WHAT IS UNFAIR DISCRIMINATION?

A Theory of the South African Constitutional Court's Unfair Discrimination Jurisprudence

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ABSTRACT

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In this thesis, I seek to understand 'unfair discrimination' under the South African Constitution, as it has been interpreted and applied by the Constitutional Court. The Court holds that unfair discrimination involves differences in treatment that violate human dignity. However, it has not clearly explained what this violation of dignity involves. Without this explanation, its '*Harksen* test' for unfair discrimination provides little guidance in identifying this wrong.

In response to this lack of explicit guidance, I examine the case law and extract three requirements for establishing the particular type of dignity violation that is required for a finding of unfair discrimination: a) there must be differentiation on the basis of group characteristics; b) that is disproportionate; and c) threatens to create or perpetuate patterns of group disadvantage. Requirements b) and c) are intertwined in important ways. I demonstrate that the Court's judgments largely turn on a proportionality analysis, as the Court weighs the impact of the discrimination on the disfavoured group against its purpose. Having found that the discrimination is disproportionate, the Court regularly concludes that the law or action expresses impermissible 'messages' about the disfavoured group, messages that threaten to create or perpetuate patterns of group disadvantage. Using the literature on 'legal expressivism', I examine these messages and conclude that they primarily reflect the concern that the state may be reasonably construed to be acting on the basis of prejudice or impermissible stereotypes.

I then use this understanding of the violation of dignity to explain the key features of the *Harksen* test. While the *Harksen* test parcels out this enquiry in a slightly different form, these three requirements form the basis of this two-part test. The result is a clearer understanding of the Court's jurisprudence and firmer guidance in identifying unfair discrimination.

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Alberta Law Review	Alberta L Rev
Canadian Journal of Law and Jurisprudence	CJLJ
Canadian Journal of Women and the Law	CJWL
Harvard Law Review	Harv L Rev
Human Rights Law Review	HRLRev
International Journal of Constitutional Law	IJCL
Journal of African Law	JAL
Louisiana Law Review	Louisiana L Rev
Maryland Law Review	Md L Rev
Michigan Law Review	Mich L Rev
Minnesota Law Review	Minn L Rev
Northern Ireland Legal Quarterly	NILQ
South African Journal of Human Rights	SAJHR
South African Law Journal	SALJ
South African Public Law	SAPL
Tydsrif vir Hedendaagse Romeins-Hollandse Reg	THRHR
University of Chicago Law Review	U Chi L Rev
University of Chicago Legal Forum	U Chi Legal F
University of Pennsylvania Law Review	U Pennsylvania L Rev
University of Toronto Law Journal	UTLJ

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INTRODUCTION

I WHAT IS UNFAIR DISCRIMINATION?

The prohibition of 'unfair discrimination' in the South African Constitution[1] is profoundly significant in light of South Africa's history. It is therefore troubling that the South African Constitutional Court has provided little explicit guidance in understanding or identifying this constitutional wrong. By the Court's own admission, its dignity-based explanation of unfair discrimination and its '*Harksen* test'[2] for identifying this wrong were preliminary in nature and in need of further refinement over time.[3] Yet after fifteen years and more than thirty judgments, the Court has done little to clarify its approach. This has real implications for the practice of discrimination law. Lower courts, practitioners, and members of the public are left with limited guidance and the difficult task of unpacking the Court's case law. The current members of the Court face a similar challenge following the retirement of all of the early discrimination law pioneers.[4] Arguably there are already signs that the Court has misinterpreted and misapplied its earlier jurisprudence.[5]

Some might argue that the Court's reluctance to provide explicit guidance simply reflects that its approach to unfair discrimination is incoherent.[6] However, I contend that if we scrutinise the case law we will see that there is an underlying coherence to it. I seek to

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[1] Constitution of the Republic of South Africa, 1996, s 9(3)-(5) (Constitution). See text to n 7 below.

[2] Developed in *Harksen v Lane NO & others* 1998 (1) SA 300 (CC) [54] (*Harksen*). Outlined in text to n 19ff below.

[3] ibid [42], reflecting on the Court's judgments in *Prinsloo v Van der Linde & another* 1997 (3) SA 1012 (CC) (*Prinsloo*) and *President of the Republic of South Africa & another v Hugo* 1997 (4) SA 1 (CC) (*Hugo*).

[4] They include Langa CJ, Ngcobo CJ, Goldstone J, Ackermann J, O'Regan J, Mokgoro J, and Sachs J.

[5] See for example Kondile AJ's majority judgment in *Union of Refugee Women & others v Director: Private Security Industry Regulatory Authority & others* 2007 (4) BCLR 339 (CC) (*Union of Refugee Women*) discussed in Chapter 2, text to n 201ff.

[6] See for example Dennis Davis, 'Equality: The Majesty of Legoland Jurisprudence' (1999) 116 SALJ 398, 413 for an early criticism along these lines.

draw this out by constructing a doctrinal theory of the Court's unfair discrimination jurisprudence. This Chapter lays the groundwork for this doctrinal theorising. In Section II, I will outline the Court's approach to unfair discrimination, demonstrating the need for this theory and identifying the questions that it must address. Section III sets out my methodology and Section IV outlines my substantive claims.

II THE COURT'S APPROACH

(a) The section 9 enquiry

The prohibition on unfair discrimination is found in sections 9(3) and (4) of the Constitution. 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.[7]

The Court has not yet dealt with unfair discrimination by private individuals under section 9(4). Therefore this thesis is will be confined to the section 9(3) prohibition of unfair discrimination by 'organs of state'.[8]

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[7] Preceded by s 8 of the interim Constitution (Constitution of the Republic of South Africa, Act 200 of 1993). The Court's approach to unfair discrimination has remained unchanged, despite some textual differences between these provisions. See *National Coalition for Gay and Lesbian Equality & another v Minister of Justice & others* 1999 (1) SA 6 (CC) [15] (the *Sodomy Case*).

[8] Defined in Constitution, s 239.

The Court engages in a four-part enquiry in dealing with section 9(3) challenges.[9] First, it subjects alleged unfair discrimination to a rationality analysis under section 9(1) to determine 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'.[10] In practice the Court often bypasses this enquiry, proceeding directly to the unfair discrimination enquiry.[11] Second, where the alleged unfair discrimination involves measures to protect or advance historically disadvantaged persons (affirmative action), the Court determines whether it complies with section 9(2), using the test devised in *Minister of Finance v Van Heerden*.[12] If it satisfies this test then it is shielded from scrutiny under section 9(3). Third, if the alleged unfair discrimination falls outside of section 9(2) or it fails the *Van Heerden* test, the Court considers whether it amounts to unfair discrimination under section 9(3). Finally, if there is unfair discrimination, the Court performs a limitations analysis under the section 36 general limitations clause.

In this thesis I will focus exclusively on the unfair discrimination enquiry. The Court regards this as the focal point of the section 9 right to equality[13] and it is where the vast majority of cases are decided. A clearer understanding of unfair discrimination will allow us to understand its conceptual and practical connections with rationality and affirmative action, but I will leave that task for a future project. I will, however, say more about the

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[9] See further Catherine Albertyn and Beth Goldblatt, 'Equality' in Stuart Woolman and others (eds), *Constitutional Law of South Africa* (2nd edn, Juta 2009) 35.2.

[10] *Harksen* (n 2) [43] and [54]. Section 9(1) may have more extensive content, see *Prinsloo* (n 3) [22].

[11] See for example *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) [26].

[12] *Minister of Finance & another v Van Heerden* 2004 (6) SA 121 (CC) [37]-[44] (*Van Heerden*). The measure must a) '[target] persons or categories of persons who have been disadvantaged by unfair discrimination'; b) it must be 'designed to protect or advance such persons or categories of persons'; and c) it must 'promote the achievement of equality'.

[13] See *Sodomy Case* (n 7) [121] (Sachs J).

connection between unfair discrimination and the section 36 limitations analysis in Chapter 2.[14]

(b) Unfair discrimination and the need for guidance

The Constitutional Court formulated its approach to unfair discrimination early in the development of its jurisprudence. The central tenet of this approach is that unfair discrimination 'principally means treating persons differently in a way which impairs their fundamental dignity as human beings'.[15] In *Harksen*,[16] the Court added that unfair discrimination may also involve an 'impairment of a comparably serious nature', but the Court has not specified what constitutes a 'comparably serious' impairment involves and this qualification has played little role in subsequent judgments.[17] Writing in a personal capacity, Ackermann J[18] describes this as an 'obfuscatory qualification' that should not draw attention away from the Court's real focus on dignity. Following Ackermann J, I will proceed on the basis that unfair discrimination is equated with the violation of dignity in the Court's existing case law.

The Court's dignity-based approach is reflected in its two-stage '*Harksen* test' for unfair discrimination.[19] At the first stage, the Court determines whether there has been discrimination, which it defines as differences in treatment ('differentiation') based directly

[14] See Chapter 2, text to n 139ff.

[15] *Prinsloo* (n 3) [31]; see further *Hugo* (n 3) [41], two judgments delivered on the same day in which the Court first developed its dignity-based account of unfair discrimination.

[16] *Harksen* (n 3) [51].

[17] Barring a fleeting reference in *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) (*Walker*) [81].

[18] LWH Ackermann, 'Equality and Non-Discrimination: Some Analytical Thoughts' (2006) 22 SAJHR 597, 599.

[19] *Harksen* (n 3) [54]. The Court and various commentators sometimes refer to the broader s 9 enquiry discussed above as the '*Harksen* test'. In contrast, I will only apply this label to the two-stage test for unfair discrimination.

or indirectly on one or more of the listed grounds of discrimination in section 9(3), or on unlisted characteristics that are 'analogous' to these grounds.[20] 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'.[21] 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.[22] There is a rebuttable presumption of unfairness where discrimination occurs on listed grounds, while complainants bear the burden of proof in cases involving analogous grounds.[23] The Court has developed an open list of considerations for determining whether discrimination has violated dignity, 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.[24]

However, the Court has not once explained how these considerations assist in identifying violations of dignity.

The *Harksen* test for unfair discrimination is therefore entirely dependent on an understanding of what constitutes a violation of dignity. The difficulty is that the Court has

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[20] ibid.

[21] ibid [47] (emphasis added).

[22] ibid [51].

[23] Constitution, s 9(5).

[24] *Harksen* (n 2) [52].

not provided a clear explanation of what this violation of dignity involves.[25] Without this explanation, the test is little more than a template for structuring judgments rather than a guide to establishing unfair discrimination. This provides little direction for the lower courts, practitioners, members of the public, and the current members of the Court in understanding or identifying this wrong.

The statutory prohibitions on unfair discrimination in the Employment Equity Act[26] and the Promotion of Equality and the Prevention of Unfair Discrimination Act[27] (Equality Act) have done little to address this need for guidance.[28] Unfair discrimination claims must now be litigated 'within the four corners' of these statutes rather than relying directly on sections 9(3) or 9(4) of the Constitution.[29] However, these statutory prohibitions are largely modelled on the constitutional prohibition and must be interpreted in light of the Court's jurisprudence.[30] The Court's jurisprudence is particularly important in understanding the unfair discrimination provisions in the Equality Act, a poorly drafted and often confusing attempt to codify the *Harksen* test.[31] Perhaps as a result, the Court has almost entirely ignored its provisions.[32] Therefore, the Equality Act has only increased the need for a clearer understanding of the Court's jurisprudence.

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25 Discussed further in Chapter 1 below.

26 55 of 1998, s 6.

27 4 of 2000, s 6 read with s 1 and s 14.

28 See also Labour Relations Act 66 of 1995, s 187(1)(f).

29 In accordance with the principle of 'subsidiarity' when dealing with legislation giving effect to constitutional rights. See further *MEC for Education, Kwa-Zulu Natal, & others v Pillay* 2008 (1) SA 474 (CC) [40] (*Pillay*).

30 ibid [43].

31 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', *Pillay* (n 29) [168]; see further 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, 480.

32 To date, *Pillay* (n 29) is the Court's only engagement with the Act in the 12 years since it was brought into force.

(c) The need for a doctrinal theory

I seek to rectify this lack of guidance by developing a theory of the Court's unfair discrimination jurisprudence. I will discuss the details of this doctrinal theory-building in Section III. For now it is apparent that this theory must address two primary questions. First, what constitutes the type of dignity violation that is required for a finding of unfair discrimination? And, second, how does the *Harksen* test assist in identifying this violation? By answering these questions I hope to provide a clearer understanding of the Court's jurisprudence and firmer guidance in understanding and identifying unfair discrimination.

This project differs from the current literature on the Court's case law. Much of the early academic commentary focused on whether human dignity is the appropriate value to underpin the wrong of unfair discrimination and the broader section 9 right to equality.[33] This debate drew attention to the many possible interpretations that can be given to human dignity, but these contributions are most often disengaged from how the Court has actually interpreted and used dignity.[34] Other contributions to the literature start with explicit or implicit theories of how we ought to understand human dignity, unfair discrimination or equality, based on moral or policy grounds that are largely independent of the Court's jurisprudence, and proceed to evaluate and criticise the Court's judgments in the light of these theories.[35] These normative contributions are valuable in guiding the development of

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[33] For sceptical accounts see Davis (n 6); Catherine Albertyn and Beth Goldblatt, 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 SAJHR 248; Anton Fagan, 'Dignity and Unfair Discrimination: A Value Misplaced and a Right Misunderstood' (1998) 14 SAJHR 220; Henk Botha, 'Equality, Dignity, and the Politics of Interpretation' (2004) 19 SAPL 724; Henk Botha, 'Equality, Plurality and Structural Power' (2009) 25 SAJHR 1. For a defence of dignity see Susie Cowen, 'Can "Dignity" Guide South Africa's Equality Jurisprudence?' (2001) 34 SAJHR 34; Ackermann (n 18); Evadné Grant, 'Dignity and Equality' (2007) 7 HRLRev 299.

[34] See Chapter 1 below.

[35] See for example Albertyn and Goldblatt, 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (n 33); Karen van Marle, 'Equality: An Ethical

the Court's jurisprudence, but they fail to provide clear insights into the nature of unfair discrimination as it has been interpreted and applied by the Court.

There is also a substantial body of doctrinal literature on unfair discrimination.[36] While this literature plays an important role in synthesising and mapping the case law, there have been few attempts to develop a fully-fledged theory of the Court's unfair discrimination jurisprudence. Where authors offer a theory they tend to slip into implicit or explicit normative theorising about how the Court ought to approach unfair discrimination.[37] Furthermore, as I will argue over the course of this thesis, many of these doctrinal contributions have overlooked vitally important features of the Court's reasoning.

As a result, this project departs from the existing literature both in its methodology and its substance. I will now turn to explain my methodology in further detail before setting out my substantive claims in Section IV.

III METHODOLOGY

(a) Constructing a doctrinal theory

I have described my project as an attempt to create a doctrinal theory of the Court's unfair discrimination jurisprudence. The precise nature of doctrinal analysis is contested, but at its core it involves reducing disorganised and often fragmentary legal materials into something

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Interpretation' (2000) 63 THRHR 595; Sandra Fredman, 'Redistribution and Recognition: Reconciling Inequalities' (2007) 23 SAJHR 214; Catherine Albertyn, 'Substantive Equality and Transformation in South Africa' (2007) 23 SAJHR 253.

[36] See for example Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (5th edn, Juta 2005) ch 9; Gretchen Carpenter, 'Equality and Non-Discrimination in the New South African Constitutional Order (1): The Early Cases' (2001) 64 THRHR 409 and the three other articles in this series; Albertyn and Goldblatt, 'Equality' (n 9) ch 35; Krüger (n 31).

[37] See Albertyn and Goldblatt, 'Equality' ibid; Krüger ibid.

more 'intelligible'.[38] This task is typically associated with textbook-style description, categorisation, and summarising of legal materials. However, doctrinal analysis generally holds higher ambitions, aiming to build theories about laws or an area of law.[39]

In this thesis I seek to develop an 'explanatory' theory[40] of the Court's unfair discrimination jurisprudence. This involves establishing the nature of the wrong the Court is seeking to address and using this to explain the core features of the *Harksen* test for identifying this wrong. The Court holds that this wrong is the violation of human dignity. Therefore my task is to understand what constitutes this violation.[41] We must recognise that while the *Harksen* test is primarily shaped by the wrong it is designed to uncover, it is also the product of other considerations extraneous to the wrong, such as fairness to the parties, practical convenience, and concerns over the Court's institutional competence and legitimacy. Nevertheless, by understanding the nature of the dignity violation required for a finding of unfair discrimination we can explain the core features of this test.

The test of this theory is whether it fits the Court's jurisprudence and brings a measure of coherence to it. There may be some aspects at the margins that do not square with the theory and these discrepancies may be explained away or discarded. Nevertheless, the theory must attain a degree of 'fit' with the core features of this jurisprudence if it is to

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[38] Christopher McCrudden, 'Legal Research and the Social Sciences' (2006) LQR 632, 634; Richard A Posner, 'In Memoriam: Bernard D. Meltzer' (2007) 74 U Chi L Rev 435, 437; 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.

[39] 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.

[40] See further Jules Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (OUP 2003) 3; W Bradley Wendel, 'Explanation in Legal Scholarship: The Inferential Structure of Doctrinal Legal Analysis' (2011) 96 Cornell L Rev 101, 102 and 104.

[41] There is some dispute over the extent to which explanatory theories must track the concepts used by courts. I side with Stephen A Smith who suggests that a successful explanatory theory must attempt to render courts' concepts and self-understandings intelligible, even though they may not be ultimately defensible. See Stephen A Smith, *Contract Theory* (OUP 2004) 27; see further Coleman ibid 26.

be acceptable.[42] This explanatory theory differs from justifying the Court's jurisprudence.[43] All justifications must start with an explanation.[44] However, justifications go further by arguing that the jurisprudence is right or appropriate on moral or policy grounds.[45] That is not my aim here.

It may be argued that it is impossible to separate doctrinal theorising about the Court's jurisprudence from moral or policy judgments about what it ought to be. This argument has connections to broader debates in general jurisprudence[46] and meta-theory[47] that I will not attempt to resolve here. I will assume that doctrinal theorising need not necessarily incorporate these types of normative judgments.[48] However, I will concede a weaker form of this concern: that it is exceedingly difficult in practice to maintain a neat divide between doctrinal and normative theorising about unfair discrimination, given that this area of law is (and ought to be) saturated with background intuitions about what makes unfair discrimination morally wrong and how the law ought to respond to it.[49] I acknowledge the risk of smuggling in subjective moral intuitions under the guise of doctrinal

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42 Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 66. However, I distance myself from Dworkin's broader claim that a theory of a law or area of law must not only fit the practice but also justify it in light of the community's prevailing moral views (see 225-28, 230-1). See further Wendel (n 40) 109.

43 Coleman (n 40); cf John Gardner, 'Backwards and Forwards with Tort Law' in J Keim-Campbell, M O'Rourke and D Shier (eds), *Law and Social Justice* (MIT Press 2005) 9.

44 As Gardner recognises in a more recent piece 'not all explanations are justifications… [b]ut all justifications are explanations.' John Gardner, 'What is Tort Law For? Part 1: The Place of Corrective Justice' (2011) 30 Law and Philosophy 1, 2-3.

45 See Wendel (n 40) 105.

46 See Julie Dickson, *Evaluation and Legal Theory* (Hart 2001) ch 2.

47 See 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).

48 Doctrinal theorising can of course generate claims about how the law ought to be applied or developed for the sake of consistency with existing doctrine.

49 See Davis (n 6) 399.

neutrality, but I will attempt to approach the case law in an open and honest way, indicating where it is silent or admits of multiple interpretations.

(b) Methodological details

This thesis focuses exclusively on the Constitutional Court's case law, as the Court has been the primary driver of South Africa's unfair discrimination jurisprudence. I have studied all of the Court's reported unfair discrimination judgments. However, I have selected 17 cases[50] for particular scrutiny as they demonstrate the Court's reasoning most clearly. They include the Court's formative judgments, where it first developed and applied its approach to unfair discrimination, requiring it to be more candid about the inner workings of this approach than it has been in more recent judgments.[51] They also include a number of split decisions where the majority and the minority were pushed to articulate their reasoning with greater clarity than in cases of unanimity.[52]

At various points I will refer to the Canadian Supreme Court's discrimination case law and Canadian academic commentary. The South African Court has been influenced by the Canadian Supreme Court's pre-*Kapp*[53] dignity-based understanding of discrimination

[50] *Prinsloo* (n 3); *Hugo* (n 3); *Harksen* (n 2); *Larbi-Odam & others v Member of the Executive Council for Education (North-West Province) & another* 1998 (1) SA 745 (CC) (*Larbi-Odam*); *Walker* (n 17); *Sodomy Case* (n 7); *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC) (*Immigration Case*); *Hoffmann* (n 11); *S v Jordan & others* 2002 (6) SA 642 (CC) (*Jordan*); *Khosa & others v Minister of Social Development & others; Mahlaule & another v Minister of Social Development & others* 2004 (6) SA 505 (CC) (*Khosa*); *Bhe & others v Magistrate, Khayelitsha, & others* 2005 (1) SA 580 (CC) (*Bhe*); *Mabaso v Law Society, Northern Provinces, and Another* 2005 (2) SA 117 (CC) (*Mabaso*); *Volks NO v Robinson & others* 2005 (5) BCLR 446 (CC) (*Volks*); *Minister of Home Affairs & another v Fourie & another* 2006 (1) SA 524 (CC) (*Fourie*); *Union of Refugee Women* (n 5); *Pillay* (n 29); *Geldenhuys v National Director of Public Prosecutions & others* 2009 (1) SACR 231 (CC).

[51] See for example the brief reasoning in *Mvumvu & others v Minister of Transport & another* 2011 (2) SA 473 (CC) [28]-[32].

[52] See Chapter 2, text to n 145 for further discussion of the revelatory role of dissenting judgments.

[53] Developed in *Miron v Trudel* [1995] 2 SCR 418 (Canadian Supreme Court) and *Egan v Canada* [1995] 2 SCR 513 (Canadian Supreme Court), and fully adopted in *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 (Canadian Supreme Court). However, the Canadian Court has since moved away from using dignity as a legal test for discrimination, see *R v Kapp* [2008] 2 SCR 483 (Canadian Supreme Court) [21]-[22]. On the connections between the Canadian and South African jurisprudence, see Joan Small and Evadné Grant, 'Dignity, Discrimination, and Context: New Directions in South African and Canadian Human Rights Law'

under section 15 of the Canadian Charter. However, I will not attempt a full analysis of the Canadian case law and its influence on the South African jurisprudence in this thesis.

(c) The scope of this theory

My explanatory theory of unfair discrimination carries several important qualifications. As indicated above, this theory will only apply to unfair discrimination perpetrated by organs of state and I will not seek to engage with the Court's approach to rationality or affirmative action under section 9(1) and 9(2) respectively. Furthermore, I will not attempt to advance a broader theory of equality as a right and a value under the Constitution. The prohibition of unfair discrimination is an important aspect of the right to equality but, as the Court has acknowledged,[54] equality is a much broader concept. Understanding unfair discrimination is a step toward developing a broader theory of equality under the South African Constitution, but that task is beyond the scope of this project. Finally, in developing this theory, I will identify what constitutes the particular type of dignity violation[55] that is required for a finding of unfair discrimination. Whether this violation of dignity can be reconciled with the Court's use of dignity in other contexts or whether it is a philosophically defensible account of dignity are questions that I will leave open in this thesis.

IV THESIS AND ARGUMENT STRUCTURE

The Court's jurisprudence reveals that the violation of dignity required for a finding of unfair discrimination involves: a) 'differentiation' on the basis of group characteristics

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(2005) 6 HRLRev 25; Rory O'Connell, 'The Role of Dignity in Equality Law: Lessons from Canada and South Africa' (2008) 6 IJCL 267.

54 See *Sodomy Case* (n 7) [61]-[63].

55 As the Court recognises, dignity can be violated in other ways. See Chapter 1, nn 71-75.

(differentiation); b) that is disproportionate,[56] reflecting a failure to afford adequate weight to group members' interests (disproportionality); and c) is likely to or actually creates or perpetuates patterns of group disadvantage (patterns of group disadvantage), primarily, but not exclusively, by expressing impermissible messages about the disfavoured group that reinforce or entrench prejudices and stereotypes (the 'expressive concerns') or by contributing to or reinforcing severe socio-economic disadvantage. All three of these requirements are necessary conditions for establishing the violation of dignity; none are individually sufficient for this finding, but together they are jointly sufficient. The *Harksen* test parcels out these requirements in a slightly different form. Nevertheless, these three requirements form the basis of this test. The discrimination enquiry is concerned with whether there is differentiation on the basis of group characteristics that has the *potential* to be disproportionate and to create or perpetuate patterns of group disadvantage. In turn, the unfairness enquiry asks whether the discrimination *actually* has these results.

The three requirements for establishing the violation of dignity are complex, and I will explain them as we explore the Court's jurisprudence rather than defining them here. The concepts of 'groups', 'group characteristics', and 'grounds' do, however, require an initial explanation. Here I will use the terms 'groups' and 'group members' to refer to individuals who share or are perceived to share certain characteristics. I will refer to these shared characteristics as 'group characteristics'. Individuals need not identify with others to count as a group, although identification is often an important shared characteristic, especially in the case of religious and cultural groups. The 'grounds' are those group characteristics that are identified as having the potential to violate dignity when forming the basis of differential treatment. The grounds are usually defined broadly to encompass a

[56] To avoid confusion, it is important to distinguish between disproportionality in the sense I use it here and the language of 'disproportionate impact' that often features in the Court's judgments on indirect discrimination. Disproportionate impact refers to the fact that certain groups have been affected more severely than others. Instead, I am concerned with disproportionality between the purpose of the discrimination and its impact on group members' interests.

category of groups (for example, religion covers all religious groups), but they could be defined narrowly to encompass only a single group (such as HIV-positive people).

My thesis is novel, although its components have been recognised in passing by others. Some commentators have noted that the Court appears to use elements of a proportionality analysis in the unfairness enquiry[57] but none have yet recognised how central this proportionality analysis is in the Court's reasoning. Most commentators have recognised that the Court is concerned with 'patterns of group disadvantage'[58] and some have noted that the Court often associates these patterns of disadvantage with what I term 'expressive concerns'.[59] However, none have yet explored the nature of these expressive concerns and their role in the Court's reasoning in any detail. Furthermore, no commentators have developed these insights into a complete theory, grounded in an analysis of the case law. This is what I set out to do.

This theory will emerge over the course of four chapters. In the first three chapters I will seek to understand what constitutes the particular violation of dignity required for a finding of unfair discrimination. In Chapter 1, I start by exploring how the Court has explained and spoken about dignity in its unfair discrimination case law. In Chapter 2, I investigate how the Court reasons to the conclusion that dignity has been violated, resulting in a finding of unfair discrimination. Here I will distil the three requirements for establishing the violation of dignity: differentiation, disproportionality, and patterns of group disadvantage which are primarily linked with the Court's 'expressive concerns'. In Chapter 3, I will turn to explore the Court's 'expressive concerns' in greater depth. Finally,

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57 See Stuart Woolman and Henk Botha, 'Limitations' in Stuart Woolman and others (eds), *Constitutional Law of South Africa* (2nd edn, Juta 2009) 34-34; Krüger (n 31) 504.

58 See Albertyn and Goldblatt, 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (n 33); Marius Pieterse, 'Finding for the Applicant? Individual Equality Plaintiffs and Group-Based Disadvantage' (2008) 24 SAJHR 397; Botha, 'Equality, Plurality and Structural Power' (n 33).

59 See Fredman (n 35) 215-8; Albertyn, 'Substantive Equality and Transformation in South Africa' (n 35) 255.

in Chapter 4, I will use this understanding of the violation of dignity to explain the core features of the *Harksen* test.

CHAPTER 1: DIGNITY

I INTRODUCTION

The Court's dignity-based account of unfair discrimination suggests that if we can identify what constitutes a violation of dignity then we can make sense of the *Harksen* test. This chapter begins this task by exploring how the Court explains and talks about dignity in its judgments. In Section II, I explore the Court's reflections on human dignity and its connection with unfair discrimination. In Section III, I consider the ways in which the Court frames the conclusion that discrimination has violated dignity.

I will argue that because the Court considers unfair discrimination to be one of many ways that dignity can be violated, we need to isolate the specific type of dignity violation required for a finding of unfair discrimination. I will further demonstrate that the Court considers this type of dignity violation to involve the actual or potential creation or perpetuation of 'patterns of group disadvantage'. This is an important insight, but I will argue that it is far from conclusive and raises many further questions. This is not an argument for dignity scepticism: the assertion that dignity is an indeterminate or content-less legal norm.[60] Instead, this is a claim about the appropriate route to understanding the Court's jurisprudence. Analysing the Court's statements about dignity is a helpful starting point. However, to understand what constitutes this violation of dignity, we need to scrutinise how the Court reasons to the conclusion that dignity has been violated, resulting in a finding of unfair discrimination. That task is left for Chapters 2 and 3.

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[60] See Fagan (n 33) 224; Davis (n 6) 413; see further Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 EJIL 655, 698.

II THE COURT'S REFLECTIONS ON HUMAN DIGNITY

(a) Dignity violations

Human dignity features prominently in the South African Constitution,[61] serving as a guide to the interpretation and adjudication of constitutional rights,[62] a self-standing right,[63] and as the basis for many other rights.[64] In *S v Makwanyane*,[65] O'Regan J defined human dignity as 'an acknowledgment of the intrinsic worth of human beings' which entails that 'human beings are entitled to be treated as worthy of respect and concern'. The Court defines dignity in a similar way in its unfair discrimination case law, as it emphasises that 'dignity requires us to acknowledge the value and worth of all individuals as members of our society'[66] and that 'all human beings, regardless of their position in society, must be accorded equal dignity.'[67] Defined in this way, human dignity is both an 'attribute' and a 'right';[68] or, using Christopher McCrudden's terminology, human dignity makes an 'ontological claim' and a 'relational claim'.[69] As an 'attribute' or 'ontological claim', it expresses the idea that human beings possess equal and intrinsic moral worth. As a 'right' or 'relational claim', human dignity requires that 'this intrinsic worth should be recognised and respected by

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[61] See *Dawood & another v Minister of Home Affairs & others* 2000 (3) SA 936 (CC) [35] (*Dawood*); Stuart Woolman, 'Dignity' in Stuart Woolman and others (eds), *Constitutional Law of South Africa* (2nd edn, Juta 2009) 36.3ff.

[62] Constitution, ss 1(a), 7(1), 36(1) and 39(1)-(2).

[63] Constitution, s 10.

[64] See text to nn 71- 75 below.

[65] *S v Makwanyane* 1995 (3) SA 391 (CC) [328] (*Makwanyane*).

[66] *Sodomy Case* (n 7) [28].

[67] *Hoffmann* (n 11) [27].

[68] *S v Dodo* 2001 (3) SA 382 (CC) [35].

[69] McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (n 60) 679.

others, and some forms of treatment … are inconsistent with, or required by, respect for this intrinsic worth.'[70]

The prohibition of unfair discrimination can be seen as a manifestation of dignity as a 'relational claim': certain types of treatment connected to group characteristics are inconsistent with respect for the intrinsic worth of human beings. Unfair discrimination is, however, just one of many ways in which dignity can be violated. The Court also recognises that cruel, inhuman, and degrading treatment;[71] the denial of a family life;[72] socio-economic deprivation;[73] defamation;[74] and insults,[75] among many other wrongs, are inconsistent with respect for intrinsic moral worth. This holds out the prospect that if we can piece together a coherent account of the Court's conception of human dignity from these many different dignity violations, then we can work backwards to understand unfair discrimination. However, the Court uses dignity in a bewildering range of ways, meaning that if there is a coherent conception of dignity underpinning these violations, it will require substantial work to draw it out.[76] Furthermore, to capture these different violations, it would need to be cast at such a high level of abstraction that it is unlikely to improve on the idea that dignity requires respect for intrinsic moral worth. Therefore, I contend that the best route to understanding unfair discrimination is to determine what constitutes the specific type of

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[70] ibid.

[71] See *Makwanyane* (n 65); *S v Williams & others* 1995 (3) SA 632 (CC); *S v Dodo* (n 68).

[72] See *Dawood* (n 61) [37].

[73] *Government of the Republic of South Africa & others v Grootboom & others* 2001 (1) SA 46 (CC) [44]. See further Sandra Liebenberg, 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 SAJHR 1.

[74] See *Khumalo & others v Holomisa* 2002 (5) SA 401 (CC) [50]; *The Citizen 1978 (Pty) Ltd & others v McBride* 2011 (4) SA 191 (CC) [143]ff (Ngcobo CJ).

[75] See *Le Roux & others v Dey* 2011 (3) SA 274 (CC) (*Le Roux*) [138], [175].

[76] Woolman, 'Dignity' (n 61) attempts to construct such an account but implicitly concedes defeat and reverts to an exposition of Kantian ethics that bears little or no relation to the case law.

dignity violation required for a finding of unfair discrimination. This requires us to focus on the Court's treatment of dignity in its unfair discrimination case law.

(b) Dignity and unfair discrimination

As I noted in the Introduction, the Court has avoided giving a precise explanation of what constitutes the type of dignity violation required for a finding of unfair discrimination. Nevertheless, some clues emerge from its infrequent discussions of dignity. In the *Sodomy Case*,[77] Sachs J noted that the violation of dignity in unfair discrimination cases differs from general dignity violations under section 10 of the Constitution in that it involves treatment based on certain group characteristics. This is a start, but it provides little insight into which group characteristics count or how to determine when treatment based on these characteristics violates dignity.

The Court regularly invokes the memory of apartheid to fill this explanatory gap.[78] There is no doubt that this history of systematic, deliberate racism serves as an important paradigm case of the violation of dignity, giving it an intuitive intelligibility that is difficult to capture in precise, analytical terms. However, as Small and Grant note,[79] these intuitions are unstable and may not be a reliable guide to understanding other types of unfair discrimination — such as discrimination on the basis of gender or sexual orientation — which may take on very different, more subtle forms.[80] Assuming, as the Court does,[81] that there is a common type of dignity violation underpinning these different forms of unfair discrimination, we need to establish its key features.

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[77] *Sodomy Case* (n 7) [124].

[78] See for example *Prinsloo* (n 3) [31]; *Dawood* (n 61) [35].

[79] Small and Grant (n 53) 37-8.

[80] Sachs J consistently emphasised this point, see *Sodomy Case* (n 7) [129]; *Volks* (n 50) [163].

[81] *Prinsloo* (n 3) [31].

A more promising insight is that this type of dignity violation involves the creation or perpetuation of 'patterns of group disadvantage'. In *Brink v Kitshoff*,[82] the Court's first unfair discrimination judgment, O'Regan J introduced this concept, suggesting that the prohibition on unfair discrimination was adopted 'in the recognition that discrimination against people who are members of disfavoured groups can lead to patterns of group disadvantage and harm.' Albertyn and Goldblatt,[83] joined by other commentators,[84] lamented the Court's subsequent turn to human dignity in *Prinsloo*[85] and *Hugo*,[86] arguing that dignity is as an inherently individualistic value. However, the Court's concern for 'patterns of group disadvantage' was not lost, but was incorporated into its account of the dignity violation.[87] In her minority judgment in *Harksen*,[88] O'Regan J explicitly linked these concepts in a passage that has been consistently endorsed by the Court:[89]

> We have interpreted [the prohibition on unfair discrimination] as a … buffer against the construction of further patterns of discrimination and disadvantage. Underpinning the desire to avoid such discrimination is the Constitution's commitment to human dignity. Such patterns of discrimination can occur where people are treated without the respect that individual human beings deserve…

The Court's explanation of the connection between dignity and patterns of group disadvantage is somewhat ambiguous. In this passage, O'Regan J suggests that it is the violation of dignity that creates or reinforces these patterns of group disadvantage. In

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82 *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) [42].

83 Albertyn and Goldblatt, 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (n 33) 257-8;

84 See Pieterse (n 58) 421.

85 Above n 3.

86 ibid.

87 See further Cowen (n 33) 48-9.

88 *Harksen* (n 2) [92].

89 See *Immigration Case* (n 50) [16]; *Van Heerden* (n 12) [27]; *Volks* (n 50) [168].

Mabaso v Law Society, Northern Provinces,[90] O'Regan J, writing for a unanimous Court, turned this connection around in reaching the conclusion that discrimination against lawyers from former 'homeland' areas (racially-based states created by the apartheid regime) violated their dignity:

> 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.

In this passage it is the fact that the discrimination will perpetuate a pattern of disadvantage that is central to establishing the dignity violation. This passage also indicates that to understand the connection between the violation of dignity and patterns of group disadvantage, it may be more fruitful to consider how the Court frames the conclusion that dignity has been violated, resulting in a finding of unfair discrimination, rather than focusing on its broad musings about dignity.

III FRAMING THE CONCLUSION

The Court frames the conclusion that discrimination has or has not violated dignity in three primary ways: by reflecting on what the law 'expresses' about the disfavoured group, by determining whether the discrimination has harmed the group members' sense of self-worth, and by concluding that the discrimination creates or entrenches severe forms of socio-economic disadvantage. However, I will argue that the Court's concern with harms to self-worth is best seen as a facet of its 'expressive' concerns. What emerges is that these conclusions identify different ways in which 'patterns of group disadvantage' may be created or perpetuated, producing violations of dignity. I will argue that this demonstrates that it is a

[90] *Mabaso* (n 50) [38].

necessary condition for establishing this particular violation of dignity that discrimination should threaten to create or perpetuate patterns of group disadvantage. However, it is not apparent that this is a sufficient condition.

(a) Expressive concerns

First, and most frequently, the Court concludes that dignity has been violated as a result of the 'messages', 'inferences', or 'statements' expressed by the discriminatory law or action about the disfavoured group. I will label these the Court's 'expressive' concerns. These concerns are a prominent feature of the case law, but here a few examples will suffice:

> The message and impact 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 … . The impact constitutes a crass, blunt, cruel and serious invasion of their dignity.[91]

> [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.[92]

> 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 who do not fit into normal society …[93]

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[91] *Immigration Case* (n 50) [54].

[92] *Khosa* (n 50) [74].

[93] *Fourie* (n 50) [71].

Despite the ubiquity of these expressive concerns, they have been almost entirely ignored in the academic commentary on the Court's case law. Sandra Fredman[94] and Catherine Albertyn[95] have separately noted this feature, referring to it as the Court's concern for 'misrecognition' or 'social inequalities' respectively.[96] However, beyond these acknowledgements, the nature of these expressive concerns and their role in the case law have not been scrutinised in any detail.

There is intriguing variation in the way the Court reaches the conclusion that these messages, inferences and statements violate dignity. At times the Court appears to suggest that they are inherently in conflict with dignity, as reflected in the quotation from the *Immigration Case*[97] above. However, as is evident in the quotation from *Khosa*[98] and *Fourie*,[99] in the vast majority of cases the Court holds that the violation of dignity arises from the actual or likely consequences of these messages. The Court suggests that these messages will 'promote' and 'reinforce' harmful notions about the disfavoured group, potentially affecting how society treats the group and how members of the group think of themselves.[100] In light of this concern for the likely consequences, it would seem that when the Court suggests that these messages violate dignity it is often using this as a convenient short-hand for its concern with the likely creation or perpetuation of patterns of group disadvantage.[101] Where these

[94] See Fredman (n 35) 215-8.

[95] Albertyn, 'Substantive Equality and Transformation in South Africa' (n 35) 255.

[96] See also Tarunabh Khaitan, 'Dignity as an Expressive Norm: Neither Vacuous Nor a Panacea' (2012) 32 OJLS 1, 7 who briefly comments on the Court's use of dignity as an 'expressive norm'.

[97] Text to n 91.

[98] Text to n 92.

[99] Text to n 93.

[100] See *Harksen* (n 2) [21] (Sachs J); *Sodomy Case* (n 7) [23]; *Jordan* (n 50) [72] (O'Regan and Sachs JJ); *Fourie* (n 50) [71]. Discussed further in Chapter 2, Section III(c). See also *Hoffmann* (n 11) [28]; *Geldenhuys* (n 50) [36]-[37].

[101] On the close connection between consequential and intrinsic harms see Andrew Koppelman, 'On the Moral Foundations of Legal Expressivism' 60 Md L Rev 777, 779.

messages are considered to be inherently in conflict with dignity, this intrinsic wrong seems so intertwined with the likely creation of patterns of disadvantage that the Court sees no reason to separate these concerns. This is evident in the *Immigration Case*[102] where Ackermann J reflected on the 'pattern of disadvantage' experienced by gay and lesbian people in society:

> The sting of past and continuing discrimination against both gays and lesbians is the *clear message that it conveys*, namely, that they, whether viewed as individuals or in their same-sex relationships, do not have the inherent dignity and are not worthy of the human respect possessed by and accorded to heterosexuals and their relationships. … The denial of equal dignity and worth 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. This is deeply demeaning and frequently has the cruel effect of undermining the confidence and sense of self-worth and self-respect of lesbians and gays.[103]

Here the Court sees a causal link between the dignity-violating message and its dignity-violating consequences: the 'message' that gay and lesbian people are 'not worthy of … human respect' threatens to produce a pattern of group based disadvantage as it is likely to result in 'inhuman treatment by the rest of society' and the erosion of individuals' sense of self-worth and respect.

From this brief discussion we can conclude that the Court's expressive concerns identify one of the ways in which 'patterns of group disadvantage' are created or perpetuated. However, these expressive concerns leave us with many unanswered questions. It is not apparent that the Court always regards these messages as being in conflict with dignity. Furthermore, the nature of these messages is unclear, and it is not immediately apparent how the Court identifies them. Finally, there are also questions over how the Court determines that they will create or perpetuate patterns of disadvantage. I will address these concerns in Chapters 2 and 3.

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[102] *Immigration Case* (n 50) [42].

[103] Emphasis added. This passage was repeated verbatim in *Fourie* (n 50) [50].

(b) Self-worth

Second, and surprisingly infrequent, is the conclusion that dignity has been violated solely through the diminution of the complainant or group's sense of self-worth. The infrequency of these conclusions is surprising because critics of the Court's dignity-based approach have often portrayed the Court as being primarily concerned with individuals' feelings.[104] This is perhaps based on the Court's tendency to conflate the constitutional right to human dignity with the common law action for injuries to self-worth (*dignitas*) in other areas of its case law.[105] It may also stem from a reading of the Canadian Court's pre-*Kapp*[106] discrimination jurisprudence, which tended to emphasise feelings of self-worth.[107] However, this is an inaccurate portrayal of the South African Court's unfair discrimination jurisprudence. While the Court occasionally refers to self-worth in its explanations of human dignity,[108] it has only once concluded that discrimination is unfair on the basis that it made the disfavoured group feel less worthy. This was in *Pretoria City Council v Walker*,[109] where Langa DP held that the Pretoria city council's secretive policy of selectively enforcing rates claims, resulting in white residents being disproportionately affected, was unfair because '[n]o members of a racial group should be made to feel that they are not deserving of equal "concern, respect and

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104 See Albertyn and Goldblatt, 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (n 33) 257-8, 272; Botha, 'Equality, Dignity, and the Politics of Interpretation' (n 33) 732; Albertyn, 'Substantive Equality and Transformation in South Africa' (n 35) 260; Pieterse (n 58) 421.

105 See nn 74-75 above.

106 *Kapp* (n 53).

107 See *Egan* (n 53) [39] (L'Heureux-Dubé J); *Law* (n 53) [53]; see further Small and Grant (n 53) 41.

108 See for example the *Sodomy Case* (n 7) [124] (Sachs J); *Immigration Case* (n 50) [41]; *Van Heerden* (n 12) [146] (Sachs J).

109 *Walker* (n 17).

consideration'".[110] The Court's concerns with self-worth most commonly feature as a component of its expressive concerns. This was apparent in the *Immigration Case*,[111] discussed above, where the Court held that one of the likely consequences of the 'message' expressed by the discriminatory law was that it would erode gay and lesbian people's feelings of self-worth, in addition to influencing how society treats these groups. Similarly, in *Fourie*[112] the harm to self-worth is mentioned as a product of a finding that the discriminatory law or action expresses impermissible messages or statements about the disfavoured group. The absence of these messages is also taken as a sign that the disfavoured group's self-worth has not been undermined. For example, in *Volks*[113] the majority held that the exclusion of unmarried life partners from the Maintenance of Surviving Spouses Act did not convey the message that they are 'less worthy' than married couples, and thus there was no basis to claim that their self-worth had been undermined. As a result, it would seem that harms to self-worth are a dimension of the Court's expressive concerns rather than being a standalone concern. Without finding that the law or action expresses impermissible messages about the group, the Court is generally unwilling to recognise a violation of individuals' self-worth.

(c) Socio-economic disadvantage

Third, the Court has often concluded that discrimination has violated dignity where it threatens to cause the disfavoured group serious socio-economic disadvantage or threatens to entrench existing socio-economic disadvantage. *Khosa*[114] provides a clear example of this

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110 ibid [81]. It is interesting to note that Langa DP was not expressly relying on dignity here, holding that this was a 'comparatively serious violation'.

111 Above text to n 102.

112 *Fourie* (n 50) [71].

113 *Volks* (n 50) [62] (Skweyiya J) and [96] (Ngcobo J).

114 *Khosa* (n 50).

concern as the Court held that legislation which excluded non-citizens from receiving social security grants violated permanent residents' dignity:[115]

> [T]he exclusion of permanent residents from the scheme is likely to have a severe impact on the dignity of the persons concerned, who, unable to sustain themselves, have to turn to others to enable them to meet the necessities of life and are thus cast in the role of supplicants.[116]

Here the violation of dignity flows from the fact that the socio-economic disadvantage is likely to be severe and long-term, thus casting the disfavoured group 'in the role of supplicants'. Concern with socio-economic disadvantage was also apparent in *Mabaso*,[117] briefly discussed above. There the Court considered a challenge to a legislation that barred attorneys admitted in former homeland areas (racially-based 'states' created under the apartheid regime) from making use of a short-cut procedure to enrol in High Courts in other provinces. While this measure was unlikely to have devastating socio-economic consequences by itself, the Court held that it 'reinforces and perpetuates' the 'impoverishing effects of the [homeland policy]', resulting in a violation of dignity.[118]

This suggests that 'patterns of group disadvantage' are constituted by severe forms of socio-economic disadvantage. However, this raises the question whether the fact that discrimination creates or entrenches socio-economic disadvantage is a sufficient condition for establishing a violation of dignity or whether it is merely a consideration that makes this finding more likely. I will address this issue in Chapter 2.

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[115] In Chapter 2, text to n 240 I will attempt to explain why this finding was confined to permanent residents and not all non-citizens.

[116] *Khosa* (n 50) [80].

[117] *Mabaso* (n 50).

[118] ibid [38].

IV CONCLUSION

From this overview, we can see that the creation or perpetuation of patterns of group disadvantage seems to be a necessary condition for establishing the specific type of dignity violation required for a finding of unfair discrimination. However, we are left questioning whether this is a sufficient condition for this finding. I have also determined that these 'patterns of group disadvantage' are primarily constituted by impermissible messages about the disfavoured group (the 'expressive concerns') and by serious forms of socio-economic disadvantage. This is not necessarily a closed list. As Sandra Fredman[119] points out, patterns of group disadvantage consist of and are produced by a range of other forms of disadvantage, including the failure to accommodate difference, and social and political exclusion. However, for the purposes of this discussion it suffices to note that expressive concerns and socio-economic disadvantage feature most prominently in the Court's existing case law. Nevertheless, we are left with lingering questions about these types of disadvantage, particularly the Court's expressive concerns. This suggests that that we cannot understand what constitutes a violation of dignity simply by focusing on how the Court talks about dignity. We now need to consider how the Court reasons to the conclusion that dignity has been violated, resulting in a finding of unfair discrimination.

[119] See Fredman's multi-dimensional conception of substantive equality in Sandra Fredman, *Discrimination Law* (2nd edn, Oxford University Press 2011) 25-33.

CHAPTER 2: ANALYSING THE COURT'S REASONING

I INTRODUCTION

In the previous chapter, I considered how the Court frames the conclusion that dignity has been violated, resulting in a finding of unfair discrimination. In this chapter I will analyse how the Court arrives at this conclusion. This involves tracing the Court's reasoning through the two stages of the *Harksen* test to identify the necessary and sufficient conditions for establishing a violation of dignity. In Section II, I will examine how the Court determines that there has been discrimination. In Sections III and IV, I will focus on the unfairness enquiry. While my analysis of the Court's reasoning will track the structure of the *Harksen* test, I will not seek to provide a detailed examination of its requirements at this stage. That task is left for Chapter 4.

II DISCRIMINATION AND THE 'POTENTIAL' TO VIOLATE DIGNITY

As outlined in the Introduction, the Constitutional Court defines 'discrimination' as direct or indirect 'differentiation' on the basis of one or more listed or analogous grounds. In practice, the Court spends little time establishing discrimination and, barring two exceptions,[120] it has had little trouble in doing so. Instead, the Court focuses its efforts on the unfairness enquiry.[121] Often it simply assumes that discrimination has been established, moving swiftly on to assessing whether it is unfair.[122] As a result, the requirements for proving discrimination are largely underdeveloped.

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[120] See *Walker* (n 17) and *Jordan* (n 50).

[121] Albertyn and Goldblatt, 'Equality' (n 9) 35.46; see also Warren Freedman, 'Understanding the Right to Equality' (1998) 115 SALJ 243, 250.

[122] See for example *Union of Refugee Women* (n 5) [45].

The Court emphasises that discrimination involves 'differentiation', which it describes as differences in treatment between people.[123] This would seem to require a real or hypothetical comparator to show that an individual or a group was treated differently to others, but the Court has left this question open.[124] The Court also indicates that differentiation does not require proof of unfavourable treatment of the complainant or group.[125] However, the Court has not once identified a violation of dignity where the complainant or group has not suffered some burden or has been denied a benefit (in the broadest sense of these terms), suggesting that unfavourable treatment is necessary for the violation of dignity.[126] This differentiation must be 'on the basis' of the listed or analogous grounds. These are categories of group characteristics which share the common feature that differentiation on the basis of these characteristics has the 'potential' to violate dignity.[127] Discrimination includes direct discrimination, involving differentiation that is explicitly based on group characteristics, and indirect discrimination, involving differentiation on the basis of neutral criteria that nonetheless impacts certain groups more severely than others.[128] The Court also recognises multiple or intersectional discrimination, involving differentiation on the basis of more than one ground or a combination of grounds.[129]

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[123] *Harksen* (n 2) [53].

[124] See *Pillay* (n 29) [44].

[125] See *Walker* (n 17) [35].

[126] See further Equality Act, s 1 which defines discrimination as acts or omissions which, directly or indirectly, '[impose] burdens, obligations or disadvantage' or '[withhold] benefits, opportunities or advantages' on the basis of listed or analogous grounds.

[127] *Harksen* (n 2) [53].

[128] Many jurisdictions recognise the failure to afford reasonable accommodation as a third form of discrimination. However, the Constitutional Court, following the structure of the Equality Act, s 14(3) considers this to be a component of the unfairness enquiry rather than a distinct type of discrimination. See *Pillay* (n 29).

[129] See *Sodomy Case* (n 7) [113]; *Immigration Case* (n 50) [35].

From this brief overview of the requirements for establishing discrimination, I determine that it is a necessary condition for establishing the violation of dignity that there must be differentiation,[130] involving the imposition of burdens or the withholding of benefits, directly or indirectly on the basis of group characteristics. I have consciously excluded the requirement that these group characteristics must be identified as listed or analogous grounds. This is an important requirement in the Court's test for discrimination. However, it cannot be a salient feature of the dignity violation that it must involve differences in treatment that could potentially be a violation of dignity. That would be redundant. Rather than being an essential component of the dignity violation, the finding that differentiation has occurred on listed or analogous grounds is best seen as a pragmatic device to filter out claims with little merit, to shield the state from having all or most of its actions scrutinised for unfair discrimination,[131] and, in the case of the listed grounds, to mark the point where the burden of proof shifts to the state to show that the discrimination is fair.[132] I will discuss these pragmatic functions in greater depth in Chapter 4.

We may nevertheless learn something about the violation of dignity from how the Court identifies new analogous grounds that have the 'potential' to violate to dignity. The Court considers three primary factors in making this decision: whether the characteristic is associated with current or historical patterns of disadvantage;[133] whether it is associated with political minority status;[134] and, lastly, whether it is 'immutable', 'not changeable without unacceptable cost',[135] or a fundamental choice.[136] The trouble is that the Court has not

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[130] I remain mindful of the ambiguity in the Court's concept of 'differentiation', particularly with respect to the requirement of a comparator.

[131] The Court explicitly emphasised this function in *Prinsloo* (n 3) [23].

[132] Constitution, s 9(5).

[133] *Harksen* (n 2) [50]; *Larbi-Odam* (n 50) [19]; *Union of Refugee Women* (n 5) [43].

[134] *Larbi-Odam* ibid; *Khosa* (n 50) [71].

[135] *Larbi-Odam* ibid; *Harksen* (n 2) [50]; *Khosa* ibid [71].

attempted to explain how these considerations are connected with dignity. Therefore, it seems that we can only understand how these factors help us to identify potential dignity violations once we understand what is required to establish an actual dignity violation.[137] Therefore, we should turn our attention to the unfairness enquiry in which the Court determines whether discrimination has violated dignity.

III UNFAIRNESS PART I: THE ROLE OF THE PROPORTIONALITY ANALYSIS

The Court's unfairness enquiry centres on the three considerations outlined in *Harksen*: a) the position of the complainants in society and whether they have suffered from past patterns of disadvantage; b) the nature and purpose of the provision or power; and c) the impact of the discrimination.[138] The Court tends to engage in a step-by-step analysis of these considerations without offering any explanation of how they assist in establishing the violation of dignity. Nevertheless, beneath the Court's unreflective application of these considerations I detect an underlying order to the enquiry.

I contend that in determining whether the discrimination violates dignity and is thus unfair, the Court determines whether the impact of the discrimination is disproportionate to its purpose and is likely to create or perpetuate patterns of group disadvantage. Both are necessary conditions for establishing the violation of dignity; together they are jointly sufficient for this finding. These considerations are also intertwined in complex ways that will emerge over the course of this chapter. Of the two considerations, the proportionality analysis is the focus of the Court's reasoning and its disagreements. This section will consider the role of the proportionality analysis, while the next section will go on to consider

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[136] See *Pillay* (n 29) [46]ff.

[137] See Chapter 4, text to nn 330ff for an explanation of these factors.

[138] *Harksen* (n 2) [52].

how the Court engages with the potential creation or perpetuation of patterns of group disadvantage.

(a) Unfairness, section 36 and proportionality

My claim that the unfairness enquiry involves a proportionality analysis is novel, but not entirely without precedent.[139] Numerous commentators have recognised that this enquiry incorporates considerations that are usually found in the section 36 limitations analysis. However, this observation is often couched in dismissive terms, suggesting that it is an infrequent aberration that departs from the Court's standard approach to unfairness.[140] In contrast, others have recognised that this blurring of the unfairness and section 36 analyses is pervasive. Woolman and Botha suggest that after the Court has found discrimination to be unfair, its section 36 analysis is mere repetition of the unfairness enquiry.[141] Rósaan Krüger[142] also recognises this trend, arguing that the Court ought to abandon the pretence and simply combine the unfairness and justification enquiries in a 'fairness-cum-justification' analysis.[143] This is supported by the fact that there has not been a single majority judgment in which the Court has found unfair discrimination to be justified under section 36.[144]

The obvious conclusion to draw from the blurring of these two enquiries — a conclusion that is curiously absent from the South African commentary — is that the

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139 See David M. Beatty, *The Ultimate Rule of Law* (OUP 2004) 80-83, 116, who argues, based on a cursory examination of a single South African decision, that unfair discrimination hinges on a proportionality analysis. Proportionality also features prominently in discrimination law in other jurisdictions, particularly in the European Court of Human Rights' jurisprudence. See further Fredman, *Discrimination Law* (n 119) 221-26.

140 Albertyn and Goldblatt, 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (n 33) 270-1; Davis (n 6) 406.

141 Woolman and Botha, 'Limitations' (n 57) 34.5.

142 Krüger (n 31) 504-505.

143 ibid.

144 Mokgoro J's minority judgment in *Hugo* (n 3) is the only example of a finding of justified unfair discrimination.

unfairness enquiry, like the section 36 analysis, involves a proportionality analysis. I must emphasise that I am not claiming that the section 36 analysis and the unfairness enquiry are identical. I am also not discounting the possibility that the Court may fashion a robust role for the section 36 analysis in time. My claim is simply that both enquiries follow the same reasoning structure.

I will demonstrate the Court's use of a proportionality analysis in the unfairness enquiry by analysing five of its most prominent split decisions. These decisions are not unique, but I have selected them because they articulate the Court's reasoning most clearly. As John Alder notes, dissents can help to 'focus and clarify our understanding of the issues'.[145] This is certainly true of the Court's unfair discrimination jurisprudence. In its unanimous decisions, the Court is often content to conjure a conclusion out of a banal recital of the case law. In contrast, these split decisions forced the majority and minority to articulate their reasoning in greater detail. As a result, they provide the best possible window on the Court's reasoning.

(b) The nature of proportionality

Before considering this case law, it is useful to reflect briefly on the Court's approach to the proportionality analysis under section 36.[146] In *S v Makwanyane*,[147] the Court explained that

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[145] John Alder, 'Dissents in Courts of Last Resort: Tragic Choices?' (2000) 20 OJLS 221, 241.

[146] 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.

[147] *Makwanyane* (n 65) [104]. See further Woolman and Botha, 'Limitations' (n 57) 34.8ff for a discussion of the s 36 limitations analysis.

this analysis calls for the 'balancing of different interests'. It has expressly rejected a structured, 'check-list' approach to proportionality — such as the Canadian Supreme Court's *Oakes*[148] test and similar proportionality tests adopted in other jurisdictions[149] — opting instead for a 'global', all-things-considered judgment.[150] While the Court does not apply this proportionality analysis in a structured way, the common features of proportionality analyses used in other jurisdictions are reflected in its reasoning.[151] There is an evaluation of the importance of the purpose[152] ('legitimacy'), an assessment of the extent to which the limitation advances this purpose[153] ('suitability'), and an assessment of whether there are less restrictive means to achieve this purpose[154] ('necessity').[155] The Court does not view these as hermetically sealed enquiries, but as components of the 'global judgment' on proportionality, involving the balancing of the limitation against its purpose (often referred to in the literature as proportionality in the 'narrow' or 'strict' sense).[156] To paraphrase the Court, this involves weighing, on the one hand, the importance of the right and the extent of its limitation and, on the other, the importance of the purpose, taking into account the extent to which it has been advanced by the limitation and the availability of less restrictive means to achieve this

148 *R v Oakes* [1986] 1 SCR 103 (Canadian Supreme Court).

149 See generally Aharon Barak, *Proportionality: Constitutional Rights and Their Limits* (CUP 2012) chs 9-12.

150 *Makwanyane* (n 65) [104]; *S v Manamela & another* 2000 (3) SA 1 (CC) [32] (*Manamela*).

151 While proportionality analyses share common features, courts in different jurisdictions adopt different approaches to these features. See further Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 UTLJ 383.

152 Constitution, s 36(1)(b). See n 146 above.

153 Section 36(1)(d).

154 Section 36(1)(e).

155 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.

156 ibid.

purpose.[157] A severe infringement of a right will carry more weight than a minimal infringement.[158] Similarly, an important purpose that is only partially achieved and which can be realised through less restrictive means carries far less weight than a purpose that is largely achieved and cannot be realised through alternative means.[159]

These features of the proportionality analysis are also evident in the Court's unfairness enquiry and are used in a similarly free-wheeling way. However, instead of seeking to balance the limitation of a right against the purpose of the limitation, the Court balances the impact of the discrimination on the disfavoured group members' rights and interests against the purpose of this discrimination. This is clearly evident in the Court's five most prominent split decisions. While I have done some reconstructive work to present the Court's reasoning more plainly, the arguments and conclusions are its own.

(c) Proportionality in the case law

(i) *Hugo*[160]

Goldstone J's majority judgment in *Hugo* provides one of the earliest and clearest examples of proportionality's role in the unfairness enquiry. At issue was President Mandela's decision to grant a remission of sentence to female prisoners with children below the age of twelve. The President sought to benefit young children, acting on the belief that mothers 'play a special role in nurturing children'.[161] 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

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157 *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC) [18]; see also *Makwanyane* (n 65).

158 See *Manamela* (n 150) [32].

159 See 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 *dagga* (marijuana) with no exception for religious use.

160 *Hugo* (n 3).

161 ibid [36].

the Court agreed that the President's action was discriminatory and that it was premised on a stereotyped view of mothers and fathers. However, the majority found that the discrimination was fair.

Goldstone J, writing for the majority, accepted the President's generalisation that mothers play the leading role in caring for their children and that fathers often play a 'secondary role'. Thus the President's action was suitable for achieving its purpose of benefitting young children. He further 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, making the reliance on this generalisation more acceptable.[162] 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.[163] This was effectively an argument of necessity, suggesting that the purpose could not be achieved through less restrictive means. He also 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.[164] This contained an implied assessment of proportionality in the 'narrow' sense, as he appeared to suggest that the benefit to children was of greater importance than male prisoners' interest in securing an early release. Thus, he concluded that the discrimination had not impaired male prisoners' 'rights of dignity or sense of equal worth.'[165]

This judgment is notable for its many factual assumptions made in the absence of any evidence or argument from the state. As Kriegler J pointed out in his dissent, the President provided no indication of the number of male prisoners with children below the

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[162] ibid [48].

[163] ibid [46].

[164] ibid [47].

[165] ibid.

age of 12 or evidence to demonstrate that their release would contribute to the crime rate or cause a public outcry. Furthermore, no evidence or argument had been presented to show that a pardon based on gender-neutral criteria — such as primary child-carers or single parents — would have been unworkable. Both of these empirical claims were assumed. In addition, Goldstone J did not address the potential effects of the President's reliance on this stereotype, apart from noting that it had contributed to women's disadvantaged position in society.[166] This highlights a common theme in the Court's unfairness analysis that will be seen in the other four judgments: the majority and minority tend to adopt wildly divergent standards of scrutiny in analysing unfairness. Despite these difficulties, it is clear that Goldstone J's reasoning followed the structure of a proportionality analysis. Kriegler J recognised this in his dissent, arguing that it conflated unfairness with the limitations analysis under section 33 of the interim Constitution, the predecessor to section 36.[167]

(ii) *Harksen*[168]

Goldstone J's majority judgment in *Harksen* again resembled a proportionality analysis. Here the Court considered a challenge to a provision in the Insolvency Act,[169] which provides that where an insolvent spouse's estate is sequestrated, the solvent spouse's assets are treated as if they belonged to the insolvent and automatically vest in the trustee of the insolvent estate. The applicant argued that this unfairly discriminated against solvent spouses[170] by imposing a burden on them that was not imposed on others with close ties with insolvent spouses, such as family members or business associates.

[166] ibid [38].

[167] ibid [71].

[168] *Harksen* (n 2).

[169] 24 of 1936.

[170] Importantly, the applicant did not allege discrimination on the listed grounds of sex and gender.

Goldstone J found that there was discrimination on the analogous ground of 'solvent spousehood' but that this was not unfair. In reaching this conclusion he implied that the purpose of protecting creditors' interests outweighed the impact on solvent spouses. Goldstone J stressed the importance of protecting creditors' interests. He held that section 21 was well suited to this purpose, as it both prevented collusion between the spouses and assisted trustees in dealing with spouses' intermingled assets, given that there is often a 'close identity of [financial] interests between many married couples'.[171] In contrast, Goldstone J afforded little weight to the solvent spouses' interests. He held that they 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 to the trustee or a court. Goldstone J recognised that this may require considerable legal resources and would prejudice those without access to legal services, but dismissed these concerns arguing that this was 'the kind of inconvenience and burden that any citizen may face when resort to litigation becomes necessary.'[172] The implication was that the discrimination was proportionate, as the protection of creditors' interests outweighed the impact of this discrimination on solvent spouses. Thus, Goldstone J concluded that the discrimination was not unfair, as it 'does not lead to an impairment of fundamental dignity or constitute an impairment of a comparably serious nature'.[173]

In their separate dissenting judgments, O'Regan J and Sachs J both disputed the weight given to these competing interests. O'Regan J emphasised 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.

[171] ibid [58]. This analysis appeared in the rationality enquiry under s 9(1), but the importance of the purpose clearly had a bearing on Goldstone J's assessment of the fairness of the discrimination.

[172] ibid [68].

[173] ibid.

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'.[174] However, O'Regan J did not explain why a mere impairment of property interests constitutes unfair discrimination. Most of her argumentative work took place in the limitations analysis. O'Regan J held that while the purpose of protecting creditors was 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 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 did not significantly advance its purpose.[175] O'Regan J also emphasised that this purpose could be achieved through less restrictive means, such as the Insolvency Act's various provisions for setting aside collusive transactions.[176] Thus, she concluded that section 21 did not strike an appropriate balance between creditors' interests and the interests of solvent spouses.[177]

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.[178] Having established that the discrimination was disproportionate he proceeded to conclude that the 'underlying premise' of the provision is

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174 ibid [101].

175 ibid [103]-[105].

176 ibid [106]-[111].

177 ibid [112].

178 ibid [121].

that only 'one business mind is at work … not two.'[179] As a result, he concluded that the provision was 'manifestly patriarchal in origin' and '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.'[180] This was held to be a violation of dignity which rendered the discrimination unfair. Here we have the first example of what I referred to in Chapter 2 as the Court's 'expressive concerns'. These expressive concerns feature prominently in the judgments to follow. I will merely note them for now and will return to discuss these expressive concerns in greater detail in the next section.[181]

It is clear that 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 differences in the judges' willingness to interrogate the suitability, necessity, and proportionality 'in the narrow sense' of the discrimination. These divisions are even more starkly apparent in *S v Jordan*, *Volks v Robinson*, 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 vociferous criticism from academic commentators and civil society groups.

(iii) *Jordan*[182]

Jordan involved a challenge to section 20(1)(aA) of the Sexual Offences Act,[183] which criminalises prostitution. Paying for sex, however, is not an offence under the Act. The applicant argued that this constituted indirect discrimination on the basis of gender, as the

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179 ibid.

180 ibid.

181 See Section III, text to n 214ff below.

182 *Jordan* (n 50).

183 23 of 1957.

offence strikes at prostitutes, who are predominantly women, and excludes their clients, who are most often men.

Ngcobo J, writing for the majority, dismissed this claim. First, he held that the offence did not constitute indirect discrimination, 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 differential impact. Second, he argued that even if it was discriminatory, this was not unfair. The purpose of the provision is to regulate commercial sex and, he reasoned, it is accepted practice for the criminal law to target the suppliers of illicit products rather than their customers. Furthermore, he suggested 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 the profession.[184] Thus, his judgment contained an implied conclusion that the purpose of the offence outweighed its impact on women. There was no sign of an examination of the suitability or necessity of the discrimination in reaching this conclusion.

In their joint dissenting judgment, O'Regan and Sachs JJ held that the provision amounted to indirect discrimination on the grounds of sex and gender. They stressed that despite the fact that clients could be found guilty of derivative offences, these offences were all parasitic on the primary offence committed by the prostitute. The result, they argued, was that women, who are more likely to work as prostitutes, are stigmatised as the primary wrongdoers.[185] On the issue of unfairness, O'Regan and Sachs JJ accepted the importance of the purpose of criminalising commercial sex. However, they suggested that the discrimination between female prostitutes and their male clients was not suitable in advancing this purpose, as male clients are as blameworthy, if not more so, than

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[184] *Jordan* (n 50) [14]-[20].

[185] ibid [63]-[64].

prostitutes.[186] The fact that the discrimination was not suitable in advancing the purpose, rendering it disproportionate, led them to conclude that it contained the 'inference' that female sexuality is more worthy of moral condemnation:

> The inference is that the primary cause of the problem is not the man who creates the demand but the woman who responds to it: she is fallen, he is at best virile, at worst weak. Such discrimination, therefore, has the potential to impair the fundamental human dignity and personhood of women.[187]

This was held to '[track] and [reinforce] in a profound way double standards regarding the expression of male and female sexuality', producing unfair discrimination.[188] Again we see an expressive concern following a finding of disproportionality. And again we see the majority and the minority adopting very different standards of scrutiny, with the result that they give radically different weightings to the purpose and impact of the discrimination.

(iv) *Volks*[189]

Divergent standards of scrutiny were again evident in *Volks*. The complainant, Robinson, had lived with her partner for sixteen years before his death. The couple did not marry, but, as Skweyiya J put it, they 'lived a life that was akin to that of a husband and wife'.[190] On his death, she received a sizeable inheritance but sought to receive additional maintenance from his estate. However, the Maintenance of Surviving Spouses Act[191] confined this benefit to spouses. She challenged this provision, arguing that it discriminated against life partners on the basis of marital status.

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[186] ibid [68].

[187] ibid [65].

[188] ibid [67].

[189] *Volks* (n 50).

[190] ibid [1].

[191] 27 of 1990.

Skweyiya J, writing for the majority, rejected this claim, holding that while the provision discriminated against life 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.'[192] In reaching this conclusion he relied on two primary arguments. First, he held that it would be inappropriate to impose a duty of support on unmarried partners in death that did not exist during their lifetimes.[193] 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 so as to preserve this institution.[194] Ngcobo J's concurring judgment 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.[195] Again, there was little attempt to interrogate the suitability and necessity of the discrimination. Both judgments recognised that this exclusion had severe consequences for surviving life partners, particularly for vulnerable women in cohabitation relationships. However, they suggested that their vulnerability should be addressed through other legislative means, primarily by imposing a duty of support on partners during their lifetime.[196] Ultimately their analysis suggested that the purposes of preserving marriage and respecting choice outweighed the impact of the discrimination on surviving life partners.

Sachs J vigorously attacked this reasoning in his dissent. He rejected the first argument, contending that the refusal to extend a duty of maintenance and support to life partners because no duty currently exists merely assumed the point that was being challenged: the failure to extend the legal protections and benefits of marriage to permanent

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[192] *Volks* (n 50) [62].

[193] ibid [60].

[194] ibid [52]ff.

[195] ibid [94].

[196] ibid [65]-[68].

life partners. Furthermore, while Sachs J also emphasised the importance of marriage, he argued that this did not provide a reason to confine all the legal benefits of marriage exclusively to marriages.[197] Finally, he attacked the argument based on choice, holding that the choice to marry is often absent or constrained and, even where choice is present, it provides no good reason to penalise surviving life partners.[198] Having addressed the majority's arguments in favour of this discrimination, Sachs J went on to hold that the Act's primary purpose was not to promote marriage but to prevent surviving spouses from suffering financial hardship on the death of their spouses.[199] He went on to hold 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. Here Sachs J drew on O'Regan and Mokgoro JJ's joint dissent, in which they noted that over 2.3 million South Africans reported that they were living in marriage-like relationships and that women were often placed in vulnerable positions of dependency within these relationships. As a result, he implied that the discrimination was not suitable for achieving the Act's purpose of addressing vulnerability. This lack of proportionality led Sachs J to conclude that the Act:

> [T]ells the world that there is something unworthy and not respectable about [life partners] because they had a family without getting married … It reinforces the stereotype that, irrespective of the actual character of their relationship and the reality of their commitment to each other, they are all irresponsible and unconcerned about the need to live in a good family relationship that is infused with love, concern and mutual support.[200]

This was held to be a violation of dignity, rendering the discrimination unfair.

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197 ibid [167]ff and [208].

198 ibid [156]ff.

199 ibid [183]-[187] and [220].

200 ibid [226].

(v) ***Union of Refugee Women***[201]

Rounding off this sample, *Union of Refugee Women* again shows how the Court's disagreements centre on the proportionality analysis underlying the unfairness enquiry. Section 23(1)(a) of the Private Security Regulation Act[202] provides that South African citizens and permanent residents can be registered as 'private security providers' provided that they furnish the prescribed documentary proof of their trustworthiness and reliability. All other categories of foreign nationals were barred from registering, including refugees. The applicant, a union representing refugee interests, challenged their exclusion from the private security industry.

Kondile AJ, writing for the majority, assumed that this exclusion constituted discrimination on the analogous ground of refugee status. However, he held that this discrimination was not unfair. Here Kondile AJ mistakenly conflated the unfairness enquiry with the question whether the applicants had a right to choose an occupation under section 22 of the Constitution. He held that because section 22 applies only to 'citizens', the applicants did not have a legally cognisable claim.[203] Alternatively, if they did have a claim, he emphasised that their interest in obtaining employment was not significantly hampered, as they could apply for special registration under section 23(6) of the Act, allowing for individual applications in cases where individuals did not meet the requirements under section 23(1)(a). Furthermore, he suggested that this impact was for a limited duration, as refugees would qualify for permanent residency after five years.[204] Kondile AJ was further swayed by the purpose of the Security Act, which he understood to be protecting the public by establishing the trustworthiness of prospective private security workers. In his view, it

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201 *Union of Refugee Women* (n 5).

202 56 of 2001.

203 *Union of Refugee Women* (n 5) [54].

204 Sachs J concurred with the majority judgment, albeit for different reasons. He was primarily swayed by the flexibility afforded by s 21(6), holding that in the absence of this mechanism the outright exclusion of refugees would be unfairly discriminatory.

was more difficult to establish the trustworthiness of a refugee than of a permanent resident or citizen,[205] although he provided no reasons for this conclusion. Ultimately his analysis suggested that the purpose of the discrimination outweighed what he viewed as a negligible impact on refugees' interests.

Mokgoro and O'Regan JJ penned yet another dissent, arguing that refugees' interests were severely affected and that this was not outweighed by the purpose of the discrimination. They pointed out that the 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, there was no reason to bar all refugees, demonstrating that this discrimination was not suitable in advancing its purpose.[206] Furthermore, they stressed that the discrimination was not necessary — it was '[not] tailored appropriately' — as the purpose could be achieved simply by barring those who did not have the necessary documentation.[207] They also stressed that this exclusion had a severe impact on refugees' interests, as the security sector is one of the main sources of employment for unskilled workers. 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[208] which, they contended, would 'inevitably foster a climate of xenophobia.'[209]

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205 ibid [38] and [61].

206 ibid [119].

207 ibid.

208 ibid [118]-[119].

209 ibid [122].

(d) Proportionality and unfair discrimination

These judgments demonstrate that a proportionality analysis plays the central role in generating decisions and is the focus of the Court's disagreements. There is a worrying variability in the standard of scrutiny that is applied in these decisions, as the members of the Court differ in their willingness to acknowledge the impact of the discrimination on the group, their assessment of the purpose of the discrimination, their willingness to interrogate the connection between the discrimination and its purpose, and their ultimate balancing of the purpose against the impact. I will return to discuss this variable standard of scrutiny in Chapter 4. For the purposes of this discussion it suffices to say that whatever we may think of the quality of the Court's reasoning, its underlying structure is clear.

In its more candid moments the Court has explicitly recognised proportionality's central role in establishing unfairness. In *Volks*,[210] Sachs J noted that:

> It is not easy to separate the question of fairness from that of justification, since each involves elements of proportionate balancing, and inevitably there will be overlap between them.[211]

Similarly in *Pillay*[212] Langa CJ recognised that the 'essence' of reasonable accommodation — a component of the unfairness enquiry — is 'an exercise of proportionality', requiring courts to weigh the impact of the failure to accommodate the affected group against the cost or 'hardship' of making this accommodation.[213]

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[210] *Volks* (n 50).

[211] ibid [209]. See also *Van Heerden* (n 12) [140] where Sachs J noted that unfairness analysis is concerned with 'context-based proportional interrelationships, balanced and weighed according to the fundamental constitutional values called into play by the situation.'

[212] *Pillay* (n 29).

[213] ibid [76] and [86]. Here the Court was applying the unfairness provision in Equality Act, s 14(3). However, it seems that its approach to reasonable accommodation under s 9 of the Constitution would be identical.

Therefore it appears that a finding of disproportionality is a necessary condition for finding discrimination to be in violation of dignity and thus unfair. However, disproportionate treatment alone does not seem to be sufficient for this finding. As demonstrated in Chapter 1, it also appears to be a necessary condition that the discrimination should threaten to perpetuate or create patterns of group disadvantage. Here the Court is primarily concerned with two types of disadvantage: entrenching or reinforcing impermissible messages about the disfavoured group (the Court's 'expressive concerns') and causing or entrenching severe socio-economic disadvantage. I will now explore these concerns in further detail, focusing on their connection with the proportionality analysis.

IV UNFAIRNESS PART II: PATTERNS OF GROUP DISADVANTAGE

(a) Expressive concerns

In Chapter 1, I noted that the Court's 'expressive concerns' are a ubiquitous feature of the case law. This was reflected in the discussion of *Harksen*, *Jordan*, *Volks* and *Union of Refugee Women* above, where the dissenting judges framed the conclusion that the discrimination violated dignity and was unfair in terms of the 'inference', 'message' or 'premise' underpinning the discriminatory laws. While these were minority judgments, they are reflective of a much broader trend in the case law, as the Court routinely expresses concern over the 'messages',[214] 'premises',[215] 'inferences',[216] 'imputations',[217] or 'statements'[218] expressed by discriminatory laws or actions.

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[214] *Sodomy Case* (n 7) [23]; *Immigration Case* (n 50) [42], [53]-[54]; *Khosa* (n 50) [74]; *Fourie* (n 50) [50]; *Union of Refugee Women* (n 5) [116]; *Pillay* (n 29) [85].

[215] *Harksen* (n 2) [121]; *Union of Refugee Women* ibid [118]; *Van Heerden* (n 12) [119].

[216] *Jordan* (n 50) [65]; *Bhe* (n 50) [92]; *Geldenhuys* (n 50) [36].

[217] *Larbi-Odam* (n 50) [20].

[218] *Volks* (n 50) [62], [226]; *Fourie* (n 50) [71]; *Mabaso* (n 50) [36].

It is important to distinguish two different ways in which these expressive concerns appear in the Court's reasoning. First, there is a category of expressive concerns which feature within the proportionality analysis, which I will term 'expressivism-in-the-balance'. Second, most of the Court's expressive concerns appear as conclusions to the proportionality analysis, which I will label 'expressivism-in-the-conclusion'. In exploring these expressive concerns I will shift to a thematic analysis of the case law and I will draw on a broader range of cases. As in the previous section, I have selected these cases because they best articulate common features of the case law.

(i) 'Expressivism-in-the-balance'

In assessing the impact of discrimination on the disfavoured group, the Court is not only concerned with direct, tangible harms but also with more indirect harms caused by the 'messages', 'inferences', or 'statements' conveyed by these laws and actions,[219] which I term 'expressivism-in-the-balance'. Both types of harm are weighed against the purpose of the discrimination in the proportionality analysis. For example, in *Khosa*,[220] the Court held that excluding non-citizens from social security benefits would not only cause material disadvantage but would deny them a benefit that '[represents] the extent to which poor people are treated as equal members of society'. This was held to have a 'strong stigmatising effect', sending a 'message of second-class status' that would marginalise non-citizens within their communities.[221] 'Expressivism-in-the-balance' has also featured prominently in cases involving the criminalisation of conduct that is closely associated with certain groups, as the Court acknowledges that crimes carry social stigma.[222] Thus, in the *Sodomy Case*,[223] the Court

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[219] Although this is not to suggest that expressive harms do not have tangible effects.

[220] *Khosa* (n 50) [74].

[221] ibid. See also *Fourie* (n 50) [72] where the Court discussed the symbolism attached to marriage.

[222] See *McBride* (n 74) [65], [102].

held that criminalisation of all anal intercourse between men sends the 'message' that gay men are 'unapprehended felons', reinforcing and perpetuating social prejudice as well as causing severe psychological harm to individuals.[224] This was echoed in O'Regan and Sachs JJ's minority judgment in *Jordan*,[225] discussed above, where they recognised that the criminalisation of prostitutes but not their clients brands female prostitutes as being more morally blameworthy, entrenching social stigma against women.

These expressive harms reflect the Court's concern with preventing the creation or perpetuation of patterns of group disadvantage. The concern is that these messages and statements will have long-term effects on how society treats the group and how the group members think of themselves. However, the mere fact that these messages will create or entrench patterns of group disadvantage does not appear to be sufficient for a finding that dignity has been violated and that the discrimination is unfair. Instead, these harms are weighed in the balance and it is only where they result in disproportionality that they produce a violation of dignity and unfair discrimination. This was evident in *Khosa*. The Court recognised that excluding non-citizens from social security would stigmatize them, but it did not go on to conclude that the dignity of all non-citizens had been violated. Instead, it confined this finding to permanent residents. The Court suggested that there were good reasons for excluding temporary residents, illegal immigrants and other categories of non-citizens from receiving social grants, reasons that outweighed any harms to their interests.[226]

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223 *Sodomy Case* (n 7).

224 ibid [23].

225 *Jordan* (n 50) [68].

226 *Khosa* (n 50) [58]-[59]. See below n 240 for further discussion of *Khosa*.

(ii) Expressivism-in-the-conclusion

'Expressivism-in-the-balance' has an important role in the Court's decisions. However, 'expressivism-in-the-conclusion' appears far more frequently and dominates the Court's account of the creation or perpetuation of patterns of group disadvantage. Expressivism-in-the-conclusion is displayed where the Court moves from a finding that the discrimination is disproportionate to drawing conclusions about what the law or action expresses.

Sachs J's dissent in *Harksen* is a good illustration of expressivism-in-the-conclusion. Having found that the impact on solvent spouses' interests outweighed the purpose of protecting creditor's interests, he proceeded to identify the 'underlying premise' behind this discrimination: the stereotype that 'only one business mind is at work in the marriage, not two'.[227] This conclusion was based on O'Regan J's overview of discrimination on the basis of marital status in South Africa, which demonstrated that this stereotype had formed the foundation of many forms of disadvantage and exclusion.[228] In light of this history, Sachs J held that this discrimination was a further manifestation of this stereotype which threatened to 'promote' and 'reinforce' its use in society.[229] He proceeded to find that this inference entrenches a pattern of group disadvantage, as it would affect the 'quality of the relationship between the spouses' and encourage society to treat the spouses as an undifferentiated unit, rather than as individuals.[230]

Similar reasoning was evident in the *Immigration Case*, where the Court considered a challenge to immigration legislation that allowed spouses of permanent residents to join their husbands or wives in the country, but denied this benefit to same-sex life partners. Ackermann J identified the purpose of this provision as protecting stable family life and

[227] *Harksen* (n 2) [121].

[228] ibid [124], reflecting on O'Regan J's account of the history of marital law at [95]-[96].

[229] ibid [121] and [124].

[230] ibid [125].

proceeded to find that same-sex partners have an equally strong interest in having a family life. Having found that the exclusion of gay and lesbian couples from this legislation did not serve the purpose (it was not suitable) and would have a severe impact on these couples, Ackermann J proceeded to hold that this expressed the ' message' that 'gays and lesbians lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected.'[231] This finding was preceded by a lengthy examination of many of the social myths that have produced historical discrimination against gay and lesbian people, including the notion that they are primarily 'sexual beings' with no interest in relationships and that intimate relationships only derive value from their procreative potential.[232] Viewed in this context, Ackermann J held that the legislative exclusion of same-sex life partners would reinforce these stereotypes and prejudices, thereby perpetuating patterns of group disadvantage.

'Expressivism-in-the-conclusion' has been a prominent feature in many of the Court's other sexual orientation decisions. As in the *Immigration Case*, the Court has moved swiftly from an explicit or implicit finding that the impact of the discrimination outweighs its purpose to drawing conclusions about the harmful 'messages' expressed by these laws or actions.[233] The members of the Court have never disagreed over these 'messages' or whether they will create or perpetuate patterns of group disadvantage. However, as the previous section demonstrated, the Court's record on other grounds of discrimination, particularly gender, has been far less consistent.[234] Thus, in *Harksen*, Goldstone J saw nothing untoward in the automatic divesting of solvent spouses' property, while Sachs J interpreted this as

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231 *Immigration Case* (n 50) [54].

232 ibid [49]-[51].

233 See for example *Fourie* (n 50) [71]; *Geldenhuys* (n 50) [36]-[37].

234 See further Michelle O'Sullivan and Christina Murray, 'Brooms sweeping oceans? Women's rights in South Africa's first decade of democracy' [2005] Acta Juridica 1; Elsje Bonthuys, 'Institutional Openness and Resistance to Feminist Arguments: The Example of the South African Constitutional Court' (2008) 20 CJWL 1.

promoting a stereotyped view of marriage that would entrench a pattern of disadvantage. In *Volks*,[235] Skweyiya J held that the exclusion of surviving life partners from the benefits of the Maintenance of Surviving Spouses Act was not unfair discrimination, 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 world they are unworthy', thus 'reinforcing' harmful stereotypes about unmarried people.[236] The same divisions were apparent in *Union of Refugee Women*. Again the majority saw no impermissible statements or messages in the blanket exclusion of refugees from the private security industry, while Mokgoro and O'Regan JJ held that this conveyed the 'message' and the 'silent premise' that refugees are inherently less trustworthy,[237] which would 'inevitably foster a climate of xenophobia'.[238]

Without an understanding of how the members of the Court reached these conclusions it may appear that they are locked in intractable disputes over interpretation and meaning. However, as I demonstrated in the previous section, their disagreements are concentrated elsewhere. These divergent interpretations stem from the earlier conclusion on the proportionality of the alleged discrimination. There has not been a single decision in which the judges have agreed that the discrimination is disproportionate but have gone on to disagree about the messages that the law or action expresses.

A finding of disproportionality is therefore a necessary condition for these expressive conclusions. Why this is so is not immediately apparent. This will require an exploration of the nature of these messages and their connection with the proportionality analysis.

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235 *Volks* (n 50) [62].

236 ibid [226].

237 *Union of Refugee Women* (n 5) [118]-[119].

238 ibid [122].

Chapter 3 will address these important issues. For now it suffices to note that these expressive conclusions are contingent on the outcome of the proportionality analysis.

(b) Socio-economic disadvantage

In Chapter 1, I noted that socio-economic disadvantage also features in the Court's concerns over the likely creation or perpetuation of patterns of group disadvantage. The case law suggests that to create or perpetuate a 'pattern of group disadvantage' the discrimination must impose a severe form of socio-economic disadvantage that is likely to have long-term consequences for the group or it must reinforce existing patterns of socio-economic disadvantage.[239]

The fact that discrimination creates or perpetuates a group's socio-economic disadvantage is an important consideration, but it is not sufficient to establish a violation of dignity. Again, this is well demonstrated in *Khosa*, dealing with the exclusion of non-citizens from social security. While the Court was deeply concerned that excluding permanent residents from social security would condemn them to poverty and dependence, this concern did not extend to other vulnerable categories of foreign nationals. Mokgoro J recognised that temporary residents and other categories of immigrants are likely to be as disadvantaged, if not more so, by this exclusion. However, this disadvantage was not sufficient for a finding that their dignity had been violated as Mokgoro J held that:

> [T]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 part of our society and have made their homes in South Africa, and those who have not.[240]

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[239] See Chapter 1, text to n 114-118.

[240] *Khosa* (n 50) [58].

Therefore, *Khosa* suggests that discrimination that creates or perpetuates a group's socio-economic disadvantage is only a violation of dignity and thus unfair where it is found to be disproportionate.

V CONCLUSION

This chapter has developed a clearer picture of how the Court reasons to the conclusion that dignity has been violated, producing unfair discrimination. From this reasoning I have identified three requirements for establishing this particular violation of dignity: a) there must be differential treatment on the basis of group characteristics; b) that is disproportionate, meaning that the purpose of the discrimination is outweighed by its impact on the group members' interests; and c) that threatens to or actually creates or perpetuates patterns of group disadvantage, primarily, but not exclusively, by expressing impermissible messages about the disfavoured group or by creating or entrenching socio-economic disadvantage. All three are necessary conditions for establishing the violation of dignity. None are individually sufficient, but together they are jointly sufficient for this finding. We have also seen that there is a complex connection between requirements b) and c). In many cases, the fact that the discrimination contributes to the creation or perpetuation of the disfavoured group's disadvantage is an important factor in the proportionality analysis that, in almost all cases, renders the discrimination disproportionate. However, in the case of expressivism-in-the-conclusion, the Court is only able to determine that discriminatory laws or actions send impermissible messages that threaten to produce patterns of disadvantage where it has found the discrimination to be disproportionate. This is the most common way in which the Court reaches the conclusion that discrimination violates dignity and is unfair. As a result, we need to explore this line of reasoning to understand the nature of these messages and how the

Court identifies them. This will provide further insights into the nature of the dignity violation required for a finding of unfair discrimination.

CHAPTER 3: EXPRESSIVISM-IN-THE-CONCLUSION

I INTRODUCTION

My analysis of the case law indicates that three necessary and jointly sufficient conditions must be satisfied to establish the violation of dignity, resulting in a finding of unfair discrimination: a) there must be differentiation on the basis of group characteristics; b) that is disproportionate; and c) threatens to or actually creates or perpetuates patterns of group disadvantage. I have also highlighted that the Court sees the 'messages', 'inferences', 'premises', or 'statements' expressed by discriminatory laws or actions as one of the primary ways in which these patterns of group disadvantage are created or perpetuated. Most commonly, these expressive concerns appear as conclusions to the proportionality analysis, a phenomenon I have termed 'expressivism-in-the-conclusion'. These conclusions are brief and summary in nature, but their brevity belies their complexity. In this chapter, I will attempt to explain expressivism-in-the-conclusion as this will allow us to arrive at a sharper understanding of the requirements for establishing the violation of dignity.

This is uncharted territory in South African discrimination law. No theorists have engaged with the Court's expressive concerns in any detail. Nevertheless, the task of unpacking these concerns is aided by the burgeoning literature on 'legal expressivism' (I will refer to this simply as 'expressivism').[241] Expressivism is not a unified theoretical position, but expressivists are united by the proposition that the meanings of laws or actions are relevant to assessing their moral and legal status.[242] Theorists have increasingly sought to

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[241] For a general overview of expressivism see Khaitan (n 96); Matthew D Adler, 'Expressive Theories of Law: A Skeptical Overview' (2000) 148 U Pennsylvania L Rev 1363; Elizabeth S Anderson and Richard H Pildes, 'Expressive Theories of Law: A General Restatement' (2000) 148 U Pennsylvania L Rev 1503. This should not be confused with expressivism in metaethics, the position that there are no moral facts, merely expressions of moral attitudes.

[242] Khaitan ibid 4.

understand discrimination law in the United States[243] and Canada[244] in expressive terms, providing a rich source of conceptual tools for understanding the South African Court's practice. In reaching for this theory my claim to be engaging in a doctrinal project may appear to wear thin. My aim, however, is not to shape the Court's jurisprudence to fit this theory. Instead, I seek to use the conceptual clarity and nuance that this theory introduces to help explain this complex feature of the case law. The test of this account remains whether it fits the Court's jurisprudence and brings coherence to it.

I will use this theory to address three questions about expressivism-in-the-conclusion. First, what is the nature of the impermissible 'messages' that the Court is uncovering (Section II)? Second, how does it identify them (Section III)? And, third, how does the Court determine that these messages will create or perpetuate patterns of group disadvantage (Section IV)?

I will argue that expressivism-in-the-conclusion is the finding that discrimination can be reasonably construed as being based on prejudice or impermissible forms of stereotyping.[245] In the absence of proof of actual prejudice or impermissible stereotyping, a finding of disproportionality is necessary for these conclusions. This is because prejudice and impermissible stereotyping provide an explanation for the state's failure to afford adequate weight to group members' interests. Where there has not been such a failure it would be unreasonable to reach these conclusions. The Court's ultimate concern is that if the state can be reasonably construed to be acting on the basis of prejudice and stereotypes

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243 See 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 241); Richard A. Primus, 'Equal Protection and Disparate Impact: Round Three' (2003) 117 Harv L Rev 493; Deborah Hellman, *When is Discrimination Wrong?* (Harvard University Press 2008).

244 See further Denise Réaume, 'Discrimination and Dignity' (2003) 63 Louisiana L Rev 1; Ron Levy, 'Expressive Harms and the Strands of Charter Equality: Drawing out Parallel Coherent Approaches to Discrimination' (2002) 40 Alberta L Rev 393.

245 As I argue below, the Court does not regard all stereotyping to be impermissible, see Section V. I will not exclude the possibility that expressivism-in-the-conclusion could also reflect other forms of misrecognition beyond prejudice and stereotyping.

then this will threaten to promote and reinforce prejudice and stereotyping in society. In the course of developing this argument, I also hope to cast light on the nature of 'expressivism-in-the-balance', the nature of the Court's proportionality analysis, and the role of prejudice and stereotyping in the Court's account of the violation of dignity.

II 'MESSAGES'

To begin to understand expressivism-in-the-conclusion we need to engage briefly with the nature of meaning. Theories of meaning are notoriously difficult and contested, but here I will rely on Matthew Adler's helpful distinction between 'linguistic' and 'nonlinguistic' meaning as a tool for exploring the Court's expressive concerns.[246]

(a) Linguistic meaning

To say that a law or action expresses a 'message' in the 'linguistic' sense, Adler explains, is to say that it is meaningful 'in the way that language is meaningful'.[247] All laws and some discriminatory actions involve language, but the question is whether the Court is referring to some additional layer of linguistic meaning when it draws conclusions about the 'messages' that discrimination expresses. To test this, we should distinguish between two types of linguistic meaning.

First, the Court could be referring to messages as a form 'communication', or what Adler terms 'speaker-meaning'.[248] Definitions of communication are complex and varied, but their common feature is that they relate to the intentions of the speaker. To

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[246] Adler (n 241) 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 Pennsylvania L Rev 1577, 1579.

[247] Adler, 'Expressive Theories of Law: A Skeptical Overview' ibid 1385.

[248] ibid 1374.

communicate a message is, in broad terms, to speak or act with the intention that the others understand one's message.[249] Some of the most heinous forms of apartheid-era discrimination could be interpreted as a form of communication, intending to convey a message of racial superiority and inferiority. However, when the Court talks about messages in present-day laws or actions it is clearly not suggesting that the state *intends* to make members of society believe that gay and lesbian people are less morally worthy, that refugees are untrustworthy, or that female sexuality is morally tainted, to give a few examples from the case law. While it is conceivable that this type of meaning could emerge in future cases, we can discount this as an explanation of the Court's existing expressive concerns.

Second, the Court could be relying on an alternative type of linguistic meaning, what Adler terms 'sentence-meaning'.[250] This is the type of meaning that could be 'attached to a well formed sentence'.[251] Like words in a sentence, laws and actions can have conventional meanings that are 'independent of the communicative intentions (or other mental states)' of the lawmaker or actor.[252] For example, wearing 'black face' — make-up that crudely imitates black skin-colour and morphology — has deep historical and cultural associations with the ridicule 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 objects of ridicule'.

We can understand the category of expressive concerns I labelled 'expressivism-in-the-balance' as a form of 'sentence-meaning'. In Chapter 2, we saw that the Court was concerned with the conventional meanings attached to social security payments,[253]

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[249] ibid 1387-8; Anderson and Pildes (n 241) 1508.

[250] Adler, 'Expressive Theories of Law: A Skeptical Overview' (n 241) 1387.

[251] ibid 1393.

[252] ibid.

[253] *Khosa* (n 50).

marriage,[254] and criminal offences.[255] Its concern was that these meanings would cast the disfavoured group in a negative light, entrenching or reinforcing prejudice and stereotyping in society.[256] For example, in the *Sodomy Case* the Court implicitly recognised that crimes have a conventional meaning of moral blameworthiness, conveying the message that the prohibited activity is severely morally wrongful and stigmatising those who engage in it. Thus it held that the criminalisation of anal intercourse 'state[s] that in the eyes of our legal system all gay men are criminals'.[257]

While 'sentence meaning' helps to explain expressivism-in-the-balance, it does not explain expressivism-in-the-conclusion. First, it does not account for the Court's use of a proportionality analysis before drawing conclusions about the messages expressed by the discriminatory laws or actions. It is not clear how a finding that discrimination is disproportionate would assist the Court in interpreting its conventional meaning. It would seem far more appropriate to proceed directly to an interpretation of the relevant conventions surrounding the discriminatory law or action. Second, in most cases there are simply no conventional meanings attached to the laws or actions. Sequestering solvent spouse's property, denying presidential pardons to fathers, withholding maintenance from unmarried partners, or barring refugees from becoming security guards are not conventional ways of expressing impermissible messages about these groups. As a result, the search for the 'sentence meaning' of these acts of discrimination would be difficult, if not impossible. This leaves the possibility that expressivism-in-the-conclusion is an example of what Adler terms 'nonlinguistic' meaning.

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254 *Fourie* (n 50).

255 *Sodomy Case* (n 7) ; *Jordan* (n 50).

256 See Chapter 2, text to n 219ff.

257 *Sodomy Case* (n 7) [28].

(b) Nonlinguistic meaning

Nonlinguistic meaning refers to the way in which laws or actions have 'meaning' insofar as they provide 'evidence' of something.[258] A shopper's furtive glances in a store 'express' his intention to steal;[259] a poorly drafted statute 'means' that it was rushed. Laws or actions can provide evidence of many things. Nonlinguistic expressivists are generally concerned with something more particular: what an action reveals about the actor's actual or ostensible reasons for acting.[260]

In the same vein, I argue that 'expressivism-in-the-conclusion' is best explained as the identification of the state's reasons for discriminating. Let us briefly postpone the question whether the Court is identifying the state's *actual* or *ostensible* reasons while we survey the evidence for this proposition.[261] The Court's language is the first important clue. Its expressive conclusions are not only couched in the language of 'messages' and 'statements' — terms that, on first inspection, point to linguistic meaning — but also in terms of the 'silent premise[s]',[262] 'inferences',[263] and 'assumptions'[264] underpinning the discrimination. This language is unmistakeably reason-orientated.

The content of these expressive concerns provides further evidence of the Court's focus on the state's reasons for discriminating. Scrutinising these messages more closely, we

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[258] Adler, 'Expressive Theories of Law: A Skeptical Overview' (n 241) 1384-5, 1498; Heidi M Hurd, 'Expressing Doubts About Expressivism' (2005) U Chi Legal F 405, 418; HP Grice, 'Meaning' (1957) 66 The Philosophical Review 377, 478.

[259] Anderson and Pildes (n 241) 1508.

[260] See Anderson and Pildes ibid 1510-13; Primus (n 243) 568 and 577.

[261] I address this question in Section III, text to n 279ff below.

[262] *Union of Refugee Women* (n 5) [118]; see also *Harksen* (n 2) [121]; *Van Heerden* (n 12) [119].

[263] *Jordan* (n 50) [65]; *Bhe* (n 50) [92]; *Geldenhuys* (n 50) [36].

[264] *Harksen* (n 2) [124] (Sachs J);*Van Heerden* (n 12) [116] (Ngcobo J).

see that they involve two possible sources of reasons for discriminating.[265] First, the Court often suggests that the discriminatory laws or actions express prejudice. The Court has not defined prejudice but it would likely agree with Larry Alexander's description of prejudice (what he terms 'bias') as the erroneous belief, either consciously or unconsciously held, that 'those with a certain trait are morally less worthy than others merely by virtue of possessing that trait'.[266] This can be understood as the belief that the interests of those who belong to certain groups count for less merely by virtue of being members of those groups.[267] In *Fourie*,[268] the Court was clearly uncovering prejudice when it held that the exclusion of same-sex couples from marriage expressed that their 'need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples.' This prejudice would supply a reason for why same-sex couples' interests were overlooked.

Second, and most commonly, these expressive conclusions are framed in terms of stereotypes. Broadly defined, stereotypes involve the belief that those who possess certain group characteristics are more likely to possess other characteristics that are an appropriate basis for different treatment.[269] Stereotypes can be negative (stigmatising group members by associating them with undesirable characteristics)[270] or positive (attaching valued traits to

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[265] Here I am working with 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* (Oxford University Press 1975) ch 1.

[266] Larry Alexander, 'What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies' (1992) 141 U Pennsylvania L Rev 149, 161 and 192.

[267] Prejudice is most often associated with feelings of enmity toward the group and an intention to cause them harm (see Sophia R Moreau, 'The Wrongs of Unequal Treatment' (2004) 54 UTLJ 291, 302). However, I will assume that these emotional and conative states are symptomatic of conscious or unconscious prejudiced beliefs.

[268] *Fourie* (n 50) [71]; see also *Immigration Case* (n 50) [54].

[269] Krüger (n 31) 509-10; Alexander (n 266) 161. Here I refer to stereotypes in their non-pejorative sense.

[270] I will refer to stigma and negative stereotypes interchangeably. However, stigma can also occur without negative stereotyping, 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.

group membership) and can have varying degrees of accuracy. The 'messages' and 'inferences' that the Court is uncovering are primarily inaccurate negative stereotypes, such as the stereotypes that 'only one business mind is at work' in marriages,[271] that homosexuality is 'perverse' or 'deviant',[272] that female sexuality is morally suspect,[273] that unmarried opposite-sex partners are 'irresponsible',[274] or that refugees are untrustworthy.[275] If believed, these stereotypes all supply reasons for imposing burdens or withholding benefits from these groups.[276]

As reflected in Chapters 1 and 2, the Court's concern is that if the state is understood to be acting on the basis of prejudice or stereotyping then this will 'encourage' and 'reinforce' this way of viewing the disfavoured group, threatening to produce patterns of group disadvantage.[277] As I indicated above, expressivism-in-the-balance can also be seen as a concern over the likely propagation of prejudice and stereotypes. However, the concern there is that the conventional meanings attached to certain laws or actions brand the disfavoured group with certain negative attributes, irrespective of the state's actual or apparent reasons for discriminating. In the case of expressivism-in-the-conclusion, the discriminatory laws or actions do not have these conventional meanings. Instead, the Court is suggesting that there is something about the way in which the discrimination occurred that reflects that it was based on prejudice or stereotyping. As I will discuss below, that is not to

[271] *Harksen* (n 2) [121].

[272] *Geldenhuys* (n 50) [36].

[273] *Jordan* (n 50) [65].

[274] *Volks* (n 50) [226].

[275] *Union of Refugee Women* (n 5) [118]-[119].

[276] 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 265.

[277] See *Immigration Case* (n 50) [54]; *Jordan* (n 50) [72]; *Union of Refugee Women* (n 5) [122] discussed in Chapter 2, Section III.

say that conventions are irrelevant to interpreting these reasons.[278] However, expressivism-in-the-conclusion is far more complicated than merely reading off the conventional meanings attached to certain laws or actions.

This account of expressivism-in-the-conclusion raises a number of questions and possibilities. Is the Court suggesting that the state is *actually* acting on the basis of prejudice or stereotypes? Or is it suggesting that this is how society or the disfavoured group *perceive* its reasons for discriminating? Or could it be objectively reconstructing the state's reasons for discriminating, suggesting that this is how the state's actions could be reasonably construed? I will now turn to address these possibilities. In Section III and IV, I will consider the further questions of how the Court identifies these reasons and how it draws the conclusion that these reasons will create or perpetuate patterns of group disadvantage.

(c) Subjective reasons, subjective interpretation of reasons, or reasonable reconstruction?

It is unlikely that expressivism-in-the-conclusion involves identifying the state's subjective reasons for discriminating. In *Walker*,[279] the Court dismissed the notion that proof of the discriminators' improper motives or intentions is necessary to establish unfair discrimination, arguing that the difficulties in proving these mental states would defeat the 'protective purpose' of section 9(3). Presumably the Court was also influenced by the problem of ascribing actual mental states to collective bodies,[280] not to mention the political controversy that would surround these findings.[281] However, Langa DP was quick to add that proof of

[278] See text to n 310ff.

[279] *Walker* (n 17) [40]-[43].

[280] See Anderson and Pildes (n 241) 1514-20.

[281] This partly explains the Court's reluctance to inquire into legislators' subjective motives, as demonstrated in *Poverty Alleviation Network and Others v President of the Republic of South Africa and Others* 2010 (6) BCLR 520 (CC) [73].

subjective intentions and motives is not irrelevant to determining whether dignity has been violated.[282] This is demonstrated in a number of cases involving racially-based apartheid-era legislation where the Court has had no hesitation in attributing subjective beliefs to the legislature of the time.[283] For example, in *Zondi*,[284] Ngcobo J held that an apartheid-era ordinance was 'manifestly racist', bearing the mark of the 'intent of those who drafted and enacted [it]'. However, the Court is far more circumspect when dealing with contemporary laws and state action, avoiding any language that would suggest that the state was subjectively motivated by prejudice or stereotypes. As a result, the Court does not appear to be suggesting that these are the state's actual reasons for discriminating.

It is also unlikely that the Court is determining how members of society or the disfavoured group actually perceive the state's reasons for discriminating. Courts are ill-equipped to assess this type of evidence, particularly in a diverse society where these perceptions are likely to be wildly divergent.[285] 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.[286] This makes it implausible that the Court is basing its decisions on these subjective perceptions. This is reinforced by the Court's insistence that the violation of dignity is to be determined 'objectively'.[287]

This leaves the possibility that the Court is objectively reconstructing the state's reasons. The Court is clearly concerned with the likely effects of the state being perceived to be acting on the basis of stereotypes and prejudice, as it sees this as encouraging and

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282 *Walker* (n 17) [44].

283 See *Moseneke and Others v The Master of High Court and Another* 2001 (2) SA 18 (CC) [21]-[23]; *Bhe* (n 50) [60]-[63]; *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 (CC) [96].

284 *Zondi* ibid.

285 Pildes and Niemi (n 243) 536; Primus (n 243) 571-2.

286 Pildes and Niemi ibid 537.

287 *Harksen* (n 2) [52]; *Walker* (n 17) [43]-[44].

perpetuating prejudice and stereotyping in society. However, because of the difficulties I have outlined, the Court cannot base its decisions on how society or the disfavoured group actually perceive the discrimination. A parallel can be drawn with defamation law. While courts are concerned with actual or potential harms to individuals' reputations, they reject evidence of how the audience actually understood allegedly defamatory publications because of the difficulties in basing legal outcomes on these unstable subjective understandings.[288] Instead, the meaning and potential effects of allegedly defamatory publications are determined objectively from the perspective of the 'reasonable', 'right-thinking' person who subscribes to constitutional values.[289] Similarly, in determining the nonlinguistic meaning of discrimination, the Court is best understood to be determining how a reasonable person would perceive the state's reasons for discriminating.

The Court has not expressly acknowledged that it is engaging in a reasonable person test, barring a parenthetical mention in Sach J's dissenting judgment in *Walker*.[290] There he referenced the need for a 'subjective-objective' approach to establishing dignity violations, drawing on the Canadian Supreme Court's approach to assessing violations of dignity. As outlined in *Law v Canada*,[291] this approach asks whether a reasonable person in the position of the complainant would interpret the law or action as 'promoting or perpetuating the view that the individual adversely affected by this distinction is less capable, or less worthy of recognition or value as a human being'. In contrast with the Canadian approach, it seems that the South African Court considers the perspective of a reasonable member of society and a reasonable member of the disfavoured group. This follows because the Court is

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288 See C Kinghorm, 'Defamation' in WA Joubert, JA Faris and LTC Harms (eds), *The Law of South Africa*, vol 7 (2nd edn, Juta 2005) [242].

289 See *Le Roux* (n 75) [85], [89] (Brand AJ) and [156], [168] (Cameron and Froneman JJ).

290 See *Walker* (n 17) [129]-[130], fn 36 (Sachs J).

291 *Law* (n 53) [88]; see also *Egan* (n 53) [56].

concerned both with how members of society may interpret the state's reasons, encouraging or reinforcing their prejudice or stereotyping, and how members of the disfavoured group may respond to the state's ostensible stereotyping or prejudice.[292] However, without express guidance from the Court it is impossible to draw firm conclusions here.

In this section I have determined that expressivism-in-the-conclusion reflects that discrimination can be reasonably construed as being based on prejudice or stereotyping. I will now investigate how the Court reaches these conclusions.

III HOW DOES THE COURT REACH THESE CONCLUSIONS?

In Chapter 2, we saw that 'expressivism-in the-conclusion' is contingent on the Court's finding that the discrimination is disproportionate. To understand this connection between the proportionality analysis and these expressive concerns we need a clearer understanding of what the proportionality analysis reveals.

(a) Disproportionality and the failure to weigh group members' interests appropriately

I have described the proportionality analysis in unfair discrimination cases as involving the 'balancing' of the purpose of the discrimination against its impact on the disfavoured group. In more precise terms, this proportionality analysis can be understood as an objective exercise in weighing the *reasons* provided for the discrimination with the *reasons* against discriminating.[293] While the Court does not frame its analysis in these terms, this appears to be the logic underlying its 'global judgment' of proportionality. The actual or likely impact

[292] See Chapter 1, text to n 103 and Chapter 2, text to n 227ff.

[293] See Mattias Kumm, 'Constitutional rights as principles: On the structure and domain of constitutional justice' (2004) 2 IJCL 574, 592; Denise Réaume, 'Limitations on Constitutional Rights: The Logic of Proportionality' Oxford Legal Research Paper 26/2009 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1463853> accessed 15 May 2012.

of the discrimination on the disfavoured group members' interests provides a compelling reason against the discrimination. This must be weighed against the reasons offered by the state in favour of the discrimination. As indicated in Chapter 2,[294] the weight of these reasons is not determined simply by the objective importance of the purpose the state is seeking to achieve. Instead, the proportionality analysis takes into account the extent to which this purpose is achieved by the discrimination (its suitability) and whether there are other ways to achieve the purpose that have less of an impact on the disfavoured group members' interests (its necessity).[295] A finding of disproportionality reflects that the actual or likely impact of the discrimination on the group members' interests provides a reason against discriminating that outweighs the state's reasons in favour of discriminating. This demonstrates that the state has failed to afford adequate weight to the disfavoured group members' interests in its deliberations.[296]

Here I talk of a failure to afford adequate weight to the 'group members' interests' rather than a failure to afford adequate weight to the interests of the litigants or affected individuals for two reasons. First, the Court is dealing with discrimination, involving the imposition of burdens or benefits on the basis of certain group characteristics. In the case of direct discrimination, those who possess particular group characteristics are marked out to receive certain burdens or to be refused benefits because of their membership of the group. Thus, a finding that this treatment is disproportionate reflects a failure to afford their interests adequate weight as a consequence of their group membership.[297] In the case of

[294] Chapter 2, text to n 157.

[295] See Réaume, 'Limitations on Constitutional Rights: The Logic of Proportionality' (n 293) 25-6 for a similar account of the proportionality analysis.

[296] I use 'deliberations' in a broad sense to refer both to the state's actual deliberations and the deliberations it ought to have engaged in in light of the objective facts about the impact of the discrimination on the disfavoured group members' interests.

[297] To say that the discrimination was 'because' of the group characteristic or that the failure to afford adequate weight to the group members' interests was a 'consequence' of their group membership is to say that group membership provided a reason for imposing burdens or withholding burdens from the group. See Fredman,

indirect discrimination, the unfavourable treatment is not based on group characteristics,[298] but impacts or has the potential to impact members of certain groups more severely than members of other groups. If it is found that this discrimination is disproportionate then this is clearly a failure to weigh the disfavoured group members' interests appropriately.

Second, the Court is concerned with the actual or likely impact of the discrimination on the disfavoured group as a whole, not merely the impact on the individual litigant or litigants before it. This follows from the Court's concern with the potential creation of patterns of group disadvantage,[299] which necessarily requires the Court to look beyond the circumstances of the individual litigant to assess the impact of the discrimination on the members of the group as a whole. This is reinforced by the Constitutional Court's insistence that the constitutional validity of laws and state conduct is to be assessed in light of its impact on all who are or are likely to be affected by it, not merely in light of the 'subjective' circumstances of the individual litigant.[300] I will return to discuss the interplay between the assessment of the impact on individual litigants and the wider group in Chapter 4.[301] For now, it suffices to note that the Court is concerned with the actual or potential impact of the discrimination on members of the disfavoured group and whether this reflects a failure to afford the group members' interests adequate weight. We can now explain why a finding of disproportionality is necessary for the conclusion that the discrimination reflects underlying prejudice or stereotyping.

Discrimination Law (n 119) 203. See further John Gardner, 'On the Ground of Her Sex(uality)' (1998) 18 OJLS 167, 179-180.

[298] Although indirect discrimination can be a disguised form of direct discrimination.

[299] See Chapter 1, text to n 82ff.

[300] *Ferreira v Levin* 1996 (1) SA 984 (CC) [26]. See further Pieterse (n 58) 399.

[301] See Chapter 4, text to n 351ff.

(b) Prejudice, stereotyping and the 'ostensible rationale'

To suggest that discrimination was based on prejudice or stereotyping is to offer an 'ostensible rationale'[302] for the failure to afford group members' interests adequate weight.[303] Prejudice, as defined above, reflects the belief that the group members' interests are deserving of lesser weight merely by virtue of the fact that they are members of the group. For example, in *Fourie*,[304] the belief that gay and lesbian couples' 'need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples' supplied an explanation for the state's failure to afford their interests appropriate weight in confining marriage to heterosexual couples.

Similarly, stereotypes can also explain this failure to afford adequate weight to group members' interests. As I will discuss below,[305] not all stereotypes necessarily lead to a failure to weigh group members' interests appropriately, but here the Court is identifying stereotypes that clearly would result in such a failure. I label these stereotypes 'impermissible stereotypes'.[306] In some cases the impermissible stereotype may provide the state's ostensible reasons in favour of discriminating. For example, in *Union of Refugee Women*, the exclusion of refugees from the private security industry could be explained by the 'silent premise' that refugees are less trustworthy.[307] If the state believed that refugees were less trustworthy then

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[302] Patrick S. Shin, 'The Substantive Principle of Equal Treatment' (2009) 15 Legal Theory 149, 166; see further Andrew Altman, 'Expressive Meaning, Race, and the Law: The Racial Gerrymandering Cases' (1999) 5 Legal Theory 75, 86. Both hint at the argument I develop here.

[303] Other forms of 'misrecognition' could conceivable result in such a failure but here I will confine the discussion to prejudice and impermissible stereotyping as these are the Court's primary concerns.

[304] *Fourie* (n 50) [71].

[305] See Section V below.

[306] On this view, the key question is whether acting on the stereotype would fail to afford adequate weight to the affected group members' interests. The question is not whether the stereotype is negative or positive, accurate or inaccurate (cf Réaume, 'Discrimination and Dignity' (n 244) 37). However, it would seem that negative, inaccurate stereotypes are far more likely to result in this failure.

[307] *Union of Refugee Women* (n 5) [118].

this would explain why it felt the need to ban all refugees from this industry, despite the severe impact this would have on their interests. Alternatively, stereotyping can explain the state's failure to recognise the impact of the discrimination on the interests of the disfavoured group. In the *Immigration Case*,[308] the belief that gay and lesbian people are primarily 'sexual beings' with no capacity for long-term relationships was offered as an apparent explanation for why the legislature overlooked same-sex couples' need to live together in the same country.

A finding of disproportionality is necessary to reach these conclusions because, in the absence of proof of actual prejudice or stereotyping, it would only be reasonable to believe that the state has acted on the basis of prejudice or impermissible stereotyping where it has in fact failed to afford adequate weight to the interests of the disfavoured group. For example, in *Walker*,[309] the Pretoria city council levied different rates for water and electricity, charging residents of 'old' Pretoria, a majority white area, a consumption-based rate while residents in Atteridgeville and Mamelodi, historically black suburbs, were charged a lower, flat rate pending the installation of water and electricity meters in the area. White residents may have interpreted the differential rates scheme as reflecting underlying prejudice against them: the belief that their interests counted for less. However, the scheme was proportionate. The Court recognised that the roll-out of water and electricity meters to the historically black suburbs would take time, making the flat-rate the 'only practical solution to the problem'. It also held that some degree of cross-subsidisation was permissible given the poverty in these areas.[310] 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 attribute prejudice to the state that serves to explain a failure to

[308] *Immigration Case* (n 50) [49].

[309] *Walker* (n 17).

[310] ibid [52]-[53], [63].

afford adequate weight to white residents' interests where, objectively viewed, there was no such failure. This demonstrates why a finding of disproportionality is necessary for the Court's expressive conclusions.

Disproportionality may be necessary for these conclusions, but it is not sufficient. For example, in *Union of Refugee Women*, Mokgoro and O'Regan JJ's conclusion that the exclusion of refugees from the private security industry was disproportionate did not inevitably lead to the conclusion that this was based on 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 believe that the discrimination was based on the stereotype that refugees are untrustworthy was the history and context of rampant xenophobia in South Africa which, among other stereotypes, characterises refugees as being deceitful and 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 social conventions also have a role to play in expressivism-in-the-conclusion, albeit that they operate in a subtly different way to the conventional meanings involved in expressivism-in-the-balance.

This demonstrates that it is the failure to afford group members' interests appropriate weight, coupled with a context or history of prejudice against and stereotyping of the group that makes it reasonable to believe that the state has acted on the basis of prejudice and impermissible stereotypes. As the Court has recognised, where a group has suffered from prejudice and stereotyping in the past, further disproportionate treatment 'will [likely] contribute to the perpetuation or promotion of their unfair social characterization.'[311] This suggests that most, if not all, disproportionate treatment of historically disadvantaged groups could be reasonably construed as the product of further prejudice or stereotyping.

[311] *Immigration Case* (n 50) [44], quoting Iacoubucci J in *Law* (n 53) [63].

This explains why, after establishing that the discrimination is disproportionate, the Court has not once disagreed on the messages that are expressed by the disproportionate discrimination. It also explains why these conclusions are generally so brief and summary in nature. This would, however, raise difficult questions where discrimination affects groups that are not associated with a history of prejudice and impermissible stereotypes but nevertheless fall under the broader protection of listed grounds of discrimination, such as white, heterosexual males in South Africa. The Court has indicated that a history of disadvantage is not a necessary condition for finding unfair discrimination,[312] but it would certainly be more difficult to establish that disproportionate treatment of dominant or privileged groups can be reasonably construed as the product of prejudice and impermissible stereotyping. Thus, expressivism-in-the-conclusion offers a form of in-built asymmetric protection, as it is primarily concerned with historically or currently disadvantaged groups.

IV PATTERNS OF GROUP DISADVANTAGE

I have noted that the Court regards expressivism-in-the-conclusion as one of the primary ways in which patterns of group disadvantage are created or perpetuated. We can now interpret this as the concern that if the state could be reasonably construed as acting on the basis of prejudice or stereotyping then this will likely encourage or reinforce this prejudice and stereotyping in society, leading to long-term harms for the disfavoured group.

These conclusions rely on a complex set of claims about social behaviour which need to be unpacked. First, this suggests that the state plays a central role in shaping social norms and behaviour. The Court has expressly made this claim on a number of occasions. In *Makwanyane*,[313] 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 emphasised that

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[312] See *Hugo* (n 3) [41]. Discussed further in Chapter 3 text to n 361 below.
[313] *Makwanyane* (n 65) [222].

law is often ‘constitutive of invidious social standards.’[314] Second, not only is the Court making complex claims about the state’s role in shaping social norms and behaviours, but it is also making far-reaching predictions about the likely effects of specific laws and actions. This was evident in the *Immigration Case* where the Court suggested that by reinforcing and perpetuating prejudice and stereotypes against gay and lesbian people this would ‘all too quickly and insidiously [degenerate] into a denial of [their] humanity and [lead] to inhuman treatment by the rest of society’.[315] Similarly, in *Union of Refugee Women*, Mokgoro and O’Regan JJ held that the message that refugees are untrustworthy would ‘inevitably foster a climate of xenophobia.’[316]

The Court reaches these conclusions without the support of concrete evidence or sociological theories. Instead, these conclusions appear to be informed by the grounds of discrimination. The Court recognises that the grounds are associated with ‘patterns of disadvantage’[317] which primarily include prejudices and stereotyping. Given the history of how prejudices and stereotypes have developed around these grounds and the impact of these prejudices and stereotypes on disfavoured groups, this allows the Court to predict that the state’s ostensible reliance on prejudice and stereotyping will likely continue this pattern. This suggests that the grounds serve as useful placeholders for the complex social processes at work here.

V PREJUDICE AND STEREOTYPING

I have established that expressivism-in-the-conclusion is best interpreted as the reasonable reconstruction of the state’s reasons for discriminating, aimed at uncovering prejudice and

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[314] *Jordan* (n 50) [72]; cf Ngcobo J’s judgment [16].

[315] *Immigration Case* (n 50) [42].

[316] *Union of Refugee Women* (n 5) [122].

[317] *Harksen* (n 2) [50].

stereotyping. The concern is that this will likely encourage prejudice and stereotyping in society, producing or perpetuating patterns of group disadvantage. I have also indicated that expressivism-in-the-balance is concerned with the likely creation or perpetuation of prejudice and stereotypes, albeit through a subtly different process involving the conventional meanings attached to particular laws or actions. As I indicated in Chapter 2, the Court's practice suggests that the mere fact that discrimination will encourage prejudice and stereotyping is not sufficient for a finding that dignity has been violated. Instead, this must be coupled with a finding that the discrimination is disproportionate, reflecting that the state has failed to afford group members' interests adequate weight in its deliberations.

Now it may seem that this extended discussion of the Court's expressive concerns has lost sight of a more obvious way in which dignity may be violated: where the state *actually* relies on prejudices and stereotypes. This requires a brief digression to discuss the role of actual prejudice and stereotyping in the case law.

Where the state discriminates because of actual prejudice against a group this would certainly satisfy the Court's requirements for establishing a violation of dignity. By definition,[318] actual reliance on prejudice would demonstrate a failure to afford adequate weight to the group members' interests and would likely encourage or perpetuate prejudice in society, threatening to reinforce or perpetuate patterns of group disadvantage. The difficulty is that clear evidence of actual prejudice is rare and the state is unlikely to justify discrimination using a bald assertion that group members' interests are less important merely by virtue of being members of the group. As a result, this explains why findings of ostensible rather than actual prejudice are far more common in the case law.

The state's actual reliance on stereotypes is evident in a number of the Court's judgments.[319] However, the Court has indicated that mere reliance on stereotypes is not

318 See text to n 266 above.

319 See for example *Harksen* (n 2); *Hoffmann* (n 11); *Union of Refugee Women* (n 5).

sufficient to establish the violation of dignity. In *Hugo*[320] and *Van Heerden*,[321] the Court recognised that stereotypes are an unavoidable feature of governance, particularly when developing programmes aimed at undoing the effects of historical discrimination and disadvantage. Thus, in *Hugo*, O'Regan J noted that '[e]ven where discrimination in a particular case arises from reliance upon a stereotype [the focus remains] whether the impact of the discrimination was unfair.'[322]

This suggests that reliance on stereotypes is only impermissible where this results in a failure to weigh the group members' interests appropriately in a way that threatens to create or perpetuate patterns of group disadvantage. This was evident in the majority's reasoning in *Hugo*. As discussed in Chapter 2,[323] the President expressly relied on the stereotype that mothers 'play a special role in nurturing children' while fathers are less likely to play such a role.[324] However, the majority implicitly held that the discrimination was proportionate. The implication was that the President's use of the stereotype had not resulted in male prisoners' interests being ignored or afforded inappropriate weight; they were merely outweighed by more pressing reasons. A key element of the disagreement between the minority and the majority was whether the President's reliance on this stereotype was likely to contribute to or reinforce its use in society, perpetuating patterns of group disadvantage. For Kriegler J, the President's mere reliance on the stereotype amounted to an endorsement that would have long-term effects.[325] However, for O'Regan J, the stereotype was so deeply entrenched in society that the President's reliance on it to afford a benefit to a limited number of female

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320 *Hugo* (n 3) [111]-[114].

321 *Van Heerden* (n 12) [39].

322 *Hugo* (n 3) [111].

323 Chapter 2, text to n 160.

324 *Hugo* (n 3) [36].

325 ibid [83].

prisoners was not likely to perpetuate it in any material way.[326] This suggests that where stereotypes are involved, courts will be faced with the difficult task of assessing whether their use will threaten to create or perpetuate patterns of group disadvantage. These potential harms will then be weighed in the balance. Despite the complexity of these considerations, *Hugo* demonstrates that the mere fact that the discriminator has relied on a stereotype is not sufficient for the finding that dignity has been violated.

VI CONCLUSION

This chapter has demonstrated that expressivism-in-the-conclusion is a highly complex package of concerns. In the process of explaining these concerns we have also gained a better understanding of expressivism-in-the-balance, the nature of the proportionality analysis, and how the Court conceives of the creation or perpetuation of patterns of group disadvantage. Combining these insights with the insights gained in Chapter 2, I can conclude that the violation of dignity involves a) differentiation on the basis of group characteristics; b) that is disproportionate, reflecting a failure to afford adequate weight to group members' interests; and c) this treatment is likely to or actually creates or perpetuates patterns of group disadvantage, primarily by entrenching or perpetuating prejudice and stereotyping or by contributing to or reinforcing severe socio-economic disadvantage. I will now use this understanding of the wrong to make sense of the important features of the *Harksen* test.

[326] ibid [113].

CHAPTER 4: EXPLAINING THE *HARKSEN* TEST

I INTRODUCTION

We now have a clearer understanding of what is required to establish the particular violation of dignity that underpins unfair discrimination. This will allow us to understand the two central features of the *Harksen* test that are explicitly based on dignity. In Section II, I will address the nature and role of the listed and analogous grounds of discrimination. In Section III, I will explain the *Harksen* considerations for establishing unfairness.

There are other aspects of the *Harksen* test that are in need of clarification, such as whether a comparator is required to establish discrimination, the nature of the presumption of unfairness that arises where the listed grounds are engaged, or the relationship between the *Harksen* test and the *Van Heerden* test for constitutionally sanctioned affirmative action. A clearer understanding of the central features of the *Harksen* test will allow us to address these issues, but I will leave that task for a future project.

II GROUNDS OF DISCRIMINATION

(a) The 'potential' to violate dignity

As the Court has emphasised, the listed and analogous grounds share the common feature that differentiation on the basis of these grounds has the 'potential' to violate human dignity.[327] We can now reformulate this as saying that differentiation on these grounds has the potential a) to be disproportionate, reflecting a failure to afford adequate weight to the disfavoured group members' interests, and b) to produce or perpetuate patterns of group disadvantage. Any group characteristic could, in principle, form the basis of disproportionate treatment. Given the right social conditions, it is also imaginable that most

[327] *Harksen* (n 2) [53].

group characteristics could be the locus of long-term group disadvantage.[328] As a result, there is no bright line dividing protected group characteristics from unprotected characteristics. Nevertheless, it would seem that the listed and analogous grounds identify group characteristics or categories of characteristics that are considered to be *particularly* susceptible to these consequences, given prevailing social conditions.[329]

In Chapter 2, I indicated that the Court uses three non-exhaustive factors to determine whether a group characteristic qualifies as an analogous ground: a) a history of disadvantage associated with the characteristic, b) a connection with political minorities, and c) whether these characteristics are immutable traits or fundamental choices.[330] We can now understand this non-exhaustive list as an attempt to isolate those factors that make certain group characteristics more susceptible to disproportionate treatment and the creation or perpetuation of patterns of disadvantage. However, it is important to stress that these factors are neither necessary nor sufficient for identifying analogous grounds.

Starting with a history of disadvantage, the fact that certain characteristics or categories of characteristics have been associated with disproportionate treatment and the creation of patterns of disadvantage has a strong predictive role, as further unfavourable treatment on the basis of these characteristics is likely to be a continuation of this historical trend. A history of disadvantage is not only useful for making predictions about the consequences of future discrimination but can also play a constitutive role in bringing about these consequences. This pre-existing disadvantage is likely to compound the effects of

328 For example, Pieterse argues that most, if not all characteristics linked with physical appearance could form the basis of patterns of group disadvantage, Marius Pieterse, 'Discrimination Through the Eye of the Beholder' (2000) 16 SAJHR 121.

329 As explained in the Introduction, I refer to the 'grounds' as group characteristics or categories of these characteristics that are marked out for protection. These grounds will often be drawn broadly — such as race, age or gender — with the result that they encompass many different groups.

330 See Chapter 2, nn 133-136

unfavourable treatment, making it more likely that this treatment will be disproportionate and will perpetuate a pattern of group disadvantage.

The fact that a characteristic is associated with political minorities also makes the violation of dignity more likely. In *Larbi-Odam*,[331] the Court recognised that minorities are 'vulnerable to having their interests overlooked' by democratic institutions, thus increasing the chances of disproportionate treatment. Furthermore, as the Court noted in the *Sodomy Case*,[332] political minorities are less able to 'secure favourable legislation for themselves' to overcome unfavourable treatment, making it more likely that their disadvantage will become entrenched over time. As Sandra Fredman[333] argues, it is not only minorities that may experience this type of political marginalisation, as disempowered majorities may be just as vulnerable to having their interests overlooked. Therefore, there may be scope for recognising political disempowerment as an additional factor in identifying analogous grounds.

Finally, the fact that a characteristic is 'immutable' or cannot be changed without 'unacceptable cost' indicates that unfavourable treatment will be impossible or difficult to avoid, potentially resulting in a more severe impact on the disfavoured group. Similarly, as the Court recognised in *Pillay*,[334] where disadvantages are imposed on the basis of characteristics that are fundamental choices, individuals face the dilemma of either abandoning an important aspect of their identity or suffering the consequences of the unfavourable treatment.[335] Thus, the fact that a characteristic is difficult to change or a

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[331] *Larbi-Odam* (n 50) [19], quoting *Andrews v Law Society of British Columbia* [1989] 1 SCR 143 (Canadian Supreme Court) 32.

[332] *Sodomy Case* (n 7) [25].

[333] Fredman, *Discrimination Law* (n 119) 136.

[334] *Pillay* (n 29) [62]ff.

[335] This is not to mention the other harms that could be caused by linking unfavourable treatment with characteristics that are central to individuals' identities, as these characteristics most often are. See further Sophia R Moreau, 'What is Discrimination?' (2010) 38 Philosophy and Public Affairs 143.

fundamental choice makes it more likely that unfavourable treatment will be disproportionate. Furthermore, the fact that a characteristic has some degree of permanence increases the chances that unfavourable treatment will reinforce or produce patterns of group disadvantage. For example, for prejudice and stereotyping to take hold in a society, it would seem that the target group must be relatively stable over time.[336] The precise social mechanics involved in this process are beyond the scope of this discussion, but the underlying principle seems to be relatively clear.

(b) What is the point of the grounds?

We now have a clearer understanding of the factors used to identify analogous grounds. These factors also help us to understand the common features that link the listed grounds. However, we may still question whether the listed or analogous grounds are necessary. To rephrase L'Heureux-Dubé J's challenge in *Egan v Canada*,[337] it would seem that the violation of dignity could be identified 'more simply and truthfully' by asking whether the particular differentiation was disproportionate and threatens to create or perpetuate patterns of group disadvantage. Establishing that the differentiation has the potential to do so seems to be an artificial diversion from this enquiry.

I agree that this is artificial, but artificiality is often useful. In Chapter 2, I indicated that the determination that differentiation has occurred on listed and analogous grounds serves a number of pragmatic functions. First, it allows the Court to filter out claims with little merit and shields the state from having all or most of its actions scrutinised for unfair discrimination.[338] While there is no strict dividing line between analogous and non-analogous grounds, certain group characteristics would be excluded. This was illustrated in

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[336] Alexander (n 266) 200.

[337] *Egan* (n 53) [82] quoted with apparent approval by Sachs J in *Sodomy Case* (n 7) [112].

[338] The Court explicitly made this point in *Prinsloo* (n 3) [23].

Prinsloo v Van der Linde[339] and *Weare v Ndebele*,[340] where the Court summarily dismissed claims involving differentiation on the basis of ownership or occupation of land outside designated fire control areas and juristic person status, holding that there was no potential dignity violation in these cases. The underlying reasoning appears to be that neither of these characteristics was particularly susceptible to disproportionate treatment. Furthermore, even if the differentiation in these cases was disproportionate, it is inconceivable that these groups could be the victims of long-term patterns of group disadvantage. There are no company ghettos or pernicious tropes associated with those living outside statutorily defined fire control areas, nor are these the types of characteristics that could give rise to such consequences, given prevailing social conditions. Thus, finding that these characteristics were not analogous grounds avoided the need to subject this alleged discrimination to the full unfairness enquiry. Second, where the listed grounds are engaged, a finding that differentiation has occurred on these grounds marks the point where the burden shifts to the state to show that the discrimination is fair.[341] Finally, as I recognised in Chapter 3, the grounds often serve as useful heuristics for the complex social processes that give rise to the creation or perpetuation of patterns of group disadvantage.[342]

While the grounds serve a useful function, there may be occasions where it would be more convenient to proceed directly to the unfairness enquiry rather than spending time establishing that a characteristic is an analogous ground of discrimination. The Court implicitly adopted this approach in *Hoffmann*, where it considered a challenge to the national airline's refusal to hire HIV-positive flight attendants. In reaching the conclusion that this was unfair discrimination, Ngcobo J proceeded directly to the unfairness enquiry without

339 ibid.

340 *Weare and Another v Ndebele NO and Others* 2009 (1) SA 600 (CC).

341 Constitution, s 9(5).

342 See Chapter 3, text to n 316ff.

pausing to establish that HIV status is an analogous ground.[343] There was good reason for this. As I will demonstrate in the next section, the unfairness enquiry replicates the considerations for identifying analogous grounds, but frames this enquiry in a far less abstract way.[344] Thus, it will often be more appropriate for the Court to determine whether the differentiation has actually violated dignity rather than postponing the issue by determining whether it has the potential to do so.

III UNFAIRNESS

I have demonstrated that the unfairness enquiry turns on whether the discrimination is a) disproportionate, reflecting a failure to afford adequate weight to the group members' interests, and b) threatens to create or perpetuate patterns of group disadvantage, primarily by encouraging or perpetuating stereotypes and prejudice, or by producing or entrenching severe socio-economic disadvantage. The three *Harksen* considerations for establishing unfairness[345] can be seen as guidelines for engaging in this enquiry rather than providing a precise test. For the purpose of this discussion, I will discuss each of these considerations in turn to explain how they relate to this broader enquiry. In doing so, I will also identify areas where the Court's approach to this enquiry appears to be inconsistent. I will not attempt to examine this inconsistency in great detail here. Instead, my aim is to highlight this as an aspect of the Court's jurisprudence that requires further study.

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343 *Hoffmann* (n 11) [26]ff.

344 Albertyn and Goldblatt, 'Equality' (n 9) 35-49.

345 See Introduction, text to n 24.

(a) '[T]he 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'[346]

I will start with the last of the *Harksen* considerations: the 'impact' of the discrimination. The Court emphasises that the unfairness enquiry is primarily concerned with the 'impact' of the discrimination on the disfavoured group.[347] However, this concept of 'impact' is somewhat misleading, as the Court uses it in two distinct ways. First, the Court often refers to the 'impact' as the effects of the discrimination on the affected group members' rights or interests and its potential to create or perpetuate patterns of group disadvantage.[348] Second, the Court also refers to the ultimate conclusion that the discrimination has violated dignity as its 'impact'.[349] This conflates the enquiry into whether dignity has been violated with its conclusion. In this discussion I will use 'impact' in the first sense.

Another point of potential confusion is whether this 'impact' should be assessed by considering its impact on the individual litigants or by considering its impact on all members of the disfavoured group who have been or are likely to be affected by the discrimination. The *Harksen* considerations refer to the 'position of the complainants in society' and the impact on the 'rights or interests of the complainants', suggesting a narrow focus on the situation of the litigants. However, as I indicated in Chapter 3, this is out of step with the Court's practice, given its insistence that the constitutional validity of laws and state actions is to be assessed in light of all those who are or are likely to be affected by it, and its aim to

[346] *Harksen* (n 2) [52].

[347] See *Van Heerden* (n 12) [121] (Ngcobo J); *Immigration Case* (n 50) [41]; *Larbi-Odam* (n 50) [23]; *Harksen* ibid [51]; *Hugo* (n 3) [43].

[348] See *Harksen* (n 2) [52].

[349] See *Sodomy Case* (n 7) [41].

prevent the creation or perpetuation of patterns of group disadvantage.[350] This reinforces the need to look beyond the situation of the individual litigants. This is not to suggest that the individual litigants' circumstances are unimportant. As Marius Pieterse notes,[351] litigants provide courts with an important 'window' on the plight of the broader group. This was apparent in *Bhe*,[352] where the applicants' circumstances cast the impact of male primogeniture on women and children in sharp relief. However, there is the danger that if courts focus too narrowly on the circumstances of individual litigants they may lose sight of the broader impact of the discrimination, particularly in cases involving privileged litigants who may not be representative of the broader group. The majority judgments in *Volks* and *Harksen* have been subjected to scathing attacks on this basis, as numerous commentators[353] have argued that the majority failed to look beyond the privileged position of the individual litigants — a white, middle class woman and a white, wealthy socialite of some notoriety — to assess the impact of the discrimination on more vulnerable women. Despite these deviations, the Court has generally managed to temper concern for the individual circumstances of the litigants with an awareness of the broader impact of the discrimination on the disfavoured group as a whole.[354] This was apparent in *Hoffmann*,[355] where Ngcobo J considered the broad impact of the national airline's refusal to hire HIV-positive flight attendants on societal attitudes toward HIV-positive people, rather than confining his analysis to the impact of this

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350 Chapter 3, text to n 299. See *Ferreira* (n 300) [26].

351 Pieterse, 'Finding for the Applicant? Individual Equality Plaintiffs and Group-Based Disadvantage' (n 58) 423; quoting K Abrams, 'Critical Strategy and the Judicial Evasion of Difference' (2000) 85 Cornell L Rev 1426, 1428.

352 *Bhe* (n 50).

353 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 in South Africa' 266; Pieterse, 'Finding for the Applicant? Individual Equality Plaintiffs and Group-Based Disadvantage' (n 58) 408ff; Bonthuys (n 234) 20.

354 See *Fraser v Children's Court, Pretoria North, and Other* 1997 (2) SA 261 (CC); *Sodomy Case* (n 7); *Khosa* (n 50).

355 *Hoffmann* (n 11) [28]ff.

policy on the complainant. Judgments such as these make the Court's failure to consider the broader impact of the discrimination in *Volks* and *Harksen* all the more difficult to understand.

(b) '[T]he position of the complainants in society and whether they have suffered in the past from patterns of disadvantage'[356]

The assessment of the impact of the discrimination on the rights and interests of the disfavoured group is intimately connected with the 'position of the complainants [and the broader disfavoured group] in society'.[357] The Court refers to this as an assessment of the 'vulnerability' of the group. 'Vulnerability' appears to encompass two of the considerations that feature in the identification of analogous grounds: past or current 'patterns of disadvantage' and whether the affected group is a political minority.[358] The difference is that the Court engages in a more context-specific analysis here, focusing on the actual circumstance of the disfavoured group. In contrast, the analogous grounds enquiry tends to abstract away from the affected group by focusing on the broader category of group characteristics involved. This is illustrated in *Larbi-Odam*,[359] where the Court considered a challenge to provincial regulations that excluded permanent residents from permanent teaching positions. In determining that citizenship is an analogous ground, the Court focused on the historical misuses of citizenship under apartheid to render black South Africans aliens within their own country.[360] It was only at the unfairness stage that the Court

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[356] *Harksen* (n 2) [52].

[357] ibid.

[358] See *Walker* (n 17) [48]; see further Krüger (n 31) 491ff; Grant and Small, 'Disadvantage and Discrimination: The Emerging Jurisprudence of the South African Constitutional Court' (n 353) 189.

[359] *Larbi-Odam* (n 50) [19]-[25].

[360] ibid.

focused squarely on the specific circumstances of permanent residents and the impact of the discrimination on their interests. The context-specific nature of this enquiry reinforces the point I made above: that it will often be more convenient for the Court to proceed directly to the unfairness analysis rather than engaging in the more abstract enquiry into whether the characteristic qualifies as an analogous ground.

While the Court has indicated that vulnerability is not a necessary condition for finding unfair discrimination,[361] it emphasises that '[t]he more vulnerable the group adversely affected, the more likely the discrimination will be held to be unfair.'[362] We are now in a position to explain why this is so. As discussed above, a history or present context of disadvantage has the potential to amplify the impact of the discrimination on the disfavoured group, with the result that it is more likely to be disproportionate. This is why the Court emphasises that impact should be assessed in light of the group's pre-existing disadvantage rather than looking solely at the particular burden imposed or benefit withheld by the discrimination.[363] This approach was evident in the *Sodomy Case*,[364] where the Court noted that while the prosecution and punishment of consensual anal sex had a severe impact on gay men, this impact was greatly magnified by the prevailing prejudices and stigma in society. The group's vulnerability also plays an important role in determining whether discrimination is likely to create or perpetuate patterns of group disadvantage. This is clearly evident in the Court's conclusions that disproportionate discrimination expresses impermissible messages about the group, the phenomenon I have labelled 'expressivism-in-the-conclusion'. This is reflected in *Harksen,* the *Immigration Case*, *Fourie*, *Jordan*, *Volks* and *Union of Refugee Women*,

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[361] *Hugo* (n 3) [41]; *Harksen* (n 2) [64]; *Walker* (n 17) [47].

[362] *Harksen* ibid [112] (O'Regan J); repeated and affirmed in *Walker* (n 17) [47] and *Immigration Case* (n 50) [44].

[363] *Harksen* ibid [124] (Sachs J) and *Jordan* (n 50) [68] quoting Wilson J's judgment in *R v Turpin* [1989] 1 SCR 1296 (Canadian Supreme Court) 38.

[364] *Sodomy Case* (n 7) [20]ff.

where the history and present context of prejudice and stereotyping of married couples, gay and lesbian people, women, and refugees made it reasonable to believe that the failure to afford adequate weight to the groups' interests was a further manifestation of stereotyping and prejudice.[365]

In practice, the Court appears to be inconsistent in recognising the vulnerability of disfavoured groups. Albertyn[366] and Bonthuys[367] have noted that a clear line can be drawn between the Court's decisions in the sexual orientation cases and gender discrimination cases such as *Harksen,*[368] *Volks* and *Jordan*. The Court has consistently reflected on the vulnerability of gay and lesbian people and has viewed the impact of the discrimination in light of this vulnerability. However, in *Harksen, Volks*, and *Jordan* the majority judgments largely overlooked the vulnerability of the affected women or failed to connect their vulnerability with the effects of the discrimination. This apparent inconsistency will also require further investigation.

(c) '[T]he nature of the provision or power and the purpose sought to be achieved by it'[369]

Commentators such as Albertyn and Goldblatt[370] have puzzled over the Court's concern with the purpose of the discrimination and the nature of the provision or power, suggesting that it cannot be relevant to assessing the 'impact' on the complainant or group.

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365 See further Chapter 3, text to n 311.

366 Albertyn, 'Substantive Equality and Transformation in South Africa' (n 35) 270ff.

367 Bonthuys (n 234) 4.

368 While *Harksen* was not argued or decided as a case of gender discrimination, gender-based disadvantage was certainly an important underlying consideration in this case.

369 *Harksen* (n 2) [52].

370 Albertyn and Goldblatt, 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (n 33) 270-1.

Understanding that the unfairness enquiry requires a proportionality analysis explains this consideration. Here the Court balances the purpose of the discriminatory law or action against the impact of the discrimination on the disfavoured group. The purpose of the discrimination is distinct from the 'nature' of the provision or power.[371] The relevance of the 'nature' of the power was demonstrated in *Hugo*,[372] where the majority placed emphasis on the fact that the Presidential pardoning power was a 'blunt axe' that did not allow for fine-grained distinctions, with the result that the President's reliance on a stereotype was more justifiable than if this discrimination had been produced through legislation. The nature of the power therefore had a bearing on the necessity of the discrimination, as the majority appeared to suggest that the President did not have less restrictive means for achieving the purpose.

As I noted in Chapter 2, the members of the Court have often adopted divergent standards of scrutiny in the proportionality analysis. As with proportionality analyses in other areas, much turns on how the Court interprets the purpose of the law or action. For example, in *Volks* the majority viewed the purpose of the Maintenance of Surviving Spouses Act as supporting and promoting marriage and therefore saw nothing wrong with excluding permanent life partners from this benefit. In contrast, Mokgoro and O'Regan JJ and Sachs J understood its primary purpose as responding to the vulnerability of surviving spouses. Viewed in this way, there was no good reason for distinguishing between surviving life partners and surviving spouses, as both groups were likely to be left financially vulnerable on the death of their partners. Furthermore, as was also demonstrated in Chapter 2, the members of the Court have often differed in their willingness to interrogate the connection between the discrimination and its purpose, with the majority tending to adopt a relatively light touch standard of scrutiny, while the minority has generally engaged in a closer

[371] Krüger (n 31) 496.

[372] *Hugo* (n 3) [31].

examination of the suitability, necessity, and proportionality in the 'narrow sense' of the discrimination. No explanation has been provided for these variable standards of scrutiny. This also calls for further exploration.

IV CONCLUSION

In this chapter, I have used the understanding of the dignity violation underpinning unfair discrimination to make sense of the core features of the *Harksen* test. I have demonstrated that the listed and analogous grounds can be understood as characteristics that are particularly susceptible to disproportionate differentiations that threaten to create or perpetuate patterns of group disadvantage. In turn, we have also seen that the *Harksen* considerations for establishing unfairness aim to determine whether particular acts of discrimination have actually resulted in these consequences. There is, however, a great deal of apparent inconsistency in the way in which the Court applies these considerations, which results in the variable application of the proportionality analysis. We have seen that in some cases the Court has overlooked the impact on the disfavoured group members' interests, as it has often been preoccupied with the circumstances of the individual litigants. Furthermore, the members of the Court have adopted very different assessments of the connection between the discrimination and its purpose. This will require a deeper examination of the case law to determine whether there is a consistent approach to applying the *Harksen* test underlying this apparent inconsistency. I will leave that task for future research.

CONCLUSION

This thesis was born of a sense of puzzlement and concern over the South African Constitutional Court's unfair discrimination jurisprudence. Despite the Court's significant efforts, its account of unfair discrimination provides little guidance in understanding or identifying this wrong. In response, I set out to probe the case law in greater depth in an effort to construct a theory of the Court's unfair discrimination jurisprudence. This involved determining the nature of the dignity violation that the Court is seeking to address and using this to make sense of the *Harksen* test for establishing unfair discrimination. I noted that these two components of the Court's jurisprudence can and do pull apart from each other. The *Harksen* test is the Court's chosen method for determining whether dignity has been violated. While the test is primarily shaped by the wrong it is designed to identify, it incorporates a range of pragmatic considerations that are extraneous to the wrong. Nevertheless, the violation of dignity is still essential to explaining the core features of this test.

In Chapter 1, I started by analysing how the Court has explained and discussed dignity in its unfair discrimination case law. This revealed that the violation of dignity required for a finding of unfair discrimination involves the creation or perpetuation of patterns of group disadvantage, which occurs primarily through the expression of impermissible messages about the disfavoured group (the 'expressive concerns') and by creating or entrenching severe socio-economic disadvantage. However, I noted that these insights were under-developed and inconclusive. This demonstrated the need to analyse how the Court reasons to the conclusion that dignity has been violated.

In Chapter 2, I explored this reasoning, distilling three necessary and jointly sufficient conditions that must be satisfied to establish the violation of dignity underpinning unfair discrimination. First, there must be 'differentiation' on the basis of group characteristics, which I interpreted as requiring that burdens must be imposed or benefits withheld either directly or indirectly on the basis of group characteristics. Second, this treatment must be found to be disproportionate, which is established where the purpose of the differentiation is outweighed by its impact on the interests of the affected group members. Third, this must threaten to or actually create or perpetuate patterns of group disadvantage, primarily, but not exclusively, by expressing impermissible messages about the disfavoured group or by creating or entrenching severe socio-economic disadvantage. I indicated that these requirements are connected in intricate ways. The fact that a law or action threatens to create or perpetuate patterns of group disadvantage is often an important consideration in the proportionality analysis. Furthermore, a finding of disproportionality is often essential for the Court to identify impermissible messages about the disfavoured group. I labelled this category of expressive concerns 'expressivism-in-the-conclusion'.

In Chapter 3, I sought to understand 'expressivism-in-the-conclusion', focusing on the nature of the impermissible messages the Court is uncovering, how it identifies them, and how it determines that these messages will create or perpetuate patterns of group disadvantage. I argued that these messages are best understood as the reconstruction of the state's rationale for discriminating, aimed at identifying ostensible prejudice and impermissible stereotyping.[373] I stressed that the Court is not uncovering the state's actual, subjective reasons for discriminating or how members of society actually interpret its reasons. Instead, it is engaged in an objective enquiry to determine how a reasonable person would interpret the rationale for the discrimination. I then sought to explain why a finding of disproportionality is necessary for these expressive conclusions. The proportionality analysis establishes whether the state has failed to afford appropriate weight to the affected group members' interests. In the absence of actual prejudice or impermissible stereotyping,

[373] Although I indicated that this does not necessarily exclude other forms of misrecognition.

it would only be reasonable to impute prejudice or impermissible forms of stereotyping to the state where there has been such a failure, as this provides an explanation for the failure to afford adequate weight to group members' interests. Furthermore, I noted that disproportionate treatment alone is not sufficient for this finding. Instead, it is the fact that disproportionate treatment has occurred on the basis of group characteristics with a history of prejudice and stereotyping that generally makes this conclusion reasonable. The Court's concern is that if the state is reasonably construed to be acting on the basis of prejudice and stereotyping, then this will encourage and entrench prejudice and impermissible stereotyping in society, potentially resulting in long-term disadvantages for the disfavoured group.

Combining the analysis in Chapter 2 with the analysis in Chapter 3, I concluded that the violation of dignity underpinning unfair discrimination involves: a) differentiation on the basis of group characteristics; b) that is disproportionate, reflecting a failure to weigh the group members' interests appropriately; and c) that threatens to create or perpetuate a pattern of group disadvantage, primarily but not exclusively by encouraging or entrenching impermissible stereotypes or prejudices about the group.

In Chapter 4, I used this understanding of the violation of dignity to explain the *Harksen* test, focusing on the two elements of the test that are explicitly based on dignity: the listed and analogous grounds of discrimination and the unfairness enquiry. First, I explained that the listed and analogous grounds identify categories of group characteristics that are deemed to be particularly susceptible to disproportionate treatment and the creation or perpetuation of patterns of group disadvantage. The factors used to identify analogous grounds isolate conditions and circumstances that make certain group characteristics particularly susceptible to these consequences. The resulting test is not particularly strict, but it does serve to filter out certain characteristics. Second, I explained that the unfairness enquiry determines whether particular acts of differentiation have actually resulted in disproportionate treatment and the likely creation or perpetuation of patterns of group disadvantage. The *Harksen* considerations for establishing unfairness can be understood as providing useful guidelines for this enquiry, steering courts to take into account the impact of the discrimination on the disfavoured group in light of their pre-existing 'vulnerability', to weigh this against the purpose of the discrimination and to determine whether this treatment will create or reinforce patterns of group disadvantage.

This theory provides a clearer understanding of unfair discrimination as it has been interpreted and applied by the Court. Recognising that a finding of unfair discrimination hinges on a proportionality analysis and a search for the likely construction of patterns of group disadvantage will provide some assistance to practitioners and courts in litigating and deciding these cases. This theory does not provide a paint-by-numbers guide to establishing unfair discrimination. Unfair discrimination is simply too complex a wrong, requiring complex, context-specific enquiries. Nevertheless, complex enquiries need not be opaque enquiries. I hope to have cast some light on the Court's underlying reasoning.

This theory also opens up further avenues for normative and doctrinal work. At a normative level, it leads to questions over the appropriateness of the Court's use of a proportionality analysis in the unfairness enquiry, its focus on the expressive dimension of laws or actions, and whether its use of dignity is philosophically defensible, among many other concerns. There are also unresolved doctrinal questions. This theory raises the question of whether unfair discrimination fits with equality as both a right and a value in the Constitution. This includes questions over how the *Harksen* test relates to the section 9(1) rationality analysis and the test for constitutionally sanctioned affirmative action under section 9(2). There are also unexplored features of the Court's reasoning. The most important is the apparent inconsistency in the standard of scrutiny applied to the proportionality analysis. We need to ask whether the Court has explicitly or implicitly settled on principles governing this standard of scrutiny, or whether it is approaching each case in an ad hoc, unprincipled way. Given that most cases hinge on a proportionality analysis it is essential that we gain further clarity on this issue. Much work lies ahead. Nevertheless, this theory provides a foundation for exploring these and other important questions.

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