07).

<sup>96</sup> Stuart Woolman and Henk Botha, ‘Limitations’ in Stuart Woolman and others (eds), *Constitutional Law of South Africa* (2nd edn, Juta 2008) para 34-34–34-35 (OS 07-06).

<sup>97</sup> Rósaan Krüger, ‘Equality and Unfair Discrimination: Refining the *Harksen* Test’ (2011) 128 *SALJ* 479, 504–505.

<sup>98</sup> See Christopher D Brecht and Adam M Dodek, ‘The Increasing Irrelevance of Section 1 of the Charter’ (2001) 14 *SCLR* 175, 181–82; Sheila Martin, ‘Balancing Individual Rights to Equality and Social Goals’ (2001) 80 *Can Bar Rev* 299, 307, 327ff; Sheila McIntyre, ‘The Supreme Court and Section 15: A Thin and

return to in the next chapter. Nevertheless, the Canadian Court vehemently denies that justification has any role in this analysis,<sup>99</sup> making the South African Court's denials appear comparatively non-committal. This is, in part, because more is at stake in applying a justification analysis under section 15(1) of the Charter. Complainants bear the full burden of establishing discrimination under section 15(1) with the result that complainants would bear the added burden of showing laws to be unjustified. By contrast, the section 9(5) presumption of unfairness under the South African Constitution ought to relieve complainants of this burden where discrimination has occurred on listed grounds.<sup>100</sup> Furthermore, the language of 'unfair' discrimination in the South African Constitution has strong justificatory overtones, creating the paradox of talking of 'unfair' but 'justified' discrimination.<sup>101</sup> Given these particular features of the South African Constitution it is understandable and, as I will argue in chapter 7, acceptable for a justification analysis to occur within the unfairness enquiry.

While the Court's use of a justification analysis in the unfairness enquiry is already widely acknowledged, commentators have not explored the nature of this justification analysis in any detail. In the next section, I will present detailed case studies showing the fluctuating intensity with which the Court reviews justifications for discrimination. Before doing so, I will explain this concept of intensity of review and the associated idea of deference.

The intensity of review refers to the stringency with which the Court assesses the validity of laws and actions. I am primarily concerned here with intensity with which the

---

Impoverished Notion of Judicial Review' (2006) 31 QLJ 731, 742–44; Denise Réaume, 'The Relevance of Relevance to Equality Rights' (2006) 31 QLJ 696; Hogg (n 10) para 55.12 (2011 – Rel 1).

<sup>99</sup> See *Andrews* (n 10) 182 (McIntyre J); *Law* (n 77) [81]; *Quebec v A* (n 16) [323] (Abella J).

<sup>100</sup> As I will show in chapter 8, the Court has been inconsistent in applying this presumption.

<sup>101</sup> Catherine Albertyn and Janet Kentridge, 'Introducing the Right to Equality in the Interim Constitution' (1994) 10 SAJHR 149, 175.

Court scrutinises justifications. This is linked to the degree of deference shown by the Court to other state bodies, as a higher intensity of review generally corresponds with a lower degree of deference, and vice versa. Deference can be understood as the Court's willingness to 'leave the answer to some question, to some extent, to the initial decision-maker'.<sup>102</sup> Courts can defer on both legitimate and illegitimate grounds.<sup>103</sup> In chapter 8, I will discuss some of the legitimate considerations that the Court ought to take into account in determining the appropriate degree of deference and the corresponding intensity of review. In this chapter, I will simply chart how the intensity of review fluctuates in the unfairness analysis.

In *Pillay*,<sup>104</sup> the Court insisted that it would not show deference to the state or any other party on the overarching question of whether discrimination is unfair. That is undoubtedly correct: the Court does not and should not simply accept the state's opinion that the discrimination is fair. Nevertheless, in assessing the justification for the discrimination as part of this unfairness enquiry, there are many points at which the Court can and does defer by adjusting the intensity of review.

As we will see, this shifting intensity of review manifests in two primary ways: a) the *standards of review* the Court uses; and b) the intensity with which it *applies* these standards.<sup>105</sup>

---

<sup>102</sup> Timothy Endicott, *Administrative Law* (2nd edn, OUP 2011) 225.

<sup>103</sup> See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) [46] (O'Regan J). See further David Dyzenhaus, 'The Politics of Deference: Judicial Review and Democracy' in Michael Taggart (ed), *The Province of Administrative Law* (Hart 1997) 279, 303; Cora Hoexter, 'The Future of Judicial Review in South African Administrative Law' (2000) 117 SALJ 484, 488, 501-502; Kirsty McLean, *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (PULP 2009) ch 2.

<sup>104</sup> *Pillay* (n 9) [80]–[81] (Langa CJ).

<sup>105</sup> For further discussion of this distinction, see Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 CLJ 174; Cora Chan, 'Proportionality and Invariable Baseline Intensity of Review' (2013) 33 LS 1, 5.

### (a) Standards of Review

Standards of review are different sets of questions that can be asked in assessing justifications. They exist on a spectrum of intensity, as they require courts to assess justifications to a greater or lesser extent, leaving some or all aspects unquestioned. Three primary standards of review have emerged in South African public law: proportionality, reasonableness, and rationality.<sup>106</sup>

Proportionality analysis is at the upper end of the spectrum of intensity and is most commonly found in the Court's section 36 general limitations analysis. As the Court has recognised, proportionality involves balancing the reasons for and against limitations of rights.<sup>107</sup> It has expressly rejected a structured, 'check-list' approach to proportionality analysis,<sup>108</sup> such as the Canadian Court's *Oakes*<sup>109</sup> test under the Charter's section 1 general limitations clause. Instead, the South African Court opts for what it terms a 'global', all-things-considered judgment on proportionality.<sup>110</sup> While the Court does not apply this proportionality analysis in a structured way, the common features of proportionality analyses used in other jurisdictions<sup>111</sup> are reflected in its reasoning and the components of section 36.<sup>112</sup> The Court interrogates the *legitimacy* of the limitation's purpose ('the

---

<sup>106</sup> See generally Sebastian Seedorf and Sanele Sibanda, 'Separation of Powers' in Stuart Woolman and others (eds), *Constitutional Law of South Africa* (2nd edn, Juta 2008) 12-59ff (OS 06-08).

<sup>107</sup> *S v Makwanyane* 1995 (3) SA 391 (CC) [104] (Chaskalson P). See further Woolman and Botha (n 96) 34-67ff (OS 07-06).

<sup>108</sup> On structured proportionality analysis, see generally Aharon Barak, *Proportionality: Constitutional Rights and Their Limits* (CUP 2012) chs 6, 9-12.

<sup>109</sup> *R v Oakes* [1986] 1 SCR 103.

<sup>110</sup> *S v Manamela* 2000 (3) SA 1 (CC) [32] (Madala, Sachs, and Yacoob JJ).

<sup>111</sup> While proportionality analyses share common features, courts in different jurisdictions adopt very different approaches to this analysis. See further Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 UTLJ 383.

<sup>112</sup> See n 94 above.

importance of the purpose’);<sup>113</sup> it questions the *suitability* of the limitation in advancing this purpose (the ‘relation between the limitation and its purpose’);<sup>114</sup> it considers the *necessity* of the limitation (whether there are ‘less restrictive means to achieve the purpose’);<sup>115</sup> and it assesses the proportionality of the limitation in the ‘*narrow sense*’.<sup>116</sup> This final component of the proportionality analysis reflects the Court’s ‘global’ judgment on proportionality, as it weighs the severity of the rights limitation (the ‘importance of the right’ and the ‘nature and extent of the limitation’)<sup>117</sup> against the importance of the purpose, taking into account the extent to which the limitation is suitable and necessary in advancing this purpose.<sup>118</sup> A severe infringement of a right provides a stronger reason against the limitation than a minimal infringement.<sup>119</sup> Similarly, an important purpose that is only partially achieved and which can be realised through less restrictive means may provide a weaker reason for the limitation than a purpose that is largely achieved and cannot be realised through alternative means. In the next section, I show that the Court has often applied a proportionality analysis in its unfairness enquiry.

Reasonableness is often described as a standard of review situated between proportionality and rationality on the spectrum of intensity.<sup>120</sup> However, many commentators have pointed out that reasonableness is simply a form of proportionality analysis that is also

---

<sup>113</sup> Constitution, s 36(1)(b).

<sup>114</sup> Section 36(1)(d).

<sup>115</sup> Section 36(1)(e).

<sup>116</sup> This terminology is taken from Robert Alexy’s influential account of proportionality. See Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, OUP 2002) 66–69, 397–401; Robert Alexy, ‘Constitutional Rights, Balancing, and Rationality’ (2003) 16 *Ratio Juris* 131, 135ff. While the Court does not use this terminology, it helps to clarify its analysis.

<sup>117</sup> Constitution, ss 36(1)(a) and 36(1)(c).

<sup>118</sup> *S v Bhulwana* 1996 (1) SA 388 (CC) [18].

<sup>119</sup> See *Manamela* (n 110) [32].

<sup>120</sup> See *Kbosa* (n 44) [67].

concerned with weighing the reasons for a law or action with the reasons against.<sup>121</sup> While there may be practical significance in identifying reasonableness as a separate standard of review, reasonableness has little analytical significance for my purposes. As a result, I will analyse the justification analysis in the unfairness enquiry against the more discrete standards of proportionality and rationality.

Rationality sits on the other end of the spectrum of intensity from proportionality. As discussed in chapter 4, rationality involves assessing whether there is a connection between the state's action and a legitimate purpose. It can be seen as a truncated version of the proportionality analysis as it merely questions whether the purpose of the action is *legitimate* and whether it is capable of advancing the purpose in some way; a weak requirement of *suitability*. It does not interrogate the *necessity* of the measure or its proportionality in the *narrow sense*, as there is no questioning whether there are better, less restrictive means of achieving the purpose or whether the impact of the action on the rights and interests of others outweighs the purpose.<sup>122</sup> Rationality analysis is therefore more deferential than proportionality analysis, as it leaves much of the state's justification unquestioned. As I will show, the Court has sometimes applied a rationality analysis in upholding discrimination as fair.

### **(b) Intensity of Application**

While proportionality and rationality come with a certain intensity of review built into their different frameworks of analysis, there can be great variability in the intensity with which they are applied. As Julian Rivers points out, merely talking about different standards of

---

<sup>121</sup> See, for example, Carol Steinberg, 'Can Reasonableness Protect the Poor? A Review of South Africa's Socio-Economic Rights Jurisprudence' (2006) 123 SALJ 264, 278–80; Cora Hoexter, *Administrative Law in South Africa* (2nd edn, Juta 2013) 343–50.

<sup>122</sup> *East Zulu Motors (Pty) Ltd v Empangeni/ Ngwelezane Transitional Local Council* 1998 (2) SA 61 (CC) [24] (O'Regan J); *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC) [17].

review does not adequately capture this variability.<sup>123</sup> For example, a court can subtly adjust the different components of the proportionality analysis in many ways.<sup>124</sup> In considering the purpose of the state's actions, it may accept the state's account of the purpose, or it may interrogate this purpose more deeply. It may also examine the suitability or necessity of the measure closely, requiring a great deal of evidence and argument to show that the measure is suitable and necessary, or it may simply take the state at its word. At the point of balancing the impact of the measure against its purpose, a court may give greater weight to the state's view that its actions are proportionate. Similarly, the rationality analysis can also be applied more or less stringently, as many commentators have observed of the South African Court's use of rationality in its broader constitutional jurisprudence.<sup>125</sup>

The intensity of review in applying these standards is intimately linked with the burden of proof and the use of evidence. Deference to the state is often shown in the way that courts give the state the benefit of the doubt, shifting the evidential and argumentative burden to the complainant to disprove all or part of the state's justification. Judicial notice—the judicial recognition of facts that are considered to be general knowledge or are easily ascertainable from sources of incontrovertible authority<sup>126</sup>—also plays a role here, as courts may invoke judicial notice to fill gaps in the state's evidence. This use of judicial notice may go so far that a court is no longer merely deferring to the state, in the sense of leaving 'the

---

<sup>123</sup> *Rivers* (n 105) 202ff.

<sup>124</sup> See, for example, the debate between the majority and minority in *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) over the suitability and necessity of the criminalisation of the possession and use of marijuana with no exception for religious use.

<sup>125</sup> See Alistair Price, 'Rationality Review of Legislation and Executive Decisions: *Poverty Alleviation Network* and *Albutol*' (2010) 127 SALJ 580; Cora Hoexter, 'Just Administrative Action' in Iain Currie and Johan De Waal (eds), *The Bill of Rights Handbook* (6th edn, Juta 2013) 688ff; Max du Plessis and Stuart Scott, 'The Variable Standard of Rationality Review: Suggestions for Improved Legality Jurisprudence' (2013) 130 SALJ 597.

<sup>126</sup> PJ Schwikkard and SE van der Merwe, 'Judicial Notice' in PJ Schwikkard and others (eds), *Principles of Evidence* (Juta 2009) ch 27.

answers to some question, to some extent, to the initial decision-maker',<sup>127</sup> but is instead assuming a partisan role in supplying answers on behalf of the state.

Commentators have noticed largely unexplained fluctuations in the intensity with which the Constitutional Court reviews justifications in other areas of its case law. However, little attention has been paid to the fluctuating intensity of review in the unfair discrimination case law. In the next section, I will highlight these fluctuations in some of the Court's most controversial split decisions.

### 5.3.3 The *Harksen* and *Van Heerden* Tests

Before turning to the case law, it is useful to reflect briefly on the separate *Van Heerden* test for legitimate affirmative action. As explained in chapter 2, if an affirmative action measure satisfies the three-part *Van Heerden* test then it is shielded from further scrutiny under the *Harksen* test.<sup>128</sup> The *Van Heerden* test requires an assessment whether the affirmative action measure: a) targets members of a historically disadvantaged group; b) is designed to protect or advance that group; and c) strikes an appropriate balance between the benefits to the included and the harms to the excluded.<sup>129</sup>

In creating this test, the Court was seeking to insulate affirmative action measures from certain features of the *Harksen* test. As a result, its reasons for establishing the *Van Heerden* test and the content of this test cast additional light on the *Harksen* test and its unfairness enquiry.

First, the *Van Heerden* test affirms the importance of impact in the *Harksen* unfairness analysis. One of the Court's reasons for creating the separate *Van Heerden* test was that it would be problematic to put the spotlight on the impact of affirmative action on privileged

---

<sup>127</sup> Endicott (n 102) 225.

<sup>128</sup> Chapter 2, text to nn 9–13.

<sup>129</sup> *Van Heerden* (n 67) [38]–[44] (Moseneke J).

groups rather than on the benefits that affirmative action brings to disadvantaged groups.<sup>130</sup> The third *Van Heerden* consideration—the balancing enquiry—still leaves room for an impact analysis,<sup>131</sup> but it is not prioritised in this enquiry. In setting up the *Van Heerden* test in this way, the Court confirms that impact must remain central to the unfairness analysis in the *Harksen* test.

Second, the *Van Heerden* test also confirms that the *Harksen* test includes a justification analysis that should be applied stringently. The Court’s primary motivation for the *Van Heerden* test was that it would be deeply problematic to apply the section 9(5) presumption of unfairness to affirmative action, as this would send the message that affirmative action is an inherently suspect enterprise rather than an essential mechanism for addressing patterns of group disadvantage.<sup>132</sup> Furthermore, the Court also held that applying the *Harksen* test to affirmative action measures would ‘unduly require the judiciary to second-guess’ the state’s attempts to undo patterns of group disadvantage.<sup>133</sup> The *Van Heerden* test still requires scrutiny of the justification for affirmative action and contains some degree of balancing.<sup>134</sup> Nevertheless, the *Van Heerden* test reflects that the *Harksen* unfairness analysis involves a justification analysis and that it should be applied in a more exacting way than the *Van Heerden* analysis.

I agree with the Court’s reasons for creating the separate *Van Heerden* test,<sup>135</sup> although a full defence is beyond the scope of this thesis. Whatever one’s views, it is clear

---

<sup>130</sup> *ibid* [80] (Mokgoro J).

<sup>131</sup> See *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23 (2 September 2014) [143] (Van der Westhuizen J).

<sup>132</sup> *Van Heerden* (n 67) [33] (Moseneke J); *Barnard* *ibid* [137] (Van der Westhuizen J).

<sup>133</sup> *Van Heerden* *ibid*.

<sup>134</sup> However, it remains to be seen how strictly this will be applied in future cases. The Court’s recent judgment in *Barnard* (n 131) does little to clarify this.

<sup>135</sup> cf JL Pretorius, ‘Fairness in Transformation: A Critique of the Constitutional Court’s Affirmative Action Jurisprudence’ (2010) 26 SAJHR 536.

that these reasons for having two separate tests only have force if the Court actually applies the *Harksen* test as it characterised it in *Van Heerden*. This requires the Court to prioritise the impact analysis and to apply a searching justification analysis that makes full use of the presumption of unfairness. As a result, the separate *Van Heerden* test commits the Court to the stringent application of the unfairness analysis under the *Harksen* test. As I will argue in chapter 8, another implication is that the Court can now apply this stringent *Harksen* test free from the fear that it may be used to thwart legitimate affirmative action. In this light, the *Van Heerden* test is as much a call for a rigorous *Harksen* test as it is an attempt to carve out separate analytical space for affirmative action.

#### 5.4 UNFAIRNESS: ANALYSING THE CASE LAW

Having outlined the impact and justification analyses that constitute the *Harksen* unfairness enquiry, I will now illustrate this unfairness enquiry in action, concentrating on a set of five prominent split decisions: *Hugo*,<sup>136</sup> *Harksen*,<sup>137</sup> *Jordan*,<sup>138</sup> *Volks*,<sup>139</sup> and *Union of Refugee Women*.<sup>140</sup> There have been other split decisions in the Court's unfair discrimination case law,<sup>141</sup> but in these five cases the disagreements were more directly focused on the unfairness analysis. For a Court that is well known for producing unanimous judgments and for going to great lengths to reach consensus,<sup>142</sup> these decisions contain some of the Court's most spectacular disagreements. As John Alder notes, disagreements such as these can help to 'focus and

---

<sup>136</sup> Above n 91.

<sup>137</sup> Above n 1.

<sup>138</sup> Above n 3.

<sup>139</sup> Above n 94.

<sup>140</sup> Above n 5.

<sup>141</sup> See, for example, *Walker* (n 2); *Kbosa* (n 44); *Bbe* (n 54); *Fourie* (n 34).

<sup>142</sup> See Michael Bishop, Lisa Chamberlain and Sha'ista Kazee, 'Twelve-Year Review of the Work of the Constitutional Court: A Statistical Analysis' (2008) 24 SAJHR 354, 359, who report that in the Court's first 12 years of operation, only 13.4 per cent of its decisions featured dissents.

clarify our understanding of the issues<sup>143</sup> as they force the majority and minority to articulate their reasoning in greater detail. By contrast, in its unanimous decisions the Court is often content to produce a conclusion on the fairness or unfairness of discrimination out of a brief recital of the *Harksen* test.<sup>144</sup> As a result, these split decisions present the best possible window on the Court's reasoning.

A further reason for concentrating on these five decisions is that they are what I have termed the 'controversial cases'; the decisions that have received the greatest critical scrutiny and scorn.<sup>145</sup> The majority judgments in these cases upheld the various discriminatory laws as fair despite clear grounds for finding that they perpetuated severe patterns of group disadvantage. I agree with the prevailing view that these decisions represent a disjuncture between the Court's stated aim of preventing and addressing patterns of group disadvantage and its reasoning. As I noted in chapter 1, other cases have also attracted critical scrutiny, but these cases deserve the greatest attention as the failure to achieve an aim is, in general, of greater concern than imperfect achievement. As a result, there is value in understanding the Court's reasoning in these five controversial cases and in tracing the fault lines of disagreement between the majority and minority. This will prepare the way for a deeper exploration of the errors in the majority judgments and how they should be addressed, the subject of chapter 8.

At this stage, a purely thematic summary of these decisions would not do justice to the nuance and complexity of the Court's analysis. In particular, the deeply intertwined nature of the impact and justification analyses and the variability in the way they are applied would be lost in a thematic summary. As a result, I will present a case-by-case analysis of

---

<sup>143</sup> John Alder, 'Dissents in Courts of Last Resort: Tragic Choices?' (2000) 20 OJLS 221, 241–42.

<sup>144</sup> See, for example, *Mvumvu v Minister of Transport* 2011 (2) SA 473 (CC) [28]–[32]; *Da Silva v Road Accident Fund* 2014 (5) SA 573 (CC) [8].

<sup>145</sup> See chapter 1, text to nn 40–48.

these five decisions as this will allow for richer insight into this reasoning. I will then discuss three themes in these decisions and link these themes with broader trends in the Court's case law.

#### 5.4.1 Five Split Decisions

In the analysis to follow, I will do some reconstructive work to present the Court's reasoning more clearly. The Court does not expressly identify the impact and justification components of its unfairness analysis, but I will draw out these components of its reasoning. I will also label the Court's justification analysis using the terminology of 'legitimacy', 'suitability', 'necessity', and proportionality in the 'narrow sense'. The Court does not use these terms but they will help to illuminate the different parts of its justification analysis. While some rearranging and relabeling of the Court's reasoning is necessary, the arguments and reasoning remain the Court's own. With this in mind, let us turn to the cases.

##### (a) *Hugo*

*Hugo*,<sup>146</sup> decided in 1997, was the Court's third unfair discrimination decision, but it presented the members of the Court with their first real challenge. At issue was President Mandela's decision to grant a pardon to various categories of prisoners, timed to coincide with his inauguration as the first democratically elected president in 1994. Among those pardoned were mothers of children under the age of twelve. The President sought to benefit children, acting on the belief that mothers play a 'special role' in caring for young children.<sup>147</sup>

---

<sup>146</sup> Above n 91.

<sup>147</sup> *ibid* [36]. In this light, if *Hugo* were decided today, it would arguably fail the *Van Heerden* test and would still need to be scrutinised under the *Harksen* test. The second requirement of the *Van Heerden* test is that the measure must be 'designed to protect or advance' groups that have historically suffered from unfair discrimination (see above text to nn 128–129). To be 'designed' to achieve this purpose, a measure must be undertaken for the reason that it would benefit the disadvantaged group (*Van Heerden* (n 67) [42], [52]). The President's actions in *Hugo* would not satisfy this requirement as he singled out mothers because he believed that they were the most suitable child carers, not because of any desire to ameliorate their historical disadvantage.

Hugo, a single father, challenged this decision, arguing that it discriminated against him and his son on the basis of sex and gender. All members of the Court agreed that the President's action was discriminatory and that it was premised on a stereotyped view of parenting roles. Nevertheless, the majority concluded that the discrimination did not violate human dignity and was therefore fair. Kriegler and Mokgoro JJ disagreed with the majority, holding that it was unfair, but Mokgoro J went on to find that it was justified under the general limitations clause.<sup>148</sup>

In the majority judgment, Goldstone J's unfairness analysis concentrated on the justification for the discrimination. In doing so, he applied a loose proportionality analysis, albeit without making this explicit. Goldstone J accepted the President's generalisation that mothers play a special role in caring for children and that fathers often play a 'secondary role'.<sup>149</sup> As a result, he suggested that the President's action was suitable for achieving the legitimate purpose of benefitting young children. He also emphasised that the President's pardoning power was a 'blunt axe' that did not allow for the type of fine-grained distinctions that could be expected of legislation or administrative decisions.<sup>150</sup> Furthermore, he held that because male prisoners far outnumbered female prisoners, granting a remission of sentence to all fathers would not be in the public interest at a time of high crime rates.<sup>151</sup> This was an argument for the necessity of the discrimination, suggesting that non-discriminatory means of benefitting young children were impractical. He went on to deny any serious impact from the discrimination. While Goldstone J noted that the President's stereotyped view of parenting roles 'was one of the root causes of women's inequality in our society', he rejected

---

<sup>148</sup> Didcott J would have dismissed the claim on the separate ground that it was moot.

<sup>149</sup> Hugo (n 91) [46].

<sup>150</sup> *ibid* [48].

<sup>151</sup> *ibid* [46].

any notion that the President's actions would perpetuate this stereotype.<sup>152</sup> He further emphasised that while male prisoners were denied a benefit, this was not a serious impact on their interests, as they had no entitlement to an early release.<sup>153</sup> In rejecting this impact, he implied that the discrimination was proportional in the 'narrow sense', as he appeared to suggest that the benefit to children was of greater importance than any impact this discrimination may have. Having presented this analysis he concluded, in summary fashion, that the discrimination had not impaired male prisoners' 'rights of dignity or sense of equal worth.'<sup>154</sup> This conclusion flowed from the proportionality analysis that preceded it. Kriegler J recognised this in his dissent, pointing out that Goldstone J merged the unfairness analysis with the general limitations analysis.<sup>155</sup>

Kriegler J took issue both with the majority's assessment of the impact and the justification. In contrast with the majority, Kriegler J argued that the President's reliance on the stereotyped view of parenting roles would indeed 'perpetuate patterns of discrimination' and would 'cramp and stunt the efforts of both men and women to form their identities freely'.<sup>156</sup> Mokgoro J agreed with Kriegler J, holding that the President's use of this stereotype would entrench disadvantages experienced by men and women in the context of child-rearing.<sup>157</sup> Mokgoro J held that this impact was sufficient for a finding of unfairness but Kriegler J did not embrace this view. While Kriegler J claimed to be against assessing

---

<sup>152</sup> *ibid* [38].

<sup>153</sup> *ibid* [47].

<sup>154</sup> *ibid*.

<sup>155</sup> *ibid* [77].

<sup>156</sup> *ibid* [80].

<sup>157</sup> *ibid* [92]–[93].

justifications in the unfairness analysis,<sup>158</sup> his real concern was that the majority's justification analysis was not stringent enough.

In Kriegler J's view, the justification analysis needed to be applied with far greater intensity, requiring a heightened standard of review and stricter insistence on the presumption of unfairness:

I must emphasise that I am not suggesting that gender or sex discrimination of any kind must always and inevitably be found to be irrevocably unfair. There is no question that gender or sex discrimination can be shown to be fair. All I am contending is that the evidence must be persuasive. In cases such as these the United States Supreme Court requires 'exceedingly persuasive justification'—a rigorous test in the context of their equality provision, which makes no express mention of discrimination and contains no deemed unfairness. We should do no less.<sup>159</sup>

In this light, Kriegler J went on to propose a stricter standard of review for assessing whether reliance on a stereotype is justified: first, the advantages of relying on this stereotype must outweigh the disadvantages and, second, the advantage must compensate for identifiable patterns of past discrimination.<sup>160</sup> He argued that the discrimination failed on both these counts and was unfair. Furthermore, Kriegler J took the majority to task for its failure to apply the presumption of unfairness and for making liberal use of judicial notice to plug gaps in the President's evidence:

In the present case the presumption of unfairness has not been disturbed. *The justification that has been tendered is manifestly inadequate.* There is no warrant to strain to uphold the presidential action in question.<sup>161</sup>

The President gave no indication of the number of male prisoners with children below the age of 12 or evidence to demonstrate that their release would contribute to the crime rate or cause a public outcry. Furthermore, no argument or evidence was presented to show that a

---

<sup>158</sup> *ibid* [77].

<sup>159</sup> *ibid* [85].

<sup>160</sup> *ibid* [82]–[84].

<sup>161</sup> *ibid* [85] (emphasis added).

pardon based on gender-neutral criteria—such as primary child-carers or single parents—would have been unworkable.<sup>162</sup> Kriegler J argued that by presenting a justification on behalf of the President, the majority had failed to apply the presumption of unfairness, as it was for the President rather than the Court to prove that the discrimination was fair.<sup>163</sup>

O'Regan J, concurring in the majority judgment, took issue with Kriegler J's stricter standard of review, arguing that this may derail efforts to achieve equality:

[W]ere we to establish the rigid rule proposed by Kriegler J that reliance upon [generalisations] even to afford some advantage to mothers would, except in very narrow circumstances, be unfair, we may well make the task of achieving the equality desired by the Constitution more difficult.<sup>164</sup>

Her underlying concern was that programmes aimed at alleviating and overcoming group-based disadvantage will often need to rely on generalisations to be effective. To avoid undermining such efforts, she argued, mere reliance on a stereotype cannot be sufficient for unfair discrimination, nor should a strict standard of review be applied to these measures.<sup>165</sup> This was a clear call for greater deference in the unfairness analysis.

O'Regan J also disputed Kriegler J's impact analysis, rejecting the claim that the President's reliance on a stereotype would entrench the gendered division of childcare responsibilities and the associated patterns of disadvantage this caused. 'The profound disadvantage', she argued, 'lies not in the President's statement, but in the social fact of the role played by mothers in child rearing'.<sup>166</sup>

The complex reasoning and disagreements in *Hugo* illustrate two of the three central themes in the Court's unfairness analysis that we will see repeated in the decisions to follow.

---

<sup>162</sup> *ibid* [72].

<sup>163</sup> *ibid* [75]–[76].

<sup>164</sup> *ibid* [113].

<sup>165</sup> *ibid* [111].

<sup>166</sup> *ibid* [113].

First, human dignity appears as a conclusion rather than a premise in the Court's reasoning. This conclusion that discrimination does or does not violate human dignity flows from an assessment of whether it creates or perpetuates patterns of group disadvantage and whether it lacks adequate justification. Mokgoro J's separate concurring judgment was the only exception, as she found that the perpetuation of group disadvantage is sufficient for a finding that human dignity has been violated.

Second, we see the complex interaction between the impact and justification analyses in the various judgments and the divergent approaches to these enquiries. The majority judgment placed greater emphasis on the justification analysis, largely subsuming the impact analysis within a proportionality analysis. In contrast, Kriegler J and Mokgoro J gave impact far greater prominence. We also see stark contrasts in the justification analyses presented by the majority and minority. The majority opted for a loose proportionality analysis, while Kriegler J favoured an even stricter standard of review. Furthermore, the majority applied the proportionality analysis with a great degree of deference to the President and, in doing so, dispensed with the presumption of unfairness by making liberal use of judicial notice to support the President's justification.

After *Hugo*, these disagreements were never again made as explicit. The judges subsequently adopted different standards of review and applied these standards with different intensity without explaining why they did so or openly criticising one another for their divergent approaches.

**(b) *Harksen***

Following soon after *Hugo*, the Court's decision in *Harksen*<sup>167</sup> consolidated the Court's dignity-based test for unfair discrimination. While the members of the Court agreed on the

---

<sup>167</sup> Above n 1.

test, they disagreed on its application. This split again demonstrated the importance of the impact and justification analyses within the unfairness enquiry and the divergent approaches to this analysis.

*Harkesen* concerned a challenge to a provision in the Insolvency Act<sup>168</sup> that provides that when a spouse is declared insolvent, the solvent spouse's assets are treated as part of the insolvent estate and automatically vest in the Master of the High Court and then the trustee of the insolvent estate. The complainant argued that this unfairly discriminated against solvent spouses<sup>169</sup> by imposing a burden that was not imposed on others who have close ties with the insolvent, such as family members or business associates.

Goldstone J, again writing for the majority, found that there was discrimination on the analogous ground of 'solvent spousehood', but concluded this was not a violation of dignity and was not unfair. This conclusion again turned on an assessment of the impact of the discrimination and its justification.

While Goldstone J stressed that the unfairness analysis is principally concerned with the impact of discrimination, his impact analysis was brief and offered little context. He held that solvent spouses are not a vulnerable group and that the sequestration of their property was merely an inconvenience, as they could regain control over their assets by proving ownership in court. Goldstone J recognised that this may require considerable legal resources and would prejudice those without access to legal services, but dismissed this impact as the 'kind of inconvenience and burden that any citizen may face when resort to litigation becomes necessary.'<sup>170</sup>

In contrast, Goldstone J afforded great weight to the justification for the discrimination. He held that the discrimination assisted trustees in dealing with spouses'

---

<sup>168</sup> 24 of 1936, s 21.

<sup>169</sup> Importantly, the complainant did not allege discrimination on the listed grounds of sex and gender.

<sup>170</sup> *Harkesen* (n 1) [68].

intermingled assets, given that there is often a ‘close identity of [financial] interests between many married couples’.<sup>171</sup> The unexpressed implication was that the protection of creditors’ interests outweighed any impact on spouses. This led Goldstone J to conclude that the discrimination ‘does not lead to an impairment of fundamental dignity or constitute an impairment of a comparably serious nature’ and was not unfair.<sup>172</sup> This conclusion appeared to flow from a loose proportionality analysis, weighing benefits against harms. However, this analysis contained no serious engagement with the suitability or necessity of this measure.

In their separate dissenting judgments, O’Regan J and Sachs J found that there was discrimination on the basis of marital status. They both disagreed with the majority in finding that the discrimination had a severe impact and that it lacked adequate justification. O’Regan J noted that the vesting of solvent spouses’ property went far beyond an inconvenience, particularly where the solvent spouse was deprived of personal effects or property necessary for running his or her own business. Furthermore, she emphasised the difficulty and cost involved in launching litigation to exclude property from the insolvent estate, particularly for poor litigants. Thus she held that ‘the interests of the solvent spouse are adversely affected’ by the provision and that the ‘extent of the impairment is substantial and sufficient to constitute unfair discrimination’.<sup>173</sup>

O’Regan J’s justification analysis took place under the general limitations clause. She held that while the purpose of protecting creditors is important, the vesting provision was overbroad, as it netted all of the solvent spouses’ assets, including personal effects such as clothing and household goods. Moreover, she argued that the vesting provision was unlikely to prevent spouses with fraudulent intent from hiding assets from the trustee. It was also

---

<sup>171</sup> *ibid* [58]. This analysis appeared in the rationality enquiry under s 9(1), but this assessment of the purpose clearly had a bearing on Goldstone J’s assessment of the fairness of the discrimination.

<sup>172</sup> *ibid* [68].

<sup>173</sup> *ibid* [101].

under-inclusive, as it excluded persons whose assets and business interests may have been far more intertwined with the insolvent's assets. Thus, the discrimination lacked suitability, as it did not significantly advance its purpose.<sup>174</sup> O'Regan J also held that this purpose could be achieved through less restrictive means, such as the Insolvency Act's various provisions for setting aside collusive transactions.<sup>175</sup> Thus, she concluded that the provision did not strike an appropriate balance between creditors' interests and the interests of solvent spouses.<sup>176</sup>

Sachs J's dissent directly incorporated O'Regan J's proportionality analysis into his unfairness enquiry. He agreed that the discrimination was not suitable or necessary, as the vesting provision was under-inclusive in relation to the class of persons targeted; too broad in relation to the property that it affected; and too invasive in light of the less restrictive means available to achieve its purpose.<sup>177</sup> Having established that the discrimination was disproportionate he proceeded to conclude that the 'underlying premise' of the provision is that only 'one business mind is at work in the marriage, not two.'<sup>178</sup> The result was that the provision 'stems from and reinforces a stereotypical view of the marriage relationship which, in the light of the new constitutional values, is demeaning to both spouses.'<sup>179</sup> This was held to be a violation of dignity that rendered the discrimination unfair. Here we have an example of what I referred to in the previous chapter as the Court's 'expressive concerns': the concern for messages expressed by discrimination. The prevalence of these expressive concerns is the third theme that I will draw from these split decisions. What is particularly interesting about Sachs J's expressive concern is that it appears to flow from the finding that

---

<sup>174</sup> *ibid* [103]–[105].

<sup>175</sup> *ibid* [106]–[111].

<sup>176</sup> *ibid* [112].

<sup>177</sup> *ibid* [121].

<sup>178</sup> *ibid*.

<sup>179</sup> *ibid*.

the discrimination is unjustified. As we will see, this connection between the justification analysis and expressive concerns is a consistent feature of the Court's reasoning.

As in *Hugo*, the division between the minority and the majority in *Harksen* stemmed from divergent assessments of the impact of the discrimination on the disfavoured group and the different intensity with which they applied the justification analysis. These divisions were made even more apparent in *Jordan*, *Volks*, and *Union of Refugee Women*, a trio of decisions that deeply divided the Court (six-five, seven-three, and six-four splits respectively) and attracted strong criticism.

### **(c) *Jordan***

In *Jordan*,<sup>180</sup> the Court considered the validity of the offence of prostitution<sup>181</sup> which criminalises engaging in sex for reward, but does not criminalise paying for sex. The complainants argued that this constituted indirect discrimination on the basis of gender, as the offence strikes at prostitutes, who are predominantly women, and excludes their clients, who are most often men.<sup>182</sup>

Ngcobo J, writing for the majority, dismissed this claim as he found that the offence was neither discriminatory nor unfair. He held that the offence did not constitute indirect discrimination on the basis of sex or gender, as clients could be found guilty of derivative offences such as accessory liability or conspiracy which carried similar punishments. As a result, he concluded there was no disproportionate impact.<sup>183</sup> This conclusion was certainly wrong. As O'Regan and Sachs JJ pointed out in their joint dissenting judgment, there was no

---

<sup>180</sup> Above n 3.

<sup>181</sup> Sexual Offences Act 23 of 1957, s 20(1)(aA).

<sup>182</sup> The complainants also challenged this offence as a violation of the rights to dignity, freedom of the person, privacy, and free economic activity. This was combined with a challenge to the criminalisation of brothel-keeping. For my purposes, I will focus on the unfair discrimination challenge.

<sup>183</sup> *Jordan* (n 3) [10]–[14].

recorded example of a customer being charged or convicted under any derivative offences.<sup>184</sup>

In addition, all parties agreed that prostitutes, and women in particular, were disproportionately affected by the offence.<sup>185</sup> Furthermore, even if clients were charged under the derivative offences, these offences were all parasitic on the primary offence of prostitution. The result, they argued, was that women, who are more likely to work as prostitutes, are stigmatised as the primary wrongdoers.<sup>186</sup> This was more than sufficient to establish indirect discrimination.

Turning to the unfairness analysis, Ngcobo J was prepared to assume that there was discrimination but held that any discrimination was fair. His reasoning resembled a thin rationality analysis, with impact considered as an afterthought. He argued as follows:

The Act pursues an important and legitimate constitutional purpose, namely to outlaw commercial sex. . . . Indeed one of the effective ways of curbing prostitution is to strike at the supply. . . . In the circumstances any ‘discrimination’ resulting from the prostitute and the customer being dealt with under different provisions of the law cannot be said to be unfair.<sup>187</sup>

Ngcobo J offered no further analysis of whether the offence was suitable for achieving this purpose or whether less restrictive means were available.

Having already concluded that the offence was fair, Ngcobo J then denied that the discrimination had any impact worthy of consideration. In response to the minority’s argument that the discrimination stigmatised women, he held that any stigma attached to prostitution was the product of societal attitudes and was not connected to the offence, nor was this stigma unfair as women had a choice to engage in prostitution.<sup>188</sup>

---

<sup>184</sup> *ibid* [42].

<sup>185</sup> *ibid* [60].

<sup>186</sup> *ibid* [63]–[64].

<sup>187</sup> *ibid* [15].

<sup>188</sup> *ibid* [16]–[17]. At [19], Ngcobo J added a similar argument to the one made in *Democratic Party*, text to n 54 above, that evidence of the application of a law is irrelevant to assessing its validity.

In contrast, O'Regan and Sachs JJ made impact central to their unfairness analysis and also contextualised this analysis appropriately. They began by acknowledging the historical pattern of disadvantage experienced by women as a result of the stigma and double-standards surrounding women's sexuality. Women who flaunt their sexuality, O'Regan and Sachs JJ noted, are considered morally reprehensible while men who do the same are regarded as 'virile, at worst weak'.<sup>189</sup> In this light, they held that by stigmatising prostitutes as the primary offenders, the discriminatory offence 'tracks and reinforces'<sup>190</sup> this stigma and, in doing so, 'entrenches the deep patterns of gender inequality' in society.<sup>191</sup> They swiftly dealt with Ngcobo J's claim that this stigma was the product of societal attitudes rather than the law, holding that the law is 'partly constitutive of invidious social standards' and should be corrected.<sup>192</sup>

O'Regan and Sachs JJ also held that this impact had no adequate justification. Male clients, they held, are just as blameworthy, if not more so, than the women they pay for sex.<sup>193</sup> As a result, there was no good reason for drawing a distinction between prostitutes and their clients. Having established that the discrimination perpetuated a pattern of group disadvantage and lacked justification, they concluded that it was unfair.

The disagreements between the majority and the minority in the unfairness analysis again turn on different assessments of the impact and justification of the discrimination. As will already be apparent from this summary, there is much that is lamentable and plainly wrong in the majority's analysis in *Jordan*. I have already indicated that its discrimination analysis was wrong in fact, law, and principle. However, it will pay to postpone a fuller

---

<sup>189</sup> *Jordan* ibid [64]–[66].

<sup>190</sup> ibid [67].

<sup>191</sup> ibid [68].

<sup>192</sup> ibid [72].

<sup>193</sup> ibid [68].

critique of its unfairness analysis for the moment while we trace the broader patterns in the Court's reasoning. As is evident in the decisions that preceded it and that came after, the majority's reasoning in *Jordan* was not unique. A broader understanding of the patterns of reasoning in these judgments will contribute to more focused criticism and more productive proposals for how the Court's reasoning ought to develop. That analysis lies ahead in chapter 8.

**(d) *Volks***

The patterns of reasoning evident in *Jordan* were largely repeated in *Volks*,<sup>194</sup> a challenge to the exclusion of heterosexual, cohabiting partners from the Maintenance of Surviving Spouses Act.<sup>195</sup> The complainant, Mrs Robinson, had lived with her partner for sixteen years before his death, although they never married. She received a sizeable inheritance but sought to receive additional maintenance from his estate. However, the Act confined this benefit to spouses. She challenged this provision, arguing that it unfairly discriminated on the basis of marital status.

Skweyiya J, writing for the majority, rejected this claim. He held that while the provision discriminated against cohabiting partners, this was not unfair, as surviving partners were 'not being told that [their] dignity is worth less than that of someone who is married.'<sup>196</sup> In reaching this conclusion, his unfairness analysis largely resembled a rationality test, with impact again consigned to the margins. Skweyiya J put forward two primary justifications for the discrimination. First, he held that this discrimination upheld the freedom of testation as it would be inappropriate to impose a duty of support on unmarried partners in death that

---

<sup>194</sup> Above n 94.

<sup>195</sup> 27 of 1990.

<sup>196</sup> *Volks* (n 94) [62].

did not exist while they were alive.<sup>197</sup> Second, he held that marriage is an important institution and that it is appropriate and necessary to confer certain benefits on married couples that are not offered to permanent life partners.<sup>198</sup> In his concurring judgment, Ngcobo J added a third argument for this exclusion: that it recognised the importance of choice, as those that had chosen not to marry should not be entitled to claim the benefits of marriage.<sup>199</sup> Skweyiya J and Ngcobo J accepted these justifications on their face, without probing the suitability, necessity, or proportionality in the narrow sense. As a result, their analysis was little more than a test for rationality. Furthermore, both judgments dispensed with the presumption of unfairness in the process, skirting around the fact that all parties had conceded that the discrimination was unfair.<sup>200</sup>

These judgments also offered little analysis of the impact of the discrimination. Skweyiya J refused to consider the evidence presented by the amicus curiae showing the vulnerability of women in cohabitation relationships. He held that this evidence, consisting of interviews with women in such relationships combined with general statistics and evidence on women's vulnerability, did not meet the standard of being 'incontrovertible' or 'capable of easy verification' under the relevant Constitutional Court Rules on the admission of further documentary evidence.<sup>201</sup> At most, Skweyiya J recognised that women in marriage-like relationships may experience some vulnerability, but he swiftly concluded that this was better addressed by the Legislature, and had no bearing on the unfairness of the discrimination.<sup>202</sup> Ngcobo J, writing with the majority's support, went further to deny any

---

<sup>197</sup> *ibid* [60].

<sup>198</sup> *ibid* [52]ff.

<sup>199</sup> *ibid* [94].

<sup>200</sup> *ibid* [27]. Discussed further in chapter 8, text to n 166ff.

<sup>201</sup> *ibid* [31]–[35]. Rule 31 of the Constitutional Court Rules.

<sup>202</sup> *ibid* [65]–[68].

impact, as he argued that cohabiting couples had chosen not to marry and could not complain about the consequences of their choice.<sup>203</sup>

In their joint dissenting judgment, Mokgoro and O'Regan JJ highlighted the severe impact of the discrimination. They took judicial notice of census statistics reflecting that over 2.3 million South Africans were living in 'marriage-like' cohabitation relationships.<sup>204</sup> Many of these relationships, they suggested, produced patterns of dependency akin to those found in marriages with the same risks of destitution on the death of the primary earner.<sup>205</sup> They further noted the absence of effective legal mechanisms to protect surviving partners<sup>206</sup> and the prevailing stigma against the unmarried.<sup>207</sup> Viewed in this light, they held that the denial of maintenance claims to surviving partners had a severe impact that would perpetuate existing patterns of disadvantage. This was held to be sufficient for a finding of unfairness.<sup>208</sup> They went on to conclude that the unfair discrimination was unjustified under section 36.<sup>209</sup>

In contrast with Mokgoro and O'Regan JJ, Sachs J engaged in both an impact and a justification analysis in his unfairness enquiry. He agreed with their assessment of the impact of the discrimination and went further by responding to the majority's three arguments justifying the fairness of the discrimination. First, he argued that appealing to freedom of testation merely assumed the correctness of the point that was under challenge: the failure to extend a duty of support to cohabiting partners.<sup>210</sup> Second, while Sachs J also spoke of the value of marriage, he argued that this did not provide a reason to confine all the legal

---

<sup>203</sup> *ibid* [91]-[92].

<sup>204</sup> *ibid* [119].

<sup>205</sup> *ibid* [124].

<sup>206</sup> *ibid* [125]-[131].

<sup>207</sup> *ibid* [124].

<sup>208</sup> *ibid* [132].

<sup>209</sup> *ibid* [136].

<sup>210</sup> *ibid* [151].

benefits of marriage exclusively to marriages.<sup>211</sup> Finally, he attacked the argument based on choice, holding that the choice to marry is often absent or constrained and, even where present, it provides no good reason to penalise surviving life partners.<sup>212</sup> In doing so, Sachs J interrogated the reasons for the discrimination in far greater depth than the majority's light-touch analysis.

Having addressed the majority's arguments in favour of this discrimination, Sachs J went on to hold that the primary purpose of the legislation was to prevent surviving spouses from suffering financial hardship on the death of their spouses.<sup>213</sup> He held that this purpose did not justify excluding life partners, as they were just as likely to face severe financial need on the death of their partners. As a result, he implied that the discrimination was not suitable for achieving the Act's purpose of addressing vulnerability. This lack of justification led Sachs J to conclude that the discrimination—

*tells the world* that there is something unworthy and not respectable about [cohabiting partners] because they had a family without getting married. . . . It reinforces the stereotype that . . . they are all irresponsible and unconcerned about the need to live in a good family relationship . . .<sup>214</sup>

This was held to be a violation of dignity, rendering the discrimination unfair. Again, we have an expressive concern that flows from a finding that discrimination is unjustified.

By this point, the patterns in the Court's split decisions are familiar. The majority concentrates on the justification, adopting a weak intensity of review, and largely side-lines the impact analysis. In contrast, the minority probes the impact in greater depth and offers a more searching analysis of the justification. The final case in this sample brings these patterns into even sharper focus.

---

<sup>211</sup> *ibid* [167]ff and [208].

<sup>212</sup> *ibid* [156]ff.

<sup>213</sup> *ibid* [183]–[187] and [220].

<sup>214</sup> *ibid* [226] (emphasis added).

**(e) *Union of Refugee Women***

In *Union of Refugee Women*,<sup>215</sup> the Court considered whether the blanket exclusion of refugees from the private security industry, with limited possibility of applying for individual exemptions, was unfairly discriminatory. Section 23(1)(a) of the Private Security Regulation Act<sup>216</sup> (Security Act) provides that only South African citizens and permanent residents can be registered as ‘private security providers’ if they can furnish the prescribed documentary proof of their trustworthiness and reliability. All other categories of foreign nationals are barred from registering, including refugees. Section 23(6) of the Act allows individuals to apply for exemption from the requirements of section 23(1)(a) on ‘good cause shown’. However, the state authority responsible for making these decisions took the position that it was not possible to exempt refugees from the citizenship and permanent residence requirement, and rejected the complainants’ applications. The complainants challenged section 23(1)(a) as being unfairly discriminatory against refugees. In the alternative, they argued that the decision not to accept individual applications under section 23(6) amounted to unjust administrative action. In a six-four decision, the majority held that the blanket exclusion of refugees was discriminatory but not unfair. However, they held that section 23(6) did allow refugees to apply for individual exemptions.

Kondile AJ, writing for the majority, assumed that the blanket exclusion of refugees under section 23(1)(a) constituted discrimination on the analogous ground of refugee status. However, he held that this discrimination was not unfair.

In his assessment of the impact of the discrimination, Kondile AJ expressed his sympathy for the plight of refugees.<sup>217</sup> However, this had little bearing on his impact analysis,

---

<sup>215</sup> Above n 5.

<sup>216</sup> 56 of 2001.

<sup>217</sup> *Union of Refugee Women* (n 5) [28]–[31].

as he proceeded to deny that there was any impact worthy of consideration. He did so by conflating the impact analysis with the question whether the applicants had a right to choose an occupation under section 22 of the Constitution. Kondile AJ held that because section 22 applies only to ‘citizens’, the applicants did not have a legally cognisable unfair discrimination claim.<sup>218</sup> Alternatively, Kondile AJ held that if refugees did have a claim, their interest in obtaining employment was not significantly hampered. He held that, on a proper interpretation of section 23(6) of the Act, it did allow refugees to be exempted from the permanent residence and citizenship requirements under section 23(1)(a).<sup>219</sup> He later acknowledged that the relevant authority responsible for registration had not developed clear procedures for considering these applications and provided no information or assistance to refugees who may qualify for an exemption.<sup>220</sup> However, these potential difficulties had no bearing on his assessment of the impact of the discrimination. Furthermore, he suggested that this impact was for a limited duration, as refugees would qualify for permanent residency after five years.

In carrying out the justification analysis, Kondile AJ was swayed by the purpose of the Security Act, which he understood to be aimed at protecting the public by establishing the trustworthiness of prospective private security workers. He intimated that it was more difficult to establish the trustworthiness of a refugee than of a permanent resident or citizen,<sup>221</sup> although he provided no reasons for this conclusion. Ultimately his analysis

---

<sup>218</sup> *ibid* [54]. He further dismissed the argument that art 17(1) of the UN Convention on Refugees affords any entitlement to employment opportunities on a par with permanent residents, a point that was disputed in the minority judgment.

<sup>219</sup> Sachs J concurred with the majority judgment, albeit for different reasons. He was primarily swayed by the flexibility afforded by s 23(6), holding that in the absence of this mechanism the outright exclusion of refugees would be unfairly discriminatory.

<sup>220</sup> *ibid* [79]–[80].

<sup>221</sup> *Union of Refugee Women* (n 5) [38] and [61].

suggested that the purpose of the discrimination outweighed what he viewed as a negligible impact on refugees' interests:

[T]he discrimination is not unfair . . . The scheme is for a limited fixed period; it is not a blanket ban on employment in general but is narrowly tailored to the purpose of screening entrants to the security industry; it is flexible and has the capacity to let in any foreigner when it is appropriate and to avoid hardship against any foreigner. . . . In short, the discrimination is a legitimate legislative choice on a highly prized public interest which is safety and security, in a country where security workers in this industry exceed the police and the army in number.<sup>222</sup>

Kondile AJ's analysis marked a return to the type of loose proportionality analysis seen in the majority judgments in *Hugo* and *Harksen*, in contrast with the rationality analysis seen in *Jordan* and *Volks*. However, he applied this proportionality analysis with a great degree of deference as he made no attempt to scrutinise the necessity and suitability of the discrimination in any depth.

In their joint dissenting judgment, Mokgoro and O'Regan JJ disputed this assessment of the impact and justification. This analysis was intertwined, as the absence of adequate justification for the discrimination was found to be a key indicator that the discrimination would entrench existing patterns of xenophobia in society. They pointed out that the Security Act required applicants to furnish various documents and evidence, such as police clearances, to prove that they are trustworthy and reliable. While some refugees would not be able to furnish these documents, many would be able to do so. Thus, the purpose would not be advanced by excluding refugees who had all the necessary paperwork.<sup>223</sup> Furthermore, they stressed that the discrimination lacked necessity—it was 'not narrowly tailored to that purpose'<sup>224</sup>—as the purpose could be achieved simply by barring those who did not have the

---

<sup>222</sup> *ibid* [67].

<sup>223</sup> *ibid* [119].

<sup>224</sup> *ibid* [123].

necessary documentation.<sup>225</sup> They further indicated that while section 23(6) provided valuable flexibility for those who lack the necessary paperwork, there was no reason to require refugees with all the necessary documents to have to go through this process. This absence of proportionality led Mokgoro and O'Regan JJ to conclude that the exclusion of refugees contained the 'message' and 'silent premise' that refugees are inherently less trustworthy<sup>226</sup> which, they contended, would 'inevitably foster a climate of xenophobia.'<sup>227</sup>

In addition, Mokgoro and O'Regan JJ also recognised that this would entrench a severe pattern of socio-economic disadvantage. They acknowledged that the private security industry was a significant source of employment for refugees, particularly those who are unskilled.<sup>228</sup> As a result, it would have a severe impact on refugees' ability to earn a livelihood, contrary to the majority's claim that it would only have a 'negligible' impact.<sup>229</sup>

#### **5.4.2 Three Themes**

The five split decisions give us a better understanding of the Court's reasoning in determining whether discrimination is unfair. Three themes emerge from these cases that can be linked with broader trends in the Court's unfair discrimination case law.

##### **(a) Human Dignity and Necessary Conditions**

The first theme is the absence of human dignity in the Court's unfairness enquiry. As we have seen, members of the Court do not reason from any concrete conception of human dignity and their disagreements are not over how to understand human dignity. Instead, the

---

<sup>225</sup> *ibid.*

<sup>226</sup> *ibid* [118]–[119].

<sup>227</sup> *ibid* [122].

<sup>228</sup> *ibid* [122].

<sup>229</sup> *ibid.*

conclusion that discrimination has or has not violated dignity hinges on whether it: a) threatens to create or perpetuate patterns of group disadvantage; and b) lacks adequate justification. Human dignity is simply a placeholder for these considerations in the Court's reasoning.

There was some initial resistance to the requirement that discrimination must be shown to lack adequate justification. Mokgoro J's minority judgment in *Hugo* and O'Regan J's minority judgment in *Harksen* appeared to hold that proof that discrimination perpetuates a pattern of group disadvantage is sufficient for a finding that discrimination violates dignity and is unfair. Their joint dissenting judgment in *Volks* demonstrated a similar pattern of reasoning, leaving justificatory considerations to the general limitations analysis. However, this approach never gained wider support. In *Union of Refugee Women*,<sup>230</sup> it seems that Mokgoro and O'Regan JJ came around to the prevailing approach as they also incorporated the justification analysis into their unfairness enquiry.

These two necessary conditions underpinning the unfairness analysis are also evident in the Court's wider case law. For example, in *Kbosa*,<sup>231</sup> dealing with the exclusion of non-citizens from social welfare grants, the Court recognised that this exclusion marked all non-citizens with a 'badge of inferiority'<sup>232</sup> and entrenched their socio-economic disadvantage. However, the Court was only prepared to find that this discrimination violated the dignity of permanent residents. Mokgoro J, writing for the majority, held that:

[I]here are compelling reasons why social benefits should not be made available to all who are in South Africa irrespective of their immigration status. The exclusion of all non-citizens who are destitute, however, irrespective of their immigration status, fails to distinguish between those who have become

---

<sup>230</sup> *Union of Refugee Women* (n 5), text to nn 223–227.

<sup>231</sup> Above n 44.

<sup>232</sup> *ibid* [74].

part of our society and have made their homes in South Africa, and those who have not.<sup>233</sup>

This passage indicates, in no uncertain terms, that the creation or perpetuation of group disadvantage is not enough to prove that discrimination violates dignity and is unfair. The discrimination must also lack adequate justification, what Mokgoro J labelled ‘compelling reasons’.

Some may point to the Court’s decision in *Walker*<sup>234</sup> to dispute my claims about human dignity’s absence in the Court’s reasoning and my account of the two necessary conditions driving its unfairness enquiry. As discussed above, a majority in *Walker* found that the Pretoria city council unfairly discriminated against white residents by pursuing debtors in predominantly white suburbs while not enforcing claims in predominantly black suburbs. Langa DP concluded that this discrimination was unfair as ‘[n]o members of a racial group should be made to feel that they are not deserving of equal concern, respect and consideration’ and that this was ‘comparable to’ a violation of human dignity.<sup>235</sup> Commentators have interpreted this conclusion as a clear sign that the Court applied a narrow conception of dignity, confined to subjective feelings.<sup>236</sup> However, looking at Langa DP’s judgment more closely, we can see that this statement was simply a conclusion following on from the finding that the discrimination threatened to create a pattern of group disadvantage without justification.

Langa DP began his analysis by recognising that while white South Africans do not experience existing patterns of group disadvantage, they can still be regarded as ‘vulnerable’

---

<sup>233</sup> *ibid* [58].

<sup>234</sup> Above n 2.

<sup>235</sup> *ibid* [81].

<sup>236</sup> Albertyn and Goldblatt, ‘Facing the Challenge’ (n 68) 259–60; Murray Wesson, ‘Contested Concepts: Equality and Dignity in the Case-Law of the Canadian Supreme Court and the South African Constitutional Court’ in András Sajó and Renáta Uitz (eds), *Constitutional Topography: Values and Constitutions* (Eleven International 2010) 283-85.

to disadvantage ‘in a political sense’ because they are a numerical minority.<sup>237</sup> He went on to find that the discrimination lacked appropriate justification as the policy was implemented in secret, without authority, and the public had been misled about the existence of the policy.<sup>238</sup> Langa DP appeared to invoke a form of public law estoppel here: having breached basic requirements of the rule of law, the city council could not raise arguments to show that its actions were justified.<sup>239</sup> In the absence of a justification, Langa DP implied that it was objectively reasonable for white residents to believe that the city did not consider their interests to be as important as black residents’ interests, and that they were being targeted by council officials.<sup>240</sup> In doing so, Langa DP suggested that a political minority’s objectively reasonable fears of persecution can be considered to be a form of disadvantage worthy of protection. There is room to debate whether the majority was correct in reaching this finding, but the pattern of reasoning displayed here is perfectly consistent with my account.

### **(b) Impact and Justification**

While there is broad agreement in these cases over *what* must be proved to establish that discrimination violates dignity and is unfair, there is substantial divergence over *how* to prove that these necessary conditions have been satisfied. In the five cases, we have seen vast differences in the way that the Court applies the impact and justification analysis.

In terms of the impact analysis, the Court has stated and applied clear principles, requiring the impact analysis to be central to the unfairness analysis and appropriately contextualised. The five majority judgments generally expressed their support for these

---

<sup>237</sup> *ibid* [48].

<sup>238</sup> *ibid* [76].

<sup>239</sup> For this reason, the city council’s actions would fail the *Van Heerden* test. In *Van Heerden* (n 67) [44], the Court held that ‘abuse[s] of power’ are disqualified from protection under the *Van Heerden* test.

<sup>240</sup> *Walker* (n 2) [81].

principles but then failed to adhere to them. In all five judgments the majority's impact analysis was perfunctory. In *Jordan* and *Volks*, impact was made almost entirely irrelevant to the enquiry as the majority dealt with impact as an aside, having already concluded that the discrimination was fair. The two primary elements of the contextual analysis were also generally missing from these majority judgments. In *Harksen* and *Volks*, there was little consideration of the impact of the discrimination on the broader group. In *Hugo* and *Union of Refugee Women*, the Court made little attempt to connect the impact of the discrimination with the existing patterns of disadvantage experienced by the disfavoured groups. In contrast, the analysis presented in the minority judgments was generally consistent with the Court's established impact analysis.

In chapter 8, I argue that more consistent application of the established impact analysis will assist in making the Court better at preventing and addressing patterns of group disadvantage. I will show that these deviations from the established impact analysis also reflect deeper problems in the Court's handling of evidence and its failure to grasp key concepts.

In contrast with the impact analysis, the Court has not articulated any clear principles for approaching the justification analysis. We have seen a great deal of variability in the five split decisions with the judgments adopting different standards of review and applying these standards with shifting intensity. In *Jordan* and *Volks*, the majority judgments simply applied a rationality analysis. In *Hugo*, *Harksen*, and *Union of Refugee Women*, the Court appeared to apply a loose proportionality analysis, balancing the reasons for the discrimination against the impact. However, we saw substantial differences in the intensity with which the majority and minority judgments applied this analysis, including different approaches to the presumption of unfairness and inconsistent review of suitability, necessity, and proportionality in the 'narrow sense'.

In chapter 8, I argue that the majority judgments in these cases all failed to satisfy the ‘baseline’ intensity of review which ought to apply in all unfair discrimination cases. I will show that consistent application of this baseline will help the Court to be better and more consistent in preventing and addressing patterns of group disadvantage.

### **(c) Expressive Concerns**

The final theme is the role of expressive concerns in the Court’s reasoning. In chapter 4, I indicated that one of the primary ways that the Court concludes that discrimination threatens to create or perpetuate patterns of group disadvantage is by identifying the messages expressed by the discrimination. The five split decisions offer further insights into these expressive concerns as they suggest that the Court is identifying impermissible messages in two different ways.

The first way is by considering meanings attached to the discriminatory law or action as part of the broader impact analysis. For instance, in *Jordan*,<sup>241</sup> Sachs and O’Regan JJ recognised that criminal offences generally carry a message of serious moral blameworthiness. As a result, they held that criminalising prostitution but not the act of paying for sex sent the message that female prostitutes are the primary wrongdoers, and their male clients are less blameworthy.<sup>242</sup> Similar reasoning is seen in the Court’s unanimous decision in the *Sodomy Case*,<sup>243</sup> where the Court held that the criminalisation of anal intercourse between men sends the ‘message’ that gay men are ‘unapprehended felons’, reinforcing and perpetuating prejudice. These concerns are not only confined to discrimination in the criminal law. In *Khosa*,<sup>244</sup> the Court recognised that social welfare

---

<sup>241</sup> Above n 3.

<sup>242</sup> *ibid* [67]–[68].

<sup>243</sup> Above n 37 [23].

<sup>244</sup> *Khosa* (n 44) [74] (Mokgoro J).

benefits are strongly associated with notions of belonging and inclusion in society. As a result, excluding non-citizens from these benefits was held to have a ‘strong stigmatising effect’, sending a ‘message of second-class status’ that would marginalise non-citizens within their communities.<sup>245</sup> In *Fourie*,<sup>246</sup> the Court recognised that marriage has profound social significance, with the result that excluding same-sex couples from marriage ‘represents a harsh if oblique statement by the law that same-sex couples are outsiders’. These messages tend to appear within the Court’s broader assessment of the impact of the discrimination on the rights or interests of individuals.

The second way that the Court identifies impermissible messages is by using the justification analysis. For example, in *Union of Refugee Women*,<sup>247</sup> Mokgoro and O’Regan JJ’s conclusion that the discrimination was unjustified led to the finding that it conveyed the ‘message’ and the ‘silent premise’ that refugees are inherently less trustworthy.<sup>248</sup> The split decisions show that the Court’s willingness to acknowledge these messages is generally contingent on the outcome of the justification analysis. Thus, in *Harksen*,<sup>249</sup> Goldstone J saw nothing untoward in automatically divesting solvent spouses of their property, while Sachs J interpreted this as conveying a stereotyped view of marriage in which ‘only one business mind is at work . . . not two’.<sup>250</sup> In *Vols*,<sup>251</sup> Skweyiya J held that the exclusion of surviving life partners from the benefits of the Maintenance of Surviving Spouses Act was not unfair, as surviving partners were ‘not being told that [their] dignity is worth less than that of someone who is married’. Sachs J took the exact opposite view, holding that it ‘tells the

---

<sup>245</sup> *ibid.*

<sup>246</sup> Above n 34 [71].

<sup>247</sup> Above n 5 [118]–[119].

<sup>248</sup> *ibid.*

<sup>249</sup> Above n 1.

<sup>250</sup> *ibid* [121].

<sup>251</sup> Above n 94 [62].

world they are unworthy’, thus ‘reinforcing’ harmful stereotypes about unmarried people.<sup>252</sup> Why and how a justification analysis is relevant in identifying these messages is not explained in these judgments.

In practice, the line between these two different ways of identifying messages is often blurred as the Court occasionally identifies messages using both methods. For instance, in the *Immigration Case*,<sup>253</sup> the Court found that the failure to allow same-sex life partners to join their partners in the country sent the ‘message’ that same-sex couples ‘lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected.’ It arrived at this conclusion having considered the meanings attached the discrimination itself. The lack of justification further confirmed this message.

This recognition that there are two methods of identifying impermissible messages will assist in better understanding the Court’s expressive concerns. In the next chapter, I will build on these insights to answer the three questions raised in chapter 4: what is the nature of these impermissible messages? How does the Court identify them? And how does it determine that they will create or perpetuate patterns of group disadvantage? I will show that the two different methods of identifying messages identified here correspond with two conceptually distinct, albeit interconnected, forms of meaning. This will allow us to understand precisely why and how these different methods assist in uncovering impermissible messages.

## 5.5 CONCLUSION

Having examined the discrimination and unfairness stages of the *Harksen* test, we can conclude that three necessary conditions must be satisfied for the Court to find that human dignity has been violated in unfair discrimination cases. There must be: a) unfavourable

---

<sup>252</sup> *ibid* [226].

<sup>253</sup> Above n 54 [54].

treatment on the basis of protected grounds; b) that threatens to create or perpetuate patterns of group disadvantage; and c) that lacks adequate justification. I have also examined how the Court identifies these various necessary conditions, focusing particularly on the complex reasoning in the unfairness analysis.

The chapters to follow will build on this understanding of the Court's reasoning and will assess its implications. In the next chapter, I will explore the Court's expressive concerns in greater detail. In part 3, consisting of chapters 7 and 8, I evaluate and critique the case law in greater depth, armed with a better understanding of the Court's reasoning.

## CHAPTER 6: MESSAGES AND MEANINGS

### 6.1 INTRODUCTION

In the previous chapter, I showed that three necessary conditions must be satisfied for the Constitutional Court to conclude that human dignity has been violated in unfair discrimination cases: there must be a) unfavourable treatment on the basis of protected grounds; b) that threatens to create or perpetuate patterns of group disadvantage; and c) that lacks appropriate justification. In chapter 4, I showed that one of the primary ways that the Court concludes that discrimination will perpetuate group disadvantage is by reflecting on the ‘messages’ expressed by this discrimination, what I have termed the Court’s ‘expressive concerns’. The concern is that these messages will perpetuate prejudice and impermissible stereotyping in society, contributing to broader patterns of group disadvantage. We have further observed that the Court identifies these messages in two broad ways: by considering the meanings attached to the discriminatory laws or actions and by drawing conclusions from the finding that discrimination is unjustified.

In this chapter, I will explore these expressive concerns in greater detail. This is uncharted territory in the South African literature. Nevertheless, the task of unpacking the Court’s expressive concerns is assisted by two sources: the Supreme Court of Canada’s case law and the burgeoning literature on ‘legal expressivism’.

As explained in chapter 4, the Canadian Court has also shown great concern for the messages expressed by laws and actions. Under the *Law*<sup>1</sup> test, the Canadian Court seemingly made proof of prejudice- and stereotype-reinforcing messages a necessary condition for establishing discrimination. The reformulated *Kapp*<sup>2</sup> test has since broadened the focus, but

---

<sup>1</sup> *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 [88].

<sup>2</sup> *R v Kapp* [2008] 2 SCR 483 [25]; *Quebec (Attorney General) v A* [2013] 1 SCR 61 [332] (Abella J).

expressive concerns will likely remain a prominent feature of the Canadian Court's decisions.<sup>3</sup>

The similarities between the South African and the Canadian Courts' expressive concerns suggest that we are dealing with a common phenomenon. The broader parallels in the Courts' approach to discrimination law, discussed in chapter 2, will allow me to explore these shared expressive concerns side-by-side, without the distraction of vast doctrinal differences.<sup>4</sup> This will help to shed greater light on the South African Court's reasoning as the Canadian Court has often been more self-reflective about the way it identifies impermissible messages. These comparisons will also allow for critical reflection where the South African and Canadian Courts' approaches differ.

The growing literature on 'legal expressivism' will provide assistance in exploring these expressive concerns.<sup>5</sup> Contributors to this literature are united by the view that the meanings of laws and actions are relevant to their moral and legal evaluation.<sup>6</sup> In other words, laws and actions can be morally right or wrong, legally valid or invalid depending on the messages they express.<sup>7</sup> Theorists have increasingly sought to understand discrimination

---

<sup>3</sup> See chapter 4, text to nn 79–81.

<sup>4</sup> Expressive concerns are also found in other jurisdictions, most notably in the United States Supreme Court's Equal Protection Clause and Establishment Clause jurisprudence. See further Matthew D Adler, 'Expressive Theories of Law: A Skeptical Overview' (2000) 148 U Pa L Rev 1363, 1428–1447; Tarunabh Khaitan, 'Dignity as an Expressive Norm: Neither Vacuous Nor a Panacea' (2012) 32 OJLS 1, 5–9. I will not explore the US Supreme Court's case law further as the deep doctrinal and philosophical differences between the South African and US approaches to discrimination law make the US an unwieldy comparator.

<sup>5</sup> For a general overview see Adler *ibid*; Elizabeth S Anderson and Richard H Pildes, 'Expressive Theories of Law: A General Restatement' (2000) 148 U Pa L Rev 1503; Khaitan *ibid*. Legal expressivism should not be confused with expressivism in metaethics, the position that there are no moral facts, merely expressions of moral attitudes.

<sup>6</sup> See Khaitan *ibid* 4.

<sup>7</sup> Authors diverge on which meanings matter and why. For my purposes it will not be necessary to engage with these deeper debates.

law in expressive terms,<sup>8</sup> providing a rich source of conceptual tools to better understand the expressive concerns in the case law.

Using these tools, I will address the three questions that have crystallised in the previous chapters: what is the nature of the impermissible messages that the South African and Canadian Courts' are uncovering (section 6.2)? How do they identify these messages (section 6.3)? And how do they determine that these messages will create or perpetuate patterns of group disadvantage (section 6.4)?

In section 6.2, I show that the South African and Canadian Courts are identifying two different types of messages. First, there are *sentence-meaning* messages, which reflect the conventional meanings attached to particular discriminatory laws and actions, viewed in context. Second, there are *non-linguistic* messages, which serve as shorthand for saying that it is reasonable for members of society to believe that the state has discriminated on the basis of prejudice or stereotyping. In section 6.3, I explain in greater depth how both Courts identify these messages. Sentence-meaning messages, I will show, are identified by exploring the interaction between conventional meanings and context. In contrast, non-linguistic messages are uncovered by using a justification analysis. A finding that discrimination is unjustified establishes that the state has failed to afford the disfavoured group members' interests adequate weight. Prejudice and stereotyping supply the imputed reasons for this failure. Section 6.4 addresses how the Courts determine that these messages will create or entrench prejudice and stereotyping in society. I will demonstrate that both Courts are making broad predictions based, in large part, on the disfavoured groups' current or historical disadvantage.

---

<sup>8</sup> See, for example, Richard H Pildes and Richard G Niemi, 'Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances after *Shaw v Reno*' (1993) 92 Mich L Rev 483; Anderson and Pildes (n 5); Richard A Primus, 'Equal Protection and Disparate Impact: Round Three' (2003) 117 Harv L Rev 493; Denise Réaume, 'Discrimination and Dignity' (2003) 63 La L Rev 1; Deborah Hellman, *When is Discrimination Wrong?* (Harvard University Press 2008) 51–54; Khaitan (n 4).

My analysis in this chapter is largely explanatory as my primary aim is to understand these expressive concerns. However, I will also offer some normative analysis to show where the South African Court's reasoning can be developed.

## 6.2 THE NATURE OF THE MESSAGES

To understand the messages that the South African and Canadian Courts are uncovering it is helpful to draw on some of the theories of meaning used in the legal expressivism literature.<sup>9</sup> I will focus on the useful distinction between *linguistic* and *non-linguistic meaning*, and the further subdivision of linguistic meaning into *speaker's meaning* and *sentence meaning*.<sup>10</sup> In this section, I will show that the two types of messages noticed in chapter 5 can be classified as sentence-meaning messages and non-linguistic messages. This distinction is less stark in practice than it will appear in this analysis, as these different messages are generally intermingled in the Court's reasoning. There are also deeper conceptual ties between these different messages, as I will discuss further below. However, for the purposes of clarity and understanding, I will analyse these different types of messages separately.

### 6.2.1 Linguistic Meaning

To say that a law or action expresses a 'message' in the linguistic sense, Matthew Adler explains, is to say that it is 'meaningful in the way that *language is meaningful*'.<sup>11</sup> All discriminatory laws and some discriminatory actions use language, but the question is whether the South African and Canadian Courts are referring to some deeper layer of

---

<sup>9</sup> See further Jeff Speaks, 'Theories of Meaning' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Stanford 2014) <<http://plato.stanford.edu/entries/meaning/>> accessed 29 September 2014.

<sup>10</sup> See Adler (n 4) 1384–7; Matthew D Adler, 'Linguistic Meaning, Nonlinguistic "Expression," and the Multiple Variants of Expressivism: A Reply to Professors Anderson and Pildes' (2000) 148 U Pa L Rev 1577, 1579. Adler draws on the work of HP Grice. See, for example, HP Grice, 'Meaning' (1957) 66 The Philosophical Review 377, 377–79.

<sup>11</sup> Adler, 'Skeptical Overview' (n 4) 1385 (emphasis in the original).

linguistic meaning when they draw conclusions about the impermissible messages expressed by discriminatory laws or actions. To test this, we should distinguish between two sub-categories of linguistic meaning: *speaker's meaning* and *sentence meaning*.

### **(a) Speaker's Meaning**

Speaker's meaning broadly relates to the intentions of the speaker.<sup>12</sup> A law or action expresses a message, in the speaker's meaning sense, where the state intends to convey this message. Many of the most heinous forms of apartheid-era discrimination in South Africa expressed speaker's meaning as the white minority government clearly intended to convey a message of racial superiority. For example, the statute which criminalised all interracial sex was titled the 'Immorality Act',<sup>13</sup> a title chosen to express the contempt for other races that criminalisation already implied.

In contrast, when the South African and Canadian Courts talk about messages in present-day laws and actions they are not suggesting that the state *intends* to make members of society believe that gay and lesbian people are less morally worthy,<sup>14</sup> that refugees are untrustworthy,<sup>15</sup> or that children are less deserving of protection from harm,<sup>16</sup> to use a few examples from the case law. While it is conceivable that speaker's meaning could emerge in future cases, we can discount this as an explanation of the Courts' existing expressive concerns.

---

<sup>12</sup> *ibid* 1387–88; Anderson and Pildes (n 5) 1508.

<sup>13</sup> Immorality Act 5 of 1927, which prohibited sex outside of marriage between white and black African people, supplemented by the Immorality Amendment Act 21 of 1950, which extended the prohibition to sex between all designated racial groups. This was paired with the Prohibition of Mixed Marriages Act 55 of 1949 which barred all interracial marriages.

<sup>14</sup> *Vriend v Alberta* [1998] 1 SCR 493 [100]; *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) [71] (Sachs J) (*Fourie*).

<sup>15</sup> *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 (4) SA 395 (CC) [118] (Mokgoro and O'Regan JJ).

<sup>16</sup> *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)* [2004] 1 SCR 76 [224], [231], [232] (Deschamps J) (*Canadian Foundation*).

## (b) Sentence Meaning

It seems that a different type of linguistic meaning is at work in many of these cases, what is termed ‘sentence meaning’.<sup>17</sup> This is the type of meaning that could be ‘attached to a well formed sentence’.<sup>18</sup> Like words in a sentence, laws and actions can also have conventional meanings—meanings that are shared in society or particular groups—in particular contexts that are ‘independent of the communicative intentions (or other mental states)’ of individuals.<sup>19</sup> For example, ‘black face’—make-up that crudely imitates black skin-colour and morphology—has deep historical and cultural associations with the mockery of black people. A white person who wears black face may not intend this meaning, but that is what will be conveyed by convention, as surely as if he or she had said ‘black people are worthy of ridicule’.

The first type of messages identified in chapter 5—those that appear from an analysis of meanings attached to the discriminatory laws or actions<sup>20</sup>—can be explained as a form of sentence meaning. The South African Court has reflected on the conventional meanings associated with welfare benefits,<sup>21</sup> marriage,<sup>22</sup> and criminal offences,<sup>23</sup> among others. It has gone on to conclude that discrimination in the allocation of these benefits and burdens would convey negative messages about the disfavoured groups that would entrench

---

<sup>17</sup> Adler, ‘Skeptical Overview’ (n 4) 1387.

<sup>18</sup> *ibid* 1393.

<sup>19</sup> *ibid*.

<sup>20</sup> Chapter 5, text to nn 241–246.

<sup>21</sup> *Kbosa v Minister of Social Development* 2004 (6) SA 505 (CC) [74] (Mokgoro J).

<sup>22</sup> *Fourie* (n 14) [71] (Sachs J).

<sup>23</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) [23], [28] (Ackermann J) (*Sodomy Case*); *S v Jordan* 2002 (6) SA 642 (CC) [65] (O’Regan and Sachs JJ).

prejudice and stereotyping in society. For instance, in the *Sodomy Case*,<sup>24</sup> the Court recognised that crimes carry a conventional meaning of moral opprobrium. The criminalisation of sex between men therefore ‘state[s] that in the eyes of our legal system all gay men are criminals’.

The Canadian Court’s case law also presents many examples of sentence-meaning messages. For instance, in *Vriend*,<sup>25</sup> the Canadian Court declared a provincial human rights statute to be in violation of the Charter as it omitted sexual orientation from a closed list of prohibited grounds of discrimination. The statute sought to establish a comprehensive anti-discrimination framework. Omitting sexual orientation therefore sent a ‘strong and sinister message’ that ‘discrimination on the grounds of sexual orientation is not as serious’ which was held to be ‘tantamount to condoning or even encouraging discrimination against lesbians and gay men’.<sup>26</sup> The Court did not suggest that the state actually intended to communicate this or that it was in fact motivated by prejudice, but the omission expressed a harmful message nonetheless. In *Quebec v A*,<sup>27</sup> Le Bel J captured this when he acknowledged that ‘a government might make laws that unintentionally convey a negative social image of certain members of society’.<sup>28</sup>

While sentence meaning helps to explain some of the expressive concerns that appear in the South African and Canadian case law, this type of meaning does not account for all of these concerns. As I showed in chapter 5, the South African Court also identifies messages using a justification analysis, rather than engaging directly with the conventional meanings attached to the discriminatory laws and actions. In some cases, these two different

---

<sup>24</sup> Above n 23 [28].

<sup>25</sup> Above n 14.

<sup>26</sup> *ibid* [100].

<sup>27</sup> Above n 2 [197].

<sup>28</sup> The Canadian Court has also recognised that the actions of officials can express such messages, see *Little Sisters Book and Art Emporium v Canada (Minister of Justice)* [2000] 2 SCR 1120 [123] (Binnie J).

types of messages appear in the same judgment.<sup>29</sup> In other cases, there are no stable or sufficiently determinate conventional meanings attached to the laws or actions. It is difficult, if not impossible, to determine the sentence meaning of actions such as sequestering solvent spouse's property,<sup>30</sup> denying widows under 45 access to full pension benefits,<sup>31</sup> barring refugees from becoming security guards,<sup>32</sup> or giving chronic pain sufferers reduced disability benefits,<sup>33</sup> among other examples. Yet both the South African and Canadian Courts arrive at conclusions about the messages expressed by these laws and actions. This leaves the possibility that these messages are a form of non-linguistic meaning.

### 6.2.2 Non-Linguistic Meaning

Non-linguistic meaning refers to the way in which laws or actions can be said to have 'meaning' insofar as they provide 'evidence' of something.<sup>34</sup> Laws and actions can provide evidence of many things. A poorly drafted statute 'means' that it was rushed, efficient implementation of a policy sends the 'message' that the government is competent, and so on. In the legal expressivism literature, non-linguistic theories are generally concerned with something more particular: what an action reveals about the state's actual or ostensible reasons for acting.<sup>35</sup>

---

<sup>29</sup> See, for example, *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) (*Immigration Case*). Discussed in chapter 5, text to n 253.

<sup>30</sup> *Harksen v Lane* NO 1998 (1) SA 300 (CC).

<sup>31</sup> *Law* (n 1).

<sup>32</sup> *Union of Refugee Women* (n 15).

<sup>33</sup> *Nova Scotia (Workers' Compensation Board) v Martin* [2003] 2 SCR 504. See further text to n 117 below.

<sup>34</sup> Grice (n 10) 478; Adler, 'Skeptical Overview' (n 4) 1384–5 and 1498; Heidi M Hurd, 'Expressing Doubts About Expressivism' (2005) U Chi Legal F 405, 418.

<sup>35</sup> See, for example, Anderson and Pildes (n 5) 1510–13; Primus (n 8) 568, 577.

Many of the South African and Canadian Courts' expressive concerns can be read in this way. When the Courts conclude that discrimination sends a 'message' they often mean that it reveals something about the reasons for the discrimination. Let us briefly postpone the question whether the Courts are identifying the state's *actual* or *imputed* reasons for discriminating while we consider the evidence for their concern for reasons.

### **(a) Uncovering Reasons**

The South African and Canadian Courts' language is the first indicator of their concern for the underlying reasons. The Courts do not only couch their expressive concerns in terms of 'messages' and 'statements'; terms that, on first inspection, point to linguistic meaning. They also talk of the 'premise[s]',<sup>36</sup> 'understandings',<sup>37</sup> 'inferences',<sup>38</sup> and 'assumptions'<sup>39</sup> underpinning these laws or actions. This language is unmistakably reason-orientated.

More importantly, the content of the messages suggests a focus on the reasons underpinning the discrimination. These messages are typically framed as reflecting prejudice or stereotyping which are both possible reasons (albeit bad ones) for discriminating.<sup>40</sup>

Prejudice, as defined earlier, involves the belief that a group's interests are less deserving of concern simply because they are a member of that group.<sup>41</sup> In the *Immigration*

---

<sup>36</sup> South Africa: *Union of Refugee Women* (n 15) [118] (Mokgoro and O'Regan JJ); *Harksen* (n 30) [121] (Sachs J); *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) [119] (Ngcobo J). Canada: *Law* (n 1) [53].

<sup>37</sup> *Law* *ibid* [64].

<sup>38</sup> *Jordan* (n 23) [65] (O'Regan and Sachs JJ); *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) [92] (Langa CJ); *Geldenhuys v National Director of Public Prosecutions & others* 2009 (1) SACR 231 (CC) [36].

<sup>39</sup> South Africa: *Harksen* (n 30) [124] (Sachs J); *Van Heerden* (n 36) [116] (Ngcobo J). Canada: *Corbiere v Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203 [18] (McLachlin and Bastarache JJ); *Lavoie v Canada* [2002] 1 SCR 769 [52] (Bastarache J); *Martin* (n 33) [105].

<sup>40</sup> My analysis in this chapter is based on a Razian conception of reasons as involving operative and auxiliary reasons. Operative reasons motivate or purport to motivate action by stating what ought to be done at a very general level. Auxiliary reasons do not motivate action by themselves, but are primarily factual premises that are used to establish that a particular action will serve the operative reason. Together they provide 'complete' reasons. Joseph Raz, *Practical Reason and Norms* (OUP 1975) ch 1.

<sup>41</sup> See chapter 4, text to n 83ff.

*Case*,<sup>42</sup> the South African Court was uncovering prejudice when it held that denying same-sex couples immigration rights afforded to married couples sent the ‘message’ that same-sex couples ‘lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected.’ This prejudice would explain why same-sex couples were treated unfavourably.<sup>43</sup>

Stereotypes involve the belief that members of certain groups are more likely to possess other characteristics that are an appropriate basis for different treatment.<sup>44</sup> These stereotypes can be positive or negative and they can also have varying degrees of accuracy. The ‘messages’ and inferences’ that the courts are uncovering are primarily inaccurate negative stereotypes, such as the stereotypes that homosexuality is ‘perverse’ or ‘deviant’;<sup>45</sup> that First Nations people living outside of reserves ‘are not interested in maintaining . . . their cultural identity’;<sup>46</sup> or that unmarried heterosexual partners are ‘irresponsible’.<sup>47</sup> If believed, these stereotypes also supply possible reasons for why these groups were treated unfavourably.<sup>48</sup>

The South African and Canadian Courts’ concern for the reasons underpinning the discrimination inevitably raises a number of questions. Are the Courts suggesting that the state is *actually* acting on the basis of prejudice or stereotypes? Or are they suggesting that this is how society or the disfavoured group *actually perceive* its reasons for discriminating? Or

---

<sup>42</sup> Above n 29 [54].

<sup>43</sup> In other words, it supplies an operative or an auxiliary reason for the discrimination. See n 40 above.

<sup>44</sup> Chapter 4, text to n 86ff.

<sup>45</sup> *Geldenhuys* (n 38) [36].

<sup>46</sup> *Corbiere* (n 39) [18] (McLachlin and Bastarache JJ).

<sup>47</sup> *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) [226] (Sachs J); *Nova Scotia (Attorney General) v Walsh* [2002] 4 SCR 325 [170] (L’Heureux-Dubé J).

<sup>48</sup> In more technical terms, these stereotypes generally supply auxiliary reasons which, when combined with operative reasons, provide a complete reason for discriminating. See above n 40.

could they be objectively reconstructing the state's reasons for discriminating, suggesting that this is how the state's actions could be *reasonably* perceived? If so, from whose perspective?

**(b) Actual Reasons, Actual Perceptions, or Reasonable Imputations?**

The Canadian Court has been relatively clear in answering the questions just posed. It holds that discrimination is to be assessed from the 'subjective-objective' perspective: the perspective of a reasonable person in the position of the complainant who is fully apprised of the relevant facts and circumstances.<sup>49</sup> As a result, when the Canadian Court concludes that a law or action expresses impermissible non-linguistic messages it is suggesting that a notional reasonable person, appropriately contextualised, would construe the state to be acting on the basis of prejudice or stereotyping. It is not suggesting that the state was actually motivated by prejudice or stereotyping (unless there is clear evidence to prove this) or that this is how society or the disfavoured group has actually perceived the law or action.

The South African Court has never expressly adopted a reasonable perception test for these non-linguistic messages, apart from general statements that unfair discrimination must be identified 'objectively'.<sup>50</sup> Nevertheless, the constraints that the Court faces make it implausible that it is uncovering the state's actual motivations or society's actual perception of these reasons.

First, there are serious difficulties with uncovering the state's actual reasons for discriminating where it has not made these reasons explicit.<sup>51</sup> Aside from the evidential problems,<sup>52</sup> there are also conceptual difficulties in ascribing mental states to multimember

---

<sup>49</sup> *Egan v Canada* [1995] 2 SCR 513 [41] (L'Heureux-Dubé J); *Law* (n 1) [88]. See further text to n 88 below.

<sup>50</sup> *Harksen* (n 30) [52] (Goldstone J); *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) [43]–[44] (Langa DP).

<sup>51</sup> I touched on this subject in chapter 4, text to n 99.

<sup>52</sup> For a discussion of these difficulties, see John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980) 136–145.

bodies whose members may have very different reasons for supporting the discrimination.<sup>53</sup> To add to these difficulties, this is also a politically sensitive task that few courts would be willing to hazard in high-profile cases.<sup>54</sup>

The South African Court was alive to these difficulties in uncovering the state's real reasons for discrimination when it held, in *Walker*,<sup>55</sup> that it is not necessary to prove illicit motives to establish unfair discrimination. This is not to say that proof of illicit motivations is impossible or irrelevant. The Court has generally had no hesitation in establishing that apartheid-era laws were actually motivated by prejudice and stereotyping.<sup>56</sup> For instance, in *Zondi*,<sup>57</sup> Ngcobo J declared an apartheid-era ordinance to be unfairly discriminatory on the basis that it was 'manifestly racist', bearing the mark of the 'intent of those who drafted and enacted [it]'. However, apartheid-era laws and policies present an easy case for identifying illicit motives as few will dispute the apartheid state's reasons for discriminating and the Court faces no political risk in exposing these reasons.

In contrast, the South African Court is far more circumspect when dealing with contemporary discrimination where prejudice or stereotyping is not made explicit. In reflecting on the 'messages' expressed by discriminatory laws, the Court consciously avoids any language that would suggest that the state was *actually* motivated by prejudice or stereotypes. As a result, the South African Court's non-linguistic messages do not appear to be reflections on the state's actual reasons for discriminating.

---

<sup>53</sup> See Anderson and Pildes (n 5) 1514–20.

<sup>54</sup> This partly explains the Court's reluctance to inquire into legislators' subjective motives, as demonstrated in *Poverty Alleviation Network v President of the Republic of South Africa* 2010 (6) BCLR 520 (CC) [73].

<sup>55</sup> Above n 50 [44] (Langa DP).

<sup>56</sup> See *Moseneke v Master of the High Court* 2001 (2) SA 18 (CC) [21]–[23]; *Bhe* (n 38) [60]–[68] (Langa DCJ); *MEC for Education, Kwa-Zulu Natal v Pillay* 2008 (1) SA 474 (CC) [121] (O'Regan J).

<sup>57</sup> *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) [96].

The second constraint is that courts are ill-equipped to determine how society actually perceives discrimination, as this evidence is difficult to come by and often unreliable.<sup>58</sup> This is particularly the case in South Africa's diverse society where perceptions are likely to be wildly divergent. Furthermore, these perceptions are often ill-informed or tainted by prejudice, providing a deeply problematic basis for determining the constitutional validity of laws or actions.<sup>59</sup> This makes it unlikely that the Court is determining how members of society or the disfavoured group *actually* perceive the state's reasons for discriminating.<sup>60</sup>

This leaves the possibility that the South African Court is objectively reconstructing the state's reasons, much like the Canadian Court does. The one difference between the South African and Canadian approaches is that the South African Court has not explicitly embraced the Canadian Court's 'subjective-objective' perspective. In the next section I will argue that it ought to do so.

### 6.2.3 Summary

To briefly summarise the argument in this section, I have suggested that the South African and Canadian Courts' expressive concerns fall into two broad categories. First, there are sentence-meaning messages, a sub-category of linguistic meaning, which look to the conventional meanings attached to certain laws or actions in particular contexts. Second, there are non-linguistic messages which consider the underlying reasons for the discrimination, reasonably construed. While there are differences between these messages, they are intertwined in complex ways in the case law and often appear side-by-side. There are

---

<sup>58</sup> Pildes and Niemi (n 8) 536; Primus (n 8) 571–72.

<sup>59</sup> Pildes and Niemi *ibid* 537.

<sup>60</sup> A parallel can be drawn with defamation law as courts reject evidence of how people actually understood allegedly defamatory communication and what effect this actually had on individuals' reputations. See *Le Roux v Dey* 2011 (3) SA 274 (CC) [85], [89] (Brand AJ) and [156], [168] (Cameron and Froneman JJ).

also conceptual ties between them, as I will discuss further below. The primary connecting thread is the common concern that these messages will perpetuate and promote prejudice and stereotyping in society, threatening to produce deeper patterns of group disadvantage. This raises questions over how the courts are able to make these complex predictions about the likely effects of these messages, a topic I will address in section 6.4. The more immediate question is how the Courts identify these impermissible messages in the first place.

### 6.3 IDENTIFYING THE MESSAGES

In chapter 5, I developed a rough outline of how the South African Court goes about identifying impermissible messages. We have seen that the Court uncovers sentence-meaning messages by looking at the conventional meaning of the law or action in context. In contrast, it seems to be identifying non-linguistic messages using a justification analysis. In this section, I will explore how and why these methods are used. The parallels in the Canadian case law will again help to cast light on this subject.

#### 6.3.1 Identifying Sentence-Meaning Messages

Interpreting the sentence meaning of a discriminatory law or action is a complex exercise. Stated most broadly, this involves identifying the conventional meanings attached to particular laws or actions in their context,<sup>61</sup> understood in the widest sense as all the facts surrounding the law or action. In analysing how the South African and Canadian Courts have gone about this task, I will divide this discussion into an analysis of the *considerations* they have used and the *perspectives* they have adopted in interpreting sentence meaning. This

---

<sup>61</sup> Hellman (n 8) 38–41, ch 3; Khaitan (n 4) 10. See further Korta Kepa and John Perry, ‘Pragmatics’ in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Stanford 2012) <<http://plato.stanford.edu/entries/pragmatics/>> accessed 29 September 2014.

discussion will help to bring greater clarity and guidance to this task. It will also demonstrate just how complex and controversial this exercise can be.

### **(a) Considerations Informing Interpretation**

The South African and Canadian Courts' case law reveals many overlapping and intersecting considerations involved in interpreting the sentence meaning of discrimination. These considerations all probe the interplay between conventional meanings and context. Sometimes these considerations will point to the same meaning, other times they will conflict and will need to be weighed against each other. I will briefly catalogue seven of the most prominent considerations that have emerged in the Courts' decisions.

As we have seen above, the *nature of the benefits or burdens* at stake is often an important consideration.<sup>62</sup> Reflecting on the Canadian Court's expressive concerns, Denise Réaume explains that—

there are some benefits or opportunities, some institutions or enterprises, which are so important that denying participation in them implies the lesser worth of those excluded.<sup>63</sup>

The South African Court acknowledged this in *Kbosa*<sup>64</sup> when it held that welfare benefits are associated with belonging in society, with the result that the exclusion of non-citizens from these benefits conveys that they are 'second-class' members of their communities.

The *language* used in framing the discriminatory law or action may also be significant. In *Trociuk*,<sup>65</sup> the Canadian Court found that the phrasing of a legal provision had a negative 'communicative effect', independent of the intentions of the Legislature. The law allowed mothers to 'unacknowledge' fathers on birth registration forms, with the effect that

---

<sup>62</sup> See text to nn 21–24 above.

<sup>63</sup> Réaume (n 8) 44. See, for example, *M v H* [1999] 2 SCR 3 [73] (Cory J).

<sup>64</sup> Above n 21 [74].

<sup>65</sup> *Trociuk v British Columbia (Attorney General)* [2003] 1 SCR 835 [24].

unacknowledged fathers were barred from having their details included on the birth certificate and from helping to choose a surname for their child. The law listed three categories of fathers who could be unacknowledged in this way: rapists and perpetrators of incest; unknown fathers; and fathers who were unacknowledged at the insistence of mothers, without reasons. Deschamps J held that by associating the latter category of fathers with rapists and perpetrators of incest this painted them with the same brush of moral opprobrium.<sup>66</sup>

The South African Court has also shown awareness of the ways in which language can express meanings independent of actual intentions. In *Moseneke*<sup>67</sup> and *Bhe*,<sup>68</sup> the Court held that the distinctions between ‘Blacks’ and ‘Europeans’ contained in surviving remnants of the Black Administration Act,<sup>69</sup> a central instrument of apartheid control, conveyed a ‘harmful and hurtful’<sup>70</sup> message irrespective of the post-apartheid Legislature’s intentions in keeping these provisions in force.

The *purpose* of a broad legislative scheme can also influence the sentence-meaning of discrimination that occurs within the scheme. *Vriend*,<sup>71</sup> discussed briefly above, demonstrates this. Given that the purpose of the provincial human rights legislation was to establish a comprehensive anti-discrimination framework,<sup>72</sup> the omission of sexual orientation sent the ‘strong and sinister message’ that discrimination on the basis of sexual orientation is

---

<sup>66</sup> *ibid* [21]–[24].

<sup>67</sup> Above n 56 [21].

<sup>68</sup> Above n 38 [67]–[68] (Langa DCJ).

<sup>69</sup> 38 of 1927.

<sup>70</sup> *Bhe* (n 38) [68] (Langa DCJ).

<sup>71</sup> Above n 14.

<sup>72</sup> *ibid* [96].

permissible.<sup>73</sup> The Canadian Court noted that if the law aimed to address only a particular type of discrimination, such as age discrimination, then the omission of sexual orientation would not carry the same meaning.<sup>74</sup> As a result, the expansive purpose of the legislative scheme was determinative.

*Where and when* distinctions occur can also have a bearing on meaning. As the Canadian Court observed in *Granovsky*,<sup>75</sup> '[a] sign that says "Men Only" looks very different on a bathroom door than a courthouse door'. While surrounding circumstances can change meanings in some cases, they can also give ambiguous meanings greater clarity. Sachs J's separate concurring judgment in *Lawrence*<sup>76</sup> provides a good example of this. This case concerned a religious freedom challenge to a law which prohibited supermarkets from selling wine on Sundays. Sundays are traditionally associated with the Christian Sabbath, but this association has faded as Sundays have increasingly become secular days of leisure. As a result, restricting the sale of wine on Sundays did not send any clear sentence-meaning messages in itself. However, the only other days when wine sales were restricted were the Christian holidays of Good Friday and Christmas Day. Viewed in this light, Sachs J held that the ban could reasonably be interpreted as an endorsement of Christianity, to the exclusion of other religions:

The sectarian message might not be powerful, but it is inescapable. Had Sundays and all public holidays been included, the situation would have been different, and the choice of days could have been considered neutral; had only Sundays been referred to, the signal would have been mixed. The fact is that Sundays have been coupled with Good Friday and Christmas Day.<sup>77</sup>

---

<sup>73</sup> *ibid* [100].

<sup>74</sup> *ibid* [96].

<sup>75</sup> *Granovsky v Canada (Minister of Employment and Immigration)* [2000] 1 SCR 703 [59], quoting Marshall J in *Cleburne v Cleburne Living Centre Inc* 473 US 432 (1985) 468–69.

<sup>76</sup> *S v Lawrence* 1997 (4) SA 1176 (CC). The majority held that there was no violation of religious freedom. Sachs J held that there was a violation but went on to conclude that it was justified under the general limitations clause.

<sup>77</sup> *ibid* [159].

As a result, Sachs J considered this context to be decisive in interpreting the message expressed by the law.

The *identity of the discriminator* may also influence the sentence meaning. Discrimination by the state carries particularly strong connotations, especially in South Africa where state discrimination has historically been synonymous with oppression. As Sachs J observed in *Union of Refugee Women*:<sup>78</sup>

[T]he routinised way in which power is exercised can readily become entangled in the public mind with existing prejudicial assumptions, reinforcing prejudice and establishing a downward spiral of disempowerment.<sup>79</sup>

The *identity of the disfavoured group* is equally important. For instance, segregation on the basis of race has become synonymous with denigration, stamping historically disadvantaged racial groups with a ‘badge of inferiority’.<sup>80</sup> In contrast, the meanings attached to other types of segregation in different contexts, such as age segregation, are less clear-cut.

The identity of the disfavoured group is inextricably connected to a further consideration: the existence of a *history or existing context of prejudice and stereotyping*. This consideration underpins and reinforces most of the other considerations outlined here. This history imprints particular meanings on discrimination that affects certain groups in particular circumstances and in particular ways. This is reflected in the South African and Canadian Courts’ insistence on considering whether groups have experienced historical or present patterns of group disadvantage.<sup>81</sup> Both courts have indicated that disadvantage is not a necessary condition for finding unfair discrimination,<sup>82</sup> but it would certainly be more

---

<sup>78</sup> Above n 15.

<sup>79</sup> *ibid* [144].

<sup>80</sup> The US Supreme Court’s conclusion in *Brown v Board of Education of Topeka Shannee County* 74 SCt 686 (1954) 691–92, overturning *Plessy v Ferguson* 163 US 537 (1896) . Cited with approval in *Khosa* (n 21) [74] (Mokgoro J).

<sup>81</sup> *Immigration Case* (n 29) [44], quoting Iacobucci J in *Law* (n 1) [63].

<sup>82</sup> See *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) [41]; *Law* *ibid* [65]; *Lavoie* (n 39) [106]ff (Arbour J).

difficult to establish that discrimination against privileged or dominant groups conveys an impermissible sentence-meaning message without a history or current context of prejudice and stereotyping to draw on. In this way, these expressive concerns come with a form of in-built asymmetric protection, as it will generally be easier to interpret the sentence meaning of discrimination against historically or currently disadvantaged groups.

This brief discussion gives a better understanding of the many moving parts involved in interpreting the sentence meaning of discrimination. In many cases, these considerations have allowed the South African and Canadian Courts to arrive at fairly determinate sentence meanings. These considerations also give a sense of how complex this interpretive task is. There will be many cases where the considerations will pull apart and no determinate meaning can be extracted. This is especially true where conventional meanings have not yet crystallised, or where societal norms and conventional meanings are undergoing rapid change. Even where there are stable conventional meanings, different shared understandings may exist in different groups, with the result that courts need to navigate conflicting conventional meanings. This adds a further layer of complexity, as it requires courts to choose the perspective from which they are interpreting the sentence meaning of discrimination.

### **(b) Perspectives**

Adopting an objective approach to interpretation avoids the complications of basing decisions on how members of society or the disfavoured group *actually* interpreted the sentence meaning of discrimination. However, an objective interpretation will still need to draw on some set of conventional meanings in society to interpret meaning. In culturally diverse, divided societies such as South Africa, conventional meanings may differ radically

from group to group.<sup>83</sup> As Tarunabh Khaitan puts it, under these conditions ‘law will always have to make a choice’ by determining meaning ‘using the resources of a particular sub-culture.’<sup>84</sup>

The South African Court has developed no clear approach to this choice. Sachs J was the only member of the Court to recognise this problem, although his suggested solution never attracted majority support. In his separate concurrence in *Lawrence* and his dissent in *Walker*, he proposed that interpretation should proceed from a strictly objective perspective that does not adopt the conventional meanings of any single group. Thus, in *Lawrence*,<sup>85</sup> he suggested that the meaning of the ban on Sunday wine sales should be interpreted from the perspective of the ‘reasonable non-sectarian South African’ of ‘any faith or none’.<sup>86</sup> He adopted a similar approach in *Walker* in interpreting the meaning of the Pretoria city council’s policy of pursuing claims for unpaid rates in majority white suburbs while not taking action in township areas. He held:

What is fair or unfair cannot be looked at exclusively through the eyes either of the inhabitants of old Pretoria or of those of Atteridgeville and Mamelodi, but must be viewed simultaneously from the diverse points of view of all the inhabitants of the whole of Pretoria, bearing in mind the values enshrined in the Constitution.<sup>87</sup>

This strictly objective approach is an understandable attempt to avoid controversy. Choosing one group’s conventional meanings over another’s will, almost inevitably, be perceived as picking sides. However, if there is a real conflict of conventional meanings, then it is impossible to arrive at a determinate meaning by attempting to view the discrimination using

---

<sup>83</sup> As Sachs J acknowledged in *Walker* (n 50) fn 36, interpretation ‘can never be easy in a society as divided, pluralist, systematically inequitable and notoriously thin skinned as ours.’

<sup>84</sup> Khaitan (n 4) 13.

<sup>85</sup> Above n 76 [163].

<sup>86</sup> *ibid* [162].

<sup>87</sup> *Walker* (n 50) [130].

the disparate conventional meanings of all communities at once. A choice must be made. While Sachs J's approach makes for good judicial diplomacy, it is unworkable where conventions are in conflict.

The Canadian Court's solution to this interpretive challenge is to adopt the 'subjective-objective' perspective. As introduced above, this involves assessing the discrimination from the perspective of a reasonable person in the position of the complainant who is fully apprised of the relevant facts and circumstances.<sup>88</sup> This approach avoids the danger of a purely subjective approach that makes the validity of laws subject to the feelings of the 'most sensitive'.<sup>89</sup> It also avoids the danger that a de-contextualised reasonableness standard could become an entry-point for dominant groups' prejudices. In *Egan*,<sup>90</sup> L'Heureux-Dubé described this as the risk of interpreting meaning from the perspective of the 'reasonable, secular, able-bodied, white male'. As a result, there is good reason for the South African Court to adopt this subjective-objective approach when faced with conflicting conventional meanings in future. However, the subjective-objective approach is not without its complications. Courts may be unable or unwilling to comprehend certain groups' shared meanings, particularly when they diverge from the mainstream.<sup>91</sup> Adopting one group's conventional meanings over another's will also attract controversy. None of these are fatal objections, but they indicate that the subjective-objective approach is not complexity-free. Interpreting sentence meaning, it seems, will always be a fraught exercise.

---

<sup>88</sup> *Egan* (n 49) [41] (L'Heureux-Dubé J); endorsed in *Law* (n 1) [88].

<sup>89</sup> *Egan* *ibid.*

<sup>90</sup> *ibid.* See also *Law* (n 1) [61].

<sup>91</sup> *Khaitan* (n 4) 13.

Having gained a better sense of how the South African and Canadian Courts interpret sentence-meaning messages, I will now explore how they identify non-linguistic messages.

### **6.3.2 Identifying Non-Linguistic Messages**

Sentence-meaning messages, I have shown, reflect that discriminatory laws and actions convey negative statements about disfavoured groups in much the same way as language can convey this meaning. In contrast, non-linguistic messages are a shorthand way of saying that something about the discrimination makes it reasonable for members of society to believe that the state has acted on the basis of prejudice or stereotyping.

In the previous chapter, we gained some insight into how the South African Court goes about identifying these non-linguistic messages. We saw that these messages were contingent on the outcome of the justification analysis, as the Court was only prepared to acknowledge these messages once it found that the discrimination was unjustified. In this section I will explain why this is so. I will begin by showing that the Canadian Court also bases its non-linguistic messages on the outcome of a justification analysis. This indicates that the link between justification and non-linguistic messages is not merely an idiosyncrasy of the South African Court's reasoning, but reflects a deeper logical connection.

#### **(a) Parallels in the Canadian Case Law**

As mentioned in chapter 5, the Canadian Court's test for discrimination regularly overlaps with its justification analysis under section 1 of the Charter.<sup>92</sup> Justificatory considerations generally enter the Court's discrimination analysis through the 'correspondence'

---

<sup>92</sup> Chapter 5, text to n 98.

consideration,<sup>93</sup> one of the four contextual factors used to identify discrimination under the *Law* test.<sup>94</sup> ‘Correspondence’ remains a part of the *Kapp* test for discrimination.<sup>95</sup> As a result, the blurring of the lines between the discrimination and section 1 analysis is still evident in some of the post-*Kapp* decisions<sup>96</sup> and will likely reappear in future cases.

‘Correspondence’ has always been a slippery idea that is described in many different ways in the Canadian case law. In its most common formulation, it considers whether the challenged law addresses the needs or circumstances of the disfavoured group.<sup>97</sup> The Canadian Court has recognised that no laws ‘correspond perfectly with social reality’<sup>98</sup> as there will always be some people who ‘[fall] through the cracks’ when broad generalisations are made.<sup>99</sup> This is what Bastarache J referred to as the permissible ‘margin of imperfection’.<sup>100</sup> How much imperfection is permissible will depend on whether the harms of this ‘imperfection’ are offset by the benefits of relying on broad generalisations. As the Canadian Court phrased it this in *Martin*,<sup>101</sup> generalisations have the advantages of ‘reduced transaction costs and speed’ which, it implied, need to be weighed against the impact on the

---

<sup>93</sup> Bruce Ryder, Cidalia C Faria and Emily Lawrence, ‘What’s *Law* Good For? An Empirical Overview of Charter Equality Rights Decisions’ (2004) 24 SCLR 103, 121–22.

<sup>94</sup> Outlined in chapter 2, text to n 107.

<sup>95</sup> *Withler v Canada* [2011] 1 SCR 396 [36], [38], [66].

<sup>96</sup> See *Withler* *ibid*; see also Le Bel J’s judgment in *Quebec v A* (n 2).

<sup>97</sup> *Law* (n 1) [70]; *Walsb* (n 47) [50] (Bastarache J); *Gosselin v Quebec (Attorney General)* [2002] 4 SCR 429 [38] (McLachlin CJ).

<sup>98</sup> *Law* *ibid* [105]. See also *Withler* (n 95) [71].

<sup>99</sup> *Gosselin* (n 97) [54] (McLachlin CJ).

<sup>100</sup> *ibid* [259].

<sup>101</sup> *Martin* (n 33) [82].

disfavoured group. As a result, correspondence regularly slides into a loose proportionality analysis.<sup>102</sup>

The Canadian Court's recognition of impermissible messages has often been contingent on the outcome of this justification analysis contained within the correspondence enquiry. The Court's decision in *Canadian Foundation*<sup>103</sup> provides a representative example. The Court considered whether the criminal law discriminated against children by allowing parents and teachers to raise a defence of reasonable corrective force when charged with assaulting a child. The majority and the minority came to divergent conclusions on what this defence expressed about children. The majority held that this did not convey any invidious messages while Deschamps J, writing the leading dissent,<sup>104</sup> interpreted this as '[sending] the message that a child's physical security is less worthy of protection'.<sup>105</sup>

At the root of this disagreement were divergent assessments of the impact of this defence on children and whether this impact was justified by the purpose of this provision. McLachlin CJ, writing for the majority, interpreted the defence narrowly, suggesting that reasonable corrective force was confined to 'minimal force of transient or trivial impact'.<sup>106</sup> In contrast, the minority held that this defence was not capable of restrictive interpretation and permitted far more serious forms of assault.<sup>107</sup> McLachlin CJ went on to balance what she viewed as a 'trivial' harm to children against the purpose of the defence: promoting children's development. She explicitly assumed that some form of reasonable chastisement

---

<sup>102</sup> Peter Hogg, *Constitutional Law of Canada* (5th edn, Carswell 2007) 55-30–55-31 (2011 – Rel 1).

<sup>103</sup> Above n 16.

<sup>104</sup> Binnie J partially dissented, holding that it was discriminatory but nevertheless justified under section 1; Arbour J held that it was an unjustified violation of section 7.

<sup>105</sup> *ibid* [224]. See also [231]–[232].

<sup>106</sup> *ibid* [59].

<sup>107</sup> *ibid* [142]ff (Arbour J).

was required for children's development.<sup>108</sup> Removing the defence would also potentially result in parents and teachers being imprisoned which, she implied, would be a greater harm to children than a 'trivial slap or spanking'.<sup>109</sup> The balancing exercise at play in this analysis was made clear when McLachlin CJ concluded as follows:

[T]he force permitted is limited and must be set against the reality of a child's mother or father being charged and pulled into the criminal justice system, with its attendant rupture of the family setting, or a teacher being detained pending bail, with the inevitable harm to the child's crucial educative setting.<sup>110</sup>

Having weighed the benefits of the defence, its impact, and the harms of doing away with it, she concluded that the defence corresponded with children's needs and circumstances and did not express any impermissible messages about them.

In her dissent, Deschamps J also incorporated elements of a loose proportionality analysis into her discrimination analysis. She stressed that there was no evidence that reasonable chastisement was required for children's development and, as a result, the substantial impact on children was not outweighed by this purpose.<sup>111</sup> On this basis, she concluded that the defence 'encourages a view of children as less worthy of protection and respect for their bodily integrity'.<sup>112</sup>

These similarities between the South African and Canadian Courts' reasoning reinforce the impression that there is a logical connection between a justification analysis and the identification of non-linguistic messages. I will now explain this connection.

---

<sup>108</sup> *ibid* [59].

<sup>109</sup> *ibid* [60].

<sup>110</sup> *ibid* [68].

<sup>111</sup> *ibid* [229]–[231].

<sup>112</sup> *ibid* [232].

## **(b) Justification and Messages**

The finding that discrimination is unjustified is, in effect, a finding that the state has failed to give proper weight to the interests of the disfavoured group in its deliberations. Irrationality and disproportionality are two of the most common ways of finding discrimination to be unjustified and both reveal such a failure.<sup>113</sup> Where the discrimination is irrational, this indicates that the state either had no legitimate reasons for discriminating or the discrimination has no connection to the reasons offered. In effect, the state has violated the interests of the disfavoured group without reason for doing so, a serious failure to give any consideration to the group members' interests. Even where discrimination is rational, it can still fail to afford adequate weight to the disfavoured group's interests where it is disproportionate. There may be a legitimate reason for the discrimination, but this reason may not outweigh the serious impact of the discrimination on the interests of the group members. In these cases, disproportionality signals that the state has failed to give group members' interests their proper weight.

Prejudice and stereotyping offer possible explanations for this failure.<sup>114</sup> As explained earlier, prejudice reflects the belief that the group's interests are less important, merely by virtue of being members of a particular group. As a result, prejudice offers a rationale for why the state has failed to give group members' interests proper consideration, such as the belief that that 'children [are] less worthy of protection and respect for their bodily integrity'.<sup>115</sup>

---

<sup>113</sup> Discussed further in chapter 5, text to n 106ff.

<sup>114</sup> See further Andrew Altman, 'Expressive Meaning, Race, and the Law: The Racial Gerrymandering Cases' (1999) 5 LT 75, 86–87; Patrick S Shin, 'The Substantive Principle of Equal Treatment' (2009) 15 LT 149, 166. Both touch on the argument that I present here, although neither develops it fully.

<sup>115</sup> *Canadian Foundation* (n 16) [124] (Deschamps J).

Stereotypes can also explain this failure to weigh group members' interests appropriately. In *Union of Refugee Women*,<sup>116</sup> Mokgoro and O'Regan JJ suggested that the exclusion of refugees from the private security industry, without adequate regard for their interests, could be explained by the 'silent premise' that refugees are less trustworthy. Similarly, in *Martin*,<sup>117</sup> the Canadian Court held that the exclusion of chronic pain sufferers from regular disability benefits sends the message that chronic pain sufferers fake their condition. This stereotype was a possible explanation for the state's failure to give proper consideration to this group's need for support.

It is important to remember that the South African and Canadian Courts are not commenting on the state's actual motives when they reflect on the messages expressed by these laws and actions. Instead, these messages are a way of saying that it is reasonable for members of society to believe that the state has acted on the basis of prejudice or stereotyping, absent proof of actual motives. As a result, we are dealing with reasonably imputed rather than actual reasons for discriminating.

The finding that discrimination is unjustified makes it possible to make these imputations. Conversely, the finding that discrimination is justified shows it is unreasonable to do so in the absence of concrete evidence of actual prejudice and stereotyping. The South African Court's decision in *Walker*<sup>118</sup> illustrates this point well. As discussed in chapter 5,<sup>119</sup> one of the complaints considered in *Walker* was that residents of majority white areas in Pretoria were charged a higher, consumption-based rate for water and electricity, while residents in predominantly black suburbs were charged a lower, flat rate. White residents

---

<sup>116</sup> Above n 15 [118].

<sup>117</sup> *Martin* (n 101) [105].

<sup>118</sup> Above n 50.

<sup>119</sup> Chapter 5, text to n 29.

may have interpreted the differential rates as reflecting underlying prejudice against them: the belief that their interests counted for less. However, the scheme was justified. The Court recognised that the vast disparities in infrastructure created by apartheid meant that it would take time to install water and electricity meters in historically black suburbs, making a flat-rate the ‘only practical solution to the problem’.<sup>120</sup> Some degree of cross-subsidisation was also necessary and permissible given the deep economic inequalities in the city.<sup>121</sup> Therefore, white residents’ interests were afforded appropriate weight, but were simply outweighed by objectively more important concerns. As a result, it would be unreasonable to impute prejudice to the city as a rationale for its failure to give white residents’ interests proper consideration when there was no such failure.

While the finding that discrimination is unjustified is necessary to identify non-linguistic messages, it is not sufficient. For example, in *Union of Refugee Women*,<sup>122</sup> Mokgoro and O’Regan JJ’s conclusion that excluding refugees from the private security industry was disproportionate did not inevitably lead to the conclusion that it was reasonable to believe that the state acted on the basis of the stereotype that refugees are untrustworthy. This failure to weigh refugees’ interests appropriately could also be explained as a simple oversight by the Legislature. What made it reasonable to favour the one explanation over the other was the history and context of rampant xenophobia in South Africa which, among other stereotypes, often characterises refugees as being dishonest. As a result, the failure to afford adequate weight to refugees’ interests could reasonably be construed as a further manifestation of this stereotype. Here we see that a history of group disadvantage has a role in identifying the non-linguistic meaning of laws and actions, albeit one that is slightly different to its role in interpreting sentence meaning. In uncovering non-linguistic messages,

---

<sup>120</sup> *Walker* (n 50) [52]-[53].

<sup>121</sup> *ibid* [63].

<sup>122</sup> Above n 15.

history serves as a predictive tool as it makes it likely that further unjustified treatment of a group is also based on this prejudice and stereotyping. This example also indicates that it is necessary to adopt the subjective-objective perspective in uncovering these non-linguistic messages so as to avoid bringing dominant group biases to the enquiry. What may look like a benign oversight to members of a dominant group may look very different from the perspective of a disfavoured group that has been on the receiving end of unjustified treatment before.

In sum, finding that discrimination is unjustified makes it possible to impute prejudice and stereotyping to the state as an explanation for this failure. This imputation is reasonable where the failure to give adequate weight to the groups' interests is coupled with good reasons for favouring this explanation over others, such as the existence of past or current patterns of prejudice and stereotyping against the group.

This analysis will always be complex and contested, as we have seen in the South African Courts' split decisions in the previous chapter. Nevertheless, hinging expressive concerns on a justification analysis will often be more familiar territory for judges than delving directly into conventional meanings. It also allows for the identification of impermissible messages where no stable conventional meanings exist. This helps to explain why both the Canadian and South African Courts' decisions contain so many examples of non-linguistic messages.

It is important to remember that the theoretical and methodological distinctions that I have drawn between these two types of messages, while illuminating and important for understanding, will always be less clear-cut in practice. There are also important conceptual links between the two types of messages. One link I have mentioned is that these messages are bound by the common concern for preventing the spread of prejudice and stereotyping in society. We can add two further links. The first is that unjustified treatment of certain groups can itself have clear sentence meaning in society. To give inadequate weight to the

interests of black people, women, or the disabled, for example, is intimately intertwined in the social consciousness with prejudice towards these groups. The second link is that in identifying non-linguistic messages, courts can create and shape sentence meanings. For instance, had Mokgoro and O'Regan JJ's judgment in *Union of Refugee Women* prevailed, this would have assisted in solidifying a convention that discrimination against refugees in the context of employment sends a harmful message of disdain. Denise Réaume captures this when she describes courts as the 'ultimate *arbiters* of the social meaning of [discrimination]'.<sup>123</sup> As 'arbiters', courts are both authoritative interpreters of existing meanings and influential shapers of new meanings. In this light, courts should not see themselves simply as passive interpreters, but rather as active participants in meaning creation.

#### 6.4 MESSAGES AND PATTERNS OF GROUP DISADVANTAGE

The final question we need to address is how the South African and Canadian Courts reach the conclusion that impermissible messages will entrench prejudice and stereotyping in society, leading to further patterns of group disadvantage.

These conclusions are based on the understanding that the state plays a central role in shaping social norms and attitudes. The South African Court has expressly made this claim on a number of occasions. In *Makwanyane*,<sup>124</sup> Langa J emphasised that '[f]or good or for worse, the state is a role model for our society.' Sachs and O'Regan JJ echoed this sentiment in *Jordan*, as they noted that law is often 'constitutive of invidious social standards.'<sup>125</sup> This understanding is implicit in the Canadian Court's aim of addressing state

---

<sup>123</sup> Réaume (n 8) 50 (emphasis added).

<sup>124</sup> *S v Makwanyane* 1995 (3) SA 391 (CC) [222].

<sup>125</sup> *Jordan* (n 23) [72].

actions that have ‘the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being’.<sup>126</sup>

Both Courts often reach conclusions about the effects of messages without the support of concrete evidence or sociological theorising. Instead, these conclusions stem from their reflections on the history or current context of disadvantage experienced by the disfavoured groups. As the Canadian Court framed it in *Lam*,<sup>127</sup> a history of prejudice and stereotyping makes it more likely that further unfavourable treatment of a group will perpetuate the group’s ‘unfair social characterisation’.<sup>128</sup>

In South Africa, these broad predictions about the likely consequences of impermissible messages are aided by the section 9(5) presumption of unfairness. Discrimination on the basis of listed grounds is presumptively unfair, with the result that it must be presumed to perpetuate patterns of group disadvantage, unless the state can show otherwise. This partly explains why the South African Court has been far more confident than the Canadian Court in making broad statements about how impermissible messages will entrench broader patterns of group disadvantage in society.<sup>129</sup>

## 6.5 CONCLUSION

In this chapter, I have demonstrated that the South African and Canadian Courts’ expressive concerns can be classified into two broad categories: sentence-meaning messages and non-linguistic messages. The Court identifies sentence-meaning messages by considering the conventional meanings attached to discrimination in particular contexts. I have shown that this involves a host of different considerations which interrogate the interactions between

---

<sup>126</sup> *Lam* (n 1) [88].

<sup>127</sup> *ibid* [63].

<sup>128</sup> *ibid*.

<sup>129</sup> Discussed in chapter 4, text to nn 89–96.

conventions and context. Most significant is the existence of historic or existing prejudice and stereotyping against the disfavoured group, as this imprints discrimination with strong conventional meanings. Conventional meanings are often specific to particular groups and cultures, making it necessary for courts to choose between competing conventional meanings. The Canadian Court's answer to this is the 'subjective-objective' perspective which adopts the conventional meanings of the disfavoured group. The South African Court has not yet decided how to deal with these choices. I have suggested that it ought to follow the Canadian Court's example, although this approach is not without complications.

Non-linguistic messages, I argued, reflect that it is reasonable to believe that the state has discriminated as a result of prejudice or stereotyping. We have seen that the South African and Canadian Courts are not identifying the state's actual reasons for discriminating nor are they determining how members of society actually perceive these reasons. Instead, they are dealing with reasonably imputed reasons. These imputations are contingent on a finding that the discrimination is unjustified as this signals that the state has failed to give sufficient weight to the disfavoured group members' interests. Prejudice and stereotyping then supply an explanation for this failure. A history or current context of prejudice and stereotyping assist in showing that this explanation is reasonable. I have also argued that a subjective-objective perspective is needed in making these determinations.

This analysis shows that expressive concerns are complex and multi-faceted phenomena. This chapter has cast greater light on this largely unexamined feature of the South African Court's reasoning. In doing so, I have offered greater guidance for identifying impermissible messages in future. This deeper understanding of the Court's expressive concerns will also contribute to the evaluation and development of the Court's reasoning in part 3. In the next chapter, I argue that while expressive concerns are important, the Court should also give greater attention to the other ways in which patterns of group disadvantage are created and perpetuated. The analysis in this chapter also has implications for the

justification analysis contained in the Court's unfairness enquiry. Given that the justification analysis assists in identifying impermissible messages, I will suggest that it can play a meaningful role within the unfairness enquiry.

## **PART 3: DEVELOPING THE COURT'S REASONING**

## CHAPTER 7: DIGNITY, DISADVANTAGE, AND JUSTIFICATIONS

### 7.1 INTRODUCTION

Before beginning part 3, it will be useful to take stock of what has been covered thus far and what lies ahead. As outlined in chapter 1, I seek to advance the ‘constructive project’ that has dominated the literature on the Constitutional Court’s unfair discrimination case law.<sup>1</sup> Contributions to this project have offered analysis and criticism of the Court’s decisions with the aim of making its unfair discrimination jurisprudence more effective in preventing and addressing patterns of group disadvantage. In this spirit, I seek to provide clearer guidance for identifying unfair discrimination. The best route to this guidance, I argued, is to address two central questions: how does the Court currently identify unfair discrimination and, in this light, how should its reasoning develop?

Part 1 of this thesis laid the groundwork for investigating these questions. Part 2 then focused on the first question, seeking to offer a more precise account of how the Court identifies unfair discrimination. As we have seen, the Court’s human dignity-based *Harksen* test offers little explicit guidance here. The Court has never explained in precise terms what is required to prove a violation of dignity, leaving lower courts, litigants, and the current members of the Court with limited direction. Nevertheless, the Court has generally reached laudable decisions, suggesting that there are valuable and important features of its reasoning that need to be captured and distilled. In chapters 4, 5 and 6, I did this work to draw out the Court’s reasoning.

In part 3, I will address the second question by using this clearer understanding of the Court’s reasoning to offer focused proposals for developing the Court’s jurisprudence. This chapter assesses the necessary conditions for identifying unfair discrimination and their

---

<sup>1</sup> Chapter 1, text to n 30.

implications. Chapter 8 focuses on the problematic inconsistency between the Court's stated aim of preventing and addressing patterns of group disadvantage and its decisions in the five controversial cases. Using the clearer understanding of the Court's reasoning developed in part 2, I will pin-point the flaws in the majority judgments and show how these flaws should be addressed in future decisions. In part 4, I will draw together my account of the Court's reasoning and my proposals for improving this reasoning in revisiting the *Harksen* test.

Let us now focus on the task at hand in this chapter: assessing the necessary conditions for proving unfair discrimination and their implications. I have demonstrated that three conditions must be satisfied: there must be a) unfavourable treatment on the basis of protected grounds; b) that threatens to create or perpetuate patterns of group disadvantage; and c) that lacks adequate justification. This account raises many questions about the merits of the Court's approach. In this chapter, I will address what I consider to be three of the most significant questions.

The first question is whether human dignity still has a place in the Court's test for unfair discrimination. In section 7.2, I argue that the South African Court should follow the Supreme Court of Canada's example by removing human dignity from the *Harksen* test. The second and third questions address the two necessary conditions that underpin the unfairness enquiry in the *Harksen* test: patterns of group disadvantage and the absence of adequate justification. Given that the unfairness enquiry occupies the bulk of the Court's analysis and disagreements, these necessary conditions are of particular importance. In section 7.3, I consider whether the Court should expand its understanding of patterns of group disadvantage to give greater attention to other forms of disadvantage. As I demonstrated in part 2, the Court has focused on disadvantage arising from prejudice and stereotyping, and has also given some attention to socio-economic disadvantage. I will argue that the Court should give greater attention to other forms of disadvantage in its unfairness analysis, including political marginalisation, social marginalisation, cultural domination, and

violence and victimisation. Finally, I will consider whether the justification analysis is appropriate within the unfairness analysis. In section 7.4, I argue that it is appropriate and that attention should instead be given to how this justification analysis should be conducted.

## 7.2 HUMAN DIGNITY

Now that we have a clear understanding of how the Constitutional Court reaches the conclusion that human dignity has been violated, I contend that the Court should follow the Canadian example by removing references to human dignity from the test for unfair discrimination.<sup>2</sup> Doing so would align the *Harksen* test with the reality of the Court's reasoning, it would be an inducement to greater transparency in this reasoning, and it would guard against the risks posed by human dignity's malleability.

First, removing human dignity from the *Harksen* test would acknowledge the reality that human dignity currently does no substantive work in the Court's reasoning. In chapter 3, I raised doubts about dignity's potential to offer precise guidance in the adjudication of unfair discrimination claims. The Court's reasoning confirms these doubts. The Court does not start with a particular conception of human dignity before proceeding to identify analogous grounds or to establish unfairness in light of this conception. Instead, the conclusion that human dignity has or has not been violated is based on whether the three necessary conditions have or have not been satisfied. Human dignity, I have argued, serves as a placeholder for these considerations in the *Harksen* test. In the early development of the Court's jurisprudence, this placeholder allowed the members of the Court to present a test for unfair discrimination even though they were unable or unwilling to articulate the precise set of considerations that were doing the work in their decisions. In this way, human dignity screened much of the uncertain, messy business of constructing a nascent unfair

---

<sup>2</sup> See *R v Kapp* [2008] 2 SCR 483, discussed in chapter 2, text to n 115ff.

discrimination jurisprudence. However, 17 years after *Harksen*,<sup>3</sup> we now have a clearer picture of the considerations doing the work in the Court's analysis. These considerations no longer need to be obscured by references to human dignity.

Second, dispensing with human dignity would encourage the Court to present more transparent, thorough reasoning. As we have seen, the Court's reasoning in applying the two parts of the *Harksen* test that are meant to be determined by dignity—identifying analogous grounds and determining unfairness—is often brief and disconnected. In identifying analogous grounds, the Court regularly concludes that a ground either has or does not have the potential to violate dignity without offering any reasons to support these conclusions.<sup>4</sup> Where it has invoked some considerations to guide this enquiry, the Court has never explained how these considerations are connected to dignity.<sup>5</sup> In presenting the unfairness analysis, the Court also tends to conjure a conclusion out of a recital of the considerations outlined in *Harksen*,<sup>6</sup> as is evident in some of the majority judgments in the five controversial cases, discussed in chapter 5. This brevity seems to carry the implication that anyone who does not understand this reasoning has simply failed to grasp the nature of human dignity.<sup>7</sup> In this way, the Court seems to use human dignity to give the appearance of reasoning where none is provided or the illusion of depth where its reasoning is shallow.<sup>8</sup> This runs contrary

---

<sup>3</sup> *Harksen v Lane* NO 1998 (1) SA 300 (CC). Handed down on 7 October 1997.

<sup>4</sup> Chapter 5, text to n 56ff. See, for example, *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) [41] (Ackermann, O'Regan, Sachs JJ); *Wcare v Ndebele* NO 2009 (1) SA 600 (CC) [75].

<sup>5</sup> See, for example, *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* 1998 (1) SA 745 (CC) [19].

<sup>6</sup> Henk Botha, 'Equality, Dignity, and the Politics of Interpretation' (2004) 19 SAPL 724, 741.

<sup>7</sup> See further *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC) [70]–[75] (Froneman, Khampepe and Skweyiya JJ), a recent example of the perfunctory use of dignity arguments in the indirect application of discrimination norms.

to the ‘culture of accountability’ that the Court espouses,<sup>9</sup> requiring courts to present transparent, well-constructed reasoning.<sup>10</sup> By acknowledging that human dignity is a placeholder in its analysis and that other considerations are doing the real work, the Court would be pushed to make its reasoning more explicit. This greater transparency is no guarantee of better decisions, but it would make a contribution.

Third, removing human dignity from the test for unfair discrimination would help to immunise the Court’s reasoning from some of the risks posed by dignity’s malleability. As I noted in chapter 4, human dignity is notoriously pliable in judicial hands.<sup>11</sup> While the Court has been using human dignity as a placeholder in its existing case law, standing in for the three necessary conditions I have identified, there is still the danger that a future Court may turn this placeholder into a gateway for some narrow conception of human dignity. As I explained in chapter 3, this would involve defining human dignity as a specific interest or wrong which may contradict the broader goal of preventing and addressing patterns of group disadvantage. South African commentators believed that the Court would use dignity in this way.<sup>12</sup> While this risk has not materialised to the extent once feared, human dignity’s malleability is undeniable, making this risk ever-present. No legal test is entirely safe from manipulation, but a dignity-free test would certainly be more secure.

---

<sup>8</sup> See further Christopher McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19 EJIL 655, 722, discussing dignity’s common use as a ‘smokescreen behind which substantive judgments are being made, but unarticulated as such, and therefore uncontestable’.

<sup>9</sup> See *Prinsloo* (n 4) [25] (Ackermann, O’Regan, Sachs JJ). Discussed further in chapter 1, text to nn 92–97.

<sup>10</sup> Pius Langa, ‘Transformative Constitutionalism’ (2006) 3 Stell L Rev 351, 353.

<sup>11</sup> See further David Feldman, ‘Human Dignity as a Legal Value: Part 1’ [1999] PL 682, 697; McCrudden (n 8) 722; Rory O’Connell, ‘The Role of Dignity in Equality Law: Lessons from Canada and South Africa’ (2008) 6 ICON 267, 279, 284.

<sup>12</sup> Chapter 4, text to nn 57–62.

*Jordan*<sup>13</sup> demonstrates this risk of dignity being whittled down to a specific interest in a way that could undermine a broader focus on patterns of group disadvantage. Alongside the unfair discrimination challenge, the Court also considered the argument that the criminalisation of prostitution itself, whether discriminatory or not, was a violation of the self-standing section 10 right to human dignity. The Court split on the unfair discrimination claim, but the judges were unanimous in dismissing the section 10 claim. O'Regan and Sachs JJ, with the majority's full support, held that human dignity means respect for the body.<sup>14</sup> Criminalisation did not violate this right, they held, as prostitutes had already undermined their dignity by commodifying their bodies.<sup>15</sup> The Court did not apply this dignity-as-bodily-respect conception of human dignity in the unfair discrimination analysis, but it would have been no stretch for it to have done so.

Even where the Court does not expressly invoke a narrow conception of human dignity as the basis of its test for unfair discrimination, there is the further risk that unstated conceptions of human dignity may subtly distort the Court's reasoning in ways that are hidden from view. As I discuss in the next section, the Court's focus on prejudice and stereotyping in its decisions reflects, in part, an attraction to a narrow conception of human dignity. These subtle distortions of the Court's reasoning have the potential to distract the Court's attention from other forms of disadvantage.

Removing human dignity from the test for unfair discrimination would help to shield the Court's jurisprudence from these risks. Nevertheless, it is important not to overstate these risks or the gains from removing human dignity. This development is needed, but it is

---

<sup>13</sup> *S v Jordan* 2002 (6) SA 642 (CC).

<sup>14</sup> *ibid* [74].

<sup>15</sup> *ibid*.

no cure for deeper problems in the Court's reasoning, as I will explain in greater depth in the next chapter.<sup>16</sup>

It is also important to emphasise that by removing human dignity from the test for unfair discrimination, the Constitutional Court would not be rejecting human dignity as a moral value. Human dignity remains an important expression of human beings' equal and inherent moral worth. Unfair discrimination is also a violation of human dignity, as are potentially all other violations of fundamental interests. In jettisoning dignity from the test for unfair discrimination, the Court would simply be acknowledging, as the Canadian Court did in *Kapp*,<sup>17</sup> that this broad concept is not appropriate as a legal test.

Finally, I acknowledge that the South African Court is unlikely to make this change in the near future. It has brushed off other criticisms of its dignity-based test in the past<sup>18</sup> and has not yet indicated any willingness to reconsider this view.<sup>19</sup> The South African Court also prizes the appearance of consistency in its case law<sup>20</sup> and does not share the Canadian Court's appetite for about-turns.<sup>21</sup> The South African Court's potential reluctance to make this change does not blunt the normative force of my argument. Nevertheless, it does suggest that an alternative approach may be required. Until such time as the Court is willing to remove dignity from its test, it must, at the very least, be more open about the

---

<sup>16</sup> Chapter 8, text to n 115ff.

<sup>17</sup> *Kapp* (n **Error! Bookmark not defined.**) [21].

<sup>18</sup> See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) [58]ff (Ackermann J), [120]ff (Sachs J) (*Sodomy Case*), where the Court dismissed the Centre for Applied Legal Studies' arguments against the dignity-based test.

<sup>19</sup> See Van der Westhuizen J's reflections on dignity in *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23 (2 September 2014) [172]–[176].

<sup>20</sup> See further Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (CUP 2013) chs 2, 4. Roux's analysis suggests that the Court's desire to maintain the appearance of consistency is part of its broader efforts to secure its institutional legitimacy and independence.

<sup>21</sup> David Robertson, *Judge As Political Theorist: Contemporary Constitutional Review* (Princeton University Press 2010) 317-26.

considerations doing the real work in its analysis and more conscious of the risks associated with dignity.<sup>22</sup>

I will now go on to address the two necessary conditions that underpin the unfairness analysis. These necessary conditions are the focus of much of the Court's reasoning and many of its internal disagreements, requiring closer attention.

### **7.3 PATTERNS OF GROUP DISADVANTAGE**

In chapter 5, I showed that the Constitutional Court's unfairness enquiry involves an assessment of the impact of the discrimination and its justification. The Court ultimately seeks to determine whether the discrimination: a) threatens to create or perpetuate a broader pattern of group disadvantage; and b) lacks adequate justification. In establishing whether discrimination threatens to create or entrench patterns of group disadvantage, the Court has primarily focused on two types of disadvantage: disadvantage arising from prejudice and stereotyping, and socio-economic disadvantage. As I have shown, the Court tends to give prejudice and stereotyping the greatest attention, as reflected in its concern for the messages expressed by discriminatory laws and actions. In this section, I argue that the Court needs to give greater attention to other forms of disadvantage, including political marginalisation, social marginalisation, cultural domination, and violence and victimisation.

The Court's focus on prejudice and stereotyping is partly explained by the influence of a narrow conception of human dignity on its reasoning. As I have argued, human dignity has served as a placeholder in the *Harksen* test, standing in for the necessary conditions I have identified in the Court's decisions. The Court has not based this test on any narrow conception of dignity, defined exclusively in terms of a particular interest or wrong. Nevertheless, as other commentators have noted, the Court does feel an attraction to a

---

<sup>22</sup> See O'Connell (n 11) 284–6. For a refreshingly candid acknowledgment of these risks, see Edwin Cameron, 'Dignity and Disgrace: Moral Citizenship and Constitutional Protection' in Christopher McCrudden (ed), *Understanding Human Dignity* (OUP 2013) 480–81.

narrow conception of dignity concerned with preventing prejudice and stereotyping.<sup>23</sup> This attraction is evident in some of the Court's reflections on the nature of human dignity<sup>24</sup> and in the judges' extra-judicial comments, which equate dignity violations with these wrongs.<sup>25</sup> In this way, a narrow conception of human dignity seems to exert a subtle influence on the Court's reasoning, narrowing its understanding of patterns of group disadvantage unduly. Prejudice and stereotyping do play an important role in creating and sustaining patterns of disadvantage. However, there are many other forms of disadvantage that play an equally significant role. It would be a mistake for the Court to adopt a blinkered view in its unfair discrimination case law that focuses on one form of disadvantage, to the exclusion of others.

The Constitutional Court's unfair discrimination case law does contain brief glimpses of a richer understanding of disadvantage. We have already seen that the Court also recognises socio-economic disadvantage in its unfair discrimination analysis, but other forms of disadvantage are also evident, albeit not as clearly expressed. The Court's broader case law, beyond the direct application of the prohibition of unfair discrimination, also reveals a more expansive awareness of the ways in which patterns of group disadvantage arise and persist.<sup>26</sup>

Using normative theory and valuable insights from the Canadian case law, I will extract and elaborate on four other forms of disadvantage that appear in the Court's decisions and ought to be given greater attention in future. This is an expressly normative task, but one that builds on existing foundations in the South African case law. In presenting

---

<sup>23</sup> See, for example, Catherine Albertyn and Beth Goldblatt, 'Equality' in Stuart Woolman and others (eds), *Constitutional Law of South Africa* (2nd edn, Juta 2008) 35-10-35-13 (OS 03-07); Sandra Fredman, 'Redistribution and Recognition: Reconciling Inequalities' (2007) 23 SAJHR 214, 219; Botha (n 6) 744.

<sup>24</sup> See, for example, *Sodomy Case* (n 18) [125]-[129] (Sachs J).

<sup>25</sup> See, for example, Cameron (n 22) 468, 475-76.

<sup>26</sup> For further discussion of indirect application cases see Saras Jagwanth, 'Expanding Equality' [2005] Acta Juridica 131.

this account, I draw inspiration from work by Cathi Albertyn,<sup>27</sup> Henk Botha,<sup>28</sup> and Sandra Fredman,<sup>29</sup> among others, who have also offered accounts of the various forms of disadvantage that the Court ought to be addressing.

In discussing these forms of disadvantage, I do not claim that the outcome of any of the Court's decisions would have been materially different had the Court applied the broader understanding of disadvantage I will outline here. As I argue in the next chapter, the inconsistency between the Court's aim of preventing patterns of group disadvantage and its decisions in the five controversial cases can be traced to other problems in the Court's unfairness analysis. Nevertheless, a narrow understanding of group disadvantage may be material to the outcome of future cases. I will now turn to address these other forms of disadvantage, starting with political marginalisation.

### 7.3.1 Political Marginalisation

Political marginalisation is a broad form of disadvantage covering everything from the denial of the right to vote through to more subtle barriers that inhibit other forms of political participation.<sup>30</sup> Commentators have urged the Court to give this form of disadvantage greater attention in its unfair discrimination case law.<sup>31</sup> I will briefly develop these insights to show why political marginalisation along group lines is of particular concern.

---

<sup>27</sup> Cathi Albertyn and Beth Goldblatt, 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 SAJHR 248, 251–54; Catherine Albertyn, 'Substantive Equality and Transformation in South Africa' (2007) 23 SAJHR 253, 254–58.

<sup>28</sup> Botha (n 6) 747–51; Henk Botha, 'Equality, Plurality and Structural Power' (2009) 25 SAJHR 1, 6–17.

<sup>29</sup> Fredman (n 23) 225–27; Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011) 25–33.

<sup>30</sup> For discussion of the value of political participation and the different forms it may take, see *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) [90]–[117] (Ngcobo J); *HOD, Department of Education, Free State Province v Welkom High School* 2014 (2) SA 228 (CC) [137]–[139] (Froneman and Skweyiya JJ). See further Jason Brickhill and Ryan Babiuch, 'Political Rights' in Stuart Woolman and others (eds), *Constitutional Law of South Africa* (2nd edn, Juta 2008).

<sup>31</sup> See, in particular, Botha, 'Politics of Interpretation' (n 6) 747–751; Botha, 'Structural Power' (n 28) 10–16.

Like other forms of disadvantage, political marginalisation harms individuals and broader society irrespective of whether some groups are more marginalised than others.<sup>32</sup> But these harms are magnified when political marginalisation is patterned along group lines, as it is both the cause and the consequence of deeper patterns of disadvantage.

As the Supreme Court of Canada noted in *Andrews*,<sup>33</sup> politically marginalised groups, such as non-citizens, are ‘vulnerable to having their interests overlooked and their rights to equal concern and respect violated’ within the political process.<sup>34</sup> Not only are they likely be overlooked, but they may also be targeted by politicians eager to exploit existing societal prejudices or stereotypes for political gain.<sup>35</sup> In this way, political marginalisation creates the conditions for further group disadvantage. South Africa’s history of racial discrimination, built on the disenfranchisement of black South Africans, amply demonstrates this process. As O’Regan J observed in *New National Party*:<sup>36</sup>

Many of the injustices of the past flowed directly from the denial of the right to vote on the basis of race to the majority of South Africans. The denial of the right to vote entrenched political power in the hands of white South Africans. That power was used systematically to further the interests of white South Africans and to disadvantage black South Africans.<sup>37</sup>

Political marginalisation not only creates the conditions for further disadvantage, but also prevents marginalised groups from using political processes to undo existing patterns of

---

<sup>32</sup> For discussions of the interests at stake, see, for example, *August v Electoral Commission* 1999 (3) SA 1 (CC) [17]; *Doctors for Life* (n 30) [115] (Ngcobo J); *Richter v Minister of Home Affairs* 2009 (3) SA 615 (CC) [53].

<sup>33</sup> *Andrews v Law Society of British Columbia* [1989] 1 SCR 143, 152 (Wilson J).

<sup>34</sup> Cited in *Larbi-Odam* (n 5) [19]; *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) [71] (Mokgoro J).

<sup>35</sup> See the famous ‘footnote four’ in *United States v Carolene Products Company* 304 US 144 (1938) 152 fn 4. See further John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980) 76–77, 103.

<sup>36</sup> *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC).

<sup>37</sup> *ibid* [120]. See also *Ramakatsa v Magashule* 2013 (2) BCLR 202 (CC) [64].

disadvantage.<sup>38</sup> Ackermann J briefly recognised this in the *Sodomy Case*<sup>39</sup> when he noted that gay men, as a minority, are particularly vulnerable as they are '[unable] on their own to use political power to secure favourable legislation for themselves.'

Minority groups tend to be particularly at risk of political marginalisation, but existing patterns of group disadvantage or advantage can radically alter these risks. Sachs J reflected on this in his dissent in *Prince*,<sup>40</sup> a religious freedom challenge to the criminalisation of the use and possession of marijuana without exception for members of the Rastafari faith. He observed that some religious minorities enjoy substantial political influence, far exceeding their power at the ballot box, as a result of their socio-economic advantage and strong ties with dominant groups.<sup>41</sup> In contrast, he recognised that members of the Rastafari faith face greater political exclusion as their relative isolation from the 'mainstream' means that other groups are unlikely to rally in support of their rights.<sup>42</sup> These comments reveal a nuanced view of the different forms of political marginalisation that minorities face.

Minorities are not the only groups at risk of political marginalisation, as the historical disenfranchisement of black South Africans,<sup>43</sup> women,<sup>44</sup> and the poor<sup>45</sup> demonstrates. Aside from the intentional exclusion of groups from political participation, there are many other barriers to meaningful participation. Limited education, illiteracy, geographical and social

---

<sup>38</sup> See Ely (n 35) 103. A problem that arises, in part, when 'the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out'.

<sup>39</sup> Above n 18 [25].

<sup>40</sup> *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC).

<sup>41</sup> *ibid* [160].

<sup>42</sup> *ibid*. See also *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) [25].

<sup>43</sup> See text to nn 36–37 above. For a brief account of this history see Brickhill and Babiuch (n 30) 45-2–45-4 (OS 03-07).

<sup>44</sup> White women received the vote in 1930.

<sup>45</sup> Property and literacy qualifications on the white franchise were lifted in 1931.

isolation, among many other factors, limit groups' ability to participate.<sup>46</sup> Failures to accommodate groups, such as the disabled or linguistic minorities, are equally exclusionary. Those who face stigma and prejudice are also likely to retreat from political engagement. In these ways, broad patterns of group disadvantage are created and sustained as different forms of disadvantage fuse together to produce greater political marginalisation, leading to further group disadvantage and further disempowerment.

### 7.3.2 Social Marginalisation

Politically marginalised groups also tend to experience a high degree of social marginalisation, broadly understood as the denial of meaningful opportunities to participate in important areas of social life.<sup>47</sup> This can range from limited opportunities to socialise with others through to exclusion from important social roles, institutions, and spaces. For instance, the mentally and physically disabled have experienced acute forms of social marginalisation, including banishment to segregated institutions and general failures of accommodation that have limited their ability to socialise with others on an equal level.<sup>48</sup>

Like political marginalisation and the other forms of disadvantage, social marginalisation is harmful to individuals in itself. As Sandra Fredman suggests, '[t]o be fully human [requires] the ability to participate on equal terms in community and society more generally.'<sup>49</sup> Nevertheless, these harms take on a different dimension when social marginalisation is patterned along group lines.

---

<sup>46</sup> Fredman, *Discrimination Law* (n 29) 134-37.

<sup>47</sup> Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press 1990) 53-55; Hugh Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66 MLR 16, 22.

<sup>48</sup> The Canadian Court reflected on this history of exclusion in *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624 [56]. See further Faisal Bhabha, 'Disability Equality Rights in South Africa: Concepts, Interpretation and the Transformation Imperative' (2009) 25 SAJHR 218.

<sup>49</sup> Fredman, *Discrimination Law* (n 29) 32.

Socially marginalised groups are particularly at risk of prejudice and stereotyping, as the absence of meaningful interaction with others allows harmful attitudes and misconceptions to breed and persist unchallenged.<sup>50</sup> Banishment to the margins of society also denies important social connections and links that are essential for socio-economic advancement. In addition, weak social ties with other groups perpetuate political marginalisation, as illustrated by the plight of the Rastafari, discussed above.<sup>51</sup> This marginalisation can also breed apathy or antipathy to political processes, resulting in further exclusion.

These other forms of disadvantage also serve to entrench social marginalisation, as prejudice and stereotyping, socio-economic deprivation, political marginalisation, and other associated disadvantages push disfavoured groups further to the margins of society. This is the all too familiar multiplier effect that occurs when disadvantage is patterned along group lines.

The Constitutional Court has briefly recognised how social marginalisation is both a cause and a consequence of other patterns of group disadvantage. In *Khosa*,<sup>52</sup> Mokgoro J noted that the impoverishing effects of the exclusion of non-citizens from social welfare benefits pushed many ‘to the margins of society’. In turn, this exclusion entrenched their stigmatisation as ‘second class’ members of their communities, producing further social isolation.<sup>53</sup> In *Hoffmann*,<sup>54</sup> the Court also made fleeting reference to the social marginalisation of HIV-positive people as a result of the prevailing stigma and socio-economic deprivation that they experience. These cases are a promising indication of a broader awareness of social

---

<sup>50</sup> For the classic formulation of this ‘contact’ theory, see Gordon W Allport, *The Nature of Prejudice* (Doubleday 1958). As Allport recognised, without the right conditions, familiarity can also breed contempt.

<sup>51</sup> Text to nn 41–42 above.

<sup>52</sup> Above n 34 [77], [81].

<sup>53</sup> *ibid* [74].

<sup>54</sup> *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) [28].

marginalisation, but this form of disadvantage requires greater attention in future unfair discrimination decisions.

### 7.3.3 Cultural Domination

Social marginalisation is often a cause and a consequence of another form of disadvantage: cultural domination.<sup>55</sup> This involves the ‘universalization of a dominant group’s experience and culture, and its establishment as the norm’.<sup>56</sup> Differently described, this arises when dominant groups set the terms for social life on their own terms, such as expecting others to conform to their cultural practices, to be able-bodied, or to be free of childcare responsibilities, among many other norms.

While cultural domination is strongly linked with social marginalisation, it can still persist under conditions of integration. The Court’s decision in *Pillay*<sup>57</sup> provides an example of this. At issue was a state school’s code of conduct which banned students from wearing all jewellery, apart from wrist-watches and stud earrings. As a result, the complainants’ daughter, Sunali, was barred from wearing a nose ring in accordance with her South Indian, Tamil, and Hindu culture and religious beliefs.<sup>58</sup> This code of conduct reflected the history of apartheid-era segregation which reserved the best schools and the greatest resources for white children. Consequently, historically whites-only schools such as Sunali’s were largely organised along white cultural norms. The Constitutional Court recognised that the school had made enormous strides since desegregation, becoming a model of integration.<sup>59</sup>

---

<sup>55</sup> Also referred to as cultural imperialism or hegemony, among other terms. See Young (n 83) 58–61; Nancy Fraser, *Justice Interruptus: Critical Reflections on the “Postsocialist” Condition* (Routledge 1997) 14.

<sup>56</sup> Young *ibid* 59.

<sup>57</sup> *MEC for Education, Kwa-Zulu Natal v Pillay* 2008 (1) SA 474 (CC). Discussed briefly in chapter 4, text to nn 54–55.

<sup>58</sup> *ibid* [90] (Langa CJ).

<sup>59</sup> *ibid* [125] (O’Regan J).

Nevertheless, the school's approach to jewellery still bore the marks of cultural domination. Langa CJ acknowledged this in concluding that the code of conduct 'is not neutral but enforces mainstream and historically privileged forms of adornment'.<sup>60</sup>

*Pillay* shows that a central harm of cultural domination is the strong assimilationist pressure it creates.<sup>61</sup> The school's policy on jewellery was a classic demand to 'cover',<sup>62</sup> requiring those who differ from the mainstream to downplay their difference in some way. As the Court recognised, this presented Sunali and other members of non-mainstream cultural and religious groups with a dilemma: either to comply with the code and lose an important expression of their identity or to leave the school and sacrifice the opportunity of a quality education.<sup>63</sup> Assimilationist pressure can take other forms, including demands to 'convert' or 'pass'.<sup>64</sup> Members of culturally dominated groups may 'convert' by discarding their different identity. Alternatively, they may 'pass' for a member of culturally dominant group, conforming to their norms to give the appearance of belonging.<sup>65</sup> All of these forms of assimilationist pressure harm group members' sense of identity, entrenching a deep sense of shame, and creating a constant fear of exposure and censure.<sup>66</sup>

Cultural domination is also a source of other harms, particularly prejudice and stereotyping. A culturally dominated group's failure to conform to mainstream norms is often a source of animosity toward that group. In turn, this animosity breeds stereotypes that

---

<sup>60</sup> *ibid* [44].

<sup>61</sup> Cultural domination is not, however, the only source of assimilationist pressure.

<sup>62</sup> See Kenji Yoshino, 'Covering' (2002) 111 *Yale LJ* 769, 772, 836–64 drawing on pioneering work by Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Penguin 1968) ch 2.

<sup>63</sup> *Pillay* (n 57) [85]–[92] (Langa CJ).

<sup>64</sup> Yoshino (n 62) 773, 784–836. See further Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* (Random House 2006).

<sup>65</sup> The line between passing and covering is inevitably blurred, but they involve different degrees of concealment of identity. See Goffman (n 62) 126.

<sup>66</sup> See Goffman *ibid* ch 3.

attempt to rationalise these feelings.<sup>67</sup> For example, South African courts historically refused to recognise the validity of Muslim marriages on the grounds that they were all ‘potentially polygamous’.<sup>68</sup> As Mahomed CJ explained in *Amod*,<sup>69</sup> this stereotype was a thinly veiled attempt to justify the underlying hostility towards Muslims because of their failure to conform to Christian norms.<sup>70</sup>

Cultural domination also causes harms independent of stereotyping and prejudice. In the Canadian Court’s decision in *Eaton*,<sup>71</sup> Sopinka J explained this as follows:

Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp.<sup>72</sup>

As the Canadian Court recognised here, while the disabled experience harmful stereotyping, much of their disadvantage flows from the simple fact that society operates on the premise that all are able-bodied.

The South African Court has shown some awareness of cultural domination,<sup>73</sup> but this awareness has often been patchily applied in its unfair discrimination analysis, particularly in its decisions on discrimination against same-sex couples. The Court’s decisions on sexual orientation contain some of the most extensive pronouncements on the

---

<sup>67</sup> For further discussion of this process, see Denise Réaume, ‘Discrimination and Dignity’ (2003) 63 La L Rev 1, 37.

<sup>68</sup> See *Seedat’s Executors v The Master (Natal)* 1917 AD 302, 307; *Ismail v Ismail* 1983 (1) SA 1006 (A) 1026.

<sup>69</sup> *Amod v Multilateral Vehicle Accident Fund* 1999 (4) SA 1319 (SCA) [21].

<sup>70</sup> See also *Daniels v Campbell* NO 2004 (5) SA 331 (CC) [19] (Sachs J); *Hassam v Jacobs* NO 2009 (5) SA 572 (CC) [33].

<sup>71</sup> *Eaton v Brant County Board of Education* [1997] 1 SCR 241.

<sup>72</sup> *ibid* [67]. Quoted with approval in *Pillay* (n 57) [74] (Langa CJ).

<sup>73</sup> See *Christian Education* (n 42) [24].

importance of accommodating and celebrating difference.<sup>74</sup> However, the Court has also been criticised for entrenching heteronormative attitudes by seeming to make the extension of benefits to same-sex couples contingent on their conformity with heterosexual norms.<sup>75</sup> For instance, in the *Immigration Case*,<sup>76</sup> the Court premised the finding that immigration legislation unfairly discriminated against same-sex couples on the basis that they are just as capable of a monogamous, stable family life as heterosexual couples.<sup>77</sup> While this is true, this reasoning comes dangerously close to suggesting that same-sex relationships can only claim recognition and protection if they resemble an idealised heterosexual relationship. As a result, further work is needed in future decisions to translate a broad awareness of cultural domination into an unfairness analysis that avoids perpetuating this domination and the associated assimilationist pressure.

There is also the complex issue of how to balance cultural sensitivity with the need to address patriarchy in African customary law. The Court has confronted this issue in *Bhe*,<sup>78</sup> *Shilubana*,<sup>79</sup> *Gumede*,<sup>80</sup> and *Mayelane*,<sup>81</sup> a set of cases that has attracted much commentary in the

---

<sup>74</sup> See *Sodomy Case* (n 18) [130]–[138] (Sachs J); *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) [59]–[61] (Sachs J).

<sup>75</sup> Albertyn, ‘Substantive Equality and Transformation’ (n 27) 270–73; Pierre de Vos, ‘From Heteronormativity to Full Sexual Citizenship?: Equality and Sexual Freedom in Laurie Ackermann’s Constitutional Jurisprudence’ [2008] *Acta Juridica* 254, 269–71; Jaco Barnard-Naudé and Pierre De Vos, ‘Disturbing Heteronormativity: The “Queer” Jurisprudence of Albie Sachs’ (2010) 25 *SAPL* 209, 218–19, 222–23.

<sup>76</sup> *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC).

<sup>77</sup> *ibid* [53].

<sup>78</sup> *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC).

<sup>79</sup> *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC).

<sup>80</sup> *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC).

<sup>81</sup> Above n 7.

literature.<sup>82</sup> The question of how best to strike this balance is a subject best left for another thesis.

### 7.3.4 Violence and Victimisation

Violence and other forms of victimisation, such as harassment or intimidation, are generally a manifestation of broader patterns of group disadvantage.<sup>83</sup> Violent acts against vulnerable groups are often motivated by prejudice and stereotyping, such as xenophobic beliefs that foreigners are sub-human and untrustworthy.<sup>84</sup> Violence is also used to police and enforce assimilation to dominant groups' norms, such as the chilling phenomenon of 'corrective rape' of gay men and lesbian women in South Africa.<sup>85</sup> Poverty, a lack of political muscle, and social marginalisation also render groups more vulnerable to violence and deprive members of effective redress.

While violence is often a manifestation of other forms of disadvantage, it is deserving of recognition in its own right as a central means through which patterns of group disadvantage are sustained and reproduced. The Court has recognised this in its indirect application of equality norms in cases involving gender-based violence.<sup>86</sup> In *Baloyi*,<sup>87</sup> involving the interpretation of domestic violence legislation, Sachs J held that 'gender-specific

---

<sup>82</sup> See, for example, Catherine Albertyn, "The Stubborn Persistence of Patriarchy"? Gender Equality and Cultural Diversity in South Africa' (2009) 2 Con Court Rev 165; Catherine Albertyn, 'Law, Gender and Inequality in South Africa' (2011) 39 Oxford Development Studies 139, 153-58; Chuma Himonga and Anne Pope, 'Mayelane v Ngwenyama and Minister for Home Affairs: A Reflection on Wider Implications' [2013] Acta Juridica 318.

<sup>83</sup> Young (n 47) 62–63; Fredman, *Discrimination Law* (n 49) 28.

<sup>84</sup> Alluded to in *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 (4) SA 395 (CC) [143]–[144] (Sachs J).

<sup>85</sup> See Clare Carter, "The Brutality of "Corrective Rape"" *New York Times* ( New York, 27 July 2013) <<http://www.nytimes.com/interactive/2013/07/26/opinion/26corrective-rape.html?smid=pl-share>> accessed 29 September 2014.

<sup>86</sup> See further Jagwanth (n 26) 137-38.

<sup>87</sup> *S v Baloyi* 2000 (2) SA 425 (CC) [12]. See also *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) [62]; *Omar v Government of the Republic of South Africa* 2006 (2) SA 289 (CC) [13].

domestic violence both reflects and reinforces patriarchal domination'. Nkabinde J drew a similar connection between male domination and rape in *Masiya*,<sup>88</sup> where the Court indirectly applied equality norms in developing the common law definition of rape to include the anal penetration of women. Nkabinde J noted that 'sexual violence and rape not only offends the privacy and dignity of women but also reflects the unequal power relations between men and women in our society.'<sup>89</sup> In his dissent, Langa CJ urged the Court to go further by expanding the definition of rape to include the anal penetration of men. He emphasised that male rape is itself a cause and a consequence of patriarchy, as it is used to enforce male dominance:

[T]he groups of men who are most often the survivors of rape, young boys, prisoners and homosexuals . . . are [often] raped precisely because of the gendered nature of the crime. They are dominated in the same manner and for the same reason that women are dominated; because of a need for male gender-supremacy. That they lack a vagina does not make the crime of male rape any less gender-based. The gendered basis of rape, rightly identified by Nkabinde J, requires that male victims are given equal rather than lesser protection.<sup>90</sup>

The majority in *Masiya* has been roundly criticised for not adopting this nuanced view of gender-based violence.<sup>91</sup>

While the Court's indirect application of unfair discrimination norms reflects a broad understanding of violence as an important form of group disadvantage, this understanding has not featured significantly in the Court's direct application of the test for unfair discrimination. In the *Sodomy Case*,<sup>92</sup> the Court made fleeting reference to the fact that the sodomy offence heightened the threat of violence against gay men as well as enabling police harassment and blackmail. However, these harms were described somewhat dismissively as

---

<sup>88</sup> *Masiya v Director of Public Prosecutions*, Pretoria 2007 (5) SA 30 (CC).

<sup>89</sup> *ibid* [28].

<sup>90</sup> *ibid* [86].

<sup>91</sup> See, for example, Elsje Bonthuys, 'Institutional Openness and Resistance to Feminist Arguments: The Example of the South African Constitutional Court' (2008) 20 CJWL 1, 15–18.

<sup>92</sup> Above n 18 [24].

ways in which the offence ‘impinges peripherally . . . on gay men’.<sup>93</sup> In *Jordan*, neither the majority nor the minority made any connection between the discriminatory criminalisation of prostitution and gender-based violence. Similarly, in *Union of Refugee Women*,<sup>94</sup> no direct mention was made of the pervasive xenophobic violence directed at refugees and other foreign nationals in South Africa.<sup>95</sup> This is an oversight that must be addressed in future cases by giving greater recognition to this form of disadvantage.

### 7.3.5 Summary

These forms of disadvantage are some of the many ways in which patterns of group disadvantage may be created and entrenched. This is not intended as an exhaustive list and these forms of disadvantage should not be treated as necessary conditions for identifying patterns of group disadvantage. Different groups may experience different combinations of disadvantage at different times. In addition, not all group members will necessarily experience disadvantage in the same way or to the same degree.<sup>96</sup> What is clear from this discussion is that there are many other forms of group disadvantage aside from prejudice and stereotyping and socio-economic disadvantage that require greater attention in the Court’s unfair discrimination analysis in future. To achieve this, the Court will often need to take more proactive steps to acquire evidence and argument on the impact of discrimination, a point I will return to in the next chapter.<sup>97</sup>

---

<sup>93</sup> *ibid.*

<sup>94</sup> Above n 84.

<sup>95</sup> This case was decided a year before the wave of xenophobic violence that spread across South Africa in May 2008. However, outbreaks of xenophobic violence were already common in the 1990s and early 2000s. See further David M Matsinhe, ‘Africa’s Fear of Itself: The Ideology of *Makwerekwere* in South Africa’ (2011) 32 *Third World Quarterly* 295, 306–308.

<sup>96</sup> I discuss issues of intersectionality further in chapter 8, text to n 63ff.

<sup>97</sup> Chapter 8, text to n 47ff.

## 7.4 JUSTIFICATION

The final question I will address is whether it is appropriate for the Court to include a justification analysis within the unfairness enquiry, alongside the impact analysis. I contend that it is appropriate. The more important issue is how should this justification analysis be conducted.

### 7.4.1 The Debate over Justification

South African commentators<sup>98</sup> have generally been more accepting of the inclusion of justificatory considerations in the unfair discrimination analysis than their Canadian counterparts, who have expressed strong opposition to any hint of justification analysis in the discrimination enquiry.<sup>99</sup> As I have noted before, this is partly because the language of ‘unfairness’ has an inescapably justificatory bent to it. Moreover, the section 9(5) presumption of unfairness relieves complainants of the burden of showing that discrimination on listed grounds is unjustified.

Nevertheless, some have called for a stricter division between the unfairness analysis and the section 36 general limitations analysis.<sup>100</sup> In an early commentary, Titia Loenen suggested that impact should be the sole focus of the unfairness enquiry, leaving all justificatory considerations to the section 36 analysis.<sup>101</sup> Cathi Albertyn and others have proposed that different justificatory considerations ought to be considered at different stages

---

<sup>98</sup> See, for example, Murray Wesson, ‘Contested Concepts: Equality and Dignity in the Case-Law of the Canadian Supreme Court and the South African Constitutional Court’ in András Sajó and Renáta Uitz (eds), *Constitutional Topography: Values and Constitutions* (Eleven International 2010) 289ff; Rósaan Krüger, ‘Equality and Unfair Discrimination: Refining the *Harksen* Test’ (2011) 128 SALJ 479, 504–505.

<sup>99</sup> See, for example, Sheila Martin, ‘Balancing Individual Rights to Equality and Social Goals’ (2001) 80 Can Bar Rev 299, 362ff; Sheila McIntyre, ‘The Supreme Court and Section 15: A Thin and Impoverished Notion of Judicial Review’ (2006) 31 QLJ 731, 768–69.

<sup>100</sup> For further discussion see Krüger (n 98) 504–505.

<sup>101</sup> Titia Loenen, ‘The Equality Clause in the South African Constitution: Some Remarks from a Comparative Perspective’ (1997) 13 SAJHR 401, 410–411.

of the analysis, with the unfairness enquiry dealing with considerations of ‘political morality’ while the section 36 analysis should focus on ‘prudential considerations’ of cost and efficiency.<sup>102</sup> A difficulty with this proposal is that there is no clear distinction between these considerations: the proper allocation of finite state resources is, after all, a central question of political morality. Nonetheless, my concern for the moment is with the motivation for these proposed divisions of labour between unfairness and section 36.

The primary motivation is to preserve the ‘integrity’ of the prohibition of unfair discrimination by keeping the focus on preventing and addressing patterns of group disadvantage as much as possible.<sup>103</sup> This motivation operates at two levels.

On a practical level, there is the important concern that justificatory considerations typically come at the expense of a fully developed impact analysis. As seen in chapter 5, the Court has often made justification the focus of the unfairness enquiry, side-lining impact. This was particularly pronounced in cases such as *Jordan*<sup>104</sup> and *Volks*<sup>105</sup> where the majority added an impact analysis seemingly as an afterthought. This undermined the Court’s claim to be concerned with preventing patterns of group disadvantage as the majority judgments made no real effort to explore whether the discrimination had this effect.

As concerning as this is, the solution is not necessarily to banish the justification analysis from the unfairness enquiry. Instead, this can be corrected simply by ensuring that the impact analysis is given full and proper consideration before exploring the justification. Separating out the impact and justification analysis within the unfairness enquiry and ensuring that the impact analysis comes first would help to preserve its rigour.

---

<sup>102</sup> Catherine Albertyn and Janet Kentridge, ‘Introducing the Right to Equality in the Interim Constitution’ (1994) 10 SAJHR 149, 175–76; Albertyn and Goldblatt, ‘Facing the Challenge’ (n 27) 269–70; Albertyn and Goldblatt, ‘Equality’ (n 23) 35–78 (OS 03-07).

<sup>103</sup> Albertyn and Goldblatt, ‘Facing the Challenge’ *ibid* 271.

<sup>104</sup> Above n 13.

<sup>105</sup> *Volks NO v Robinson* 2005 (5) BCLR 446 (CC).

In addition, the justification analysis can often complement the impact analysis. As I showed in the previous chapter, the justification analysis can serve as a tool for determining whether discrimination expresses impermissible messages that threaten to perpetuate prejudice and stereotyping. Provided that this justification analysis does not displace the impact enquiry, it can add depth to the Court's reasoning. This was well demonstrated in Mokgoro and O'Regan JJ's dissent in *Union of Refugee Women*.<sup>106</sup>

At a deeper level, concern for the 'integrity' of the unfairness analysis reflects a desire to avoid an apparent contradiction. It seems inconsistent to say that the prohibition of unfair discrimination aims to prevent and address patterns of group disadvantage, while also saying that discrimination that has this effect can be justified and found to be fair. However, this contradiction is more apparent than real. There is an important distinction to be made between the purpose of the test for unfair discrimination and the test itself. The test for unfair discrimination is shaped by its purpose of preventing and addressing patterns of group disadvantage, but it should also be appropriately responsive to other considerations and constraints.<sup>107</sup> The justification analysis may, in some cases, be a departure from the pure pursuit of this purpose, but that is legitimate provided that there are good reasons for doing so and provided that the justification analysis is carried out in a way that gives appropriate weight to this purpose.

An important consideration in favour of keeping the justification analysis within the unfairness enquiry is the obstacle posed by the wording of the section 36 general limitations clause. Section 36(1) provides that limitations of rights may only be justified where they are 'authorised by a law of general application'. Woolman and Botha suggest that 'law' should be

---

<sup>106</sup> Chapter 6, text to n 124ff.

<sup>107</sup> As noted in chapter 1, text to n 84, we can distinguish between the 'general justifying aim' of the prohibition of unfair discrimination and the reasons for particular aspects of the test. For a more complete account, see Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015) (forthcoming) ch 1.

given a wide interpretation,<sup>108</sup> but even on a wide interpretation it is clear that policies, practices, actions, and omissions are excluded.<sup>109</sup> The Court has also been clear that rights limitations must be directly authorised by a law of general application; the mere existence of general framework legislation is not enough.<sup>110</sup> Thus, in *Hoffmann*,<sup>111</sup> the Court held that it could not apply a section 36 analysis to the unfair discrimination as the national airline's policy of refusing to employ HIV-positive people as cabin attendants was not directly authorised by law. The result of this is that if all justificatory considerations were banished from the unfairness analysis, many potentially justifiable instances of discrimination may be struck down because they fail at the law of general application hurdle. This would present courts with a dilemma.

On the one hand, courts could bite the bullet and strike down potentially justifiable discrimination that is not directly sanctioned by law. This could produce anomalous results. Given the deeply entrenched patterns of group disadvantage in South African society, many state programmes and policies may have some indirectly discriminatory impact that may perpetuate group disadvantage in some way.<sup>112</sup> Some of this discrimination may be unjustifiable, but there are likely to be many instances of discrimination that could be justified.

On the other hand, to avoid such anomalous results, courts may bend and distort the unfair discrimination doctrine. As Mokgoro J warned in *Hugo*:<sup>113</sup>

---

<sup>108</sup> See further Stuart Woolman and Henk Botha, 'Limitations' in Stuart Woolman and others (eds), *Constitutional Law of South Africa* (2nd edn, Juta 2008) 34-53 n 3 (OS 07-06); Iain Currie and Johan De Waal, *The Bill of Rights Handbook* (6th edn, Juta 2013) 155-56.

<sup>109</sup> See *August* (n 32) [23]; *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) [51].

<sup>110</sup> *August* *ibid.*

<sup>111</sup> Above n 54 [41].

<sup>112</sup> *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) [117]-[118] (Sachs J).

<sup>113</sup> *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).

Courts which wish to uphold action[s] or rules as justified, but are unable to do so . . . may strain the interpretation of other sections of the Constitution in order to find the conduct did not infringe the right in question.<sup>114</sup>

This strain may appear in many forms. Most likely it would result in courts continuing to apply a justification analysis in the unfairness enquiry, but in an even more opaque and unaccountable way. Alternatively, courts may impose strict requirements for proving discrimination, invoking mirror comparators or other contrivances to block challenges to what they perceive to be justifiable discrimination. What may be used to save genuinely justifiable discrimination in one case may then be used to block challenges to unjustifiable discrimination in the next, resulting in a jurisprudence that drifts far from its aim of preventing and addressing patterns of group disadvantage.

There are several possible ways out of this dilemma. One is to develop two different tests for unfair discrimination, where justificatory considerations are banished to the section 36 analysis where discrimination is sanctioned by a law of general application and imported back into the unfairness enquiry where it is not.<sup>115</sup> However, such an approach is likely to be unwieldy and confusing, leading to disconnected strands of jurisprudence. A second solution is to water down the ‘law of general application’ requirement to allow in a far broader range of limitations.<sup>116</sup> There is a case to be made for this change but the Court has shown no willingness to yield on this point. This suggests that an alternative approach is needed.

A different response to this dilemma is to accept the justification analysis within the unfairness enquiry and to concentrate on developing guidelines for its proper application. This would render the section 36 analysis redundant in unfair discrimination cases, but this

---

<sup>114</sup> *ibid* [104].

<sup>115</sup> Cathi Albertyn, ‘Equality’ in Halton Cheadle, Dennis Davis and Nicholas Haysom (eds), *South African Constitutional Law: The Bill of Rights* (Butterworths 2002) 117; Albertyn and Goldblatt, ‘Equality’ (n 102) 35-82 (OS 03-07).

<sup>116</sup> Woolman and Botha (n 108) 34–53 fn 3 (OS 07-06).

would merely confirm what is already apparent in the case law.<sup>117</sup> This would not be an unprecedented acknowledgement, as the Court has already signalled that the section 36 analysis is unnecessary when dealing with other internally qualified rights.<sup>118</sup> I will now address how the justification analysis ought to be applied within the unfairness enquiry.

#### 7.4.2 Developing the Justification Analysis

As was apparent in chapter 5, the Court tends to apply the justification analysis within the unfairness enquiry in an opaque and haphazard way. This justification analysis requires several important developments.

The first is that the Court should be open about the fact that it is applying this justification analysis, bringing a greater degree of accountability to its reasoning. As we saw in chapter 5, in the Court's most controversial split decisions, the majority and minority have adopted very different degrees of deference in the justification analysis without offering any reasons for these different approaches. This was evident in *Union of Refugee Women*,<sup>119</sup> the challenge to legislation which barred refugees from registering as private security guards, requiring refugees to apply for individual exemptions from this blanket exclusion. In the unfairness analysis, the majority gave much weight to the legislation's purpose of protecting the public by ensuring the trustworthiness and reliability of private security guards, but it did little to probe the suitability or necessity of the discrimination in achieving this purpose. In contrast, the minority engaged in a far more robust examination, finding that the discrimination was '[not] tailored appropriately' to its purpose.<sup>120</sup> However, neither the

---

<sup>117</sup> Krüger (n 98) 504–505.

<sup>118</sup> See, for example, *Kbosa* (n 34) [83]–[84] where Mokgoro J noted that there may be no place for the s 36 limitations analysis when dealing with the socio-economic rights contained in ss 26 and 27 of the Constitution.

<sup>119</sup> Above n 84.

<sup>120</sup> *ibid* [119].

majority nor the minority provided any reasons for why their more or less deferential approaches should be preferred. One explanation for this is that because the members of the Court do not openly acknowledge that they are applying a justification analysis, they see no need to justify the different degrees of deference they apply to this analysis.

Apart from being more transparent, the justification analysis should also be conducted in a way that gives sufficient weight to the aim of preventing and addressing patterns of group disadvantage.<sup>121</sup> This has two key implications. First, the justification analysis should be conducted in a way that complements rather than undermines the impact analysis. As mentioned above, this requires the Court to apply the justification analysis after a fully developed impact analysis, rather than letting justification crowd out this analysis. It is only once the impact is established that the Court can adequately assess the justification for this impact.

Second, the Court must ensure that discrimination is only found to be justified for sufficiently weighty reasons; reasons that outweigh the impact of the discrimination. Precisely what counts as a sufficiently weighty reason is a complex matter. In some instances, it may be possible to rule out certain reasons categorically as never being legitimate reasons for discrimination. Thus, in the *Sodomy Case*<sup>122</sup> and *Hoffmann*,<sup>123</sup> the Court held that appeals to societal prejudices and negative stereotypes are never permissible as justifications. In *Fourie*,<sup>124</sup> the Court also indicated that the state cannot justify discrimination by appealing to religious beliefs.<sup>125</sup> While it is possible to rule out reasons like this categorically, there is

---

<sup>121</sup> This is shorthand for saying that the justification analysis should be conducted in a way that best advances the aim of preventing and addressing patterns of group disadvantage, while still remaining sensitive to the various considerations and constraints that require a justification analysis to be applied within the unfairness enquiry.

<sup>122</sup> Above n 18 [37].

<sup>123</sup> Above n 54 [33]-[37].

<sup>124</sup> Above n 74 [106].

<sup>125</sup> See also *Sodomy Case* (n 18) [38].

generally no bright line dividing legitimate from illegitimate reasons. The Canadian Court's trouble in deciding whether financial constraints can serve as justifications for rights violations—the so-called 'dollars versus rights controversy'—is a good example of just how difficult this line-drawing exercise can be.<sup>126</sup> Having initially taken the strong stance that financial considerations alone could never be legitimate reasons for rights limitations, the Canadian Court has gradually softened this line, allowing financial justifications to enter its analysis in various ways.<sup>127</sup> This remains controversial, but it seems to be an inevitable concession to the fact that behind almost every budgetary argument there is a difficult choice about how to balance competing rights and interests. Given the trouble with categorical exclusions, it will often be simpler and more direct to ask whether, in the circumstances of each case, the reasons offered for the discrimination are sufficient to outweigh the impact of the discrimination.

Aside from categorically excluding certain reasons, attention must also be paid to the appropriate intensity of review that must be applied in assessing the justification. I will explore this subject in greater detail in the next chapter where I will show that the majority judgments in the five controversial cases all adopted an indefensibly weak intensity of review that resulted in the Court upholding discrimination on flimsy grounds. Addressing this problem will help to make the Court more consistent in preventing and addressing patterns of group disadvantage in future.

---

<sup>126</sup> For a summary of the Canadian Court's case law on this controversy, see *Newfoundland (Treasury Board) v NAPE* [2004] 3 SCR 381 [65]–[75].

<sup>127</sup> *NAPE* *ibid.* See further Judy Fudge, 'Substantive Equality, the Supreme Court of Canada, and the Limits to Redistribution' (2007) 23 SAJHR 235, 249-50; Hester A Lessard, "'Dollars Versus [Equality] Rights": Money and the Limits on Distributive Justice' (2012) 58 SCLR 299, 319ff.

## 7.5 CONCLUSION

This chapter has addressed three broad issues that flow from the deeper understanding of the Court's reasoning. I have demonstrated that the Court no longer needs to invoke human dignity as the basis of its test for unfair discrimination. Instead, it should be more open about the considerations that are doing the real work in its judgments. I then went on to consider the two necessary conditions that underpin the Court's unfairness analysis. I argued that the Court needs to give greater attention to other forms of disadvantage that constitute and create patterns of group disadvantage. Furthermore, I argued that it is appropriate for the Court to include a justification analysis within the unfairness enquiry, provided that it is conducted openly and in a manner that gives proper weight to the aim of preventing and addressing group disadvantage.

The next chapter continues to explore how the Court's reasoning should develop by addressing the big question that has dominated much of the literature on the Court's case law: where did the Court go wrong in the five controversial cases and how can these errors be prevented in future?

## CHAPTER 8: LEARNING FROM THE CONTROVERSIAL CASES

### 8.1 INTRODUCTION

As outlined in chapter 1, a central concern motivating this thesis is the glaring inconsistency between the Constitutional Court's stated aim of preventing patterns of group disadvantage and its decisions in a small but significant minority of its judgments. In these five controversial cases—*Hugo*,<sup>1</sup> *Harksen*,<sup>2</sup> *Jordan*,<sup>3</sup> *Volks*,<sup>4</sup> and *Union of Refugee Women*<sup>5</sup>—slender majorities dismissed claims of unfair discrimination despite clear indications that the discrimination entrenched severe patterns of group disadvantage. These cases have attracted much critical scrutiny as commentators have attempted to pin-point the flaws in the majority judgments.<sup>6</sup> This chapter will develop and significantly extend upon this commentary, using the clearer understanding of the Court's reasoning that I developed in the previous chapters. I will show how the Court's reasoning ought to be tightened and developed to make the Court more consistent in preventing and addressing patterns of group disadvantage. Studying the problems in these five controversial cases is a backward-looking enterprise, but necessarily so. These cases reveal repeated errors that are likely to resurface in future cases unless exposed and addressed.

In chapter 5, I showed that the five controversial judgments largely turned on the unfairness analysis, the second part of the two-stage test for unfair discrimination.<sup>7</sup> In these

---

<sup>1</sup> *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).

<sup>2</sup> *Harksen v Lane* NO 1998 (1) SA 300 (CC).

<sup>3</sup> *S v Jordan* 2002 (6) SA 642 (CC).

<sup>4</sup> *Volks NO v Robinson* 2005 (5) BCLR 446 (CC).

<sup>5</sup> *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 (4) SA 395 (CC).

<sup>6</sup> See chapter 1, text to nn 45–49.

<sup>7</sup> In *Jordan* (n 3) [9]–[15], Ngcobo J held that there was no discrimination, but proceeded to find that even if there was discrimination then it would be fair.

cases, the majority judgments found (or were prepared to assume) that the laws in issue were discriminatory, but held that they were fair. We saw that this unfairness analysis hinged on an analysis of the impact of the discrimination and its justification, as the majority and minority reached very different conclusions on these issues. The majority judgments generally engaged in a brief impact analysis, in contrast with the minority's more detailed enquiry. The majority and minority also approached the justification analysis with very different intensities of review. The majority judgments consistently adopted a weaker, more deferential approach, both in the standards of review they adopted and in the intensity with which they applied these standards. Given the focus of these decisions, I will frame my analysis in this chapter around the impact and justification analyses that make up the unfairness enquiry. My analysis will be supplemented with a detailed understanding of the evidence and argument before the Court gained from the records in each of these decisions.<sup>8</sup> These records include the lower court decisions, the pleadings, and the written submissions before the Court. These documents provide rich insight into the Court's decisions and help to pin-point precisely where the majority judgments went wrong.

I will analyse these flaws in two sections. Section 8.2 focuses on the problems in the impact analysis. I will show that the majority judgments were guilty of repeated errors of doctrine, proof, and concept in applying this analysis. I will also address the commonly held view that these errors can be blamed on the Court's use of dignity. As I have argued in the preceding chapters, dignity has played little role in the Court's reasoning. As a consequence, these errors need to be addressed directly and are not likely to go away simply by jettisoning dignity.

---

<sup>8</sup> The records of all Constitutional Court cases heard after 2001 are accessible online through the Constitutional Court Library's website <[www.constitutionalcourt.org.za/uhtbin/webcat](http://www.constitutionalcourt.org.za/uhtbin/webcat)> accessed 29 September 2014. I obtained records of cases heard before 2001 from the Constitutional Court's archives. The Court generally does not produce publicly accessible transcripts of its hearings. As a result, I have relied on the Court's account of these hearings in its judgments and what can be gleaned from post-hearing submissions.

Section 8.3 focuses on the justification analysis. The errors in this justification analysis have been almost entirely overlooked in the existing literature. I will demonstrate that in the five cases, the majority judgments consistently adopted an indefensibly weak intensity of review that led the judges to accept insubstantial justifications. The error here was that the majority did not satisfy the ‘baseline’ intensity of review,<sup>9</sup> the non-negotiable threshold intensity of review which, I will argue, ought to be applied in unfair discrimination cases to ensure that the aim of preventing patterns of group disadvantage is given proper weight.

The arguments in these sections will vindicate much of the reasoning presented in the minority judgments. This vindication is necessary as these judgments generally remained silent on the flaws in the majority decisions and offered limited justification for why their approach had greater merit. This is not meant as a criticism of the minority judgments. Some degree of judicial tongue-biting will always be necessary on a collegial court, particularly one with as strong a culture of collegiality as the Constitutional Court.<sup>10</sup> Nevertheless, this silence does make it necessary to articulate precisely why the majority judgments got it wrong and why the approach demonstrated in the minority judgments ought to be preferred in future cases.

The central theme running through the arguments in this chapter is that the Court’s failure to address patterns of group disadvantage in the five controversial cases can generally be traced to basic failures of adjudication. As a result, the task of making the Court better and more consistent in preventing and addressing patterns of group disadvantage must begin with getting the basics right. This has further implications for the development of the constructive project in the literature. While it is important to address the broader principles

---

<sup>9</sup> Here I draw on the terminology used by Cora Chan, ‘Proportionality and Invariable Baseline Intensity of Review’ (2013) 33 LS 1, discussed further at text to nn 153ff below.

<sup>10</sup> See further Albie Sachs, *The Strange Alchemy of Life and Law* (OUP 2009) 49–51.

and values that should inform the unfair discrimination analysis, this cannot be divorced from the intricacies of the Court's reasoning and adjudicative processes. The success of the constructive project depends on its ability to connect the broader principles with these fine-grained details. Contributors to the constructive project have already made important efforts to address this need. I will show that more can be done.

## 8.2 IMPACT ANALYSIS

The impact analysis requires the Court to determine the effect of the discrimination on the interests of the disfavoured group and whether this will create or entrench a pattern of group disadvantage. As a result, this enquiry is essential to preventing and addressing patterns of group disadvantage.

As we saw in chapter 5, the majority judgments in the five controversial cases downplayed or ignored the impact of the discrimination and refused to acknowledge that it would perpetuate patterns of group disadvantage. In this section I will show that this reasoning involved three types of errors. First, the majority judgments all made *doctrinal* errors, as they failed to apply the Court's established impact analysis. Second, these doctrinal errors were combined with errors of *proof*, as the majority judgments failed to apply the presumption of unfairness, ignored clear evidence and argument on the impact of the discrimination, or failed to take the proactive approach to information-gathering which, I argue, is necessary to address patterns of group disadvantage. Third, I will show that the Court repeated at least four *conceptual* errors, as the majority judgments failed to grasp or misapplied key concepts.

### 8.2.1 Doctrinal Errors

A common criticism of the five majority judgments is that they failed to apply the impact analysis that the Court prescribed in *Harksen*<sup>11</sup> and has consistently followed in most of its decisions.<sup>12</sup> This has led many to express their frustration at this ‘gap between the promise and the reality of the jurisprudence’.<sup>13</sup>

As explained in chapter 5, the Court has insisted that the impact analysis must be *central* to the unfairness enquiry and must be appropriately *contextualised*.<sup>14</sup> Making impact central to the enquiry requires the Court to engage in an extensive impact analysis and to ensure that this analysis comes before any consideration of the justifications. This analysis must be contextualised in two key ways. First, the Court must consider the impact of the discrimination on the broader disfavoured group, rather than focusing exclusively on the complainant. Second, this assessment should take place in light of the past or current patterns of disadvantage that the group has experienced or its vulnerability to patterns of disadvantage.

In chapter 5, I explored the structure of the Court’s reasoning in great detail. From this analysis it was apparent that the majority judgments in the five controversial cases all failed to apply the impact analysis correctly. In *Hugo*, *Harksen*, and *Union of Refugee Women*, the majority offered no more than one or two cursory paragraphs on the impact of the discrimination on single fathers, spouses, and refugees respectively, contrasted with their more detailed analysis of the justification for the discrimination. In *Jordan* and *Volks*, the

---

<sup>11</sup> Above n 2 [54].

<sup>12</sup> See Cathi Albertyn and Beth Goldblatt, ‘Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality’ (1998) 14 SAJHR 248, 261–66; Henk Botha, ‘Equality, Dignity, and the Politics of Interpretation’ (2004) 19 SAPL 724, 731; Catherine Albertyn, ‘Substantive Equality and Transformation in South Africa’ (2007) 23 SAJHR 253–276; Elsje Bonthuys, ‘Institutional Openness and Resistance to Feminist Arguments: The Example of the South African Constitutional Court’ (2008) 20 CJWL 1, 17–21.

<sup>13</sup> Botha *ibid* 731.

<sup>14</sup> Chapter 5, text to n 65ff.

impact analysis was added seemingly as an afterthought, coming well after the Court had already concluded that the discrimination was justified.

This cursory analysis generally failed to offer anything approaching a fully contextualised assessment of impact. The majority judgments in *Harksen* and *Volks* have been rightly criticised for failing to look beyond the privileged position of the individual litigants—a white, middle class woman and a white, wealthy socialite—to assess the impact of the discrimination on more vulnerable women.<sup>15</sup> In this way, the majority judgments showed little concern for the impact on the broader disfavoured group. In addition, the majority judgments in *Hugo* and *Union of Refugee Women* recognised that the affected groups experienced existing patterns of group disadvantage, but made no attempt to explore the connection between the discrimination and this disadvantage. As a consequence, this impact analysis took place in a contextual vacuum.

In contrast, the dissenting judgments in these five cases generally made the impact analysis central to the unfairness enquiry and contextualised it appropriately, reaching the conclusion that the discrimination had a severe impact that would perpetuate existing patterns of group disadvantage. In this light, the gap between the Court's aim of preventing group disadvantage and the outcomes reached in these cases could be addressed, in part, by ensuring greater fidelity to the established impact analysis. That would be a good start, but the Court's doctrinal errors reflect deeper problems.

Some have suggested that these errors reflect the gender composition of the Court<sup>16</sup> and the judges' lack of awareness and sensitivity.<sup>17</sup> The fact that four of the five controversial

---

<sup>15</sup> See Evadné Grant and Joan Small, 'Disadvantage and Discrimination: The Emerging Jurisprudence of the South African Constitutional Court' (2000) 51 NILQ 174, 192; Albertyn, 'Substantive Equality and Transformation' (n 12) 265–68; Marius Pieterse, 'Finding for the Applicant? Individual Equality Plaintiffs and Group-Based Disadvantage' (2008) 24 SAJHR 397, 408–409; Bonthuys (n 12) 20.

<sup>16</sup> The Constitutional Court has never had more than two women out of the eleven judges.

<sup>17</sup> See, for example, Bonthuys (n 12) 30–33; Sandra Fredman, 'Gender and Transformation in the South African Constitutional Court' in Oscar Vilhena, Upendra Baxi and Frans Viljoen (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (PULP 2013) 246.

cases involved gender discrimination and that the two women judges were consistently in dissent<sup>18</sup> lends support to this view. No doubt, appropriate interventions are needed to address the gender imbalance on the Court and to improve judicial education.<sup>19</sup> However, these are subjects which fall beyond the scope of this thesis.

Problems of judicial diversity and awareness aside, there are flaws in the Court's application of the impact analysis that can be addressed more immediately. These errors occur in the handling of evidence and argument on the impact, and the type of arguments that the Court makes in denying impact.

### 8.2.2 Errors of Proof

Presenting a fully contextualised impact analysis is a difficult and evidence-intensive task. As Cathi Albertyn and Beth Goldblatt explain, this requires judges 'to step outside their own experiences and critically consider situations that are either not before them or that they may not have previously encountered.'<sup>20</sup>

As a court of final instance in an adversarial adjudicative system, the Constitutional Court's ability to gather and consider information on the impact of discrimination is constrained.<sup>21</sup> As a result, the chances of the Court presenting a fully contextualised impact analysis are significantly improved where complainants and amici curiae<sup>22</sup> present meticulously planned cases supported by extensive evidence and argument. This reality is

---

<sup>18</sup> With the exception of *Hugo*, O'Regan and Mokgoro JJ were together in dissent in each of the five controversial cases. See further Bonthuys (n 12) 31. Sachs J joined them in *Harksen*, *Jordan*, and *Vols*.

<sup>19</sup> Bonthuys *ibid* 32–33. See further Catherine Albertyn, 'Judicial Diversity' in Cora Hoexter and Morné Olivier (eds), *The Judiciary in South Africa* (Juta 2014).

<sup>20</sup> Albertyn and Goldblatt, 'Facing the Challenge' (n 12) 261.

<sup>21</sup> See generally Hugh Corder and Jason Brickhill, 'The Constitutional Court' in Cora Hoexter and Morné Olivier (eds), *The Judiciary in South Africa* (Juta 2014).

<sup>22</sup> On the role of amici in constitutional litigation in South Africa, see Geoff Budlender, 'Amicus Curiae' in Stuart Woolman and others (eds), *Constitutional Law of South Africa* (2nd edn, Juta 2008).

reflected in the Court's celebrated line of sexual orientation decisions. These cases were part of a carefully strategised litigation campaign that employed some of South Africa's leading counsel.<sup>23</sup> The cases were litigated in a sequence, starting with the challenge to the criminalisation of sodomy,<sup>24</sup> working through a host of discriminatory laws that denied benefits to same-sex couples, and culminating in the same-sex marriage challenge in *Fourie*.<sup>25</sup> As a result, the Constitutional Court was incrementally made aware of the plight of gay and lesbian people and accumulated layers of case law acknowledging the serious impact of discrimination on these groups.

In contrast, the complainants in the Court's five controversial cases did not display the same degree of strategic and evidential nous. In *Hugo, Harksen, and Union of Refugee Women*, the Court was offered limited evidence and argument on the broader impact of the discrimination. In *Jordan* there was copious evidence, largely supplied by the amici, but the complainants' case had serious shortcomings. The unfair discrimination challenge was one of five separate challenges to the criminalisation of prostitution and was never developed fully in the complainants' submissions.<sup>26</sup> *Volks* was the only instance of a well-constructed case, supported with extensive evidence, buttressed by amici submissions. However, the complainant's relatively privileged position proved to be a liability, as the majority failed to look beyond her circumstances to consider the position of other women in cohabitation relationships in any depth.

---

<sup>23</sup> For further discussion of the litigation strategy in these cases, see Jonathan Berger, 'Getting to the Constitutional Court on Time: A Litigation History of Same-Sex Marriage' in Melanie Judge, Shaun de Waal and Anthony Manion (eds), *To Have and To Hold: The Making of Same-Sex Marriage in South Africa* (Fanele 2008); Gilbert Marcus and Steven Budlender, *A Strategic Evaluation of Public Interest Litigation in South Africa* (The Atlantic Philanthropies 2009) 28–43.

<sup>24</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) (*Sodomy Case*).

<sup>25</sup> *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC) (*Fourie*).

<sup>26</sup> See *Jordan*, complainants' submissions [29]–[32] (on file with author).

All of this offers a partial explanation for why the majority judgments failed to provide a proper impact analysis in these cases, but it does not justify these failures. In all five cases, the majority could and should have done more to apply the presumption of unfairness, to consider the available evidence and argument, and to gather further evidence of impact.

### **(a) The Presumption of Unfairness**

The first error, evident in *Hugo*, *Jordan*, and *Volks*, is that the Court has not given proper effect to the Constitution's presumption of unfairness in its impact analysis. Section 9(5) of the Constitution provides that discrimination on the listed grounds 'is unfair unless it is established that the discrimination is fair.'<sup>27</sup> The Constitutional Court holds that this creates a rebuttable presumption of unfairness,<sup>28</sup> placing the burden on the state (or any other party seeking to uphold the discriminatory law or action)<sup>29</sup> to defend the discrimination.<sup>30</sup> This has implications for how the Court should assess both the impact of the discrimination and its justification. I will address its implications for the justification analysis in the next section.<sup>31</sup> For present purposes, its effect on the impact analysis is that the Court should presume that discrimination on listed grounds threatens to entrench a pattern of group disadvantage unless the state proves otherwise on a balance of probabilities.<sup>32</sup>

---

<sup>27</sup> Section 8(4) of the interim Constitution also contained a presumption of unfairness. For ease of reference, I will talk of the s 9(5) presumption even though some of the decisions discussed here were decided under s 8 of the interim Constitution.

<sup>28</sup> *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) [36] (Langa DP).

<sup>29</sup> In the rest of this chapter, I will refer to the state, remaining mindful that other parties can also defend discriminatory laws and state actions.

<sup>30</sup> See further Catherine Albertyn and Beth Goldblatt, 'Equality' in Stuart Woolman and others (eds), *Constitutional Law of South Africa* (2nd edn, Juta 2008) s 35.7 (OS 03-07).

<sup>31</sup> See text to n 158ff and text to n 198ff.

<sup>32</sup> Rósaan Krüger, 'Equality and Unfair Discrimination: Refining the *Harksen* Test' (2011) 128 SALJ 479, 505.

There are good reasons for shifting the burden of proof to the state in the impact analysis. As the Court has acknowledged, discrimination on the basis of the listed grounds has a strong likelihood of entrenching patterns of group disadvantage,<sup>33</sup> with the result that the Court should err on the side of declaring this discrimination to be unfair. The presumption also assists litigants in overcoming the significant burden of proving the full impact of the discrimination. Few litigants will have the resources to tender extensive evidence showing that the discrimination has a severe impact on the broader group that will entrench a pattern of group disadvantage. In contrast, the state has the resources to contest the impact of discrimination and it should be required to bring these resources to bear on the issue. This presumption will not entirely relieve complainants of the burden of presenting evidence, as they will still need to contest the state's claims. Furthermore, where discrimination occurs on analogous grounds, the complainants will also bear the burden of establishing impact. Nevertheless, the presumption of unfairness offers an important aid to assessing the impact of discrimination on listed grounds. The majority judgments in *Hugo*, *Jordan*, and *Volks* ignored this presumption.

In *Hugo* and *Volks*, the majority accepted that there was discrimination on listed grounds, while in *Jordan* the majority was at least prepared to assume this for the sake of argument. In all three cases, there was no direct contestation of the impact of the discrimination.<sup>34</sup> In fact, as I will discuss below, in *Jordan* and *Volks* all parties effectively conceded that the discrimination was unfair.<sup>35</sup> As a result, the presumption of unfairness ought to have led the Court to presume that there was an impact that threatened to entrench existing patterns of gender disadvantage.

---

<sup>33</sup> *Harksen* (n 2) [50] (Goldstone J).

<sup>34</sup> See parties' submissions in *Hugo*, *Jordan*, and *Volks* (on file with author).

<sup>35</sup> See text to nn 162–170.

The Court's resistance to applying the presumption of unfairness may have been motivated by the fear that the presumption could turn into an obstacle to affirmative action. However, the Court has since developed the separate *Van Heerden*<sup>36</sup> test for legitimate affirmative action which is free from this presumption.<sup>37</sup> The consequence is that the Court should now give section 9(5) its full effect in unfair discrimination cases. In this way, the *Van Heerden* test should be seen as a safeguard and an affirmation of a more consistent and stringent *Harksen* test.

### **(b) Available Evidence and Argument**

A second error is that the Court has often ignored evidence or argument of impact without good reason. In *Jordan* and *Volk*s, the Court ought to have applied the presumption of unfairness. Even without this presumption, the complainants and amici provided the Court with ample evidence and argument demonstrating the impact.

In *Jordan*, the Commission for Gender Equality, an independent institution created under Chapter 9 of the Constitution to promote gender equality,<sup>38</sup> appeared as an amicus. The Commission presented extensive argument on how the discriminatory criminalisation of prostitution further stigmatised women.<sup>39</sup> In their joint minority judgment, Sachs and O'Regan JJ made extensive reference to these submissions, noting the Commission's special constitutional role and its expertise.<sup>40</sup> In contrast, Ngcobo J, writing for the majority

---

<sup>36</sup> *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC).

<sup>37</sup> See further, chapter 5, text to n 132.

<sup>38</sup> Constitution, section 187.

<sup>39</sup> *Jordan*, Commission for Gender Equality's submissions [69], [88]–[101] (on file with author).

<sup>40</sup> *Jordan* (n 3) [63], [70].

dismissed all concerns over stigma in two paragraphs, without once referring to the Commission's uncontested submissions.<sup>41</sup>

In *Volks*, the majority at least offered reasons for not considering the evidence and argument before it, although these reasons were deeply problematic. The Centre for Applied Legal Studies, appearing as an amicus, presented copious evidence and argument on the impact of excluding cohabiting couples from the Maintenance of Surviving Spouses Act.<sup>42</sup> At the heart of their submissions was a report based on interviews with 68 women from poor areas living in cohabitation relationships.<sup>43</sup> The report also included census statistics on the number of cohabiting couples in the country, information on the gendered nature of poverty in South Africa, and argument showing that women's weaker economic position and childcare responsibilities often produce dependency, resulting in destitution on the death of their partners. Skweyiya J, writing for the majority, invoked the Constitutional Court Rules on the admission of documentary evidence to dismiss the report.<sup>44</sup> He held that the report did not satisfy the requirements of being 'common cause or otherwise incontrovertible or 'of an official, scientific, technical or statistical nature capable of easy verification.' The flaw in this argument was that none of the parties objected to the report being admitted and the findings were not in dispute.<sup>45</sup> Furthermore, even if the qualitative evidence was inadmissible under Rule 31, the statistical evidence was certainly admissible and was a more than sufficient basis to draw inferences as to the impact of the discrimination on women in

---

<sup>41</sup> *ibid* [16]–[17].

<sup>42</sup> 27 of 1990.

<sup>43</sup> *Volks*, Centre for Applied Legal Studies' founding affidavit annexure BG 7 (on file with author). The report was published as Beth Goldblatt, 'Regulating Domestic Partnerships—A Necessary Step in the Development of South African Family Law' (2003) 120 SALJ 610.

<sup>44</sup> *Volks* (n 4) [31]–[35].

<sup>45</sup> *Volks*, Centre for Applied Legal Studies' supplementary submissions [20]–[24]; executor's supplementary submissions [22] (on file with author).

cohabitation relationships.<sup>46</sup> As a result, the majority's refusal to admit the report was certainly wrong and produced a judgment that failed to give proper consideration to the impact.

### **(c) The Proactive Approach**

In contrast with *Volks* and *Jordan*, there was a genuine lack of evidence of the impact of the discrimination in *Hugo*, *Harksen*, and *Union of Refugee Women*. However, the majority judgments failed to adopt the more proactive approach to information-gathering that is necessary to prevent and address patterns of group disadvantage.

As argued above, few litigants in South Africa have access to the legal expertise and resources necessary to demonstrate the full impact of discrimination. As other commentators have suggested,<sup>47</sup> this requires the Court to take a more active role in gathering evidence and managing submissions to expose this impact, working within its institutional constraints. This would not entail a pro-complainant bias. Instead, this proactive approach is a necessary acknowledgement that the aim of combating patterns of group disadvantage cannot be achieved through judicial passivity. It also does not necessarily require the development of new fact-finding procedures, but it does require the better use of existing mechanisms.

In many cases, this proactive approach will require the greater use of judicial notice. This was certainly necessary in *Hugo*, the challenge to the President's decision to release mothers of young children from jail. The complainant, Mr Hugo, was indigent and had no legal representation in launching his High Court application.<sup>48</sup> As a result, his pleadings were rudimentary and did little to expose the broader impact of the discrimination. His argument

---

<sup>46</sup> Bonthuys (n 12) 19–20.

<sup>47</sup> Albertyn and Goldblatt, 'Facing the Challenge' (n 12) 261; Pieterse (n 15) 423–24.

<sup>48</sup> See *Hugo*, complainant's founding affidavit and supplementary affidavit in the High Court (on file with author). He was later assisted by court-appointed counsel.

for the unfairness of the discrimination hinged on the blunt assertion that ‘[i]f I was a female I would have qualified for the [pardon].’<sup>49</sup> In the Constitutional Court, the majority and minority judgments both engaged in some proactive analysis of the impact. The judges took judicial notice of the fact that women have borne the brunt of childcare responsibilities and also acknowledged that stereotypes about parenting roles have entrenched this pattern of disadvantage.<sup>50</sup> However, the majority bluntly dismissed any notion that the President’s reliance on such stereotypes in justifying the discrimination would contribute to this pattern of disadvantage.<sup>51</sup> As I will argue below, this showed a flawed understanding of the connection between state actions and the perpetuation of stereotyping in society, but at least the majority showed some willingness to take a proactive approach in assessing evidence of impact.

In contrast with *Hugo*, the majority in *Union of Refugee Women* displayed no willingness to investigate the impact of the discrimination in any depth. Apart from general statements about the vulnerability of refugees,<sup>52</sup> the majority did not consider how refugees were affected by the barrier to employment in the private security industry. While the complainants did not present forceful evidence or argument on this point, there was more than sufficient basis for the Court to take judicial notice of this impact. Annexed to the complainants’ pleadings was a national survey of refugee employment patterns that indicated that almost twenty per cent of all economically active refugees in South Africa were employed in the private security industry.<sup>53</sup> The Court ought to have taken judicial notice of the economic vulnerability of refugees and inferred from the national survey that the

---

<sup>49</sup> *Hugo*, complainant’s supplementary affidavit in the High Court [7] (on file with author).

<sup>50</sup> *Hugo* (n 1) [39] (Goldstone J); [80] (Kriegler J); [93] (Mokgoro J).

<sup>51</sup> *ibid* [113] (O’Regan J).

<sup>52</sup> *Union of Refugee Women* (n 5) [28]–[31].

<sup>53</sup> Community Agency for Social Enquiry (CASE), *National Refugee Baseline Survey 2003* (CASE 2003).

discrimination threatened to compound refugees' economic exclusion. Mogkoro and O'Regan JJ did just this in their joint dissenting judgment.<sup>54</sup>

As *Hugo* and *Union of Refugee Women* demonstrate, greater use of judicial notice will often be necessary to expose the broader impact of the discrimination. However, judicial notice will always be a slippery and unstable basis for the impact analysis, subject as it is to the experience and empathy of the individual judges.<sup>55</sup> An alternative form of proactive information-gathering is for the Court to give greater direction to the parties on the type of evidence and argument that is needed to determine the impact of the discrimination.

There are several avenues open to the Constitutional Court to obtain further evidence and argument to assist its impact analysis. The Court has the power to issue directions calling for further submissions and evidence,<sup>56</sup> as it has done in a number of cases raising discrimination issues.<sup>57</sup> It may also postpone the matter to allow time for amici to be admitted to provide further evidence and argument on the issues. In appropriate cases, the Court may also remit the matter back to the High Court for the hearing of further evidence.<sup>58</sup>

The Constitutional Court and lower courts may also need to raise issues of unfair discrimination themselves where they are apparent on the papers but have not been addressed by the parties.<sup>59</sup> Arguably this approach was needed in *Harksen* where the Court considered the constitutionality of divesting solvent spouses of their property where one

---

<sup>54</sup> *Union of Refugee Women* (n 5) [122].

<sup>55</sup> Albertyn, 'Substantive Equality and Transformation' (n 12) 274.

<sup>56</sup> Rule 32(2) of the Constitutional Court Rules: the Court or the Chief Justice may give any directions they consider 'just and expedient'.

<sup>57</sup> See, for example, *Kbosa v Minister of Social Development* 2004 (6) SA 505 (CC) [12]; *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) fn 10; *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC) [53].

<sup>58</sup> See Rule 21(1)(c)(v) of the Constitutional Court Rules. However, in *Kbosa* ibid [24], the Court cautioned that this may draw out proceedings, causing greater hardship for indigent complainants.

<sup>59</sup> See further *Matatiele Municipality v President of the Republic of South Africa* 2006 (5) SA 47 (CC) [68] (Ngcobo J); *S v Thunzi* 2011 (3) BCLR 281 (CC) [70] (Skweyiya J).

spouse is declared insolvent. The case was litigated as one of discrimination on the basis of ‘solvent spousehood’,<sup>60</sup> a curious diversion from what ought to have been the primary concern with this law: its indirect discrimination against married women. The minority judgments clearly strained at this restriction, as they signalled that the discrimination had a deeper gender dimension that they were prevented from addressing.<sup>61</sup> The Court could have raised the issue of indirect gender discrimination and called for further evidence and submissions on this point, throwing the matter open to amicus interventions that would have allowed the Court to gain a deeper understanding of the impact.

Given the range of options available to the Court to obtain further evidence and argument, there was no good reason for its cursory examination of the impact in the five controversial cases. A more proactive approach to evidence-gathering in future will do much to advance the aim of preventing and addressing patterns of group disadvantage. In time, this may also require the development of new judge-led evidence-gathering procedures, a topic best left for another time.<sup>62</sup> However, better gathering and handling of evidence and argument will not be enough if the Court does not also address significant conceptual problems that arose in the five controversial cases.

### 8.2.3 Conceptual Errors

The Court has repeatedly failed to grasp or has misapplied key concepts in its impact analysis with the result that it has overlooked the full impact of the discrimination. Four errors were most prominent in the majority judgments: a) the Court’s failure to engage with the

---

<sup>60</sup> *Harksen*, complainant’s submissions [56] (on file with author); *Harksen* (n 2) [62] (Goldstone J).

<sup>61</sup> *Harksen* *ibid* [96] (O’Regan J); [121] (Sachs J).

<sup>62</sup> For some proposals, see Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) ch 5; James Fowkes, ‘How to Open the Doors of the Court—Lessons on Access to Justice from Indian PIL’ (2011) 27 SAJHR 434. For a more wary view, see Sunil Khilnani, Vikram Raghvan and Arun Thiruvengadam, ‘Revisiting the Role of the Judiciary in Plural Societies’ in Sunil Khilnani, Vikram Raghvan and Arun Thiruvengadam (eds), *Comparative Constitutionalism in South Asia* (OUP 2012).

intersectional nature of group disadvantage; b) its problematic understanding of choice; c) its occasional denial of the connection between state actions and societal attitudes; and d) its failure to distinguish the impact analysis from an analysis of whether other rights have been infringed.

### **(a) Intersectionality**

As discussed in chapter 5, the Court has adopted an intersectional understanding of discrimination, as it recognises that discrimination can occur on a combination of grounds.<sup>63</sup> Awareness of intersectionality—the recognition that groups overlap and intersect, producing diverse experiences of discrimination<sup>64</sup>—must also extend to the unfairness analysis. This requires the Court to investigate how discrimination impacts disfavoured group members differently as a consequence of their complex identities.<sup>65</sup> For example, in assessing the impact of discrimination on the basis of marital status, the Court should not treat the disfavoured group as a homogenous whole. Given the historical association between women’s disadvantage and marital status<sup>66</sup> and the broader patterns of racialised and gendered poverty in South Africa, the Court must, at the very least, explore how discrimination on the basis of marital status impacts women and poor, black women in particular.

---

<sup>63</sup> Chapter 5, text to nn 52–55.

<sup>64</sup> See Kimberlé Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ [1989] U Chi Legal F 139, one of the earliest and most forceful applications of intersectionality theory to discrimination law. See further Saras Jagwanth, ‘What is the Difference? Group Categorisation in *Pretoria City Council v Walker* 1998 (2) SA 363 (CC)’ (1999) 15 SAJHR 200, 206–207; Catherine Albertyn, ‘Equality’ in Elsje Bonthuys and Cathi Albertyn (eds), *Gender, Law and Justice* (Juta 2007) 105–107; Bonthuys (n 12) 26–29; Pieterse (n 15) 405–408.

<sup>65</sup> Albertyn *ibid* 106. This impact analysis differs from the indirect discrimination enquiry, which simply assesses whether members of protected groups have been affected disproportionately to other groups.

<sup>66</sup> Discussed in *Brink v Katsboff NO* 1996 (4) SA 197 (CC) [44] (O’Regan J); *Harksen* (n 2) [95]–[96] (O’Regan J); *Volk* (n 4) [107]–[111] (Mokgoro and O’Regan JJ).

The Court's failure to grasp intersectionality was particularly pronounced in *Harksen*, *Volks*, and *Jordan*. In *Harksen*, the majority's brief treatment of the impact showed a tendency to treat the complainant as being representative of all members of the disfavoured group. Goldstone J suggested that divesting solvent spouses of their property when their spouses are declared insolvent had a trivial impact, as solvent spouses could regain ownership of their property by bringing a court application proving ownership and by providing security.<sup>67</sup> He swiftly dismissed the costs and difficulties of doing so as 'the kind of inconvenience and burden that any citizen may face when resort to litigation becomes necessary.'<sup>68</sup> Marius Pieterse comments that this may have been true of Mrs Harksen, a 'rich, white and flamboyant wife of a controversial businessman with access to a team of lawyers'.<sup>69</sup> However, as O'Regan J suggested in her minority judgment, this was certainly not true of the majority of spouses.<sup>70</sup> The Court's refusal to see this was partly a product of the facts before it. As Albertyn and Goldblatt point out, if the complainant had been a poor, black, woman business-owner, whose stock and equipment had been taken from her, the majority may have taken a very different view of the impact of the discrimination.<sup>71</sup> However, the majority's failure to consider such a possibility and to assess the impact on more vulnerable women revealed a deeper failure to grasp intersectionality.<sup>72</sup>

In *Volks* and *Jordan*, lack of awareness of intersectionality was evident in the majority's sweeping generalisations about the choices available to the disfavoured groups. In *Volks*, Ngcobo J, writing with the support of the majority, shrugged off any concern for the impact

---

<sup>67</sup> *Harksen* ibid [68].

<sup>68</sup> ibid.

<sup>69</sup> Pieterse (n 15) 408.

<sup>70</sup> *Harksen* (n 2) [98]–[100].

<sup>71</sup> Albertyn and Goldblatt, 'Facing the Challenge' (n 12) 263.

<sup>72</sup> Bonthuys (n 12) 29; Pieterse (n 15) 406, 408.

of the discrimination against unmarried couples with the blunt statement that they had chosen not to marry and could not complain that they were denied the legal benefits of marriage.<sup>73</sup> This ignored the fact that for many women, particularly those living in poverty, this choice is tightly circumscribed by their circumstances. As Sachs J put it, the only choice available to many women is ‘between destitution, prostitution and loneliness, on the one hand, and continuing cohabitation with a person who was unwilling or unable to marry them on the other.’<sup>74</sup> Furthermore, even where both partners exercise a choice not to marry, many would not realise that this would disentitle them to benefits such as maintenance on the death of their partner.<sup>75</sup>

In *Jordan*, Ngcobo’s J treatment of choice was as cursory as his analysis in *Volsks*. There he held that any stigma caused by criminalising prostitutes but not their clients was of no concern as prostitutes had voluntarily exposed themselves to this stigma by choosing to sell sex.<sup>76</sup> Again there was no attempt to explore the constrained choices facing women who enter into prostitution, particularly women in poverty.<sup>77</sup>

Many have suggested that the Constitutional Court’s failure to take an intersectional view of the impact of discrimination can be traced to its use of the grounds of discrimination.<sup>78</sup> The grounds, it is argued, tend to narrow the focus of the impact analysis to the experience of discrete, homogenous groups. The Court has a tendency to focus the

---

<sup>73</sup> *Volsks* (n 4) [91]–[92]. In a brief aside, Ngcobo J accepted that some may face constrained choices, but he attached no significance to this ([94]).

<sup>74</sup> *ibid* [225].

<sup>75</sup> See further L’Heureux-Dubé J’s dissent in *Nova Scotia (Attorney General) v Walsh* [2002] 4 SCR 325 [157] (*Walsh*).

<sup>76</sup> *Jordan* (n 3) [16].

<sup>77</sup> See further Rósaan Krüger, ‘Sex Work from a Feminist Perspective: A Visit to the *Jordan* Case’ (2004) 20 SAJHR 138, 141–44, 148–49.

<sup>78</sup> Jagwanth (n 64) 205–207; Bonthuys (n 12) 26–29; Pieterse (n 15) 419–20. This has also been a concern in the Canadian literature. See, for example, Nitya Duclos, ‘Disappearing Women: Racial Minority Women in Human Rights Cases’ (1993) 6 CJWL 25; Dianne Pothier, ‘Connecting Grounds of Discrimination to Real People’s Real Experiences’ (2001) 13 CJWL 37.

impact analysis on a single ground<sup>79</sup> or to break up intersectional discrimination claims into discrete, disconnected enquiries into the impact of the discrimination on each of the implicated grounds.<sup>80</sup> For some, the solution to this is to dispense with the grounds analysis entirely.<sup>81</sup> However, most commentators take a more moderate view, accepting that the problem here is not with the grounds, but with their application.<sup>82</sup> Where unfair discrimination claims are framed in terms of a single ground, this does not necessarily limit the Court's ability to explore how this discrimination impacts on different members of the disfavoured group in light of their intersecting identities. Furthermore, the grounds do not necessitate parcelling out intersectional claims of discrimination into discrete impact enquiries. The real problem with the Court's application of the grounds is its failure fully to grasp intersectionality. A proper understanding of intersectionality should lead the Court to treat the grounds as entry-points to an intersectional analysis of the impact rather than as analytical blinkers.<sup>83</sup> I will briefly return to this idea in the next chapter in discussing how the Court ought to use the grounds in applying the *Harksen* test.

## **(b) Choice**

The majority's choice-based argument in *Volks* and *Jordan* were problematic for reasons beyond the failure to grasp intersectionality. Not only was the majority wrong in claiming that most unmarried couples and prostitutes exercise a meaningful choice, but the basic premise underpinning the argument is fallacious. This premise, baldly stated, is that if a

---

<sup>79</sup> See *Brink* (n 66) [43] (O'Regan J), where the Court chose to focus solely on the gender dimension of the discrimination, rather than considering the intersection between gender and marital status.

<sup>80</sup> See, for example, *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) where the Court considered the impact of discrimination on women and extra-marital children separately.

<sup>81</sup> L'Heureux-Dubé J's minority judgment in *Egan v Canada* [1995] 2 SCR 513 [81]–[84] is one of the most forceful articulations of this position.

<sup>82</sup> See, for example, Pieterse (n 15) 420; Bonthuys (n 12) 26–27.

<sup>83</sup> Pieterse *ibid*; Duclos (n 78) 50; Pothier (n 78) 40–45.

person has elected to suffer the impact of discrimination, then there is no impact worthy of consideration. The minority judgments in *Jordan*<sup>84</sup> and *Volks*<sup>85</sup> both presented responses to this premise. Commentators have also offered various critiques.<sup>86</sup> All make heavy work of a simple point: the availability of a choice to avoid the impact of discrimination does not remove the impact or reduce its potential to perpetuate patterns of group disadvantage.<sup>87</sup> The fact that a person has elected not to marry has no bearing on whether he or she will experience socio-economic destitution on his or her partner's death. In the same way, stigma is wounding irrespective of whether a person has chosen to become a prostitute. The choice to brave the harms of discrimination (if the choice is in fact real) may reflect admirable stoicism. We may even think that the absence of a choice to avoid the harmful consequences of discrimination adds an additional harm to the broader impact.<sup>88</sup> But the presence of choice does not diminish the destitution, stigma, or other disadvantages a person may experience or make it any less likely that this will entrench a broader pattern of group disadvantage.<sup>89</sup>

As Denise Réaume argues,<sup>90</sup> the added problem with this type of choice-based argument is that it deflects attention away from the state's responsibility to address disadvantage. In *Volks* and *Jordan*, the Court conveniently shifted the blame to the

---

<sup>84</sup> Above n 3 [66], [68] (O'Regan and Sachs JJ). However, O'Regan and Sachs JJ also appeared to adopt some of this fallacious choice-based reasoning in the majority judgment, see in particular [66], [74].

<sup>85</sup> Above n 4 [154]ff (Sachs J).

<sup>86</sup> See, for example, Henk Botha, 'Equality, Plurality and Structural Power' (2009) 25 SAJHR 1, 18–20; Bonthuys (n 12) 23–26; Pieterse (n 15) 409–411.

<sup>87</sup> See further Ruth Colker, 'Pornography And Privacy: Towards The Development Of A Group Based Theory For Sex Based Intrusions Of Privacy' (1983) 1 L & Ineq 191, 218–22.

<sup>88</sup> However, the availability of a choice to avoid discrimination can be a harm in itself where the choice carries assimilationist pressure. See chapter 7, text to nn 62–67.

<sup>89</sup> See further *Brooks v Canada Safeway Ltd* [1989] 1 SCR 1219, 1238 (Dickson CJ); *Lavoie v Canada* [2002] 1 SCR 769 [5] (McLachlin CJ and L'Heureux-Dubé J) for similar arguments rejecting choice-based denials of impact.

<sup>90</sup> Denise Réaume, 'Dignity, Choice, and Circumstances' in Christopher McCrudden (ed), *Understanding Human Dignity* (OUP 2013) 539–40.

complainants for choosing in the way that they did, rather than focusing on the state's failure to extend legal protections to the unmarried and its role in entrenching stigma surrounding women's sexuality.

The majority's argument that choice vitiates impact is even more inexcusable given that the Court has rejected or ignored similar choice arguments in other cases. In the *Immigration Case*,<sup>91</sup> the Court swiftly dismissed the argument that same-sex couples were not discriminated against by being denied certain marital benefits because they had a choice to marry members of the opposite sex.<sup>92</sup> In *Daniels*,<sup>93</sup> *Hassam*,<sup>94</sup> and *Gumede*,<sup>95</sup> the fact that the complainants all had the notional choice to conclude civil marriages had no bearing on the Court's assessment of the impact of the discrimination on spouses in Muslim and African customary law marriages respectively.<sup>96</sup> Viewed in this light, the Court's selective use of choice-based arguments in *Jordan* and *Volks* points to a double standard at play, reflecting the Court's disdain for certain choices and those who make them. As Elsie Bonthuys puts it, the Court's use of choice appears to '[demarcate] the line between the "good" and the "undeserving"—between the Madonna and the whore who deserves the legal and social treatment that she currently receives'.<sup>97</sup> This idea that choice gives a reason to ignore the impact of discrimination needs to be rejected forcefully in all future cases.

There is an entirely different type of choice-based argument that is not impermissible in itself but is generally made badly and accepted all too readily. This is the argument that, in

---

<sup>91</sup> *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC).

<sup>92</sup> *ibid* [38].

<sup>93</sup> *Daniels v Campbell* NO 2004 (5) SA 331 (CC).

<sup>94</sup> *Hassam v Jacobs* NO 2009 (5) SA 572 (CC).

<sup>95</sup> *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC).

<sup>96</sup> The Court explicitly rejected the relevance of choice in *Daniels* (n 93) [25].

<sup>97</sup> Bonthuys (n 12) 24.

certain cases, discrimination may be necessary to preserve valuable choices. The Court gestured at this argument in *Volks* in suggesting that the discrimination was necessary to preserve couples' ability to choose the form and legal consequences of their relationship and to respect testamentary freedom.<sup>98</sup> This does not necessarily deny the impact of the discrimination. Instead, it implies that the impact of the discrimination is outweighed by the importance of preserving choices. This justification tends to blur into the Court's impact analysis. As a result, I will briefly address it here.

This choice-based justification can only succeed if the discrimination actually promotes valuable choices (it is suitable), if non-discriminatory means of preserving choice are either unavailable or undesirable (it is necessary), and if the choice-enhancing consequences of the discrimination actually outweigh its impact (it is proportional in the 'narrow sense').<sup>99</sup> In *Volks*, there were many choice-preserving alternatives to the blanket exclusion of the unmarried from spousal maintenance, such as extending spousal maintenance to cohabiting couples who have expressly undertaken reciprocal duties of support.<sup>100</sup> This analysis of alternatives was entirely absent in the majority judgment. The majority also had to show that the aim of preserving one partner's choice outweighs the harm of leaving the surviving partner destitute. As L'Heureux-Dubé J put it in her dissent in *Walsh*,<sup>101</sup> this was a case where 'one person's autonomy is another person's exploitation'. The majority in *Volks* failed to demonstrate why choice outweighed the impact of the discrimination and, in so doing, the judges failed to give any serious consideration to the aim

---

<sup>98</sup> *Volks* (n 4) [60] (Skweyiya J), [94] (Ngcobo J).

<sup>99</sup> Discussed further at text to n 184ff below.

<sup>100</sup> The option proposed by Mokgoro and O'Regan JJ in their dissenting judgment, *Volks* (n 4) [139].

<sup>101</sup> Above n 75 [152].

of preventing patterns of group disadvantage. This is a criticism that I will take up in the discussion of the justification analysis below.<sup>102</sup>

### **(c) State and Society**

The Court's failure to see how particular discriminatory laws and actions entrench existing patterns of group disadvantage has often stemmed from the denial that state actions shape societal attitudes. This was evident in *Jordan* and *Hugo*. In *Jordan*,<sup>103</sup> Ngcobo J suggested that any stigma resulting from the criminalisation of prostitutes was a result of society's views on prostitution rather than a product of the law. O'Regan and Sachs JJ pointed out the obvious error in this approach. While it is true that prejudice and stereotyping exists independently of the law, law is often 'constitutive of invidious social standards'.<sup>104</sup> In this case, the criminalisation of prostitutes but not their clients conveyed the strong message that prostitutes were more culpable than their clients,<sup>105</sup> reflecting and reinforcing the stigmatisation of women's sexuality. As a result, O'Regan and Sachs JJ concluded that it was artificial 'to say that the constitutional problem lies not in the law but in social values when the law serves to foster those values.'<sup>106</sup>

A similar mistake was made in *Hugo*. There the majority bluntly dismissed the idea that the President's reliance on the stereotype that mothers enjoy a special bond with children would perpetuate this stereotype and the disadvantage it has caused.<sup>107</sup> Given President Mandela's moral stature there was certainly the danger that his endorsement of this

---

<sup>102</sup> See text to nn 179–182 below.

<sup>103</sup> Above n 3 [16].

<sup>104</sup> *ibid* [72].

<sup>105</sup> *ibid*.

<sup>106</sup> *ibid*.

<sup>107</sup> *Hugo* (n 1) [113] (O'Regan J).

stereotype would, in some way, contribute to its perpetuation.<sup>108</sup> The majority's denial of this danger reflected an insufficiently nuanced view of the ways in which stereotypes persist in society and the role that leading public figures play in propagating these stereotypes.

As I discussed in chapter 6, the Court has often emphasised the 'educative' role that the state and the Constitution ought to play in shaping societal attitudes.<sup>109</sup> The Court's concerns over the messages expressed by discrimination are premised on this idea that state actions can profoundly shape societal attitudes for better or worse. The members of the Court have also invoked this educative role to legitimise decisions that go against the grain of prevailing public opinion.<sup>110</sup> In this light, the Court's denial of the connection between state actions and societal attitudes in *Hugo* and *Jordan* is antithetical to its own vision of social progress.

#### **(d) Impact and Rights Analysis**

The fourth conceptual problem is the Court's conflation of the impact analysis with an analysis of whether other legal rights have been violated. In both *Hugo* and *Union of Refugee Women*, the majority argued that the discrimination had no serious impact on the disfavoured groups because the interests affected enjoyed no free-standing constitutional or legal protection. In *Hugo*, the President's decision to pardon mothers but not single fathers was deemed to have a negligible impact on fathers because prisoners have no right to an early release.<sup>111</sup> In *Union of Refugee Women*, the Court reasoned that because the Constitution

---

<sup>108</sup> Above text to nn 48–51.

<sup>109</sup> Chapter 6, text to nn 124–126.

<sup>110</sup> Pius N Langa and Edwin Cameron, 'The Constitutional Court and the Supreme Court of Appeal after 1994' (2010) 23 *Advocate* 28, 32; Edwin Cameron, 'What You Can Do with Rights' [2012] *EHRLR* 148, 150, describing how constitutional rights should serve as a 'corrective of public irrationality'. See further Max du Plessis, 'Between Apology and Utopia: The Constitutional Court and Public Opinion' (2002) 18 *SAJHR* 1.

<sup>111</sup> *Hugo* (n 1) [47].

confines the right to choose an occupation to citizens,<sup>112</sup> refugees had no cause for complaint in being denied the opportunity to register as private security guards using the regular procedures.<sup>113</sup>

These arguments misunderstand the nature of the impact analysis. The focus of this impact analysis is on the severity of the harms to the disfavoured group and whether this will create or entrench a broader pattern of group disadvantage. The fact that the underlying interest affected—securing an early release or getting a job as a security guard—is not independently protected does not mean that harms to these interests will not entrench patterns of group disadvantage.<sup>114</sup> Where constitutional or other legal rights are affected, this may lend greater gravity to this impact, but their absence does not give reason to ignore the impact.

#### **8.2.4 Is Dignity to Blame?**

For many commentators, the Court's failure to apply the impact analysis correctly in the five controversial cases can be traced to human dignity. Some blame the inconsistency in the Court's application of the impact analysis on dignity's indeterminacy, as it is argued that dignity gives judges a licence to reach whatever conclusion they feel is appropriate in the circumstances.<sup>115</sup> Others argue that the close association between dignity and subjective feelings has led the Court to focus on the impact of discrimination on individual

---

<sup>112</sup> Constitution, s 22.

<sup>113</sup> *Union of Refugee Women* (n 5) [54].

<sup>114</sup> cf Anton Fagan, 'Dignity and Unfair Discrimination: A Value Misplaced and a Right Misunderstood' (1998) 14 SAJHR 220, who conflates unfair discrimination with the violation of other constitutional rights or constitutionally protected interests.

<sup>115</sup> Dennis Davis, 'Equality: The Majesty of Legoland Jurisprudence' (1999) 116 SALJ 398, 413; Albertyn, 'Equality' (n 64) 107–109, 111; Rory O'Connell, 'The Role of Dignity in Equality Law: Lessons from Canada and South Africa' (2008) 6 ICON 267, 279, 283.

complainants rather than the impact on the broader disfavoured group.<sup>116</sup> In the same vein, the Court's failure to take an intersectional view of this impact is often attributed to dignity, as it is thought that dignity concentrates attention on the complainants' circumstances.<sup>117</sup> Some also argue that dignity is bound up with an impoverished understanding of choice, producing the problematic choice-based arguments we have seen above.<sup>118</sup> As a result, many have suggested that removing human dignity from the *Harksen* test or radically reconceptualising dignity may help to address these flaws.<sup>119</sup>

As I argued in the previous chapter, I agree that the Court should remove human dignity from the *Harksen* test. However, this would not do much to fix the flaws that we have seen in the Court's impact analysis. My point of disagreement with other commentators is that I doubt that human dignity has played such a substantial role in the Court's reasoning as many suggest.

As I demonstrated in chapter 5, the majority judgments never invoked a particular concept or conception of human dignity within the impact analysis or any other part of the unfairness enquiry. In all of these judgments, dignity only appeared in the Court's conclusion on the fairness or unfairness of the discrimination and played no material role in its reasoning up to that point. As a result, there is little direct evidence that dignity has caused these flaws.

It is possible that unstated conceptions of human dignity may have exerted a subterranean influence on the judges' thinking, distorting their impact analysis in ways that were hidden from view. As I indicated in the previous chapter, there is evidence to suggest

---

<sup>116</sup> Botha, 'Politics of Interpretation' (n 39) 747; Pieterse (n 15) 421–22; Sandra Fredman, 'Facing the Future: Substantive Equality Under the Spotlight' in Ockert Dupper and Christoph Garbers (eds), *Equality in the Workplace: Reflections from South Africa and Beyond* (Juta 2009) 19–22. Discussed further in chapter 4, text to n 56ff.

<sup>117</sup> Pieterse *ibid* 422.

<sup>118</sup> Botha, 'Politics of Interpretation' (n 39) 744; Pieterse *ibid*; Bonthuys (n 12) 23; O'Connell (n 115) 279–80.

<sup>119</sup> See, for example, Albertyn and Goldblatt, 'Facing the Challenge' (n 12) 256–60; Botha, 'Politics of Interpretation' *ibid* 747–51; Pieterse *ibid* 421–22; O'Connell *ibid* 284–86.

that this is why the Court has given so much attention to prejudice and stereotyping in its judgments. However, without more concrete evidence, it is difficult to determine whether and to what extent dignity is responsible for the other flaws in the impact analysis that have been attributed to it.

The Supreme Court of Canada's post-*Kapp*<sup>120</sup> case law gives further reason to doubt the link between human dignity and these problems in the South African Court's impact analysis. In *Withler*<sup>121</sup> and *Quebec v A*,<sup>122</sup> the two most significant judgments applying the dignity-free *Kapp* test, the Canadian Court repeated many of the mistakes that we have seen in the South African Court's reasoning.

*Withler* shows that a dignity-free analysis of impact is still prone to being inconsistent, cursory, and decontextualized.<sup>123</sup> This case concerned an age discrimination challenge to a benefits scheme for surviving spouses and dependents of deceased public sector employees. These benefits included a lump-sum payment on the employee's death which was reduced by ten percent for every year the employee was over 65 (or 60 for members of the armed forces), terminating entirely after ten years. This payment was designed to assist with funeral costs and the medical expenses incurred before death, costs that were shown to rise with age.<sup>124</sup> However, the payment diminished and then disappeared when need was greatest. This affected elderly widows particularly severely, given the history of male-dominated public service employment. The Canadian Court applied the *Kapp* test, which involved determining whether the distinction on the basis of age discriminates by 'perpetuating disadvantage or

---

<sup>120</sup> *R v Kapp* [2008] 2 SCR 483.

<sup>121</sup> *Withler v Canada* [2011] 1 SCR 396.

<sup>122</sup> *Quebec (Attorney General) v A* [2013] 1 SCR 61.

<sup>123</sup> It is also noticeable for its flawed use of comparator analysis, see further Denise Réaume, 'Dignity, Equality, and Comparison' in Deborah Hellman and Sophia R Moreau (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013) 18–19.

<sup>124</sup> *Withler* (n 121) [75]–[76].

prejudice to the claimant group, or by stereotyping the group.<sup>125</sup> In their joint judgment, McLachlin CJ and Abella J stressed the need for a fully contextualised impact analysis:

The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group.<sup>126</sup>

However, this approach was not reflected in their application of the test as they offered a dry summary of the lower court's decision which contained little analysis of the impact and little context. McLachlin CJ and Abella J made no attempt to explore the particular situation of elderly widows, the heightened medical costs they faced, the current and historical patterns of disadvantage they experienced, or how the reduced lump sum payment compounded this disadvantage. This was despite extensive evidence and argument presented by the intervener, the Women's Legal Education and Action Fund, which urged the Court to consider the gendered dimension to the impact and presented extensive analysis of the patterns of disadvantage experienced by widows.<sup>127</sup> These deficiencies suggest that dispensing with dignity is no cure for inconsistent, decontextualized approaches to the impact analysis.

Problematic conceptions of choice were also evident in *Quebec v A*, the challenge to the exclusion of cohabiting heterosexual partners from certain legal consequences of marriage in Quebec. The Canadian Court split along numerous lines, but the majority ultimately dismissed the challenge. Le Bel J, writing for a minority of four judges, found that there was no discrimination. Five judges found that there was discrimination, but McLachlin CJ provided the crucial swing vote in finding that the discrimination was justified under section 1 of the Charter. Despite the many differences between their judgments, Le Bel J and McLachlin CJ were united by a similar attitude to choice. Both viewed the exclusion of

---

<sup>125</sup> *ibid* [71].

<sup>126</sup> *ibid* [39].

<sup>127</sup> Discussed further in Jennifer Koshan and Jonnette Watson Hamilton, 'Meaningless Mantra: Substantive Equality after *Wihbler*' (2011) 16 *Rev Const Stud* 31, 56–57.

cohabiting couples from the legal benefits of marriage as necessary to protect the choice not to marry.<sup>128</sup> Both provided little analysis of whether cohabiting couples really choose not to marry, whether that choice is made by both partners, and whether choice trumps the considerable impact of the exclusion from marital benefits. In this way, their analysis mirrored the flawed use of choice arguments seen in *Vols*. As Abella J argued,<sup>129</sup> this problematic understanding of choice repeated many of the errors displayed in Canadian Court's earlier decision on the rights of cohabiting couples in *Walsh*,<sup>130</sup> decided using the dignity-based *Law* test. The difference in *Quebec v A* was that dignity was no longer a part of the Court's analysis. This suggests that bad choice-based reasoning will not disappear simply by removing dignity from the test.

From what we have seen in the Canadian Court's post-*Kapp* case law thus far, dispensing with dignity is unlikely to do much to address the many flaws in the South African Court's impact analysis that I have outlined. Removing human dignity from the *Harksen* test is necessary, for the reasons outlined in chapter 7, but it will be no cure for these problems. The problems in the Court's impact analysis are diffuse and need to be addressed directly and on their own terms.

While the errors in the impact analysis are significant, they are not the only area of concern in the Court's unfairness enquiry. I will now go on to highlight the flaws in the justification analysis.

### 8.3 JUSTIFICATION ANALYSIS

Existing commentaries on the five controversial cases have focused almost entirely on the problems in the impact analysis, generally neglecting the justification analysis that was such a

---

<sup>128</sup> *Quebec v A* (n 122) [256]ff (Le Bel J), [435]ff (McLachlin CJ).

<sup>129</sup> *ibid* [338]–[347].

<sup>130</sup> Above n 75.

central part of these decisions.<sup>131</sup> This is partly explained by commentators' reluctance to accept that a justification analysis belongs within the unfairness enquiry. As I have argued in the previous chapter, the justification analysis can play an appropriate role here, provided it is conducted transparently and in a way that gives appropriate weight to the aim of preventing and addressing patterns of group disadvantage. This requires that the justification analysis must come after a fully developed impact analysis. It also requires the Court to ensure that it only accepts sufficiently weighty justifications for the discrimination. In some cases, it is possible to rule out certain justifications categorically as never being legitimate, such as appeals to prejudice. However, in most cases, the determination of what counts as a sufficiently weighty reason will depend on the appropriate intensity of review in each case.

In this section, I will argue that the majority judgments in the five controversial cases all adopted an indefensibly weak intensity of review with the result that they accepted flimsy justifications. In particular, they did not satisfy the 'baseline' intensity of review, the non-negotiable threshold intensity of review which, I will argue, ought to be applied in all unfair discrimination decisions as part of a broader doctrine of deference. Consistent adoption of this baseline will help to make the Court better at preventing and addressing patterns of group disadvantage in future decisions.

Before discussing the flaws in these judgments, I will explain what I mean by a doctrine of deference and how the baseline intensity of review forms part of this doctrine.

### **8.3.1 The Doctrine of Deference and the Baseline Intensity of Review**

As explained in chapter 5, the intensity of review refers to the stringency with which the Court reviews the justification for laws or actions.<sup>132</sup> A higher intensity of review generally

---

<sup>131</sup> Some commentaries have briefly touched on these problems. See, for example, Fredman, 'Gender and Transformation' (n 17) 258, 260–61.

<sup>132</sup> Chapter 5, text to n 94ff.

corresponds with a lesser degree of deference, and vice versa, where deference is understood as the Court's willingness to leave 'the answer to some question, to some extent, to the initial decision-maker'.<sup>133</sup>

In chapter 5, we saw that in the five controversial cases the majority and the minority adopted very different intensities of review in applying the justification analysis and that this intensity fluctuated from case to case. This manifested in two ways: the different standards of review that the Court adopted (ranging from rationality through to proportionality) and the variable intensity with which the Court applied these standards.

The fluctuating intensity of review that we witnessed in these cases is also seen in the Court's broader constitutional jurisprudence. South African commentators have often criticised the Court for the largely unexplained variations in the intensity with which it reviews state action in the context of administrative law,<sup>134</sup> socio-economic rights,<sup>135</sup> and legality review under section 1 of the Constitution,<sup>136</sup> among other areas of its case law.<sup>137</sup> A common proposal to address this problem is that the Court should adopt a doctrine of deference in the hope that this will tame these fluctuations and make the Court's decision-making more accountable.<sup>138</sup> The precise form of this doctrine is open to debate,<sup>139</sup> but the

---

<sup>133</sup> Timothy Endicott, *Administrative Law* (2nd edn, OUP 2011) 225.

<sup>134</sup> See, for example, Cora Hoexter, 'The Future of Judicial Review in South African Administrative Law' (2000) 117 SALJ 484; Dennis Davis, 'To Defer and When? Administrative Law and Constitutional Democracy' [2006] Acta Juridica 23; Cora Hoexter, *Administrative Law in South Africa* (2nd edn, Juta 2013) 137–55.

<sup>135</sup> See Kirsty McLean, *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (PULP 2009); Anashri Pillay, 'Economic and Social Rights Adjudication: Developing Principles of Judicial Restraint in South Africa and the United Kingdom' [2013] PL 599.

<sup>136</sup> See Alistair Price, 'The Content and Justification of Rationality Review' in Stuart Woolman and David Bilchitz (eds), *Is This Seat Taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (PULP 2012); Max du Plessis and Stuart Scott, 'The Variable Standard of Rationality Review: Suggestions for Improved Legality Jurisprudence' (2013) 130 SALJ 597.

<sup>137</sup> For an analysis of some of these fluctuations, see Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (CUP 2013) chs 6–10.

<sup>138</sup> See authors cited above nn 134–136.

<sup>139</sup> For an overview of the other forms that a doctrine of deference could take, see Jeff King, *Judging Social Rights* (CUP 2012) ch 5.

most common proposal is that the Court should develop and apply a clear set of principles to determine the appropriate intensity of review in each case.

### **(a) Principles of Deference**

South African commentators have proposed a broad range of principles that should form part of the doctrine of deference, often drawing on the British<sup>140</sup> and Canadian<sup>141</sup> deference literature. These principles can be roughly grouped under three headings: the *nature of the interests* at stake, relative *democratic legitimacy*, and relative *institutional competence*.<sup>142</sup> I will refer to these three clusters of principles as the ‘principles of deference’.

These principles of deference should be weighed up in each case to determine the appropriate intensity of review. In general terms, where important *interests* are at stake and where they are severely threatened, courts should scrutinise state actions more closely, all other things remaining equal. In the case of unfair discrimination claims, the aim of preventing and addressing patterns of group disadvantage provides an important reason for more intense review. Considerations of relative *democratic legitimacy* require courts to recognise that some issues are better decided by democratically elected decision-making bodies rather than unelected judges, generally requiring a greater degree of deference to these decisions. However, in some cases democratic legitimacy may necessitate closer scrutiny, particularly where democratic processes have failed.<sup>143</sup> Furthermore, as the Court has stressed,<sup>144</sup>

---

<sup>140</sup> See, for example, Julian Rivers, ‘Proportionality and Variable Intensity of Review’ (2006) 65 CLJ 174; Eileen Kavanagh, ‘Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication’ in Grant Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (CUP 2009); King (n 139).

<sup>141</sup> See, for example, Sujit Choudhry, ‘So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian Charter’s Section 1’ (2006) 34 SCLR 501; Rosalind Dixon, ‘The Supreme Court of Canada, Charter Dialogue and Deference’ (2009) 47 Osgoode Hall L J 235.

<sup>142</sup> McLean (n 135) chs 1, 2; Price (n 136) 50; Hoexter, *Administrative Law in South Africa* (n 138) 151–155; Pillay (n 138) 600. This is by no means an exhaustive list, as other principles may also be relevant, such as the availability of non-judicial accountability mechanisms.

<sup>143</sup> See further John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980) chs 4–6; King (n 139) ch 6.

democracy requires the development of a culture of justification, a culture that can be fostered through more intense forms of review in appropriate cases.<sup>145</sup> Finally, considerations of *relative institutional competence* require courts to recognise the limits of their expertise and to be careful not to second-guess decisions reached by more competent bodies equipped with greater capacity, experience, and information. This consideration can, in many cases, also provide a reason for more intense scrutiny where courts are better equipped to decide matters than other branches of state.<sup>146</sup> This brief outline cannot do justice to the complex, context-sensitive task of weighing up these principles, but it does provide a sense of what is involved.<sup>147</sup>

The Constitutional Court has occasionally referred to some of these principles of deference in its case law.<sup>148</sup> However, it generally prefers to explain its choice to adopt a more or less intense form of review, if it explains it at all, by making sweeping references to the separation of powers.<sup>149</sup> Respect for the separation of powers does indeed require some degree of deference to the other branches of the state in appropriate contexts.<sup>150</sup> However, this abstract idea cannot provide precise guidance for determining the appropriate level of deference. The principles of deference are needed to give content to the separation of

---

<sup>144</sup> See chapter 1, text to nn 92–97.

<sup>145</sup> Etienne Mureinik, ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 SAJHR 31, 32; McLean (n 135) 88, 211; Sandra Fredman, ‘Adjudication as Accountability’ in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (OUP 2013) 106, 108.

<sup>146</sup> On the intricacies of claims of competence, see further King (n 139) chs 7–9 who more accurately subdivides the broad question of competence into issues of polycentricity, expertise, and flexibility.

<sup>147</sup> For a fuller discussion of these principles and an account of how they ought to be weighed against each other, see King *ibid* (n 139) chs 6–10.

<sup>148</sup> See, for example, *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) [180]; *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) [38]; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) [48].

<sup>149</sup> See, for example, *Poverty Alleviation Network v President of the Republic of South Africa* 2010 (6) BCLR 520 (CC) [71]; *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC) [41].

<sup>150</sup> For further discussion of the separation of powers in South African law, see Sebastian Seedorf and Sanele Sibanda, ‘Separation of Powers’ in Stuart Woolman and others (eds), *Constitutional Law of South Africa* (2nd edn, Juta 2008).

powers by helping to demarcate the appropriate boundaries of judicial review on a case-by-case basis.<sup>151</sup>

The complexity of fleshing out and applying the principles of deference should not obscure the fact that it is also possible to identify more determinate rules and standards<sup>152</sup> that help to determine the appropriate intensity of review in each case. These more determinate norms form what Cora Chan has termed a ‘baseline’ intensity of review<sup>153</sup> which should form part of any doctrine of deference, complementing the more abstract principles.

### **(b) The Baseline Intensity of Review**

A ‘baseline’ intensity of review fixes a threshold, non-negotiable level of scrutiny.<sup>154</sup> It does not fully determine the intensity of review, as it merely sets a floor rather than a ceiling. Courts must resort to the principles of deference to determine the appropriate intensity of review beyond the threshold requirements.<sup>155</sup> There is always the danger that the floor can become a ceiling, as the baseline may become the target which courts will aim for rather than the minimum threshold that they must satisfy. However, this tendency can be counteracted through constant emphasis that the baseline and the principles of deference are complementary norms that together determine the appropriate intensity of review in each case.

---

<sup>151</sup> McLean (n 135) 62; Alistair Price, ‘Rationality Review of Legislation and Executive Decisions: *Poverty Alleviation Network* and *Albut*’ (2010) 127 SALJ 580, 589; Roux (n 137) 366–69.

<sup>152</sup> On the distinction between principles, standards, rules, and other norms, see Cass R Sunstein, ‘Problems with Rules’ (1995) 3 Cal Law Rev 953.

<sup>153</sup> Chan (n 9).

<sup>154</sup> *ibid* 3, 8–16.

<sup>155</sup> *ibid* 16–17.

How do we identify baseline norms and where do they come from?<sup>156</sup> In some instances, these baseline norms will be found in the text of the Constitution or statutes, reflecting a considered judgment made by the drafters on the threshold intensity of review that ought to be applied in particular types of cases. In other instances, the baseline will emerge in the case law, reflecting the gradual development of a consensus on what the principles of deference require in concrete cases. It is also possible to argue for particular baseline requirements by showing that the principles of deference all point in favour of a particular intensity of review in broad categories of cases. In this way, the baseline intensity of review can be seen as the crystallisation of a determinate set of rules and standards from the more fluid principles of deference, a process which occurs through the combined forces of enactment, case law, and argument.

I will show that the South African Constitution, the Constitutional Court's case law, and the underlying principles of deference together establish a baseline intensity of review that ought to be applied in unfair discrimination cases.<sup>157</sup> This baseline has at least four key components, requiring the Court to: a) enforce a duty of justification; b) apply a proportionality analysis in all cases; c) apply the proportionality analysis in full; and d) and place the evidential and argumentative burden on the state in assessing its justifications. The Court has recognised some of these components, but it has never appreciated that they operate together as a baseline intensity of review, nor has it applied them consistently. As a result, the argument I will present here is grounded in doctrine but ultimately presents a normative justification for why the baseline of review ought to be recognised and applied consistently in each case.

---

<sup>156</sup> The following can be inferred from Chan's analysis of the baseline intensity of review for proportionality analysis under the UK Human Rights Act, although she does not explicitly discuss these methods in her piece.

<sup>157</sup> This account is not intended to set the baseline of review for other rights under the Bill of Rights. Other rights may require different baselines, a subject for another time.

I will demonstrate that the five majority judgments consistently failed to satisfy these baseline requirements. As a result, I will argue that proper application of the baseline is essential to making the Court better and more consistent at preventing and addressing patterns of group disadvantage. Further work will be needed to determine how the principles of deference ought to be applied in setting the intensity of review beyond the baseline. However, the baseline is the most pressing concern for the moment, given the Court's repeated failure to get past this threshold.

### **8.3.2 Duty to Present a Justification**

The first requirement of the baseline is that the state (or any other party seeking to defend the discrimination) must present a justification, failing which the discrimination should be held to be unfair. This baseline requirement flows from the section 9(5) presumption of unfairness where discrimination has occurred on listed grounds. As discussed above, this presumption also has implications for the impact analysis and, as I will discuss below, it has further implications for how the Court ought to assess the justification presented. For now, my concern is with the most basic duty to present a justification.

In its 2011 decision in *Mvumvu*,<sup>158</sup> a challenge to road accident compensation legislation that indirectly discriminated against black road users, the Court gave the section 9(5) presumption its full effect. The state presented no justification for the discrimination which led Jafta J, writing for a unanimous Court, to conclude that '[a]bsent a rebuttal of this presumption [of unfairness] from the respondents, I have to accept that the [discrimination] is indeed unfair.'<sup>159</sup> The Court has adopted a similar approach in other cases where the state's

---

<sup>158</sup> *Mvumvu v Minister of Transport* 2011 (2) SA 473 (CC).

<sup>159</sup> *ibid* [32].

failure to defend the fairness of the discrimination has resulted in the Court promptly concluding that it is unfair.<sup>160</sup>

Despite this clear implication of section 9(5), the Court has often chosen to ignore it. In the *Sodomy Case*,<sup>161</sup> Ackermann J noted that the state had made no attempt to defend the fairness of the criminalisation of sodomy, but held that ‘the Court must still be satisfied, on a consideration of all the circumstances, that fairness has not been established’. This failure to apply section 9(5) was relatively benign in that case, as the Court proceeded to find that the discrimination was indeed unfair. However, this failure had more serious implications in *Jordan* and *Volks*.

In both *Jordan* and *Volks*, the state and other parties effectively conceded that the discrimination in issue was unfair and the presumption of unfairness ought to have led the Court to the same conclusion. In *Jordan*, the state sought to persuade the Court that the offence of prostitution should be interpreted as applying to prostitutes and clients alike, with the result that there was no discrimination on the basis of gender. The state contended that this was the most constitutionally compatible interpretation,<sup>162</sup> in effect conceding that if the offence only applied to prostitutes then it would be unfairly discriminatory.<sup>163</sup> In his majority judgment, Ngcobo J did not accept the state’s interpretation of the offence.<sup>164</sup> However, he went on to hold that the discrimination was fair.<sup>165</sup> This showed blatant disregard for the section 9(5) presumption of unfairness.

---

<sup>160</sup> See, for example, *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC) [26]; *Da Silva v Road Accident Fund* 2014 (5) SA 573 (CC) [8].

<sup>161</sup> Above n 24 [18].

<sup>162</sup> Section 39(2) of the Constitution requires that all courts must promote the ‘spirit, purport and objects of the Bill of Rights’ in interpreting legislation.

<sup>163</sup> *Jordan*, state’s submissions [55]–[58] (on file with author).

<sup>164</sup> *Jordan* (n 3) [8].

<sup>165</sup> *ibid* [15].

In *Volks*, the state made no attempt to oppose the constitutional challenge to the exclusion of heterosexual cohabiting couples from the Maintenance of Surviving Spouses Act. In the High Court,<sup>166</sup> the state effectively conceded that the exclusion of cohabiting couples was unfairly discriminatory as it chose to abide the court's decision and took no part in the proceedings. The High Court found that the exclusion was unfairly discriminatory on the basis of marital status and the matter was sent to the Constitutional Court to confirm this order of invalidity.<sup>167</sup> The state entered the fray during these confirmation proceedings, but only to contest the remedy granted by the High Court, not the merits of the constitutional challenge.<sup>168</sup> It was left to the executor of the deceased's estate to argue that the discrimination was fair. However, in a dramatic reversal, the executor's counsel announced at the hearing that they conceded that the discrimination was unfair.<sup>169</sup> In his majority judgment, Skweyiya J acknowledged this concession but swiftly stated that the Court still had to consider the fairness of the discrimination.<sup>170</sup>

In both *Jordan* and *Volks*, the straightforward application of this presumption ought to have led the Court to conclude that the discrimination was unfair and to declare the discriminatory laws to be invalid. In offering a justification for the discrimination, the Court was not in fact deferring to the Executive and the Legislature, but was instead supplying its own partisan defence.

The Court's failure to give effect to the express requirements of section 9(5) is problematic in itself, but it also reflects deeper normative failings that can be traced back to the three principles of deference: the interests at stake, democratic legitimacy, and relative

---

<sup>166</sup> *Robinson v Volks* NO 2004 (6) SA 288 (C).

<sup>167</sup> The High Court and the Supreme Court of Appeal can declare legislation to be invalid, but this declaration only has effect once it is confirmed by the Constitutional Court. Constitution, s 172(2)(a).

<sup>168</sup> *Volks*, state's submissions [9]–[10] (on file with author).

<sup>169</sup> *Volks* (n 4) [26].

<sup>170</sup> *Volks* *ibid* [27].

institutional competence. Taking the aim of preventing and addressing patterns of group disadvantage seriously requires the Court to probe all justifications for discrimination with great care. It cannot do this where the state has offered no justification and where it is left to the Court to invent one on its behalf. Furthermore, the Court has repeatedly emphasised that the development of a culture of justification is central to the growth of democracy, requiring the state to account for its actions.<sup>171</sup> Insisting on a justification is also one of the Court's core competencies and presents no risk of judicial overstretch. Viewed in this light, section 9(5) gives concrete expression to the underlying principles of deference.<sup>172</sup>

One potential reason for the Court's reluctance to apply the section 9(5) presumption is its fear that potentially justifiable laws may be held to be unfairly discriminatory because of the states' failure to mount a defence. The state has been notoriously poor at defending itself against constitutional challenges, often failing to present a justification and regularly presenting feeble cases.<sup>173</sup> The appropriate response is for the Court to issue directions<sup>174</sup> calling on the state<sup>175</sup> or other parties to present a justification for the discrimination. This is what the Court did in *Kbosa*<sup>176</sup> when the state failed to offer any defence for the discriminatory exclusion of non-citizens from social welfare grants. If a justification is still not forthcoming, there is no value in rewarding the state's inattention or

---

<sup>171</sup> See nn 144–145 above.

<sup>172</sup> These principles may also justify extending the presumption of unfairness to discrimination on analogous grounds. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s 13(2)(b) does this for claims litigated under the Act.

<sup>173</sup> See, for example, *Kbosa* (n 57) [12]–[25]; *Mabaso v Law Society, Northern Provinces* 2005 (2) SA 117 (CC) [43]; *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders* 2005 (3) SA 280 (CC) [49] (Chaskalson CJ) (NICRO).

<sup>174</sup> See n 57 above.

<sup>175</sup> The Court already requires the relevant state authorities to be joined in all proceedings concerning the constitutionality of laws or actions falling under their control. See Rule 5 of the Constitutional Court Rules.

<sup>176</sup> *Kbosa* (n 57) [12].

recalcitrance by inventing one on its behalf. The presumption should be applied and the discrimination should be held to be unfair.

The next components of the baseline intensity of review address how the Court ought to assess justifications when they are presented, starting with the appropriate standard of review that should be applied.

### 8.3.3 Proportionality, Not Rationality

In chapter 5, I explained that standards of review are the different sets of questions that a court asks in reviewing the state's justifications, existing on a spectrum of intensity.<sup>177</sup> As we have seen, the majority judgments have fluctuated between a rationality analysis and a proportionality analysis in the five controversial cases. Rationality simply asks whether there is a legitimate reason for the discrimination and whether the discrimination advances that purpose to some extent. Proportionality, in contrast, interrogates this balance of reasons, weighing the reasons for the discrimination with the reasons against.<sup>178</sup>

Merely requiring discrimination to be rational fails to give weight to the aim of preventing patterns of group disadvantage. This was the flaw in *Jordan* and *Volks* as the majority judgments found that the discrimination was fair as it advanced a legitimate purpose: addressing a criminal activity and promoting marriage and choice respectively.<sup>179</sup> There was no attempt in these cases to weigh up these reasons against the impact of the discrimination. If all that matters is that the discrimination advances some legitimate purpose then it does not matter how severely the discrimination impacts the rights and interests of

---

<sup>177</sup> Chapter 5, text to n 106ff.

<sup>178</sup> *S v Makwanyane* 1995 (3) SA 391 (CC) [104] (Chaskalson P); *S v Bhubwana* 1996 (1) SA 388 (CC) [18].

<sup>179</sup> *Jordan* (n 3) [15] (Ngcobo J); *Volks* (n 4) [52]ff, [62] (Skweyiya J), [94] (Ngcobo J).

the disfavoured group and whether it creates a pattern of group disadvantage.<sup>180</sup> Such an approach to the justification analysis fails to advance the aim of addressing patterns of group disadvantage because it dispenses with it entirely.

A proportionality analysis is required to ensure that there is a proper assessment of whether the impact of the discrimination is outweighed by the reasons for the discrimination.<sup>181</sup> As I explained further in chapter 6, a proportionality analysis can also assist in determining whether discrimination threatens to create or perpetuate group disadvantage. As I showed, a finding that discrimination is disproportionate can assist in uncovering impermissible messages that may entrench prejudice and stereotyping in society. In this way, the proportionality analysis can serve as an important aid to the impact analysis.

In some cases the principles of deference may require the Court to adopt even more intense standards of review, going beyond a proportionality analysis. This could involve something resembling a ‘strict scrutiny’ standard, requiring a compelling purpose for discrimination and for there to be no other way of achieving this purpose.<sup>182</sup> The proportionality analysis sets the baseline standard of review in unfair discrimination cases and does not prevent the Court from increasing the intensity of review in this way where this is justified by the principles of deference. Work is needed to determine precisely when stricter standards of review are appropriate and what form they should take, a subject that I will leave for a future project.<sup>183</sup> The more pressing concern for the moment is to get the Court to satisfy the baseline requirements.

---

<sup>180</sup> Acknowledged in *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23 (2 September 2014) [96] (Cameron J, Froneman J and Majiedt AJ), [146] (Van der Westhuizen J).

<sup>181</sup> See Murray Wesson, ‘Contested Concepts: Equality and Dignity in the Case-Law of the Canadian Supreme Court and the South African Constitutional Court’ in András Sajó and Renáta Uitz (eds), *Constitutional Topography: Values and Constitutions* (Eleven International 2010) 289ff, who also argues for a proportionality analysis within the unfairness enquiry.

<sup>182</sup> See further Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011) 118–25.

<sup>183</sup> The deference literature referred to above nn 138–147 provides some helpful guidance here.

In the three other controversial cases—*Hugo, Harksen*, and *Union of Refugee Women*—the majority judgments offered a loose proportionality analysis, as they attempted to weigh the impact of the discrimination against its purpose. However, they failed to satisfy two further requirements of the baseline intensity of review.

#### 8.3.4 Applying the Full Proportionality Analysis

The next baseline requirement is that the Court must investigate each of the components of the proportionality analysis. As explained in chapter 5, the task of weighing up the reasons for the discrimination and the reasons against can be separated into four component parts, requiring an investigation of the *legitimacy*, *suitability*, *necessity* and ‘*proportionality in the narrow sense*’ of the law or action.<sup>184</sup> The Court does not apply a strict, step-by-step approach to these component questions, but each is essential to the balancing enquiry. In establishing the strength of the reasons for the discrimination, the Court should consider the importance of the purpose of the discrimination (*its legitimacy*), the extent to which the discrimination will achieve its purpose (*its suitability*), and the availability of alternative, non-discriminatory means to achieve that purpose that have less severe consequences (*its necessity*). While the state may put forward a seemingly good reason for discrimination, that reason has less strength where the discrimination only partially achieves its purpose and can be achieved in other non-discriminatory ways. This reason, appropriately discounted for its suitability and necessity, must then be weighed against the impact of the discrimination on the disfavoured group. This is the assessment of proportionality in the ‘*narrow sense*’.

The principles of deference may require the Court to vary the intensity with which it approaches these components of the proportionality analysis. For example, in assessing the necessity of the discrimination, these principles may require a broad or a narrow approach to

---

<sup>184</sup> See chapter 5, text to n 112ff.

this enquiry. A broad enquiry into all available non-discriminatory alternatives would require a complex investigation of the relative effectiveness of the different alternatives in achieving the purpose, the extent to which they reduce the harms, and the other costs that they may present.<sup>185</sup> In some cases, the strain on the Court's expertise and worries over the Court's legitimacy in intruding on Executive or Legislative decision-making functions may justify a narrower, more deferential approach to this enquiry. This may push the Court to explore only those non-discriminatory alternatives that achieve the purpose as well as the discrimination, without incurring any additional costs.<sup>186</sup> In this way, necessity, along with the other components of the proportionality analysis, can be applied with variable intensity.

While the principles of deference may justify some flexibility in this proportionality analysis, they do not justify omitting any of the components of this analysis in assessing the justification for discrimination. The importance of preventing and addressing patterns of group disadvantage already provides a strong reason for conducting a full assessment of the balance between the impact and the justification. Furthermore, no matter how complex or politically sensitive the subject matter of the discrimination may be, the Court hazards little by requiring the state to provide evidence and argument on these points.<sup>187</sup> It will almost always be democratically legitimate for the Court to insist that the state account for discrimination in this way, as the greater transparency and rigour in decision-making that this promotes is democracy-enhancing. As a consequence, while the principles of deference may require the Court to investigate the legitimacy, suitability, necessity, and proportionality in the narrow sense of discrimination with varying intensity in different cases, they will always require the Court to explore these components. This is another example of how the fluid

---

<sup>185</sup> See further *Rivers* (n 140) 198–200.

<sup>186</sup> Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, OUP 2002) 398; Aharon Barak, *Proportionality: Constitutional Rights and Their Limits* (CUP 2012) 323–24.

<sup>187</sup> Chan (n 9) 9–11. See further Cora Chan, 'Deference, Expertise and Information-Gathering Powers' (2013) 33 LS 598.

principles of deference give rise to a more determinate baseline norm that ought to be applied in each case.

In *Union of Refugee Women* and *Harksen*, the majority judgments failed to satisfy this baseline requirement as they omitted key components of the proportionality analysis entirely. In *Union of Refugee Women*, the blanket exclusion of refugees from registering as private security guards was patently unnecessary, but the majority made no attempt to scrutinise this. The avowed purpose of the exclusion was to ensure the trustworthiness of private security workers, as it was argued that refugees lacked the documentation necessary to prove their trustworthiness.<sup>188</sup> As Mokgoro and O'Regan JJ showed in their joint minority judgment, this purpose could be achieved as well and at no additional cost without needing to create a blanket exclusion of refugees.<sup>189</sup> All that was needed was to apply the existing requirements that all applicants should furnish the necessary documentary proof of trustworthiness, such as police clearances, allowing those refugees with all the necessary documentation to register. As a result, the discrimination was disproportionate even on the most deferential understanding of necessity: the availability of non-discriminatory means that can achieve the purpose as well at no additional cost.<sup>190</sup> Kondile AJ, writing for the majority, gave no consideration to the necessity of the discrimination. Had the majority done so, it would have been forced to concede that the reasons for the discrimination did not outweigh its impact.

In *Harksen*, the majority made no attempt to explore the suitability or necessity of divesting solvent spouses of their property when their spouse is declared insolvent. The Court simply held that the discrimination served the purpose of protecting creditors' interests and did not explore the matter further.<sup>191</sup> This was despite the fact that the

---

<sup>188</sup> *Union of Refugee Women* (n 5) [38], [61].

<sup>189</sup> *ibid* [123].

<sup>190</sup> See above n 186.

<sup>191</sup> *Harksen* (n 2) [68] (Goldstone J).

complainant presented extensive argument on the over-breadth and under-inclusiveness of the vesting provision, as it targeted many spouses who no longer lived together and omitted people whose assets may be more closely intertwined with the insolvents' assets, such as business associates.<sup>192</sup> It was also argued that creditors' interests could be protected as effectively by using the existing mechanisms in insolvency law to set aside collusive transactions, demonstrating the availability of less restrictive alternative means of achieving the purpose.<sup>193</sup> These arguments were considered in depth by O'Regan J and Sachs J in their dissenting judgments. Both held that the measures for setting aside collusive transactions were a less restrictive means of achieving the purpose, obviating the need for the discriminatory vesting provision.<sup>194</sup>

The baseline intensity of review can help to rectify the problems in these judgments by insisting on a minimum level of scrutiny that must be applied. This will not guarantee better reasoning, but it can certainly help to guide judges in the right direction and to close off avenues for inappropriately weak, pre-committed forms of justification analysis. This guiding and constraining role of legal doctrine should not be overestimated, but it also cannot be discounted or ignored.<sup>195</sup>

Before turning to the next baseline requirement, a brief comment is needed on the form that the proportionality analysis should take within the unfairness enquiry. As indicated in chapter 5, the South African Court has expressed an aversion to structured, 'check-list' approaches to proportionality that are favoured in other jurisdictions.<sup>196</sup> Investigating each

---

<sup>192</sup> *Harksen*, complainant's submissions [56]–[59], complainant's further submissions [15.6]–[15.7] (on file with author).

<sup>193</sup> Complainant's submissions *ibid* [67].

<sup>194</sup> *Harksen* (n 2) [106]–[111] (O'Regan J), [121] (Sachs J).

<sup>195</sup> See further Emerson H Tiller and Frank B Cross, 'What is Legal Doctrine?' (2006) 100 *NWU L Rev* 517; Roux (n 137) 49–62.

<sup>196</sup> See *S v Manamela* 2000 (3) SA 1 (CC) [32] (Madala, Sachs, and Yacoob JJ).

component of the proportionality analysis in unfair discrimination cases does not necessarily require such an approach. It simply requires the Court to remain conscious of the need to explore the proportionality analysis in full. The common justification for the check-list approach is that without this discipline courts will often fail to present a rigorous proportionality analysis, omitting key components of the proportionality analysis where it suits the argument.<sup>197</sup> The South African Court's more flexible approach is justified provided that it can maintain the necessary rigour. However, its record in the unfair discrimination cases gives reason to doubt its self-discipline, and may require the development of a more rigid proportionality analysis in future.

### 8.3.5 The Evidential and Argumentative Burden

The section 9(5) presumption of unfairness not only requires the state to present a justification for discrimination, but it also has further implications for the way that the Court ought to *assess* the justification presented. Most importantly, it requires the Court to place the evidential and argumentative burden on the state to prove that the discrimination was proportionate.<sup>198</sup>

In *NICRO*,<sup>199</sup> a successful challenge to the denial of prisoners' voting rights, Chaskalson CJ outlined the correct approach to the evidential and argumentative burden under the section 36 proportionality analysis:

Where justification depends on factual material, the party relying on justification must establish the facts on which the justification depends.

---

<sup>197</sup> Barak (n 186) 460–67; Mark Elliott, 'Proportionality and Deference: The Importance of a Structured Approach' in Christopher Forsyth and others (eds), *Effective Judicial Review: A Cornerstone of Good Governance* (OUP 2010).

<sup>198</sup> In more technical terms, we can distinguish between the burden of 'non-persuasion' and the burden of presenting evidence and argument. See further Barak (n 186) 437; PJ Schwikkard, 'The Standard and Burden of Proof and Evidential Duties in Civil Trials' in PJ Schwikkard and others (eds), *Principles of Evidence* (Juta 2009) 571–72.

<sup>199</sup> Above n 173.

Justification may, however, depend not on disputed facts but on policies directed to legitimate governmental concerns. If that be the case, the party relying on justification should place sufficient information before the court as to the policy that is being furthered, the reasons for that policy, and why it is considered reasonable in pursuit of that policy to limit a constitutional right.<sup>200</sup>

Here Chaskalson CJ distinguishes between two different types of claims that may be made in support of a justification: factual claims and value judgments (what the Court terms matters of ‘policy’). Factual claims, the Court holds, require the state to present hard evidence to substantiate these claims. Bald assertions of fact in the papers or statements from the bench are not sufficient to discharge this burden.<sup>201</sup> Value judgments, involving broad assessments of how competing rights and interests ought to be appropriately balanced, are not as amenable to empirical proof, but the Court still requires that there must be ‘sufficient’ evidence and argument to help it to assess the strength of these claims. Precisely what counts as sufficient will depend on the circumstances of the case, but there must be *some* evidence and argument to support the state’s assertions. This approach to the evidential and argumentative burden has developed in the Court’s section 36 jurisprudence, but it is equally applicable to the burden of justification imposed by section 9(5).

In rare cases, it may be legitimate for the Court to take judicial notice of the state’s factual or policy claims. In *NICRO*, the Court described these as circumstances where ‘despite the absence . . . of information on the record, a court is nonetheless able to uphold a claim of justification based on common sense and judicial knowledge.’<sup>202</sup> However, resort to judicial notice must be used exceedingly sparingly, as it has the potential to erode the presumption of unfairness and the associated argumentative and evidential burden entirely. This requires strict adherence to the rules for judicial notice, requiring facts to be of general

---

<sup>200</sup> *ibid* [36].

<sup>201</sup> *S v Steyn* 2001 (1) SA 1146 (CC) [36]; *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2013 (12) BCLR 1429 (CC) [88], [96].

<sup>202</sup> *NICRO* (n 173) [36] (Chaskalson CJ).

knowledge or readily ascertainable from sources of incontrovertible authority.<sup>203</sup> Furthermore, it would not be appropriate to present a full justification on behalf of the state under the guise of judicial notice.

The principles of deference justify this strict approach to judicial notice in assessing the state's justifications for discrimination.<sup>204</sup> The Court can only determine whether the impact of the discrimination is justified by sufficiently weighty reasons where it is provided with information and evidence in support of this justification. Furthermore, while it may sometimes be inappropriate for the Court to second-guess decisions taken by competent, democratically elected authorities on highly complex matters, it is far worse for the Court to reach a decision on such matters without adequate information. Such conjecture will always be a more serious overstretch of the Court's competence and legitimacy than simply requiring the state to account for its decisions. Moreover, as Sandra Fredman argues, the state's duty to present evidence and argument should be seen an important way to enhance democracy:

Respect for the democratic process requires greater, not less, attention to the duty to account and explain. Providing an explanation for a decision enhances the accountability of decision makers, exposing them to public scrutiny and debate. . . . Requiring the state to provide a reasoned explanation does not require the judges to substitute their own opinions for those of policy makers on resource allocation questions. The judicial role in applying substantive equality remains a supervisory one, to guard against [discrimination] which can cause or perpetuate disadvantage. This role is not easy to define. However, by protecting the state from having to explain an allocation in the first place, courts circumvent the need to develop an appropriate judicial standard of scrutiny.<sup>205</sup>

---

<sup>203</sup> Schwikkard and van der Merwe, 'Judicial Notice' (n 198) 481–83.

<sup>204</sup> These principles explain why I advocate a stricter approach to judicial notice in supplementing the state's justifications in contrast with the more liberal approach to judicial notice that I advocated in the impact enquiry. Furthermore, complainants' limited resources and the goal of preventing and addressing patterns of group disadvantage give reason for the Court to use judicial notice more proactively to uncover the full impact of discrimination. These considerations do not apply when it comes to assessing the state's justification for discriminating.

<sup>205</sup> Fredman, 'Gender and Transformation' (n 17) 260–61.

In this light, a tight grip must be maintained on the use of judicial notice. Far from being an appropriate form of deference, the free-wheeling use of judicial notice to support the state's justifications is directly in conflict with the principles of deference.

The Canadian Supreme Court's decision in *Gosselin*<sup>206</sup> provides a cautionary example of what can go wrong when judicial notice is used in an unrestrained way.<sup>207</sup> There the majority dismissed an age discrimination challenge against a Quebec welfare scheme which gave under-30s a third of the welfare benefits offered to welfare recipients over 30 unless they participated in designated education and job training schemes. The Quebec government argued that this scheme was justified as it helped to get under-30s into the job market. However, it offered little evidence to support these claims. McLachlin CJ made liberal use of judicial notice to defend this justification. She held that 'logic and commonsense'<sup>208</sup> suggested that a '[l]ack of skills and basic education were among the chief causes of youth unemployment',<sup>209</sup> and that adults under 30 have better employment prospects than older welfare beneficiaries.<sup>210</sup> As a result, she concluded that the welfare scheme was 'designed to address [under-30s'] needs and abilities' and was not discriminatory.<sup>211</sup> Bastarache J and the other dissenting judges subjected this judgment to withering criticism, as they argued that all of these empirical claims were heavily contested and were thus far beyond the bounds of judicial notice.<sup>212</sup> As they demonstrated, available evidence suggested that under-30s had far

---

<sup>206</sup> *Gosselin v Quebec (Attorney General)* [2002] 4 SCR 429.

<sup>207</sup> See further Sheila McIntyre, 'The Supreme Court and Section 15: A Thin and Impoverished Notion of Judicial Review' (2006) 31 *QLJ* 731, 745–59; Fredman, 'Gender and Transformation' (n 17) 260.

<sup>208</sup> *ibid* [44].

<sup>209</sup> *ibid* [40].

<sup>210</sup> *ibid* [56].

<sup>211</sup> *ibid* [44].

<sup>212</sup> *ibid* [248].

fewer employment opportunities than over-30s.<sup>213</sup> Furthermore, there were significant gaps in the education and training schemes, with only 30,000 places available for approximately 85,000 welfare claimants under 30.<sup>214</sup> Viewed in this light, the majority's use of judicial notice was a partisan defence of discrimination rather than a tightly constrained mechanism limited to facts that were general knowledge or readily ascertainable.

In *Hugo*, the South African Court also misused judicial notice to relieve the President of his evidential and argumentative burden. A central issue in *Hugo* was whether there were appropriate non-discriminatory means for the President to achieve his purpose of benefitting young children. Goldstone J held that alternative means were not available, as he suggested that the President's pardoning power was a 'blunt axe' that could not make fine distinctions and that releasing single fathers from prison would have caused a spike in crime and a public outcry.<sup>215</sup> However, the President never made these arguments and there was no evidence on the record to support these claims. The sole justification that the President offered for the discrimination was that mothers enjoy a closer bond with their children than fathers do. In the High Court, Majid J held that the President's failure to present any argument or evidence on these issues meant that the rebuttable presumption of unfairness had not been overturned.<sup>216</sup> In the Constitutional Court, Kriegler J adopted a similar position as he held that it was not permissible for the Court to offer a justification for the President.<sup>217</sup> The difficulties of applying a gender neutral criterion, the numbers of male prisoners who stood to be released under such a criterion, and the likely public response to their release were all complex and contested matters of conjecture that could not be judicially noted.

---

<sup>213</sup> *ibid* [254].

<sup>214</sup> *ibid* [185].

<sup>215</sup> *Hugo* (n 1) [46], [48].

<sup>216</sup> *Hugo v President of the Republic of South Africa* 1996 (4) SA 1012 (D).

<sup>217</sup> *Hugo* (n 1) [72]–[76].

The solution to this misuse of judicial notice is not merely to insist on the rigid application of the formal rules for judicial notice.<sup>218</sup> It also requires the Court to appreciate the deeper reasons for imposing the evidential and argumentative burden on the state. Concern for preventing and addressing patterns of group disadvantage, promoting a culture of justification, and the Court's limited competence all present powerful reasons against letting the state off the hook by offering evidence and argument on its behalf.

### **8.3.6 The Baseline and Beyond**

This section has demonstrated that the Constitutional Court has often adopted the wrong intensity of review in unfair discrimination cases, leading it to accept weak justifications for discrimination that clearly threatened to entrench patterns of group disadvantage. Consistent application of the baseline intensity of review will help to make the Court better at advancing the aim of addressing patterns of group disadvantage in future. It is no guarantee that the Court will reach the right outcome, but it would help to ward off unjustifiably weak scrutiny. In the five controversial cases, the baseline intensity of review would certainly have made a difference.

Effective application of the baseline depends on the Court being transparent about the fact that it is using a justification analysis in the unfairness enquiry. As I argued in the previous chapter, the Court's denial that it is applying a justification analysis stands in the way of a frank discussion about the appropriate intensity of review. It is only once the Court acknowledges that it is applying a justification analysis that it can fully account for its chosen intensity of review and be properly held to account when it gets it wrong. As I further argued, removing human dignity from the test for unfair discrimination may help to promote this transparency. However, this is no guarantee that the Court will apply the baseline

---

<sup>218</sup> Text to n 201 above.

intensity of review consistently. Only a proper appreciation of the need for the baseline can ensure this.

#### 8.4 CONCLUSION

This chapter has located the flaws in the majority judgments in the five controversial cases with the aim of showing how the Court's reasoning ought to be tightened and developed. If the Court fails to learn from these errors then it will undoubtedly repeat them in future, making it essential to articulate precisely where the majority got it wrong and where the minority got it right. I have focused on the unfairness enquiry, consisting of the impact and justification analyses, because this was the primary area of dispute in these judgments.

In the impact analysis, I have demonstrated that the majority judgments all made serious *doctrinal* errors by failing to prioritise and contextualise this analysis. I showed that these doctrinal errors were combined with errors of *proof* and *concept*. In approaching the impact analysis, the Court has consistently failed to apply the presumption of unfairness to the impact enquiry, most notably in *Hugo*, *Jordan* and *Volks*. In *Jordan* and *Volks*, this error was compounded by the fact that the Court ignored clear evidence and argument on the impact of the discrimination. Furthermore, in *Hugo*, *Harksen*, and *Union of Refugee Women*, the Court failed to take the proactive approach to evidence gathering that is necessary if the Court is serious about addressing patterns of group disadvantage. These doctrinal and evidential errors were combined with deeper conceptual problems. These included the Court's failure to take an intersectional view of the impact of discrimination (most pronounced in *Harksen*, *Jordan* and *Volks*); its acceptance of fallacious arguments about choice (*Volks* and *Jordan*); its denial of the link between state actions and societal attitudes (*Jordan* and *Hugo*); and its conflation of the impact enquiry with a general rights analysis (*Union of Refugee Women* and *Hugo*).

These judgments also adopted an unjustifiably weak intensity of review in conducting the justification analysis, as they all fell far below the baseline intensity of review. These errors included failing to enforce the state's duty to present a justification (*Jordan* and *Volk*s); applying a rationality analysis rather than the required proportionality analysis (*Jordan* and *Volk*s); failing to apply the full proportionality analysis (*Union of Refugee Women* and *Harksen*); and failing to impose the evidential and argumentative burden on the state (*Hugo*). This weak intensity of review led the Court to accept insubstantial reasons for the discrimination that failed to give proper weight to the aim of preventing and addressing patterns of group disadvantage.

This analysis demonstrates that the task of making the Court better at preventing and addressing patterns of group disadvantage must start with getting the basics right. Existing contributions to the constructive project have recognised this need. My contribution has been to develop and extend on this work, venturing far deeper into the details of the Court's reasoning, particularly its justification analysis.

In the next chapter, I will consolidate my analysis in parts 2 and 3 by returning to the *Harksen* test. Now that we have a better grasp of the Court's reasoning and a better sense of how the Court's reasoning ought to develop, I will use this understanding to give greater substance and direction to this test.

## **PART 4: CONSOLIDATION**

## CHAPTER 9: THE *HARKSEN* TEST REVISITED

### 9.1 INTRODUCTION

The Constitutional Court's *Harksen* test for unfair discrimination was an ambitious development for its time. Drawing on four previous decisions and a confusing tangle of mid-1990s Canadian case law,<sup>1</sup> the Constitutional Court fashioned a framework for approaching unfair discrimination claims. While this framework offers some guidance, this guidance has proved limited. This is because the Court made human dignity central to the identification of analogous grounds of discrimination and the determination whether discrimination is unfair. As we have seen, human dignity has served as a placeholder for a set of considerations that the Court has not clearly articulated in its reasoning. I have now identified the considerations doing the real work in the Court's decisions.<sup>2</sup> In light of this deeper understanding of the Court's reasoning, I have also presented proposals for how the Court's reasoning ought to be improved to make it better at advancing its stated aim of preventing and addressing patterns of group disadvantage.<sup>3</sup> In this chapter, I will use this understanding and these proposals to revisit the *Harksen* test. My aims here are three-fold: to *explain* the core components of the original *Harksen* test; to *demonstrate* how the various considerations outlined by the Court ought to be applied; and to show how the test needs to be *developed*. In this way, I seek to make the *Harksen* test a clearer source of guidance for identifying unfair discrimination in a way that will better prevent and address patterns of group disadvantage.

I will focus on the two parts of the *Harksen* test that were explicitly based on human dignity and have remained most opaque. In section 9.2, I discuss the listed and analogous grounds of discrimination. In section 9.3, I focus on the unfairness analysis. Section 9.4 will

---

<sup>1</sup> Discussed in chapter 2.

<sup>2</sup> See chapters 4–6.

<sup>3</sup> Chapters 7 and 8.

close with a restatement of the *Harksen* test that will crystallise my analysis in this chapter and the thesis as a whole.

## 9.2 GROUNDS OF DISCRIMINATION

In chapter 5, I explained that discrimination involves unfavourable treatment on the basis of protected grounds. The Court insists that the protected grounds, whether listed or analogous, share the common feature that unfavourable treatment on these grounds has the *potential* to violate human dignity.<sup>4</sup> We can now understand the Court to be saying that unfavourable treatment on these grounds has the *potential*: a) to create or perpetuate patterns of group disadvantage; and b) to do so without adequate justification. In contrast, the unfairness analysis determines whether discrimination *actually* has these effects. This insight allows us to understand the role of the protected grounds in the unfair discrimination analysis and it also offers better guidance for identifying analogous grounds.

### 9.2.1 The Role of Protected Grounds

Establishing that unfavourable treatment has occurred on the basis of listed or analogous grounds (grounds analysis) shows that the unfavourable treatment has the *potential* to create or perpetuate group disadvantage without adequate justification. A sceptic may ask: why not cut out the grounds analysis and focus on whether unfavourable treatment *actually* has these consequences by proceeding directly to an unfairness analysis? Grounds analysis, it seems, adds an artificial and cumbersome step. L'Heureux-Dubé J presented a similar challenge in the Supreme Court of Canada's decision in *Egan*<sup>5</sup> where she argued that discrimination could be identified 'more simply and truthfully' by focusing on the effects of the law or action,

---

<sup>4</sup> *Harksen v Lane* NO 1998 (1) SA 300 (CC) [50] (Goldstone J).

<sup>5</sup> *Egan v Canada* [1995] 2 SCR 513 [82] quoted with apparent approval by Sachs J in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) [112].

rather than spending time trying to determine whether and which listed or analogous grounds were engaged.

In response to this challenge, we can see that grounds analysis serves a number of important functions in determining whether unfavourable treatment *actually* threatens to create or perpetuate patterns of group disadvantage without adequate justification. Understanding these functions will help to indicate when grounds analysis must be applied stringently and when some deviation from this analysis is permissible.

First, ground analysis helps to guide the impact analysis under the unfairness enquiry. As discussed in chapter 8, when used appropriately, grounds can provide an important lens through which to view this impact of the discrimination.<sup>6</sup> Rather than focusing on the abstract category of all who have been or are potentially affected by the law or action, the grounds help to focus on those groups that are particularly at risk of patterns of group disadvantage. Furthermore, the grounds also import a context and history of past or current patterns of group disadvantage that helps to orientate this impact analysis.<sup>7</sup> For example, in *Harksen*, the majority's focus on the abstract ground of solvent spousehood partly explained why it overlooked the real impact of the discrimination on married women.<sup>8</sup> Had the discrimination been considered through the lens of marital status and gender, the majority would have had to confront the patterns of group disadvantage experienced by married women and would have been prompted to consider how the legislation compounded this disadvantage.

Second, the grounds analysis helps to filter out cases where there is no prospect that the laws or actions in issue will create or perpetuate group disadvantage. This was illustrated

---

<sup>6</sup> Chapter 8, text nn 78–83.

<sup>7</sup> Dianne Pothier, 'Connecting Grounds of Discrimination to Real People's Real Experiences' (2001) 13 CJWL 37, 41–43.

<sup>8</sup> *Harksen* (n 4) [62]ff.

in *Prinsloo*<sup>9</sup> and *Weare*<sup>10</sup> where the Court summarily dismissed claims involving unfavourable treatment on the basis of ownership or occupation of land outside designated fire control areas and juristic person status respectively, holding that differentiation on these grounds had no potential to violate human dignity. We can now understand this to mean that unfavourable treatment on the basis of these grounds posed no danger of producing or perpetuating patterns of group disadvantage. There are no juristic person ghettos or pernicious tropes associated with living outside fire control areas, nor are these the types of characteristics that could give rise to such consequences, given prevailing social conditions. Finding that these characteristics were not analogous grounds avoided having to employ a full unfairness enquiry.

Third, this filtering function also helps to prevent undue judicial intrusion into the legislative and executive domain and, in doing so, preserves the rigour of the unfairness analysis. Without the grounds as a filter, the Court would potentially be called upon to expose all laws and state actions to a full impact and justification analysis. The Court expressed this fear in *Prinsloo*<sup>11</sup> when it suggested that, without the grounds analysis, courts would need to ‘review the justifiability or fairness of just about the whole legislative programme and almost all executive conduct’.<sup>12</sup> Such a broad sweep would likely result in the Court diluting its unfairness analysis to avoid imposing an onerous burden on the state. This is the danger of an unfair discrimination jurisprudence which is ‘far-reaching but wafer-

---

<sup>9</sup> *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) [41] (Ackermann, O’Regan, and Sachs JJ).

<sup>10</sup> *Weare v Ndebele* NO 2009 (1) SA 600 (CC) [75], a challenge to a gambling law that only allowed natural persons to hold betting licences.

<sup>11</sup> Above n 9 [17] (Ackermann, O’Regan, and Sachs JJ).

<sup>12</sup> A similar fear was expressed by the Canadian Supreme Court in *Andrews v Law Society of British Columbia* [1989] 1 SCR 143, 180–81 (McIntyre J).

thin'.<sup>13</sup> As a result, the filtering role that the protected grounds play also serves to protect the rigour of the unfairness analysis.

Finally, the grounds not only prevent undue judicial intrusion but they also serve to guard against its opposite: excessive judicial timidity. As the Canadian Court put it in *Corbiere*,<sup>14</sup> the grounds serve as 'constant markers of suspect decision-making' requiring careful scrutiny. Establishing that unfavourable treatment has occurred on the basis of listed or analogous grounds should trigger a close assessment of the impact of the discrimination and its justification. Indeed, the section 9(5) presumption of unfairness gives expression to this requirement.

In this light, we can say that the grounds analysis serves as a source of guidance for the impact analysis, a filter for claims with no prospects of success, a limit on excessive judicial intrusion, and a prompt to action where courts may otherwise be reluctant to scrutinise laws or actions. These functions provide important reasons for applying the grounds analysis. However, these reasons do not necessarily require slavish application of the grounds analysis in all cases, as this analysis can be loosened where these reasons have less force.

For example, where it is clear that unfavourable treatment *actually* entrenches patterns of group disadvantage unjustifiably, it will generally be unnecessary to go through the motions of a full grounds analysis that picks out each of the affected grounds or provides an exhaustive analysis of the factors for recognising analogous grounds. In these cases, there is little danger of judicial overreach, the claim has clear merit, and the Court requires no prompting or grounds-based guidance. *Hoffmann*<sup>15</sup> is an example of such a case. In

---

<sup>13</sup> *Lavoie v Canada* [2002] 1 SCR 769 [86] (Arbour J).

<sup>14</sup> *Corbiere v Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203 [8], [11] (McLachlin and Bastarache JJ).

<sup>15</sup> *Hoffmann v South African Airways* 2001 (1) SA 1 (CC).

considering whether the national airline's refusal to hire HIV-positive people as cabin attendants was unfairly discriminatory, Ngcobo J proceeded directly to the unfairness enquiry without pausing to establish that HIV status is an analogous ground of discrimination.<sup>16</sup> In this case it was clear that the discrimination *actually* perpetuated patterns of group disadvantage experienced by HIV-positive people and did so unjustifiably. Lengthy analysis of whether unfavourable treatment on the basis of HIV status had the *potential* to do so would have been repetitive and unnecessary.

There will, however, be many cases where stringent grounds analysis is necessary. As a general rule of thumb, the less certain the Court is that the unfavourable treatment creates or perpetuates patterns of group disadvantage unjustifiably, the more in-depth the grounds analysis should be. In such cases, the grounds analysis can guide the Court away from impulses toward overreach or excessive timidity as well as laying the groundwork for a more careful and nuanced unfairness analysis. This is particularly important in cases calling for the recognition of new analogous grounds where the unfairness is not readily apparent. In these cases, careful analysis of whether the grounds are analogous can help to counteract any kneejerk impulses to ignore or deny these novel claims.

### **9.2.2 Identifying Analogous Grounds**

Identifying analogous grounds, we can now say, involves showing that unfavourable treatment on the basis of an unlisted ground has the potential to create or perpetuate a pattern of group disadvantage unjustifiably. All differentiation has some potential to be unjustified. As a result, the most salient consideration is the potential for patterns of group disadvantage. As the Constitutional Court has recognised, what the listed and analogous grounds have in common 'is that they have been used (or misused) in the past (both in South

---

<sup>16</sup> *ibid* [27]ff.

Africa and elsewhere) to categorise, marginalise and often oppress persons who have had, or who have been associated with, these attributes or characteristics.<sup>17</sup> The fact that unfavourable treatment has the potential to create or perpetuate group disadvantage would, by implication, signal that it is more likely to be unjustified.

In chapter 5, we saw that the Constitutional Court has used three non-exhaustive factors to determine whether a ground is analogous: a) current or historical patterns of group disadvantage associated with the ground; b) a connection with political minorities; and c) immutability.<sup>18</sup> We can now understand these factors as an attempt to pin-point what makes certain grounds more likely to be the locus of patterns of group disadvantage. This offers greater guidance in understanding and applying these factors and also indicates how these factors need to be supplemented in future decisions.

The fact that a ground is the basis of current or historical patterns of disadvantage is the most significant indicator that it is analogous. This has a strong predictive role, as it makes it more likely that unfavourable treatment will continue this trend of entrenching patterns of group disadvantage. Mokgoro J gestured at this line of reasoning in *Larbi-Odam*<sup>19</sup> and *Khosa*<sup>20</sup> where she indicated that citizenship has historically been associated with severe patterns of group disadvantage in South Africa, as citizenship was used to oppress black South Africans who were banished to ‘homelands’ and made aliens within South Africa. The implication was that courts must be particularly wary of unfavourable treatment on the basis of citizenship as there is a danger that it could replicate this type of oppression. Current or historic patterns of group disadvantage not only predict the effects of further unfavourable treatment but they also play a constitutive role in bringing about further group disadvantage.

---

<sup>17</sup> *Harksen* (n 4) [50] (Goldstone J).

<sup>18</sup> See chapter 5, text to nn 58–61.

<sup>19</sup> *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* 1998 (1) SA 745 (CC) [19].

<sup>20</sup> *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) [71].

For example, the fact that many non-citizens live in poverty and are stigmatised means that further unfavourable treatment on the basis of citizenship will likely compound and perpetuate this disadvantage. In this light, proof of current or historic patterns of group disadvantage can be seen as a sufficient condition for identifying analogous grounds, as it signals that further unfavourable treatment on the basis of these grounds is highly likely to entrench existing patterns of group disadvantage or create new ones.<sup>21</sup>

While past or present patterns of group disadvantage should be seen as a sufficient condition, this does not mean that it should be the only condition or a necessary condition for identifying analogous grounds. This is such a broad consideration that other factors are needed to shoulder the burden of analysis. Furthermore, elevating past or present disadvantage to a necessary condition for identifying analogous grounds would shut the door on characteristics that may become the basis of patterns of group disadvantage in future,<sup>22</sup> such as genetic identity.<sup>23</sup> The Court has rightly avoided making this the sole consideration in this enquiry.

The second factor identified by the Court—whether a ground is associated with political minorities—can play a dual role as an indicator of existing or historical patterns of group disadvantage or as a marker of vulnerability to future patterns of group disadvantage. As I explained further in chapter 7, political marginalisation can be a consequence and a cause of broader patterns of group disadvantage.<sup>24</sup> It is not only minorities that may experience political marginalisation, as disempowered majorities may be just as vulnerable to

---

<sup>21</sup> It is possible that grounds that have historically been the basis of patterns of group disadvantage may no longer be the basis of such disadvantage in future. Nevertheless, it would still be necessary to maintain them as protected grounds to avoid any resurgence of unfair discrimination.

<sup>22</sup> It is descriptively true that all recognised protected grounds are historically or currently associated with patterns of group disadvantage. However, this does not place any normative constraints on which grounds ought to be protected.

<sup>23</sup> See further Anita Silvers and Michael Ashley Stein, ‘Human Rights and Genetic Discrimination: Protecting Genomics’ Promise for Public Health’ (2003) 31 *J L Med & Ethics* 377.

<sup>24</sup> See chapter 7, text to nn 43–46.

having their interests overlooked. Therefore, the Court ought to consider political marginalisation broadly rather than focusing solely on minority status.

In addition to political marginalisation, the Court should also consider whether unlisted grounds are associated with the other forms of disadvantage identified in the previous chapters. These include prejudice and stereotyping, socio-economic disadvantage, social marginalisation, cultural exclusion, or violence. Like political marginalisation, all of these forms of disadvantage can help to indicate historical or current patterns of group disadvantage, or demonstrate vulnerability to future patterns of group disadvantage. In dealing with claims for the recognition of a new analogous ground, the Court will need to consider whether groups identified by the ground have suffered from, currently suffer from, or are vulnerable to these various forms of disadvantage. It is important to adopt a nuanced view here as different grounds may be associated with different combinations of disadvantage. For instance, Marius Pieterse argues that physical attractiveness ought to be accepted as an analogous ground, given the stigma, cultural domination, and social marginalisation that the unattractive experience.<sup>25</sup> There is a debate to be had over whether this ground deserves recognition, a debate I will not seek to resolve here. Nevertheless, the fact that physical attractiveness is not typically associated with some forms of disadvantage, such as political marginalisation or socio-economic disadvantage, would not be a conclusive reason to reject it.

The final factor, immutability, also assists in determining whether a ground is likely to become the basis of patterns of group disadvantage. In ordinary use, 'immutability' means that a characteristic is impossible to change. The South African Court gives it a looser meaning, referring to characteristics that are 'difficult to change'.<sup>26</sup> In *Khosa*, Mokgoro J distinguished between two ways in which characteristics are 'difficult to change': they may be

---

<sup>25</sup> Marius Pieterse, 'Discrimination Through the Eye of the Beholder' (2000) 16 SAJHR 121.

<sup>26</sup> *Larbi-Odam* (n 19) [19].

‘at least temporarily . . . not alterable by conscious action’ or they may be alterable only at ‘unacceptable cost’ to individuals.<sup>27</sup> This distinction tracks the Canadian Court’s distinction between ‘*actual*’ and ‘*constructive*’ immutability, where actual immutability relates to the degree of control a person has over a characteristic whereas constructive immutability relates to the cost of change.<sup>28</sup> The Constitutional Court recognises that constructively immutable characteristics include those characteristics which are ‘fundamental choices’: choices that are important to the formation of identity and, hence, are changeable only at great personal and social cost.<sup>29</sup> For instance, in *Pillay*,<sup>30</sup> the Court held that the protected grounds of religion and culture not only protect obligatory practices, but also extend to voluntary religious and cultural practices that are important to individuals’ sense of identity.

There are several ways in which actual or constructive immutability contributes to the creation or perpetuation of patterns of group disadvantage. First, immutability makes unfavourable treatment on the basis of a ground impossible to avoid or raises the costs of avoidance, potentially increasing its impact. Second, immutable characteristics tend to be (although are not always) more central to individuals’ identities, adding identity-based harms to the burdens imposed or benefits withheld by the unfavourable treatment.<sup>31</sup> Finally, some degree of immutability also seems to be necessary for disadvantage to be transformed into a pattern of group disadvantage that affects groups across many areas of social life in a sustained way. These processes generally require the disfavoured group to have a stable identity and for membership of that group to be difficult to change at any given time. This is

---

<sup>27</sup> *Khosa* (n 20) [71].

<sup>28</sup> See *Corbiere* (n 14) [13] (McLachlin and Bastarache JJ).

<sup>29</sup> See further Tarunabh Khaitan, ‘An Autonomy-Based Foundation for Legal Protection Against Discrimination’ (DPhil thesis, University of Oxford 2010) 75–77; Robert Wintemute, *Sexual Orientation and Human Rights: the United States Constitution, the European Convention, and the Canadian Charter* (OUP 1995) ch 1.

<sup>30</sup> *MEC for Education, Kwa-Zulu Natal v Pillay* 2008 (1) SA 474 (CC) [61]–[67] (Langa CJ).

<sup>31</sup> In *Pillay* *ibid* [62], the Court described religious discrimination as presenting groups with a ‘Hobson’s choice between observance of their faith and adherence to the law.’

part of the reason why refugees<sup>32</sup> and HIV-positive people<sup>33</sup> are protected under South African discrimination law, in contrast with tourists or those suffering from the common cold.

In Canada, immutability has been elevated to something approaching a necessary condition for recognising analogous grounds.<sup>34</sup> The Canadian Court went from using multiple factors to identify analogous grounds in *Andrews*<sup>35</sup> to making immutability the primary consideration in its 1999 decision in *Corbiere*.<sup>36</sup> McLachlin and Bastarache JJ suggested that:

[W]hat [protected] grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but *on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity*.<sup>37</sup>

The Canadian Court's recent decisions in *Withler*<sup>38</sup> and *Quebec v A*<sup>39</sup> indicate that immutability remains, if not the only factor, then at least the most important.

In contrast, the South African Court has avoided making immutability a central consideration. In *Harksen*, Goldstone J sounded a note of 'caution against any narrow definition' of protected grounds:

---

<sup>32</sup> Recognised as an analogous ground in *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 (4) SA 395 (CC).

<sup>33</sup> Recognised in *Hoffmann* (n 15).

<sup>34</sup> For further commentary on the Canadian approach to analogous grounds, see Rosalind Dixon, 'The Supreme Court of Canada and Constitutional (Equality) Baselines' (2013) 50 Osgoode Hall L J 637, 648–49; Joshua Sealy-Harrington, 'Assessing Analogous Grounds: The Doctrinal and Normative Superiority of a Multi-Variable Approach' (2013) 10 J L & Equality 37, 40–48.

<sup>35</sup> Above n 12 174–75, 183 (McIntyre J).

<sup>36</sup> Above n 14.

<sup>37</sup> *ibid* [13] (emphasis added).

<sup>38</sup> *Withler v Canada* [2011] 1 SCR 396 [33].

<sup>39</sup> *Quebec (Attorney General) v A* [2013] 1 SCR 61 [190] (Le Bel J); [335] (Abella J) but cf McLachlin CJ at [385] who focused on historical disadvantage.

There is often a complex relationship between these grounds. In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features. The temptation to force them into neatly self-contained categories should be resisted.<sup>40</sup>

There is good reason for not confining the test for analogous grounds to immutability.

While some degree of immutability seems to be necessary for the development and perpetuation of patterns of group disadvantage, this does not mean that immutability should be the sole consideration or even a necessary condition in identifying analogous grounds. Immutability is not sufficient for the creation of patterns of group disadvantage as many actually or constructively immutable traits, such as the capacity to grow wisdom teeth, are in little danger of becoming the locus of patterns of group disadvantage in South African society. Furthermore, historical or existing patterns of group disadvantage will often be a far surer marker in most cases, obviating any need to determine whether a ground is immutable.<sup>41</sup> In *Larbi-Odam*<sup>42</sup> and *Kbosa*,<sup>43</sup> Mokgoro J did not need to ponder the actual or constructive immutability of citizenship in any real depth to conclude that citizenship is an analogous ground. The ready supply of historic examples of how citizenship had been used in South Africa to oppress and marginalise black South Africans provided more than enough basis to conclude that further differentiation on this characteristic has the potential to perpetuate group disadvantage.<sup>44</sup>

There are also evident dangers associated with elevating immutability to the sole or central consideration in establishing analogous grounds. First, this risks adding to assimilationist pressures facing marginalised groups. Basing protection on immutability sends

---

<sup>40</sup> *Harksen* (n 4) [50] (Goldstone J).

<sup>41</sup> *Dixon* (n 34) 652.

<sup>42</sup> *Larbi-Odam* (n 27) [19].

<sup>43</sup> *Kbosa* (n 20) [71].

<sup>44</sup> *Larbi-Odam* (n 27) [19].

the message that the more mutable the ground, the less deserving the disfavoured group is of protection under discrimination law. In turn, as Kenji Yoshino argues, this message ‘swiftly transmutes into the prescriptive claim that the group should assimilate’ to the dominant groups’ norms.<sup>45</sup> Reducing immutability to one consideration among many others serves to counteract this message. Second, immutability may also become an entry-point for the type of flawed choice-based reasoning discussed in chapter 8, where all harms flowing from choices are taken to be beyond scrutiny.<sup>46</sup> As I argued there, the fact that there is some degree of choice over group membership does not mean that harms visited on the group will not create a pattern of group disadvantage. Focusing on constructive immutability may help to counteract some of this flawed reasoning, as it recognises that chosen group membership is also deserving of protection. However, this can become an entry-point for unreflective stigma or prejudice against the disfavoured group which may lead courts to dismiss the costs of change as acceptable or the choice as trivial or worthy of contempt. For instance, if faced with a case of weight discrimination, courts may be influenced by the pervasive stigmatisation of obesity, leading them to frame obesity as a choice and to dismiss the costs of losing weight as a negligible harm or a fitting punishment for an unhealthy lifestyle.<sup>47</sup> These risks associated with immutability are significantly reduced by making immutability just one of a number of considerations in identifying analogous.

Without directly acknowledging these risks, the South African Court has correctly emphasised the need for a broader view of analogous grounds that should not be reduced to immutability. Immutability is useful in considering whether a ground is likely to become the

---

<sup>45</sup> Kenji Yoshino, ‘Covering’ (2002) 111 Yale LJ 769, 877 developed further in Kenji Yoshino, *Covering: The Hidden Assault on Our Civil Rights* (Random House 2006). Discussed further in chapter 7, text to nn 62–67.

<sup>46</sup> See chapter 8, text to n 84ff.

<sup>47</sup> For further discussion of this stigma, see Lucy Wang, ‘Weight Discrimination: One Size Fits All Remedy?’ (2008) 117 Yale LJ 1900.

basis for patterns of group disadvantage, but it is neither a necessary nor a sufficient condition for identifying analogous grounds.

In sum, the three factors that the Court has used in identifying analogous grounds assist in determining whether unfavourable treatment on the basis of a ground has the potential to create or perpetuate patterns of group disadvantage. In light of this discussion, it would be more accurate to parcel out this enquiry into two questions: a) whether the ground is the basis of current or historical patterns of group disadvantage; or b) whether it is likely to become the basis of patterns of group disadvantage. The immutability of the ground is more relevant to the latter enquiry, as it will generally be unnecessary to determine that a ground is immutable where there are current or historical patterns of group disadvantage to draw on. In section 9.4 below, I will consolidate this guidance in restating the *Harksen* test.

As is apparent in this discussion and the restatement, there are overlaps between the identification of analogous grounds and the impact analysis that follows. This is inevitable given that the enquiries deal with largely the same subject matter, focusing on the likelihood that differentiation will create or perpetuate patterns of group disadvantage.<sup>48</sup> As I explained above,<sup>49</sup> the duplication between the analogous grounds and impact analysis will often make it permissible to skip the analogous grounds enquiry where it is clear that the differentiation in issue actually entrenches patterns of group disadvantage unjustifiably. However, where there is doubt, the analogous grounds enquiry introduces useful nuance to the test for unfair discrimination (in addition to the other functions discussed above) even though it will ultimately involve a degree of repetition.

---

<sup>48</sup> There are, however, subtle differences between these enquiries. The identification of analogous grounds is more abstract, focusing on whether, in general terms, unfavourable treatment on the basis of an unlisted ground, such as citizenship or HIV status, has the *potential* to create or perpetuate patterns of group disadvantage. In contrast, the impact enquiry focuses on the particular act of discrimination in issue and its *actual* effects on the particular disfavoured group or groups, such as permanent residents or HIV-positive people. As a result, analysis moves from the general to the particular.

<sup>49</sup> Text to n 15.

Having discussed the grounds of discrimination, I will now turn to the unfairness analysis, the other component of the *Harksen* test that was directly based on human dignity.

### 9.3 UNFAIRNESS

The unfairness stage of the *Harksen* test has already received significant attention in previous chapters. In this section, I will briefly summarise the insights and arguments developed in these chapters to explain how the unfairness analysis must be understood and developed in future.

The Constitutional Court holds that discrimination is unfair where it actually violates dignity. In *Harksen*, it outlined three broad factors to assist in identifying dignity violations: a) the nature of the disfavoured group and whether they have suffered from past or present patterns of group disadvantage; b) the nature and purpose of the discrimination; and c) the rights and interests affected by the discrimination.<sup>50</sup> The Court has tended to apply these factors in a mechanical, step-by-step way without explaining precisely why they are relevant to proving violations of dignity. I have demonstrated that when the Court applies these three factors it is engaging in an impact analysis and a justification analysis. In turn, these analyses are aimed at establishing two necessary conditions for finding discrimination to be unfair: that it a) threatens to create or perpetuate group disadvantage; and b) lacks adequate justification.<sup>51</sup>

In this light, we can extract two broad implications for how the unfairness analysis should be framed and applied in future. First, the Court must make explicit that it is seeking to identify these two necessary conditions and that it is applying an impact and justification analysis in the process. In doing so, the Court can dispense with obfuscatory references to human dignity. Second, the Court must separate out the impact and justification analyses and

---

<sup>50</sup> *Harksen* (n 4) [52] (Goldstone J).

<sup>51</sup> The conclusion reached in chapter 5.

ensure that the impact analysis comes first to prevent this analysis being overlooked or downplayed. As I have acknowledged, the impact and justification analyses are interconnected. It is the impact of the discrimination that must be justified. Furthermore, a justification analysis is often necessary to determine that discrimination expresses impermissible messages that perpetuate prejudice and stereotyping.<sup>52</sup> Nevertheless, a division between the impact and justification analyses should be maintained to preserve the rigour of the impact analysis.

In previous chapters, I have offered extensive analysis of the impact and justification analyses, tracing how they have been applied and how they should be developed in future. I will now briefly summarise some of these insights.

### **9.3.1 Impact**

The impact analysis considers the effects of the discrimination on the disfavoured group and whether this will entrench a pattern of group disadvantage. This analysis must be prioritised and contextualised appropriately by considering the impact of the discrimination on the broader disfavoured group, taking into account the past or present patterns of disadvantage experienced by the group, or their vulnerability to such disadvantage.<sup>53</sup>

As we have seen, the Court has focused on two primary ways in which patterns of group disadvantage may be created or perpetuated. First, it has focused on whether the discrimination perpetuates prejudice and stereotyping in society, principally by determining whether the discrimination expresses impermissible messages about the disfavoured group. In chapter 6, I explored this reasoning in great detail, demonstrating that the Court uses two methods to identify two different types of messages: sentence-meaning messages and non-linguistic messages. Second, the Court has also considered socio-economic disadvantage to

---

<sup>52</sup> Chapter 6, text to n 113ff.

<sup>53</sup> Chapter 5, text to n 65ff.

be an important dimension of patterns of group disadvantage. In chapter 7, I argued that the Court should give greater attention to other forms of disadvantage, including political marginalisation, social marginalisation, cultural domination, and violence. These forms of disadvantage are the cause and consequence of deeper patterns of group disadvantage and should receive greater recognition in the impact analysis.

The three unfairness considerations outlined in *Harksen* all have some bearing on the impact analysis, although they need to be reconfigured to ensure a clearer focus on the impact of the discrimination.<sup>54</sup> To determine the impact of the discrimination it is necessary to consider whether the disfavoured group has suffered past or present patterns of group disadvantage or is vulnerable to such disadvantage (the first consideration), and the particular impact of the discrimination on their rights or interests (the third consideration) to determine whether this will entrench a pattern of group disadvantage. However, by interposing consideration of the nature and purpose of the discrimination (the second consideration) between these considerations, the Court has often jumped directly to a justification analysis without doing a proper impact analysis.<sup>55</sup> In some cases it has also treated the first and third considerations as disconnected enquiries, making no attempt to connect the vulnerability of the disfavoured group with the effects of the discrimination on the rights and interests of the group.<sup>56</sup> This must be corrected by considering the first and third considerations together, treating them as inseparable parts of the impact analysis. The nature and purpose of the discrimination can have a role in the impact analysis. As we saw in chapter 6, this can influence the sentence meaning of discrimination, adding to its potential to create or perpetuate patterns of group disadvantage.<sup>57</sup> However, when conducting the

---

<sup>54</sup> Text to n 50 above.

<sup>55</sup> See *S v Jordan* 2002 (6) SA 642 (CC) and *Volks NO v Robinson* 2005 (5) BCLR 446 (CC).

<sup>56</sup> See, for example, *Union of Refugee Women* (n 32).

<sup>57</sup> Chapter 6, text to n 71–74.

impact analysis, the Court should avoid turning this consideration into a full-blown analysis of the justification for the discrimination, as this risks neglecting the impact analysis.

In applying the impact analysis in future, the Court must also learn from its mistakes in its controversial cases, as discussed in chapter 8. Apart from ensuring that the impact analysis is properly prioritised and contextualised, the Court must also pay close attention to the way it handles the evidence and argument on impact and the reasoning it deploys in this analysis. As I showed, the Court's errors of proof include its failure to apply the presumption of unfairness where listed grounds are engaged, its failure to consider available evidence and argument, and its failure to adopt a proactive approach to information-gathering. These errors have been combined with various conceptual flaws, such as the Court's failure to take an intersectional view of the impact, its use of flawed choice-based arguments, its failure to see how state actions are connected with social attitudes, and its conflation of the impact analysis with an analysis of whether other rights have been limited. The Court must be on its guard to avoid these errors in future.

### **9.3.2 Justification**

Justificatory considerations have featured prominently in the Constitutional Court's unfairness analysis, rendering the section 36 general limitations analysis redundant in unfair discrimination cases. I have argued that this is permissible provided that the justification analysis is conducted transparently and in a way that gives sufficient weight to the aim of preventing patterns of group disadvantage. This entails that the justification analysis should come after a full impact analysis, rather than supplanting this analysis. Furthermore, the Court must guard against upholding discrimination on the basis of illegitimate or flimsy justifications. In some cases, it will be possible for the Court to exclude certain reasons from the outset as being illegitimate, such as justifications that appeal to prejudice or stereotyping.

In all cases, the Court must focus on the intensity with which it scrutinises the justification presented by the state.

In determining the appropriate intensity of review, I have argued that the Court must, at the very least, adhere to a baseline intensity review. As I showed in chapter 8, this baseline has four important components, requiring the Court to: a) enforce a duty of justification; b) apply a proportionality analysis in all cases; c) apply the proportionality analysis in full; and d) and place the evidential and argumentative burden on the state in assessing its justifications. Beyond these baseline requirements, the Court will need to tailor the intensity of review to the case, with reference to the broader principles of deference outlined in chapter 8. These principles include the nature of the interests at stake, democratic legitimacy, and relative institutional competence.<sup>58</sup>

The *Harksen* test, as originally formulated, provides none of this nuance or guidance. As a result, it is important to reformulate the test to offer clearer direction to courts and litigants.

#### **9.4 THE *HARKSEN* TEST: A RESTATEMENT**

In this section I will draw together the analysis presented in this chapter and previous chapters by offering a restatement of the *Harksen* test. The original *Harksen* test was never meant to be the final word. The Court explicitly indicated that it was a preliminary test that was to be fleshed out and revised as its jurisprudence developed.<sup>59</sup> In the 17 years since *Harksen*, the Court has left the test largely untouched. This restatement is offered as a broad proposal for how the Court could reframe the test to offer more explicit guidance in identifying unfair discrimination. This combines my analysis of the Court's reasoning in its existing case law and my proposals for how its reasoning ought to develop.

---

<sup>58</sup> Chapter 8, text to nn 140–151.

<sup>59</sup> *Harksen* (n 4) [52] (Goldstone J).

### 9.4.1 The Restatement

This restatement will be divided into an account of the necessary conditions that must be established to prove discrimination and unfairness, in bold, followed by the set of considerations that are relevant to establishing these necessary conditions. Like the original *Harksen* test, my aim here is not to strive for statutory precision or finality. Instead, the aim is to offer guidance while remaining open to further developments, clarifications, and revisions. With this in mind, the *Harksen* test for unfair discrimination can be reformulated as follows:

- A. Is there discrimination? This involves:**
- a. Unfavourable treatment directly or indirectly on the basis of one or more listed or analogous grounds (protected grounds), or on a combination of grounds;**
  - b. A ground is analogous to a listed ground where unfavourable treatment or impact on the basis of that ground has the *potential* to:**
    - i. Create or perpetuate patterns of group disadvantage;**
    - ii. Without adequate justification.**

In approaching the discrimination enquiry, several considerations must be kept in mind:

#### *Unfavourable treatment*

As seen in chapter 5, some form of unfavourable treatment is required for a finding of discrimination. This must be understood in broad terms to include actions or omissions that impose burdens or withhold benefits in some way.<sup>60</sup> Unfavourable treatment or impact

---

<sup>60</sup> This accords with the definition of discrimination in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, s 1.

includes expressive harms: treatment that conveys negative messages about the disfavoured group.<sup>61</sup>

### *Comparators*

It is true that all discrimination leaves some worse off than others, but this does not necessarily require proof that the disfavoured group has been treated less favourably than an identifiable comparator. A flexible approach to comparators must be applied, meaning that the identification of a comparator is not a necessary or a sufficient condition for proving unfair discrimination, nor is a rigid ‘mirror’ comparator test required.<sup>62</sup> Comparators should be treated as occasionally useful tools of analysis rather than rigid preconditions for unfair discrimination claims. As explained in chapter 5, this flexible approach to comparators is reflected in the Court’s existing reasoning.

### *Direct and indirect, multiple and intersectional*

Discrimination occurs where a law or action makes a protected ground a criterion for unfavourable treatment (direct discrimination) or where a protected group is disproportionately affected by an otherwise neutral law or action (indirect discrimination). These forms of discrimination can occur on a number of grounds (multiple discrimination) or a combination of grounds (intersectional discrimination). This also reflects the Court’s existing practice.<sup>63</sup>

---

<sup>61</sup> Chapter 5, text to nn 33–35.

<sup>62</sup> Chapter 5, text to nn 11–13.

<sup>63</sup> Chapter 5, text to nn 52–55.

*Identifying analogous grounds*

A ground is analogous where differentiation on the basis of that ground has the potential to create or perpetuate group disadvantage.<sup>64</sup> If it has that potential then it will, by implication, also be potentially unjustifiable. The primary considerations here include:

- a. Whether the ground is the basis of current or historical patterns of group disadvantage, where disadvantage includes but is not limited to:
  - i. Prejudice and stereotyping;
  - ii. Socio-economic disadvantage;
  - iii. Political marginalisation;
  - iv. Social marginalisation;
  - v. Cultural domination; and
  - vi. Violence and victimisation.
- b. Whether the ground is likely to become the basis of patterns of group disadvantage. Considerations include, but are not limited to:
  - i. Whether the ground is actually or constructively immutable; and
  - ii. Whether any groups identified by the ground are vulnerable to one or more forms of disadvantage listed above.

**B. If there is discrimination, is it unfair? This involves discrimination that:**

- a. **Threatens to create or perpetuate patterns of group disadvantage; and**
- b. **Lacks adequate justification.**

**Both are necessary conditions for establishing unfairness, together they are sufficient.**

---

<sup>64</sup> Text to n 17ff above.

Where discrimination has occurred on listed grounds, section 9(5) of the Constitution requires that it must be presumed to be unfair unless the state proves otherwise. The determination whether discrimination threatens to create or perpetuate patterns of group disadvantage unjustifiably must be approached through two enquiries: a) an impact analysis; and b) a justification analysis.

### *Impact*

In determining the impact of the discrimination, the Court must consider:

- a. Whether the disfavoured group has suffered from past or present patterns of group disadvantage or is otherwise vulnerable to patterns of group disadvantage;<sup>65</sup>
- b. The effect of the discrimination on the complainant and the broader disfavoured group;
- c. Other relevant contextual factors, including the circumstances in which the discrimination occurs, the social and historical context, the nature and purpose of the discrimination, among others;
- d. In light of the above, whether the discrimination threatens to create or perpetuate a pattern of group disadvantage, primarily but not exclusively by creating or entrenching:
  - i. Prejudice and stereotyping, particularly by expressing impermissible messages about the disfavoured group;
  - ii. Socio-economic disadvantage;
  - iii. Political marginalisation;
  - iv. Social marginalisation;

---

<sup>65</sup> As noted above, there is some overlap here with the analogous grounds enquiry. See n 48 and accompanying text above.

- v. Cultural domination; or
- vi. Violence and victimisation.

### *Justification*

In assessing the justification for the discrimination, the Court must, at minimum, satisfy the baseline intensity of review which requires the Court to:

- a. Find discrimination on listed grounds to be unfair where no justification is offered by the state or other parties;
- b. Apply a proportionality analysis to the justification;
- c. Apply the proportionality analysis in full by considering:
  - i. The importance of the purpose of the discrimination (*legitimacy*);
  - ii. The relation between the limitation and its purpose (*suitability*);
  - iii. The availability of non-discriminatory means to achieve the purpose (*necessity*);
  - iv. Whether the purpose for the discrimination, considered in light of the suitability and necessity of the discrimination in advancing this purpose, is sufficient to outweigh the impact of the discrimination on the complainant and the wider disfavoured group (*proportionality in the 'narrow sense'*).
- d. Place the burden on the state (or other party defending the discrimination) to supply evidence and argument in support of its justification where discrimination has occurred on listed grounds.

Beyond the baseline, the Court must openly apply the principles of deference to justify its chosen intensity of review. These principles include:

- a. The nature of the interests at stake, including the severity of the impact of the discrimination and the importance of preventing patterns of group disadvantage;
- b. Democratic legitimacy;
- c. Relative institutional competence.

*Expressive concerns*

An important way of identifying unfair discrimination is by focusing on the messages expressed by discriminatory laws or actions, and whether these messages perpetuate prejudice and stereotyping.<sup>66</sup> This should not distract from other forms of group disadvantage and it should not be treated as a necessary condition for proving unfairness, but it remains important nonetheless.

Identifying impermissible messages involves asking whether a reasonable member of the disfavoured group, apprised of all relevant facts (the subjective-objective perspective), would understand the discrimination as expressing an impermissible message that threatens to create or entrench prejudice or stereotyping. These messages can take two forms which are identified in two ways:

- a. Sentence-meaning messages: identified by considering whether the conventional meanings attached to the discrimination, viewed in context, can be reasonably interpreted as sending a message that will entrench prejudice or stereotyping. This analysis occurs within the impact analysis.
- b. Non-linguistic messages: identified by determining whether the discrimination is unjustified and whether it is reasonable to impute prejudice and stereotyping to the state to explain this failure to give proper weight to the disfavoured group members' interests.

---

<sup>66</sup> See chapters 4 and 6.

As is evident here, the identification of impermissible messages is not a distinct enquiry, but forms part of the broader impact and justification analyses.

#### **9.4.2 Guidance and the Future Development of the Case Law**

This restatement captures how the Court has been reasoning in its unfair discrimination cases as well as how its reasoning ought to develop in future. This is not a paint-by-numbers guide to identifying unfair discrimination. It will remain a complex enquiry. Nevertheless, this reformulation offers far greater guidance for the litigation and adjudication of unfair discrimination claims than the existing *Harksen* test.

The Court would not be turning its back on the *Harksen* test in adopting this reformulation. Instead, it would be honouring the creativity and ambition that inspired the original test and the hard work that has gone into applying this test in subsequent case law. The *Harksen* test was a first attempt at offering guidance that was never meant to become dogma. It is now time for the Court to capture and distil the key features of its reasoning and to learn from its mistakes.

## CHAPTER 10: CONCLUSION

In dissecting and critiquing the Constitutional Court's unfair discrimination case law, it is important not to lose sight of how much the Court has achieved. The Court has been widely commended for stating its commitment to preventing and addressing patterns of group disadvantage. It has also developed an impressive body of case law striking down unfair discrimination that perpetuated such disadvantage. This thesis has offered clearer guidance for identifying unfair discrimination in a way that will both sustain and improve this record.

Two central concerns have motivated this project. The first is the lack of explicit guidance for identifying unfair discrimination in the Court's existing case law. While the Court has generally been reaching laudable outcomes, its human dignity-based *Harksen* test offers little explicit guidance for identifying unfair discrimination. The Court has provided no clear indication of what is required to prove a violation of human dignity and has not explained how this is connected with the aim of addressing group disadvantage. Existing contributions to the literature have offered some insights into the Court's reasoning, but many features remained under-examined. As a result, further work was needed to capture and distil the Court's reasoning.

The second concern is that in a small but significant minority of the Court's decisions the Court upheld discrimination that clearly entrenched serious patterns of group disadvantage. While there has been considerable commentary on these controversial cases, more needed to be done to diagnose and address the problems in these controversial cases.

In light of these concerns, I set about studying the Court's unfair discrimination case law, guided by two central questions: how does the Court currently identify unfair discrimination? And how should its reasoning develop? Answering these questions has involved doctrinal and normative analysis, supported by comparisons with the Supreme Court of Canada's discrimination case law and a measure of analytic philosophy.

I developed this analysis in four parts. Part 1, consisting of chapters 2 and 3, laid the foundations for a deeper analysis of the Court's reasoning. In chapter 2, I provided necessary background to the Constitutional Court's unfair discrimination jurisprudence. I traced the development of the Court's human dignity-based *Harksen* test and juxtaposed this test with the Canadian Court's discrimination case law.

Chapter 3 considered whether deeper theorising of human dignity could offer precise and appropriate guidance for identifying unfair discrimination. I argued that this route to guidance is far less promising than it may appear. I discussed two possible concepts of human dignity: the 'broad' and the 'narrow'. I argued that the broad concept of human dignity, as an articulation of human beings' equal and inherent moral worth, cannot offer precise guidance for identifying unfair discrimination. The narrow concept of human dignity, defined as a particular interest or wrong, could provide guidance, but its narrowness may come into conflict with the broader aim of preventing and addressing group disadvantage. I did not rule out all possibility of obtaining clear and appropriate guidance from some other understanding of human dignity. However, my analysis cast some doubt on this way of seeking guidance. A better route to guidance, I suggested, is to begin with a close examination of the Court's reasoning to determine precisely how it reaches the conclusion that human dignity has been violated in its unfair discrimination cases.

In part 2, I proceeded to investigate the Court's reasoning in greater depth. Chapter 4 began this task by considering how the Court has connected the concepts of equality, patterns of group disadvantage, unfair discrimination, affirmative action, and human dignity. Understanding these connections, I suggested, is important in making sense of the Court's broader reasoning. I showed that the aim of preventing and addressing patterns of group disadvantage is one of the Court's four conceptions of equality. This conception underpins the prohibition of unfair discrimination and the authorisation of affirmative action, as both are seen as tools for achieving this broader purpose. I then addressed the connection

between patterns of group disadvantage and human dignity. Many commentators have suggested that the two concepts are in tension. I did not doubt the *potential* for tension. However, I argued that, in practice, the Constitutional Court has not invoked any specific conception of human dignity as a necessary condition for finding unfair discrimination. Instead, human dignity has served as a placeholder for a set of other considerations. I demonstrated that one of these considerations is that the discrimination must threaten to create or perpetuate a pattern of group disadvantage. This was seen in the way that the Court frames the conclusion that human dignity has been violated.

Chapter 5 built on the analysis in chapter 4 by presenting a close study of the Court's reasoning in applying the *Harksen* test. This was necessary to determine precisely how the Court reaches the conclusion that human dignity has been violated. I demonstrated that three necessary conditions must be established to reach this conclusion: a) unfavourable treatment on the basis of protected grounds; b) that threatens to create or perpetuate a pattern of group disadvantage; and c) that lacks adequate justification. This added further substance to my argument that human dignity serves as placeholder in the Court's reasoning. I also revealed the complex ways in which the Court determines that these necessary conditions have been satisfied. In particular, I showed that the Court's unfairness analysis consists of an impact and a justification analysis. I further demonstrated that in the Court's five controversial cases the majority and minority adopted divergent approaches to this analysis. In particular, I revealed the fluctuating intensity with which the Court scrutinises justifications for discrimination, shifting from a proportionality analysis to a rationality analysis and applying these different standards of review in a variable way.

Chapter 6 went on to explore the expressive concerns that are such a consistent feature of the Court's reasoning. In chapters 4 and 5, I showed that the Court regularly concludes that discrimination threatens to create or perpetuate patterns of group disadvantage by reflecting on the messages expressed by discrimination. In chapter 6, I

showed that these messages can be classified into two distinct categories that are identified in two different ways. First, there are sentence-meaning messages that are identified by considering conventional meanings attached to discrimination in particular contexts. Second, there are non-linguistic messages which serve as a shorthand for saying that it is reasonable for members of society to believe that the state has discriminated against a group because of prejudice or stereotyping.<sup>1</sup> These messages are identified by showing that discrimination is unjustified and that surrounding circumstances, such as a history of prejudice or stereotyping of the disfavoured group, support this imputation. This analysis cast greater light on this important aspect of the Court's reasoning that has been largely overlooked in the existing literature.

Having developed a clearer understanding of the Court's reasoning, part 3 then focused more directly on how the Court's reasoning ought to develop. Chapter 7 began this enquiry by considering the necessary conditions for establishing a violation of human dignity and their implications. I addressed three topics. First, I argued that the Court should abandon the pretence that human dignity is the touchstone for identifying unfair discrimination. This would reflect the reality of the Court's reasoning, it would bring greater transparency to this reasoning, and it would guard against some of the risks posed by dignity's malleability. Second, I argued that the Court should give greater attention to other forms of disadvantage, in addition to its current focus on disadvantage arising from prejudice and stereotyping, and socio-economic disadvantage. These other forms of disadvantage include political marginalisation, social marginalisation, cultural domination, and violence and victimisation. Finally, I argued that the justification analysis has a place in the unfairness enquiry provided that it is conducted transparently and gives sufficient weight to the aim of preventing and addressing patterns of group disadvantage. This requires the justification

---

<sup>1</sup> In the absence of proof of actual prejudice or stereotyping.

analysis to come after a full impact analysis and to be applied with an appropriate intensity of review.

Chapter 8 investigated the five controversial cases to determine precisely how the majority judgments went wrong and how these errors ought to be avoided in future decisions. Drawing on my analysis in chapter 5, I showed that the problems were located primarily in the unfairness enquiry, consisting of the impact and justification analyses. At the impact stage, the Court made repeated doctrinal, evidential, and conceptual errors. At the justification stage, the Court consistently adopted an indefensibly weak intensity of review. The central problem with this justification analysis, I argued, is that the Court has not complied with the baseline intensity of review: the non-negotiable threshold of review which ought to be applied in all unfair discrimination cases. Addressing these problems in the impact and justification analyses holds the key to making the Court more consistent in preventing and addressing patterns of group disadvantage.

Part 4, consisting of chapter 9, consolidated my account of the Court's reasoning and my proposals for developing this reasoning by revisiting the *Harksen* test. I concluded with a detailed restatement of this test that distilled my analysis in this thesis.

The central argument running through these chapters is that it is possible to extract a clear line of reasoning from the Court's case law and that this understanding leads to focused proposals for developing the jurisprudence. Together, this understanding and these proposals offer more precise guidance for identifying unfair discrimination in a way that will enable the Court to be better and more consistent in addressing patterns of group disadvantage.

This thesis has made several significant contributions to the existing literature on the Court's case law and the 'constructive project' that is so central to this literature. First, I have offered a more detailed and complete account of the Court's reasoning than existing work. I have shown *what* must be proved to establish unfair discrimination and *how* the Court

determines that these requirements have been satisfied. In the process, I have uncovered and explored many features of the Court's reasoning that have been neglected in the existing scholarship. These include the Court's expressive concerns and its fluctuating intensity of review in assessing justifications for discrimination.

Second, I have used this understanding of the Court's reasoning to build upon existing proposals for developing the jurisprudence and to offer new proposals of my own. In particular, I have demonstrated the need for the Court to apply a baseline intensity of review in assessing justifications for discrimination. Doing so would help to guard against the Court reflexively accepting weak justifications for discrimination.

Finally, I have offered a full restatement of the *Harksen* test that captures the Court's reasoning and how it should develop. As I indicated in chapter 9, this restatement is not a complete guide to identifying unfair discrimination. Unfair discrimination is simply too complex a wrong, requiring context-specific analysis. Nevertheless, complex enquiries need not be opaque enquiries. I have exposed the Court's underlying reasoning and I have shown how this reasoning ought to evolve in future decisions.

The scope of this thesis and the methodological choices that I have made suggest a number of topics for future research. I have focused solely on the Constitutional Court's application of the constitutional prohibition of unfair discrimination to laws and state actions. As a consequence, further work is now needed to translate my account of the Court's reasoning into guidance for interpreting and applying the statutory prohibitions of unfair discrimination. This will be particularly important to assist courts in navigating the convoluted provisions of the Equality Act.<sup>2</sup> In carrying out this task, more thought is needed on how the Court's approach to unfair discrimination by the state should be adapted or developed when dealing with unfair discrimination between private actors.

---

<sup>2</sup> Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Discussed further in chapter 2, text to n 20ff.

I also bracketed out the question of how the Court's *Van Heerden* test for legitimate affirmative action should be applied. The intensity of review in applying this test needs to be calibrated so that it does not obstruct legitimate affirmative action but also ensures proper judicial oversight. My analysis of the Court's intensity of review in applying the *Harksen* test and my outline of the components of a doctrine of deference will be a useful basis for further exploration of this subject.<sup>3</sup>

I have made use of the Supreme Court of Canada's case law to better understand and evaluate the South African Court's case law. There is still scope for more in-depth comparisons with the Canadian case law on discrete topics such as comparators, intersectionality, and justifications. My account of the South African Court's reasoning and how it should develop could also be refined through wider-ranging comparative analysis of discrimination law in other jurisdictions. There is also opportunity to invert this comparative focus to consider what the South African case law can teach other jurisdictions. The Constitutional Court's unfair discrimination jurisprudence has already attracted much interest from discrimination law scholars in other countries.<sup>4</sup> These comparative studies would benefit from the more detailed account of the South African Court's reasoning that this thesis provides.

My analysis has also shown the value of applying analytic philosophy in understanding and developing the South African Court's reasoning. Admittedly, I have only skimmed the surface of debates in the philosophical literature, particularly the growing body

---

<sup>3</sup> For existing work on the intensity of review in applying the *Van Heerden* test see, for example, JL Pretorius, 'R v Kapp: A Model for South African Affirmative Action Jurisprudence?' (2009) 126 SALJ 398; JL Pretorius, 'Fairness in Transformation: A Critique of the Constitutional Court's Affirmative Action Jurisprudence' (2010) 26 SAJHR 536.

<sup>4</sup> See, for example, Rory O'Connell, 'The Role of Dignity in Equality Law: Lessons from Canada and South Africa' (2008) 6 ICON 267; Joan Small and Evadne Grant, 'Dignity, Discrimination, and Context: New Directions in South African and Canadian Human Rights Law' (2005) 6 HRLRev 25; Anne Smith, 'Constitutionalising Equality: The South African Experience' (2008) 9 IJDL 203; Rory O'Connell, 'Cinderella Comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR' (2009) 29 LS 211, 214; Sandra Fredman, *Discrimination Law* (2nd edn, OUP 2011); Sandra Fredman, *Comparative Study of Anti-Discrimination and Equality Laws of the US, Canada, South Africa and India* (European Commission, 2012).

of writing on the philosophical foundations of discrimination law.<sup>5</sup> As a result, there is great potential for further philosophical work on the Court's case law. In addition, it seems that this case law also has something to offer philosophers. Much of the existing philosophical foundations literature focuses exclusively on Anglo-American discrimination law.<sup>6</sup> A future project could explore what unique insights the South African case law brings to these philosophical debates.

In the course of this thesis, I have also highlighted aspects of the Constitutional Court's reasoning that are in need of further exploration. Among these issues is the question of precisely when and why comparator analysis may be useful to the unfair discrimination enquiry. I have explained that the Court has adopted a flexible approach to comparator analysis as the identification of a comparator is not a necessary condition in proving unfair discrimination, and the Court has also not adopted anything like a mirror comparator approach. It seems that this comparator analysis can sometimes serve as a useful diagnostic tool for exposing unfair discrimination,<sup>7</sup> although the precise circumstances under which it is useful remain unclear.

Another important topic that will require deeper analysis is how to determine the appropriate intensity of review for assessing justifications, beyond the baseline requirements I outlined in chapter 8. The principles of deference give some direction to this task, but these principles require much more elaboration and refinement. This reflects a broader need for an appropriate doctrine of deference for South African constitutional law.<sup>8</sup>

---

<sup>5</sup> See, for example, the contributions in Deborah Hellman and Sophia R Moreau (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013); Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015) (forthcoming).

<sup>6</sup> An important exception is Khaitan *ibid*.

<sup>7</sup> For an interesting perspective on this, see Denise Réaume, 'Dignity, Equality, and Comparison' in Deborah Hellman and Sophia R Moreau (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013).

<sup>8</sup> See further Cora Hoexter, 'The Future of Judicial Review in South African Administrative Law' (2000) 117 SALJ 484, 500-511; Kirsty McLean, *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (PULP 2009) ch 2.

Much work lies ahead. Nevertheless, this thesis creates a sound basis for pursuing these research projects. It also leaves an important message for the Constitutional Court. Seventeen years and many unfair discrimination judgments since *Harksen*, the Court has developed an impressive body of case law. The task of sustaining and building this jurisprudence must begin with deeper study of the Court's reasoning in its existing case law. As this thesis has demonstrated, this is a complex task. However, it is not nearly as fraught as the Court's early work in constructing its unfair discrimination jurisprudence from scratch, while dealing with all the uncertainties attendant on its role as a new court, faced with a new constitutional text.<sup>9</sup> The Court now has the benefit of a relatively mature unfair discrimination jurisprudence and a more stable institutional identity.<sup>10</sup> The time is now right for it to learn from, to develop, and to clarify its unfair discrimination jurisprudence rather than allowing it to ossify. This thesis provides some direction for this important work.

---

<sup>9</sup> Discussed further in chapter 2, text to nn 55–58.

<sup>10</sup> See further Hugh Corder and Jason Brickhill, 'The Constitutional Court' in Cora Hoexter and Morné Olivier (eds), *The Judiciary in South Africa* (Juta 2014) 400–402.

## BIBLIOGRAPHY

### BOOKS

- Ackermann L, *Human Dignity: Lodestar for Equality in South Africa* (Juta 2012)
- Albertyn C, Goldblatt B and Roederer C (eds), *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (Witwatersrand University Press 2001)
- Alexy R, *A Theory of Constitutional Rights* (Rivers J tr, OUP 2002)
- Allport GW, *The Nature of Prejudice* (Doubleday 1958)
- Aristotle, *Nicomachean Ethics* (Crisp R tr, CUP 2000)
- Bamforth N, Malik M and O’Cinneide C, *Discrimination Law: Theory and Context* (Sweet & Maxwell 2008)
- Barak A, *Proportionality: Constitutional Rights and Their Limits* (CUP 2012)
- Barnard-Naudé A, Cornell D and Du Bois F (eds), *Dignity, Freedom and the Post-Apartheid Legal Order: The Critical Jurisprudence of Laurie Ackermann* (Juta 2009)
- Cornell D and others (eds), *The Dignity Jurisprudence of the Constitutional Court of South Africa: Cases and Materials* (Fordham University Press 2013)
- Currie I and De Waal J, *The Bill of Rights Handbook* (6th edn, Juta 2013)
- Dickson J, *Evaluation and Legal Theory* (Hart 2001)
- Dworkin R, *Law’s Empire* (Harvard University Press 1986)
- Dyzenhaus D, *Hard Cases in Wicked Legal Systems: Pathologies of Legality* (OUP 2010)
- Ely JH, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980)
- Endicott T, *Administrative Law* (2nd edn, OUP 2011)
- Fraser N, *Justice Interruptus: Critical Reflections on the “Postsocialist” Condition* (Routledge 1997)
- Fredman S, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008)
- *Discrimination Law* (2nd edn, OUP 2011)
- Goffman E, *Stigma: Notes on the Management of Spoiled Identity* (Penguin 1968)

- Grogan J, *Dismissal, Discrimination & Unfair Labour Practices* (2nd edn, Juta 2007)
- Gutto S, *Equality and Non-Discrimination in South Africa* (New Africa Books 2001)
- Hellman D, *When is Discrimination Wrong?* (Harvard University Press 2008)
- and Moreau SR (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013)
- Hoexter C, *Administrative Law in South Africa* (2nd edn, Juta 2013)
- Hogg P, *Constitutional Law of Canada* (5th edn, Carswell 2007)
- Hughes A, *Human Dignity and Fundamental Rights in South African and Ireland* (PULP 2014)
- Kant I, *Groundwork of the Metaphysics of Morals* (CUP 1997)
- Khaitan T, *A Theory of Discrimination Law* (OUP 2015) (forthcoming)
- King J, *Judging Social Rights* (CUP 2012)
- Klug H, *The Constitution of South Africa: A Contextual Analysis* (Hart 2010)
- Marcus G and Budlender S, *A Strategic Evaluation of Public Interest Litigation in South Africa* (The Atlantic Philanthropies 2009)
- McCrudden C (ed) *Understanding Human Dignity* (OUP 2013)
- McLean K, *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (PULP 2009)
- Mostert N, *Frontiers: The Epic of South Africa's Creation and the Tragedy of the Xhosa People* (Jonathan Ball 1992)
- Pickett K and Wilkinson R, *The Spirit Level: Why Greater Equality Makes Societies Stronger* (Bloomsbury 2010)
- Rawls J, *A Theory of Justice* (OUP 1999)
- Raz J, *Practical Reason and Norms* (OUP 1975)
- Robertson D, *Judge As Political Theorist: Contemporary Constitutional Review* (Princeton University Press 2010)
- Rosen M, *Dignity: Its History and Meaning* (Harvard University Press 2012)
- Roux T, *The Politics of Principle: The First South African Constitutional Court, 1995-2005* (CUP 2013)

- Sachs A, *The Strange Alchemy of Life and Law* (OUP 2009)
- Sen A, *Inequality Reexamined* (OUP 1992)
- Sunstein CR, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard University Press 1999)
- Vilhena O, Baxi U and Viljoen F (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (PULP 2013)
- Wintemute R, *Sexual Orientation and Human Rights: the United States Constitution, the European Convention, and the Canadian Charter* (OUP 1995)
- Worden N, *The Making of Modern South Africa: Conquest, Apartheid, Democracy* (Blackwell 2007)
- Yoshino K, *Covering: The Hidden Assault on Our Civil Rights* (Random House 2006)
- Young IM, *Justice and the Politics of Difference* (Princeton University Press 1990)
- Zweigert K and Kötz H, *Introduction to Comparative Law* (Weir T tr, 3rd edn, OUP 1998)

## CONTRIBUTIONS TO EDITED BOOKS

- Albertyn C, 'Equality' in Cheadle H, Davis D and Haysom N (eds), *South African Constitutional Law: The Bill of Rights* (Butterworths 2002)
- 'Equality' in Bonthuys E and Albertyn C (eds), *Gender, Law and Justice* (Juta 2007)
- 'Constitutional Equality in South Africa' in Dupper O and Garbers C (eds), *Equality in the Workplace: Reflections from South Africa and Beyond* (Juta 2009)
- 'Judicial Diversity' in Hoexter C and Olivier M (eds), *The Judiciary in South Africa* (Juta 2014)
- and Goldblatt B, 'Equality' in Woolman S and others (eds), *Constitutional Law of South Africa* (2nd edn, Juta 2008)
- Berger J, 'Getting to the Constitutional Court on Time: A Litigation History of Same-Sex Marriage' in Judge M, de Waal S and Manion A (eds), *To Have and To Hold: The Making of Same-Sex Marriage in South Africa* (Fanele 2008)

- Biernat M and Dovidio JF, 'Stigma and Stereotypes' in Heatherton TF and others (eds), *The Social Psychology of Stigma* (Guilford Press 2003)
- Brickhill J and Babiuch R, 'Political Rights' in Woolman S and others (eds), *Constitutional Law of South Africa* (2nd edn, Juta 2008)
- Budlender G, 'Amicus Curiae' in Woolman S and others (eds), *Constitutional Law of South Africa* (2nd edn, Juta 2008)
- Cameron E, 'Dignity and Disgrace: Moral Citizenship and Constitutional Protection' in McCrudden C (ed), *Understanding Human Dignity* (OUP 2013)
- Choudhry S, 'Migration as a New Metaphor in Comparative Constitutional Law' in Choudhry S (ed), *The Migration of Constitutional Ideas* (CUP 2006)
- Corder H and Brickhill J, 'The Constitutional Court' in Hoexter C and Olivier M (eds), *The Judiciary in South Africa* (Juta 2014)
- Du Plessis L, 'Interpretation' in Woolman S and others (eds), *Constitutional Law of South Africa* (2nd edn, Juta 2008)
- Dyzenhaus D, 'The Politics of Deference: Judicial Review and Democracy' in Taggart M (ed), *The Province of Administrative Law* (Hart 1997)
- Elliott M, 'Proportionality and Deference: The Importance of a Structured Approach' in Forsyth C and others (eds), *Effective Judicial Review: A Cornerstone of Good Governance* (OUP 2010)
- Fredman S, 'Facing the Future: Substantive Equality Under the Spotlight' in Dupper O and Garbers C (eds), *Equality in the Workplace: Reflections from South Africa and Beyond* (Juta 2009)
- 'Adjudication as Accountability' in Bamforth N and Leyland P (eds), *Accountability in the Contemporary Constitution* (OUP 2013)

- ‘Gender and Transformation in the South African Constitutional Court’ in Villhena O, Baxi U and Viljoen F (eds), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (PULP 2013)
- Hage J, ‘The Method of a Truly Normative Legal Science’ in Van Hoecke M (ed), *Methodologies of Legal Research* (Hart 2011)
- Hellman D and Moreau SR, ‘Introduction’ in Hellman D and Moreau SR (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013)
- Hoexter C, ‘Just Administrative Action’ in Currie I and De Waal J (eds), *The Bill of Rights Handbook* (6th edn, Juta 2013)
- Kavanagh E, ‘Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication’ in Huscroft G (ed), *Expounding the Constitution: Essays in Constitutional Theory* (CUP 2009)
- Khaitan T, ‘Prelude to a Theory of Discrimination Law’ in Hellman D and Moreau SR (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013)
- Khilnani S, Raghvan V and Thiruvengadam A, ‘Revisiting the Role of the Judiciary in Plural Societies’ in Khilnani S, Raghvan V and Thiruvengadam A (eds), *Comparative Constitutionalism in South Asia* (OUP 2012)
- Mackor AR, ‘Explanatory Non-Normative Legal Doctrine: Taking the Distinction between Theoretical and Practical Reason Seriously’ in Van Hoecke M (ed), *Methodologies of Legal Research* (Hart 2011)
- McCrudden C, ‘In Pursuit of Human Dignity: An Introduction to Current Debates’ in McCrudden C (ed), *Understanding Human Dignity* (OUP 2013)
- Moreau SR, ‘Analytic Philosophy and the Interpretation of Constitutional Rights’ in Atkinson L and Majury D (eds), *Law, Mystery, and the Humanities* (University of Toronto Press 2008)

- Örücü E, 'Developing Comparative Law' in Örücü E and Nelken D (eds), *Comparative Law: A Handbook* (Hart 2007)
- Price A, 'The Content and Justification of Rationality Review' in Woolman S and Bilchitz D (eds), *Is This Seat Taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (PULP 2012)
- Réaume D, 'Dignity, Choice, and Circumstances' in McCrudden C (ed), *Understanding Human Dignity* (OUP 2013)
- 'Dignity, Equality, and Comparison' in Hellman D and Moreau SR (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013)
- Scanlon T, 'The Diversity of Objections to Inequality' in Clayton M and Williams A (eds), *The Ideal of Equality* (Palgrave 2000)
- Schwikkard P, 'The Standard and Burden of Proof and Evidential Duties in Civil Trials' in Schwikkard P and others (eds), *Principles of Evidence* (Juta 2009)
- Schwikkard P and Van Der Merwe S, 'Judicial Notice' in Schwikkard P and others (eds), *Principles of Evidence* (Juta 2009)
- Seedorf S and Sibanda S, 'Separation of Powers' in Woolman S and others (eds), *Constitutional Law of South Africa* (2nd edn, Juta 2008)
- Van Hoecke M, 'Preface' in Van Hoecke M (ed), *Methodologies of Legal Research: What Kind of Method for What Kind of Discipline?* (Hart 2011)
- 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in Van Hoecke M (ed), *Methodologies of Legal Research* (Hart 2011)
- Waldron J, 'Dignity and Rank' in Waldron J and Dan-Cohen M (eds), *Dignity, Rank, and Rights* (OUP 2012)
- Wesson M, 'Contested Concepts: Equality and Dignity in the Case-Law of the Canadian Supreme Court and the South African Constitutional Court' in Sajó A and Uitz R (eds), *Constitutional Topography: Values and Constitutions* (Eleven International 2010)

Williams B, 'The Idea of Equality' in Hawthorn G (ed), *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Princeton University Press 2005)

Woolman S, 'Application' in Woolman S and others (eds), *Constitutional Law of South Africa* (Juta 2008)

— 'Dignity' in Woolman S and others (eds), *Constitutional Law of South Africa* (2nd edn, Juta 2008)

— and Botha H, 'Limitations' in Woolman S and others (eds), *Constitutional Law of South Africa* (2nd edn, Juta 2008)

## **JOURNAL ARTICLES**

Ackermann L, 'Equality and the South African Constitution: The Role of Dignity' (2000) 63 *ZaöRV* 537

— 'Constitutional Comparativism in South Africa' (2006) 123 *SALJ* 497

— 'Equality and Non-Discrimination: Some Analytical Thoughts' (2006) 22 *SAJHR* 597

Adler MD, 'Expressive Theories of Law: A Skeptical Overview' (2000) 148 *U Pa L Rev* 1363

— 'Linguistic Meaning, Nonlinguistic "Expression," and the Multiple Variants of Expressivism: A Reply to Professors Anderson and Pildes' (2000) 148 *U Pa L Rev* 1577

Albertyn C, 'Substantive Equality and Transformation in South Africa' (2007) 23 *SAJHR* 253

— "'The Stubborn Persistence of Patriarchy'? Gender Equality and Cultural Diversity in South Africa' (2009) 2 *Con Court Rev* 165

— 'Law, Gender and Inequality in South Africa' (2011) 39 *Oxford Development Studies* 139

— and Kentridge J, 'Introducing the Right to Equality in the Interim Constitution' (1994) 10 *SAJHR* 149

- and Goldblatt B, ‘Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality’ (1998) 14 SAJHR 248
- Alder J, ‘Dissents in Courts of Last Resort: Tragic Choices?’ (2000) 20 OJLS 221
- Alexander L, ‘What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies’ (1992) 141 U Pa L Rev 149
- Alexy R, ‘Constitutional Rights, Balancing, and Rationality’ (2003) 16 Ratio Juris 131
- Altman A, ‘Expressive Meaning, Race, and the Law: The Racial Gerrymandering Cases’ (1999) 5 LT 75
- Anderson ES and Pildes RH, ‘Expressive Theories of Law: A General Restatement’ (2000) 148 U Pa L Rev 1503
- Barnard-Naudé J and De Vos P, ‘Disturbing Heteronormativity: The “Queer” Jurisprudence of Albie Sachs’ (2010) 25 SAPL 209
- Bentele U, ‘Mining for Gold: The Constitutional Court of South Africa’s Experience with Comparative Constitutional Law’ (2009) 37 Ga J Intl & Comp L 219
- Bhabha F, ‘Disability Equality Rights in South Africa: Concepts, Interpretation and the Transformation Imperative’ (2009) 25 SAJHR 218
- Bishop M, Chamberlain L and Kazee SI, ‘Twelve-Year Review of the Work of the Constitutional Court: A Statistical Analysis’ (2008) 24 SAJHR 354
- Bonthuys E, ‘Institutional Openness and Resistance to Feminist Arguments: The Example of the South African Constitutional Court’ (2008) 20 CJWL 1
- Botha H, ‘Equality, Dignity, and the Politics of Interpretation’ (2004) 19 SAPL 724
- ‘Equality, Plurality and Structural Power’ (2009) 25 SAJHR 1
- ‘Human Dignity in Comparative Perspective’ (2009) 2 Stell L Rev 171
- Bredt CD and Dodek AM, ‘The Increasing Irrelevance of Section 1 of the Charter’ (2001) 14 SCLR 175

- Brickhill J, 'Testing Affirmative Action under the Constitution and the Equality Act' [2006] ILJ 2004
- Brodsky G and Day S, 'Denial of the Means of Subsistence as an Equality Violation' [2005] Acta Juridica 149
- Cameron E, 'Sexual Orientation and the Constitution: A Test Case for Human Rights' (1993) 110 SALJ 450
- 'What You Can Do with Rights' [2012] EHRLR 148
- Carpenter G, 'Equality and Non-Discrimination in the New South African Constitutional Order (1): The Early Cases' (2001) 64 THRHR 409
- Chan C, 'Proportionality and Invariable Baseline Intensity of Review' (2013) 33 LS 1
- 'Deference, Expertise and Information-Gathering Powers' (2013) 33 LS 598
- Chaskalson A, 'Human Dignity as a Foundational Value of Our Constitutional Order' (2000) 16 SAJHR 193
- Choudhry S, 'So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1' (2006) 34 SCLR 501
- Cockrell A, 'Rainbow Jurisprudence' (1996) 12 SAJHR 1
- Colker R, 'Pornography And Privacy: Towards The Development Of A Group Based Theory For Sex Based Intrusions Of Privacy' (1983) 1 L & Ineq 191
- Collins H, 'Discrimination, Equality and Social Inclusion' (2003) 66 MLR 16
- Cowen S, 'Can "Dignity" Guide South Africa's Equality Jurisprudence?' (2001) 34 SAJHR 34
- Crenshaw K, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] U Chi Legal F 139
- Currie I, 'Judicious Avoidance' (1999) 15 SAJHR 138
- Davis D, 'Equality: The Majesty of Legoland Jurisprudence' (1999) 116 SALJ 398

- ‘Constitutional Borrowing: The Influence of Legal Culture and Local History in the Reconstitution of Comparative Influence: The South African Experience’ (2003) 1 ICON 181
- ‘To Defer and When? Administrative Law and Constitutional Democracy’ [2006] Acta Juridica 23
- De Vos P, ‘Equality For All? A Critical Analysis of the Equality Jurisprudence of the Constitutional Court’ (2000) 63 THRHR 62
- ‘A Bridge Too Far? History as Context in the Interpretation of the South African Constitution’ (2001) 17 SAJHR 1
- ‘Substantive Equality After *Grootboom*: The Emergence of Social and Economic Context as a Guiding Value in Equality Jurisprudence’ [2001] Acta Juridica 52
- ‘From Heteronormativity to Full Sexual Citizenship?: Equality and Sexual Freedom in Laurie Ackermann’s Constitutional Jurisprudence’ [2008] Acta Juridica 254
- De Waal J, ‘Equality and the Constitutional Court’ (2002) 14 SA Merc LJ 141
- Dixon R, ‘The Supreme Court of Canada, Charter Dialogue and Deference’ (2009) 47 Osgoode Hall L J 235
- ‘The Supreme Court of Canada and Constitutional (Equality) Baselines’ (2013) 50 Osgoode Hall L J 637
- Dodek AM, ‘Canada as Constitutional Exporter: The Rise of the “Canadian Model” of Constitutionalism’ (2007) 36 SCLR 309
- Du Bois F and Visser D, ‘The Influence of Foreign Law in South Africa’ (2003) 13 Transnatl L & Contemp Probs 593
- Du Plessis M, ‘Between Apology and Utopia: The Constitutional Court and Public Opinion’ (2002) 18 SAJHR 1
- and Scott S, ‘The Variable Standard of Rationality Review: Suggestions for Improved Legality Jurisprudence’ (2013) 130 SALJ 597

- Duclos N, 'Disappearing Women: Racial Minority Women in Human Rights Cases' (1993) 6 CJWL 25
- Dyzenhaus D, 'Law as Justification: Etienne Mureinik's Conception of Legal Culture' (1998) 14 SAJHR 11
- Epstein L and Knight J, 'Constitutional Borrowing and Nonborrowing' (2003) 1 ICON 196
- Fagan A, 'Dignity and Unfair Discrimination: A Value Misplaced and a Right Misunderstood' (1998) 14 SAJHR 220
- Feldman D, 'Human Dignity as a Legal Value: Part 1' [1999] PL 682
- Fiss OM, 'Groups and the Equal Protection Clause' (1976) 5 Philosophy & Public Affairs 107
- Foster A, 'The Role of Dignity in Canadian and South African Gender Equality Jurisprudence' (2008) 17 Dalhousie J Legal Stud 73
- Fowkes J, 'How to Open the Doors of the Court—Lessons on Access to Justice from Indian PIL' (2011) 27 SAJHR 434
- Fredman S, 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21 SAJHR 163
- 'Redistribution and Recognition: Reconciling Inequalities' (2007) 23 SAJHR 214
- Freedman W, 'Understanding the Right to Equality' (1998) 115 SALJ 243
- Fudge J, 'Substantive Equality, the Supreme Court of Canada, and the Limits to Redistribution' (2007) 23 SAJHR 235
- Gilbert D and Majury D, 'Critical Comparisons: The Supreme Court of Canada Dumps Section 15' (2006) 24 Windsor YB Access Justice 111
- Goldblatt B, 'Regulating Domestic Partnerships—A Necessary Step in the Development of South African Family Law' (2003) 120 SALJ 610
- Grant E, 'Dignity and Equality' (2007) 7 HRLRev 299

- and Small J, ‘Disadvantage and Discrimination: The Emerging Jurisprudence of the South African Constitutional Court’ (2000) 51 NILQ 174
- Greschner D, ‘The Purpose of Canadian Equality Rights’ (2002) 6 Rev Const Stud 291
- Grice H, ‘Meaning’ (1957) 66 The Philosophical Review 377
- Grimm D, ‘Proportionality in Canadian and German Constitutional Jurisprudence’ (2007) 57 UTLJ 383
- Hart H, ‘Prolegomenon to the Principles of Punishment’ (1959) 60 Proceedings of the Aristotelian Society 1
- Himonga C and Pope A, ‘*Mayelane v Ngwenyama and Minister for Home Affairs*: A Reflection on Wider Implications’ [2013] Acta Juridica 318
- Hoexter C, ‘The Future of Judicial Review in South African Administrative Law’ (2000) 117 SALJ 484
- Holmes E, ‘Anti-Discrimination Rights Without Equality’ (2005) 68 MLR 175
- Hurd HM, ‘Expressing Doubts About Expressivism’ (2005) U Chi Legal F 405
- Jagwanth S, ‘What is the Difference? Group Categorisation in *Pretoria City Council v Walker* 1998 (2) SA 363 (CC)’ (1999) 15 SAJHR 200
- ‘Expanding Equality’ [2005] Acta Juridica 131
- and Murray C, ‘Ten Years of Transformation: How Has Gender Equality in South Africa Fared?’ (2002) 14 CJWL 255
- Kahn-Freund O, ‘On Uses and Misuses of Comparative Law’ (1974) 37 MLR 1
- Khaitan T, ‘Dignity as an Expressive Norm: Neither Vacuous Nor a Panacea’ (2012) 32 OJLS 1
- Klare KE, ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 SAJHR 146
- Koshan J and Watson Hamilton J, ‘Meaningless Mantra: Substantive Equality after *Withler*’ (2011) 16 Rev Const Stud 31

- ‘The Continual Reinvention of Section 15 of the Charter’ (2013) 64 U New Brunswick L J 19
- Krüger R, ‘Sex Work from a Feminist Perspective: A Visit to the *Jordan* Case’ (2004) 20 SAJHR 138
- ‘Equality and Unfair Discrimination: Refining the *Harksen* Test’ (2011) 128 SALJ 479
- Langa P, ‘Transformative Constitutionalism’ (2006) 3 Stell L Rev 351
- and Cameron E, ‘The Constitutional Court and the Supreme Court of Appeal after 1994’ (2010) 23 Advocate 28
- Lessard HA, ‘“Dollars Versus [Equality] Rights”: Money and the Limits on Distributive Justice’ (2012) 58 SCLR 299
- Liebenberg S, ‘The Value of Human Dignity in Interpreting Socio-Economic Rights’ (2005) 21 SAJHR 1
- and Goldblatt B, ‘The Interrelationship between Equality and Socio-Economic Rights Under South Africa's Transformative Constitution’ (2007) 23 SAJHR 335
- Loenen T, ‘The Equality Clause in the South African Constitution: Some Remarks from a Comparative Perspective’ (1997) 13 SAJHR 401
- Martin S, ‘Balancing Individual Rights to Equality and Social Goals’ (2001) 80 Can Bar Rev 299
- Matsinhe DM, ‘Africa’s Fear of Itself: The Ideology of *Makwerekwere* in South Africa’ (2011) 32 Third World Quarterly 295
- McConnachie C, ‘Human Dignity, “Unfair Discrimination” and Guidance’ (2014) 34 OJLS 609
- McCrudden C, ‘A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights’ (2000) 20 OJLS 499
- ‘Legal Research and the Social Sciences’ [2006] LQR 632
- ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19 EJIL 655

- McIntyre S, 'The Supreme Court and Section 15: A Thin and Impoverished Notion of Judicial Review' (2006) 31 QLJ 731
- McLachlin B, 'Equality: The Most Difficult Right' (2001) 14 SCLR 17
- Michelman FI, 'On the Uses of Interpretive "Charity": Some Notes on Application, Avoidance, Equality and Objective Unconstitutionality from the 2007 Term of the Constitutional Court of South Africa' (2008) 1 Con Court Rev 1
- Moreau SR, 'The Wrongs of Unequal Treatment' (2004) 54 UTLJ 291
- 'Equality Rights and the Relevance of Comparator Groups' (2006) 5 J L & Equality 81
- 'The Promise of *Law v Canada*' (2007) 57 UTLJ 415
- '*R v Kapp*: New Directions for Section 15' (2009) 40 Ottawa L Rev 283
- Moseneke D, 'Transformative Adjudication' (2002) 18 SAJHR 309
- Mureinik E, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 SAJHR 31
- O'Regan C, 'A Forum for Reason: Reflections on the Role and Work of the Constitutional Court' (2012) 28 SAJHR 116
- 'Undoing Humiliation, Fostering Equal Citizenship: Human Dignity in South Africa's Sexual Orientation Equality Jurisprudence' (2013) 37 NYU Rev L & Soc Change 307
- O'Sullivan M and Murray C, 'Brooms Sweeping Oceans? Women's Rights in South Africa's First Decade of Democracy' [2005] Acta Juridica 1
- O'Connell R, 'The Role of Dignity in Equality Law: Lessons from Canada and South Africa' (2008) 6 ICON 267
- 'Cinderella Comes to the Ball: Art 14 and the Right to Non-Discrimination in the ECHR' (2009) 29 LS 211
- Pieterse M, 'Discrimination Through the Eye of the Beholder' (2000) 16 SAJHR 121
- 'What Do We Mean When We Talk About Transformative Constitutionalism?' (2005) 20 SAPL 155

- ‘Finding for the Applicant? Individual Equality Plaintiffs and Group-Based Disadvantage’ (2008) 24 SAJHR 397
- Pildes RH and Niemi RG, ‘Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances after *Shaw v Reno*’ (1993) 92 Mich L Rev 483
- Pillay A, ‘Economic and Social Rights Adjudication: Developing Principles of Judicial Restraint in South Africa and the United Kingdom’ [2013] PL 599
- Pothier D, ‘Connecting Grounds of Discrimination to Real People’s Real Experiences’ (2001) 13 CJWL 37
- Pretorius J, ‘*R v Kapp*: A Model for South African Affirmative Action Jurisprudence?’ (2009) 126 SALJ 398
- ‘Fairness in Transformation: A Critique of the Constitutional Court’s Affirmative Action Jurisprudence’ (2010) 26 SAJHR 536
- Price A, ‘Rationality Review of Legislation and Executive Decisions: *Poverty Alleviation Network* and *Albutt*’ (2010) 127 SALJ 580
- Primus RA, ‘Equal Protection and Disparate Impact: Round Three’ (2003) 117 Harv L Rev 493
- Réaume D, ‘Of Pigeonholes and Principles: A Reconsideration of Discrimination Law’ (2002) 40 Osgoode Hall L J 113
- ‘Discrimination and Dignity’ (2003) 63 La L Rev 1
- ‘The Relevance of Relevance to Equality Rights’ (2006) 31 QLJ 696
- Rivers J, ‘Proportionality and Variable Intensity of Review’ (2006) 65 CLJ 174
- Roux T, ‘Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction Without a Difference?’ (2009) 20 Stell L Rev 258
- Ryder B, Faria CC and Lawrence E, ‘What’s *Law* Good For? An Empirical Overview of Charter Equality Rights Decisions’ (2004) 24 SCLR 103

- Sachs A, 'Equality Jurisprudence: The Origin of Doctrine in the South African Constitutional Court' (1999) 5 *Rev Const Stud* 76
- Sarkin J, 'The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions' (1998) 1 *U Pa J Const L* 178
- Scheppele KL, 'Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models' (2003) 1 *ICON* 296
- Sealy-Harrington J, 'Assessing Analogous Grounds: The Doctrinal and Normative Superiority of a Multi-Variable Approach' (2013) 10 *J L & Equality* 37
- Shin PS, 'The Substantive Principle of Equal Treatment' (2009) 15 *LT* 149
- Silvers A and Stein MA, 'Human Rights and Genetic Discrimination: Protecting Genomics' Promise for Public Health' (2003) 31 *J L Med & Ethics* 377
- Small J and Grant E, 'Dignity, Discrimination, and Context: New Directions in South African and Canadian Human Rights Law' (2005) 6 *HRLRev* 25
- Smith A, 'Constitutionalising Equality: The South African Experience' (2008) 9 *IJDL* 203
- Steinberg C, 'Can Reasonableness Protect the Poor? A Review of South Africa's Socio-Economic Rights Jurisprudence' (2006) 123 *SALJ* 264
- Sunstein CR, 'The Anticaste Principle' (1994) 92 *Mich L Rev* 2410
- 'Problems with Rules' (1995) 3 *Cal Law Rev* 953
- Tiller EH and Cross FB, 'What is Legal Doctrine?' (2006) 100 *NWU L Rev* 517
- Van Marle K, 'Equality: An Ethical Interpretation' (2000) 63 *THRHR* 595
- Vogt GS, 'Non-Discrimination on the Grounds of Race in South Africa—With Special Reference to the Promotion of Equality and the Prevention of Unfair Discrimination Act' (2001) 45 *JAL* 196
- Wang L, 'Weight Discrimination: One Size Fits All Remedy?' (2008) 117 *Yale LJ* 1900
- Wesson M, 'Discrimination Law and Social Rights: Intersections and Possibilities' (2007) 13 *Juridica* 74

— ‘Equality and Social Rights: An Exploration in Light of the South African Constitution’  
[2007] PL 748

Yoshino K, ‘Covering’ (2002) 111 Yale LJ 769

Young IM, ‘Equality of Whom? Social Groups and Judgments of Injustice’ (2001) 9 J Pol  
Phil 1

## **REPORTS, THESES, AND WORKING PAPERS**

Fredman S, *Comparative Study of Anti-Discrimination and Equality Laws of the US, Canada, South  
Africa and India* (European Commission, 2012)

Khaitan T, ‘An Autonomy-Based Foundation for Legal Protection Against Discrimination’  
(DPhil thesis, University of Oxford 2010)

Waldron J, ‘Is Dignity the Foundation of Human Rights?’ (2013) Working Paper No. 12-73  
NYU Public Law & Legal Theory Research Paper Series

## **NEWSPAPER ARTICLES**

Carter C, ‘The Brutality of “Corrective Rape”’ *New York Times* (New York, 27 July 2013)

Gardner J, ‘How to Be a Good Judge: Review of *The Rule of Law* by Tom Bingham’ *London  
Review of Books* (London, 8 July 2010)

## **INTERNET REFERENCES**

Dickson J, ‘Interpretation and Coherence in Legal Reasoning’ in Zalta EN (ed), *The Stanford  
Encyclopedia of Philosophy* (Stanford 2001)  
<<http://plato.stanford.edu/archives/spr2010/entries/legal-reas-interpret/>> accessed  
29 September 2014

Goseparth S, ‘Equality’ in Zalta EN (ed), *The Stanford Encyclopedia of Philosophy* (Stanford 2011)  
<<http://plato.stanford.edu/entries/equality/>> accessed 29 September 2014

Kepa K and Perry J, 'Pragmatics' in Zalta EN (ed), *The Stanford Encyclopedia of Philosophy*  
(Stanford 2012) <<http://plato.stanford.edu/entries/pragmatics/>> accessed 29  
September 2014

Speaks J, 'Theories of Meaning' in Zalta EN (ed), *The Stanford Encyclopedia of Philosophy*  
(Stanford 2014) <<http://plato.stanford.edu/entries/meaning/>> accessed 29  
September 2014