ABHANDLUNGEN

Equality and the South African Constitution: The Role of Dignity

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I. Introduction

As only the second Afrikaner to deliver this lecture, Beyers Naude being the first, I feel a responsibility difficult to articulate. Bram Fischer was born an Afrikaner and, notwithstanding the unusual path his life followed, died an Afrikaner, proud of his language and culture, despite the unrelenting attempts of the National Party, as well as its various support structures, to define and distort the identity of every South African, including that of the Afrikaner. Both my parents were born, like Bram Fischer, in the Orange Free State but a few years earlier and they experienced the full rigours of the Boer War; my mother losing two sisters in the concentration camps and my father spending the earliest years of his life in them. Fortunately for me, my grandparents and parents chose the road less travelled and translated suffering into a loftier and broader concept of South Africanism, eschewing hatred, self-pity and inward looking Afrikaner nationalism. One was, however, exposed to the onslaught of Afrikaner nationalist attempts at identity manipulation and one battled with the complexities of pluriform self-identification. It became difficult, when rejecting the pathologies of Afrikaner nationalism not to reject at the same time one's own Afrikaner identity. Fortunately pluriform self-identification is possible, when one becomes sufficiently aware of the examples around one, as richly demonstrated by persons as diverse as Bram Fischer, Beyers Naude and, more permanently rooted in Oxford, Isaiah Berlin.

I am not aware that Fischer expounded his socio-economic views in any detail in writing, but there is reason to believe that his personal motivation was not so much theoretically inspired as existentially practical, rooted in the context of South Africa. When one follows the deepening of his opposition during the 1930's to the prevailing social and political mores of all but a very small number of white

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South Africans on the issue of race, one senses that his acute moral conscience was confronted at a deep level by the indignity to which black South Africans were being subjected. He appreciated, many decades before most other white South Africans did, how this would inevitably intensify.

Fischer was born to privilege; his grandfather was the prime Minister of the Orange River Colony and his father was to become the Judge President of this province in the Union of South Africa. His life followed a path no less distinguished; a Rhodes Scholarship at Oxford and thereafter an outstanding practice, eventually as a silk, at the Johannesburg Bar. His birth, innate abilities and career path, made the highest judicial, if not political, office in the white South African oligarchy his for the asking. It was his almost prophetic, but certainly vivid, awareness in the 1930's and 1940's of the extent to which the infringement on the dignity of blacks would inevitably escalate, that caused him ultimately to reject such a future for himself. Instead he chose a course which led to a prison sentence for life and to death during such detention, consequences which he accepted and endured without any abatement of his concern for the innate dignity of others. One could not, however superficial one's personal acquaintance with Fisher, as mine was, fail to be captivated by his unfailing humanity towards and his equal concern for all people.

Ten years after the unbanning of the African National Congress and the release of President Mandela, there are young South Africans, Afrikaners and others, who took no part in apartheid oppression but who are struggling to discover an identity for themselves in the new South Africa. A number are emigrating, for a variety of reasons, but some because of an identity crisis. Fischer's life could offer them an example which does not require the rejection of all prior identity. One does not have to agree with Fischer's socio-economic beliefs to absorb this.

Why would one, in addressing an Oxford audience, speak on equality and dignity in the South African Constitution? I do so in the first place because they are two of the principles for which Fischer, a Rhodes Scholar and an alumnus of this university, sacrificed his life and because they infuse the South African Constitution. Second, because the Constitution's attempt to grapple afresh with the issue of dignity and equality, in the light of our sad history of indignity and inequality, might be of interest in a country which has recently, through the adoption of the Human Rights Act 1998, entered a new phase in its long and influential history of democracy, constitutionalism and human rights.

II. The Fundamental Normative Changes Wrought by the New South African Constitution

The substantive constitutional revolution[1] which occurred when the interim Constitution took effect on 27 April 1994 imploded the apartheid constitution and

[1] The radical constitutional change which occurred when the interim Constitution took effect on 27 April 1994, might not qualify as a revolution procedurally, because it did not constitute a discontinuous legal fracture with the old legal order, but was effected by a parliamentary statute of that old order which regulated the constitutional transition culminating in the 1996 Constitution.

structures, including the four provinces and the black so-called "homelands", and simultaneously replaced them with a new democratic state, consisting of nine provinces and a democratic system of local government. The changes to the basic legal nature of the South African state are as profound. The former Westminster-type constitution, manipulated by a white oligarchy through an omni-competent Parliament subject to no substantive legal limitation, has been replaced by a multiparty, universal adult franchise democracy functioning within the constraints of a rigid, written constitution incorporating an extensive and entrenched Bill of Rights, enforced by an independent judiciary empowered to invalidate all law and conduct inconsistent with the Constitution. Legal supremacy has been moved from Parliament to the Constitution. The significant differences between the interim and the 1996 Constitutions are few and unless otherwise indicated further reference will be to the 1996 Constitution.[2]

The Constitution constitutes itself "the supreme law of the republic" and enacts that law or conduct inconsistent with it is invalid.[3] Even this does not adequately reflect the extent of the normative change that has taken place. The Constitution embodies certain fundamental legal norms which are not merely hortatory but which define the Constitution in a substantive way.

Many constitutions, particularly those coming into existence in societies that have recently passed through national crisis, are to a greater or lesser degree reactive in nature; they often embody remedial or prophylactic responses to ills of the past. The South African Constitution is a reactive constitution and in this respect is closer in character to that of the German Basic Law than to the Constitution of the United States. It highlights dignity, equality and freedom, because these are the rights that have suffered so much in the recent past, and it does so for much the same reason as is done in the Universal Declaration of Human Rights and in the United Nations Charter.[4]

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[2] The 1996 Constitution was mandated by, developed out of and its content and coming into effect controlled by the interim Constitution.

[3] Section 2.

[4] In the preamble to the Universal Declaration the "inherent dignity" and the equality of "all members of the human family" are singled out for mention as belonging to those values and human rights that constitute "the foundation of freedom, justice and peace in the world", whose contemptuous disregard has "resulted in barbarous acts which have outraged the conscience of mankind" and whose protection by the rule of law is essential, if humans are not "to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression." It is this protection of and by the rule of law in order to obviate rebellion against tyranny and oppression which Nobel Laureate Nadine Gordimer regards as the most important "article" in the Declaration, in: Danieli [et al.] [eds.]. The Universal Declaration of Human Rights: Fifty Years and Beyond (1999) vii, viii. Compare also articles 1(3) and 55 (c) of the United Nations Charter. Article 1 of the German Basic Law ("GG") which is referred to later in the text, places human dignity ("Menschenwürde") at the centre of and determinative for the GG and its protection of fundamental rights; this constitutes a direct reaction to and an outright rejection of the totalitarianism and inhumanity of the preceding Nazi period encapsulated by the phrase "You are nothing, your 'Volk' is everything" ("Du bist nichts, dein Volk ist alles"); see, for example, Werneke, in: Bonner Kommentar zum Grundgesetz Art. 1 Abs. 1 Rn. 2, 3, and von

III. An Analysis of the Past Ills

In interpreting the Constitution and particular provisions thereof it is permissible and indeed necessary to look at the ills of the past which they seek to rectify and in this way try to establish what equality and dignity mean in the relevant provisions. What lay at the heart of apartheid pathology was the extensive and sustained attempt to deny to the majority of the South African population the right of self-identification and self-determination. The fact that the apartheid laws did not ultimately achieve their ends and that the greater majority of black South Africans claimed their freedom and exerted their moral agency does not detract from the indignity and trauma inflicted by apartheid. The apartheid state not only denied to black South Africans all meaningful participation in the political process, but tried generally to legislate the lives of its people on the sole criterion of race or ethnic origin. As Archbishop emeritus Desmond Tutu has expressed it –

> "Apartheid claimed that what imbued anyone with worth was actually a biological irrelevance – the colour of one's skin ...".[5]

Who you were, where you could live, what schools and universities you could attend, what you could do and aspire to, and with whom you could form intimate personal relationships was determined for you by the state, or at least the state directed all its power at achieving this end. This of course also denied identity determination in certain respects to whites, but because such denial in most cases worked to the advantage of whites, the impact was very different, but it could still be damaging.

The state did its best to deny to blacks that which is definitional to being human, namely the ability to understand or at least define oneself through ones own powers and to act freely as a moral agent pursuant to such understanding or self-definition. Blacks were treated as means to and end and hardly ever as an end in themselves; an almost complete reversal of the Kantian imperative and concept of priceless inner worth and dignity.[6] As a human rights scholar Louis Henkin has observed –

Münch/Kunig, Grundgesetz-Kommentar, Vol. 1 (4th ed. 1992) Art. 1 mn 6. When the US Constitution was ratified in 1789 the initial and prime purpose of its founders was "to form a more perfect union" between the previously independent states. The Bill of Rights, consisting of the first ten amendments, only became part of the Constitution in 1791. Yet even it is not without its reactive features. The third amendment prohibits the compulsory quartering of soldiers in any house in time of peace and in time of war except in a manner prescribed by law. This guaranteed right was in response to grievances which had contributed to bringing about the American Revolution and the fact that English troops had been forcibly billeted in colonists' homes during the revolutionary war; a right which has never been enforced by the Supreme Court. See Corwin, The Constitution and What it Means Today (14th ed. 1978) revised by Chase/Ducat; Stephens Jr./Schab II, American Constitutional Law (1993) 473; and Schauer, The Constitution of Fear, in: Eskridge Jr./Levison (eds.), Constitutional Stupidities, Constitutional Tragedies (1998) 84, 89 fn. 3.

[5] In Danieli (note 4) at xiii.

[6] "So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means."; Immanuel Kant, Groundwork of the Metaphysics of Morals, 429, as translated in Gregor/Wood, Immanuel Kant: Practical Philosophy (The Cambridge Edition of the Works of Immanuel Kant) (1996) 80; and "In the kingdom of ends

"On the highest level, dignity is a quality of worth or excellence, and when used in the compound term 'human dignity,' it suggests all that for Kant is inherent in the human 'personhood' of every human being."[7]

The following description of human dignity, given by Günter Dürig in the 1950's, is regarded as the classic definition in Germany:

"All humans are human by virtue of their intellectual capacity ('kraft seine Geistes') which serves to separate them from the impersonality of nature and enables them to exercise their own judgment, to have self-awareness, to exercise self-determination and to shape themselves and nature."[8]

Such a denial by the apartheid state of innate dignity, as absolute worth, had inevitably to lead, and did lead, to a similarly fundamental denial of freedom[9] and also a most egregious denial of equality.[10] As Ronald Dworkin puts it, citing John Rawls in part, the right of persons to equal respect is "'owed to human beings as moral persons,' and follows from the moral personality that distinguishes humans from animals."[11] Rawls sees "moral personality and not the capacity for pleasure and pain as the fundamental aspect of the self."[12]

Viewed in its historical context I understand dignity in the Constitution to connote innate, priceless and indefeasible human worth. This idea of dignity is well captured by the German equivalent "Menschenwürde" or the Afrikaans "men-

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everything has either a price or a dignity. What has a price can be replaced by something else as its equivalent; what on the other hand is raised above all price and therefore admits of no equivalent has a dignity. ... that which constitutes the condition under which alone something can be an end in itself has not merely a relative worth, that is a price, but an inner worth, that is, dignity.", Kant, Groundwork, 434–435; Gregor/Wood, 84.

[7] Henkin, Human Dignity and Human Rights (1995) 13.

[8] "Jeder Mensch ist Mensch kraft seines Geistes, der ihn abhebt von der unpersönlichen Natur und ihn aus eigner Entscheidung dazu befähigt, seiner selbst bewußt zu werden, sich selbst zu bestimmen und sich und die Umwelt zu gestalten.", Dürig, Der Grundrechtssatz von der Menschenwürde, in: AöR 81 (1956) 117, 125. For a discussion hereon see Enders, Die Menschenwürde in der Verfassungsordnung (1997) 27, 10–13.

[9] "[N]othing can have a worth other than that which the law determines for it. But the lawgiving itself, which determines all worth, must for that reason have a dignity, that is, an unconditional, incomparable worth; and the word respect alone provides a becoming expression for the estimate of it that a rational human being must give. Autonomy is therefore the ground of the dignity of human nature and of every rational creature.", Kant, Groundwork (note 6) 436; Gregor/Wood (note 6) 85. Isaiah Berlin, not dissimilarly, emphasises that "[I] wish to determine myself, and not be directed by others, no matter how wise and benevolent; my conduct derives an irreplaceable value from the sole fact that it is my own, and not imposed upon me.", in: "Introduction" to Four Essays on Liberty (1969) xliii.

[10] "[A] human being regarded as a *persona*, that is, as the subject of a morally practical reason, is exalted above any price; for as a person (*homo noumenon*) he is not to be valued merely as a means to the ends of others or even to his own ends, but as an end in itself, that is, he possesses a dignity (an absolute inner worth) by which he exacts respect for himself from all other rational beings in the world. He can measure himself with every other being of this kind and value himself on a footing of equality with them.", Kant, Groundwork (note 6) 435; Gregor/Wood (note 6) 557. See also Kant, On the Common Saying: that Might be Right in Theory, but it is of no Use in Practice, *id.* (note 6) 8:293; Gregor/Wood (note 6) 293.

[11] Dworkin, Taking Rights Seriously (1977) at 181.

[12] Rawls, A Theory of Justice (1971) at 563.

swaardigheid", both conveying explicitly the idea of fundamental human worth. Humans are at the very least entitled to be treated as moral subjects and not as mere objects; as subjects with absolute and inherent value and therefore as moral subjects of equal value.

IV. The Constitution's Reaction to these Past Ills

The new South African Constitution embodies an unequivocal rejection of the infringements of dignity, freedom and equality of the past. The right to equality and the guarantee against unfair discrimination are dealt with in detail in section 9 of the Constitution, which provides:

"Equality

9 (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."

In order to appreciate fully the scope and impact of these specific provisions, it is necessary to see the normative function of dignity, equality and freedom in the context of the Constitution as a whole and to appreciate the important role given to these values by specific provisions of the Constitution for the general development of the legal order.

The preamble to the Constitution records an objective of its adoption as the desire – to "[h]eal the divisions of the past and establish a society based on ... fundamental human rights"; to "[l]ay the foundations for a[n] ... open society in which ... every citizen is equally protected by the law" and to "free the potential of each person."

Section 1 of the Constitution enacts, amongst other things, that the new South African state is founded on the values of "human dignity, the achievement of equality and the advancement of human rights and freedoms".[13] The emphasis on these rights gains added significance from the fact that this section, which proclaims their foundational importance, enjoys the highest level of entrenchment of

[13] Section 1(a).

any provision in the Constitution. Whereas the amendment of other provisions of the Constitution necessitates, amongst other prerequisites, the approval of two thirds of the members of the National Assembly and (in some cases) the approval of at least six of the nine provinces in the National Council of Provinces,[14] the amendment of section 1 requires, amongst other preconditions, the approval of at least 75 percent of the members of the National Assembly and (always) the approval of at least six of the nine provinces in the National Council of Provinces.[15] In this regard it would seem that the founding parents of the South African Constitution were in part influenced by the German Basic Law ("Grundgesetz" – GG). Article 1 of the GG provides that human dignity is unassailable and that it is the duty of all state authority to respect and protect it.[16] This provision is one that is absolutely entrenched in the GG; no repeal or amendment of it is permissible.[17]

But the values of equality and dignity, as well as that of freedom, are further woven into the fabric of the Constitution, not only as a means of protecting other fundamental rights, but in a manner which enables them to impact significantly on other areas of the law. In section 36(1),[18] the Constitution recognises the relatively uncontroversial principle that no entrenched right as substantively defined in the Bill of Right is absolute in its operation. It is universally acknowledged, for example, that even so important a right as freedom of speech has its recognised limits, although these may differ from one democratic country to another. The framers of the South African Constitution opted for one general limitations clause, rather than attempt to formulate a limiting provision in respect of each entrenched right, following in this respect the example of the Canadian Charter, without imitating it. Any proper discussion of rights limitation falls outside the purview of this paper but, broadly speaking, section 36 provides that an entrenched right may be limited only –

(a) in terms of a law of general application;

(b) after taking into account all relevant factors, including the nature of the right, the nature and extent of its limitation, the importance of the purpose of the

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[14] Section 74(2)-(8).

[15] Section 74(1).

[16] Art. 1 (1): "Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt." A vast body of literature exists in Germany dealing with the meaning and implications of Menschenwürde as a fundamental right in the German Basic Law (GG) which, in my view, would repay careful study for the benefit of South African constitutional jurisprudence in general and for its equality jurisprudence in particular. See, for example, amongst this mass of literature, Dürig and Enders (note 8), as examples, and for a treatise on the prohibition against discrimination, Sachs, Grenzen des Diskriminierungsverbotes München (1987).

[17] GG Art. 79(3).

[18] 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."

limitation, the relation between the limitation and its purpose, and less restrictive means to achieve this purpose. But overriding and controlling all these considerations is the requirement that a right may only be limited –

> "to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom."

In order to deal with this precondition, South African courts must look to the jurisprudence of such open and democratic societies and the South African Constitutional Court has attempted to do so as widely as possible. The limitation provisions, as applied by the Constitutional Court, incorporate a proportionality analysis and evaluation analogous to that developed in Western Europe and in particular by the German Constitutional Court. What I would stress is the importance given to dignity, freedom and equality in this evaluation.

Lastly, in this regard, the normative impact of these values is further strengthened by the constitutional provisions dealing with the construction of the Constitution, ordinary statutes and the development of the common law and customary law.[19] In this regard the Constitution requires every court, when interpreting the Bill of Rights, to "promote the values that underlie an open and democratic society based on human dignity, equality and freedom" and, when interpreting any legislation, and when developing the common law or customary law, in turn to "promote the spirit, purport and objects of the Bill of Rights."[20] In section 10, the Bill of Rights not only protects, but indeed refers as a postulate to the "inherent dignity" which "[e]veryone has."

The foundational role which dignity plays in our constitutional jurisprudence is illustrated in a non-technical way by the following passage from the Constitutional Court's judgment in the *Immigration* case (para. 42), to which I will refer again later:

> "The sting of past and continuing discrimination against both gays and lesbians is the clear message 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. This discrimination occurs at a deeply intimate level of human existence and relationality. It denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity, which at this point are closely intertwined, namely that all persons have the same inherent worth and dignity as human beings, whatever their other differences may be. 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 of lesbians and gays."

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[19] Sections 39(1) and 39(2).

[20] Section 39(1)(a) and (2).

V. Equality and Non-discrimination in Section 9 of the Constitution

Against this background I consider the importance of the concept of dignity in the application of section 9 of the Constitution[21] and focus on six features.[22]

First. Section 9(1) guarantees that "[e]veryone is equal before the law and has the right to equal protection and benefit of the law." This is the classic positive formulation of legal equality. This does not of course mean that the law must under all circumstances treat all people identically; indeed to treat two people whose circumstances are radically different in exactly the same way could well constitute unfair discrimination. It would be manifestly unfair to levy the same amount of income tax on A and B where the tax constituted 50% of A's income but only 1% of B's. What is required from the law is equal respect. Subsection (1) ensures in the first place that courts of law treat all persons with the same respect in adjudicating their disputes. It also restrains the state from differentiating between persons in an arbitrary manner. Other provisions in section 9 are concerned with drawing a line between mere differentiation and differentiation which constitutes unfair discrimination. Section 9(1) is not concerned with this distinction, but with rational differentiation The constitutional state is expected to act rationally, also when it differentiates in its treatment of people. It must be accepted that, in order to govern a modern country efficiently and to harmonise the interests of all its peoples for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without differentiation and without classifications which treat people differently and which impact on people differently. If each and every differentiation made in terms of the law amounted to unequal treatment that had to be proved not to be unfair or had to be justified under the limitations clause, the Courts could be called upon to review the justifiability or fairness of just about the whole legislative programme and almost all executive conduct.[23] But provided legislation, for example, does not constitute unfair discrimination, not much is required for its differentiating provisions to pass constitutional muster. It is sufficient if there is a rational connection between such differentiation and a legitimate governmental purpose it is designed to further or achieve. The state may not differentiate in an arbitrary manner that serves no legitimate governmental purpose, for this would be contrary to the rule of law and

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[21] Although the wording of section 9 differs in a few respects from that of its predecessor, section 8 of the Interim Constitution, such differences are not material. See *The National Coalition for Gay and Lesbian Equality and Another v The Minister of Justice and Others*, 1998 (12) BCLR 1517 (CC); 1999 (1) SA 6 (CC) (the *Sodomy* case); paras. 58, 59 and 64.

[22] The cases in which the Constitutional Court has considered the provisions of the equality clause and to which reference is made in this paper are *Prinsloo v Van der Linde and Another*, 1997 (6) BCLR 759 (CC); 1997 (3) SA 1012 (CC) (*Prinsloo's* case); *President of the Republic of South Africa and Another v Hugo* 1997, (6) BCLR 708 (CC); 1997 (4) SA 1 (CC) (*Hugo's* case); *Harksen v Lane NO and Others*, 1997 (11) BCLR 1489 (CC); 1998 (1) SA 300 (CC) (*Harksen's* case); the *Sodomy* case (note 21); and *The National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*, 2000 (1) BCLR 39 (CC) (the *Immigration* case).

[23] *Prinsloo's* case (note 22) paras. 17and 23–26.

the fundamental premises of the constitutional state.[24] Section 9(1) is the first hurdle over which state differentiation has to pass.[25]

Second. Of course the mere fact that differentiation is rationally connected to a legitimate governmental purpose is not the end of the equality inquiry under section 9, for it might still constitute unfair discrimination under section 9(3) in respect of the person against whom the differentiation impacts. Section 9(3), may I remind you, provides that:

> "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."

Mere differentiation occurs when the ground on which persons are treated differently by the state is not covered by the provisions of section 9(3).[26] Although the grounds specifically mentioned in subsection (3) constitute the broadest basis explicitly articulated in any national constitution, on which discrimination is prohibited, they do not constitute a closed category. If differentiation takes place on one of the specified grounds it is presumed to amount to discrimination. If it does not, but is based on attributes or characteristics which objectively have the potential to impair the fundamental dignity of persons as human beings, such differentiation will also amount to discrimination. The essential criterion is whether the differentiation has the potential to impair the fundamental dignity of persons as human beings.[27]

Third. At the heart of section 9 lies the prohibition against unfair discrimination which, for the moment, will be considered in the context of section 9(3), the subsection prohibiting unfair discrimination by the State on the specified and other grounds. The inquiry as to the "unfairness" of discrimination concentrates on the impact of the law or conduct on the complainant and here, too, human dignity is central to the inquiry. The Court has held that the unfairness of the discrimination is determined by focusing primarily on the experience of the "victim";

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[24] *Id.* paras. 24–26, and *Harksen's* case (note 22) paras. 43 and 45. See also the recent decision of the Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa and Others. In re: the ex parte application of the President of the Republic of South Africa and Others*, 2000(3) BCLR 241 (CC); 200(2) SA 674 (CC), where it was decided in even wider terms that action by or on behalf of the State that arbitrarily fixed a commencement date for national legislation duly passed, offends against the rule of law, one of the founding values of the South African constitutional state, and is accordingly invalid.

[25] It should not be assumed, however, from what has been said thus far, that section 9(1) merely constitutes a prohibition against the state. It could be argued that, because the Bill of Rights directly binds the State under section 8(1) of the Constitution and mandates it under section 7(1), *inter alia*, to "promote and fulfil" the rights in the Bill of Rights, that there is a positive constitutional obligation on the State to go further and take the necessary positive steps to ensure the equal enjoyment of rights, particularly in view of the fact that the second sentence of section 9(2) explicitly provides that "[e]quality includes the full and equal enjoyment of all rights and freedoms." In Germany this is a much debated topic.

[26] *Prinsloo's* case (note 22) paras 23–27, and *Harksen's* case (note 22) paras. 44–46.

[27] *Prinsloo's* case *id.* paras. 17, 23, 31 and 33, and *Harksen's* case (note 22) para. 47.

the determining factor being whether the impact of the discrimination has impaired the complainant's human dignity.[28] It is important to emphasise, as was done in *Hugo*,[29] that the prohibition on unfair discrimination in the Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups; it seeks to do more than that:

> "At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked."[30]

In determining whether a discriminatory provision has impacted unfairly on complainants, various factors are to be considered, including –

the position of complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination under consideration is on a specified ground or not;

the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the dignity of the complainants, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered an impairment to their dignity;

the extent or degree to which the rights or interests of the complainants have been affected by the discrimination.

These and other relevant factors are to be considered objectively and cumulatively and an assessment made of the extent to which, if any, they have led to the impairment of the fundamental dignity of the complainants or have affected them in a comparably serious manner. On this basis a determination is to be made, on the totality of the facts of each case, whether the discrimination in question is unfair or not.[31] In *Hugo's* case President Mandela had, by Presidential decree and as an act of mercy, granted pardon, subject to certain conditions, to three groups of prisoners, namely, disabled prisoners, young persons and mothers of young children. Male prisoners, who were fathers of young children, were not included in the pardon and challenged the Presidential Act on the basis that it unfairly discriminated against such fathers. The fact that all the favoured groups were regarded as being particularly vulnerable in South African society, and that in the case of the disabled and the mothers of young children, they belonged to groups who had been victims of discrimination in the past, weighed with the Court in

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[28] *Prinsloo's* case (note 22) paras. 31–33; *Hugo's* case (note 22) paras. 41–43, and *Harksen's* case (note 22) paras. 51–52.

[29] *Id.* para. 41, and see also *Harksen's* case *id.* para. 41.

[30] *Hugo* (note 22) para. 41.

[31] *Harksen's* case (note 22) para. 52.

concluding that the discrimination was not unfair.[32] In the *Sodomy* case the common law offence of sodomy, as well as certain related statutory offences and provisions were declared to be inconsistent with the equality section of the Constitution and invalid.[33] The Court held that –

> "Gay men are a permanent minority in society and have suffered in the past from patterns of disadvantage. The impact [of the discrimination] is severe, affecting the dignity, personhood and identity of gay men at a deep level. It occurs at many levels and in many ways and is difficult to eradicate. ... [To criminalise private conduct of consenting adults which causes no harm to anyone else] has no other purpose than to criminalise conduct which fails to conform with the moral or religious views of a section of the community. The discrimination has ... gravely affected the rights and interests of gay men and deeply impaired their fundamental dignity."[34]

In the *Immigration* case the Court held that a section of the Aliens Control Act 96 of 1991, by omitting to confer on persons who are partners in permanent same-sex life partnerships the benefits it extends to spouses, unfairly discriminates, on the grounds of their sexual orientation and marital status, against partners in such same-sex partnerships who are permanently resident in the Republic and is inconsistent with the equality clause.[35] The remedy granted by the Court was to "read in" (i.e. add) certain words after the word "spouse" in the offending section, namely the words "or partner, in a permanent same-sex life partnership."[36] In other words, it extended the spousal benefits under the section to permanent same sex partners. In the Court's judgment the following is said:

> "The message and impact [of the omission in the section] are clear ... gays and lesbians lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected. It serves in addition to perpetuate and reinforce existing prejudices and stereotypes. The impact constitutes a crass, blunt, cruel and serious invasion of their dignity. The discrimination, based on sexual orientation, is severe because no concern, let alone anything approaching equal concern, is shown for the particular sexual orientation of gays and lesbians."[37]

Fourth. Of procedural importance to complainants alleging unfair discrimination on any one or more of the grounds specified in subsection (3), is the fact that once discrimination on such specified ground has been demonstrated it is assumed, under subsection (5), that such discrimination is unfair, unless it is established that the discrimination is fair. This means that where it necessary to rely on specific factual circumstances to establish that such discrimination is fair, the burden will be on the State to prove such facts.

Fifth. In an attempt, one assumes, to avert certain of the problems experienced in the United States of America under the Fourteenth Amendment with the con-

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[32] Above note 22 para. 47, confirmed in *Harksen's* case (note 22) para. 52.
[33] Above note 21 para. 106.
[34] *Id.* para. 26.
[35] Above note 22 para. 97.
[36] *Id.* paras. 97 and 98.
[37] *Id.* para. 54.

stitutionality of race-based preferential treatment (often imprecisely or misleadingly referred to as "affirmative action"), section 9(2) of the South African Constitution provides, *inter alia*, that –

> "[t]o 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."

Its meaning has not yet been considered by the Constitutional Court. It would be uncontroversial, I believe, to suggest that a restitutionary principle underlies this provision. The present position in regard to race-based preferential treatment in the United States is complex and uncertain and will not be dealt with in this paper.[38] Suffice it to say that the general acceptance for nearly twenty years of the constitutionality of diversity based preferential treatment in higher education, which was the basis of Justice Powell's judgment in the *Bakke* case,[39] was rejected in 1996 by the Fifth Circuit Court of Appeals when it held that "any consideration of race or ethnicity ... for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment" and *certiorari* denied by the Supreme Court.[40] In the previous year the Supreme Court had held that all governmental racial classifications were subject to strict scrutiny, regardless of whether they benefited or burdened minority race persons.[41] In this context strict scrutiny means that where a classification is based on race, even when its purpose is benign, it is still inherently suspect and presumptively unconstitutional unless the government can demonstrate that the racial classification is narrowly tailored to promote a compelling government interest. South African constitutional jurisprudence does not follow the United States model where different levels of scrutiny are applied. Instead, a two stage inquiry is required by the Constitution. The first question is whether there has been a limitation of a right entrenched in the Bill of Rights and the second is whether such limitation is justified under the provisions of section 36. The latter inquiry involves, as I have indicated, a proportionality analysis and weighing up. Section 9(2) constitutes an integral part of the equality and anti-discrimination guarantee. Its purpose, I would suggest, is to ensure that remedial measures under its provisions, even if based on a ground specified in subsection (3), will not by that fact alone constitute discrimination or presumptive unfair discrimination. An obvious and important qualification is that the measures referred to must fall within the ambit of subsection 9(2) as properly construed. It is hard to imagine human dignity, given its important place so far in our unfair discrimination jurisprudence, not having a role to play in determining the

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[38] For a general discussion of the position in the USA, on which a vast amount of literature exists, see Rotunda/Novak, Treatise on Constitutional Law (3rd ed. 1999) §18.10 and for a recent discussion on the "diversity rationale" see Liu, Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test, in: 33 (1998) Harvard Civil Rights-Civil Liberties Law Review 381, and the extensive list of authorities referred to therein.

[39] *Regents of University of California v Bakke*, 438265 at 311–15 (1978).

[40] *Hopwood v Texas*, 78 F 3d 932 at 944 (5th Circ), *cert. denied* 116 S Ct 2581 (1996).

[41] *Adarand Constructors, Inc. v Pena*, 515 US 200 at 227 (1995).

correct meaning and limits of subsection (2). The object of this subsection is to redress disadvantage caused by unfair discrimination. It would be difficult to understand what "disadvantaged" or "unfair discrimination" in the subsection meant, or what the limits of the remedial measures were, divorced from human dignity and its established role in unfair discrimination jurisprudence thus far.[42]

Lastly, I should like to address, however briefly, the question of the direct horizontal application of the Bill of Rights and the role which the concept of human dignity might play in the complexities of such application, particularly in the sphere of equality and unfair discrimination. Bills of Rights have customarily been seen as protecting the rights of individuals against the state only. The rights guaranteed therein applied only to the vertical relationship between the state and the individual; they were thus described as operating vertically. Horizontality, on the other hand, refers broadly to the impact of these rights on legal relationships between individuals.

A distinction is drawn between direct and indirect horizontality. As pointed out earlier, the South African Constitution provides that the spirit, purport and objects of the Bill of Rights should influence statutory interpretation and the development of the common law and customary law. In this way the content of the Bill of Rights will indirectly influence the interpretation and development of the law, including the common law, also as it applies between individuals. This is referred to as indirect horizontality. Direct horizontal operation refers to a situation where individual A can found a right against individual B directly from a provision in the Bill of Rights, that is to say the Bill of Rights would be the immediate and direct source of A's right against B. The United States Bill of Rights (with the exception of the thirteenth amendment, i.e. the prohibition of slavery) operates only vertically.[43] The fundamental rights in the German Basic Law operate vertically and also with indirect horizontality.[44] In early 1996 a majority judgment of the Constitutional Court in *Du Plessis and Others v De Klerk and Another*,[45] held that the Bill of Rights in the interim Constitution did not have direct horizontal operation, only indirect.

At the time of the decision in *Du Plessis v De Klerk*, fears were expressed that unless the Bill of Rights operated with direct horizontality apartheid, and the socio-economic benefits unjustly gained thereunder, could be "privatised", either permanently or for an unacceptably long time.[46] These fears persisted, despite the fact that in *Du Plessis v De Klerk* it was pointed out, with particular reference to

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[42] Compare Henkin (note 7) at 19.

[43] See Tribe, American Constitutional Law (2nd ed. 1988) at 1688.

[44] Indirect horizontal operation of fundamental rights is referred to in German constitutional law as "mittelbare Drittwirkung" (lit. "indirect third party operation") and direct horizontal operation as "unmittelbare Drittwirkung" (lit. "direct third party operation"). For a discussion in English of *Drittwirkung* in German law see *Du Plessis and Others v De Klerk and Another*, 1996 (5) BCLR 658 (CC); 1996 (3) SA 850 (CC).

[45] *Id.*

[46] Compare the observations of Kriegler J in his powerful dissenting judgment in *Du Plessis v De Klerk* (note 44) para. 120.

the German jurisprudence, not only that the so-called "radiating effect" of the indirect horizontal application of the Bill of Rights on the common law would adequately address any legitimate fears concerning the privatising of apartheid,[47] but that direct horizontality had a number of unsatisfactory jurisprudential features.[48]

Against this background three new provisions in the 1996 Constitution, sections 8(2), 8(3) and 9(4), give the Bill of Rights in general and the equality guarantee in particular direct horizontal effect, within the limits set by these new provisions.[49] Section 8(2) states in general terms that a provision of the Bill of Rights "binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right." In order to overcome some of the problems which direct horizontality gives rise to, section 8(3) confers both mandatory and discretionary powers on a court applying this provision. The court must, in order to give such effect to a right in the Bill "apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right" and the court may "develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)." Subsection 9(4) then explicitly provides that "[no] person may unfairly discriminate directly or indirectly against any one on one or more grounds in terms of subsection (3)."

There is no obvious reason for the Constitutional Court to depart from the path it has hitherto followed and not to use dignity as an important touchstone for determining when differentiation amounts to discrimination and when discrimination is unfair under these provisions. In applying them a court would, in the main, be performing three interconnected tasks. The application or development of the common law generally; its development to limit the right to equality; and a decision whether there is unfair (horizontal) discrimination under section 9(4). In performing this last task there is no patent reason why the principles enunciated concerning human dignity in relation to the vertical application of section 9(3) should not apply to the horizontal application of this right. In developing the common law generally and in developing it to limit the right to horizontal equality, it would seem that the courts are in effect being enjoined to conduct a proportion-

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[47] *Id.* paras. 103–105.

[48] *Id.* paras. 37–41 and paras. 106–112.

[49] They respectively read:

8(2): "A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."

8(3): "When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)."

9(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."

ality analysis and evaluation in the process of balancing what is in essence a clash of rights between different persons. A clash between, on the one hand, the right to equality and non-discrimination and, on the other, the rights to freedom (in its various forms), privacy, property (and possibly others), or combinations of such rights.[50] It is difficult to see how this clash is to be resolved without having regard to the nature or severity of the impact of the discrimination on the dignity of the person asserting the right to equality when consideration is being given under section 8(3)(b) to limiting this right or the right clashing with it.

Some of the problems posed by horizontality, direct or indirect, are illustrated by the following examples:

(i) Primus sells his spacious home in a well planned and well serviced suburb to Secundus with a restrictive condition prohibiting Secundus from selling it to a female or black purchaser. In breach of this condition Secundus sells the property to Tertia, a black women, whereupon Primus applies to court to have the Secundus/Tertia sale set aside and the parties interdicted from proceeding with the transfer of the property to Tertia. [51] The arguments for the remedy would be based on property and freedom of contract rights. The arguments against the remedy could proceed along the following lines. The exclusion of blacks and women is an unqualified and naked preference, which has no regard to the age, profession, financial stability, income, sobriety, morality or indeed any personal characteristic of the persons excluded other than their race and gender. The covenant excludes no white male however violent, dishonest, immoral and antisocial he may be. It is embodied in an otherwise standard commercial document. Under these circumstances its impact on Tertia constitutes a deep affront to her human dignity. She has suffered in the past from patterns of disadvantage on the double ground of race and gender and has been unable, because of such disadvantage, to acquire the sort of house which is the subject of the sale. At the same time the covenant advances no substantive interest of either Primus or Secundus and if struck down would constitute a mere abstract limitation of their general freedom to contract and Primus' right to dispose of his property as he pleases. The relevant circumstances and impact, if evaluated in accordance with established vertical equality ju-

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[50] Compare Henkin, *Shelley v Kraemer:* Notes for a Revised Opinion (hereafter "Notes"), in: 110 Univ. Pa. L. Rev. 473 (1962), and "Infallibility Under Law: Constitutional Balancing", in: 78 Colum. L. Rev.1023 (1978).

[51] In *Shelley v Kraemer*, 334 US 1 (1948), on analagous facts, the United States Supreme Court unanimously reversed the judgments of state courts enforcing the racist restrictive covenant. While the result of the decision is universally applauded, the reasons for the Supreme Court's decision have given rise to a number of celebrated journal articles including those by Wechsler, Towards Neutral Principles of Constitutional Law, in: 73 Harv. L. Rev 1(1959); Henkin, Some Reflections on Current Constitutional Controversy, in: 109 Univ. Pa. L. Rev. 637 (1961) and "Notes" (note 50), and Greenawalt, The Enduring Significance of Neutral Principles, in: 78 Colum. L. Rev. 982 (1978). Although the decision in *Shelley* must be seen in the context of the fourteenth amendment "state action" (verticality only) doctrine with which it was dealing, the depth of treatment of the issues of equality and principled neutral reasons for constitutional adjudication in these articles are relevant to equality adjudication under the South African Constitution and in particular to issues of horizontality.

risprudence in relation to dignity, suggests that the covenant ought to be declared void and the transfer interdicted. It is difficult to see why the same conclusion would not have been reached under the interim Constitution through indirect horizontality and could not also be reached under the 1996 Constitution, by the development in both cases of the common law in a manner which promoted "the spirit, purport and objects of the Bill of Rights."[52] The concept of public policy, well recognised in South African common law as a basis for invalidating a contract, could be developed so as to include discrimination on the grounds of race and gender as grounds for such invalidation.

(ii) Primus, for racist reasons, seeks to have someone trespassing on his residential property ejected therefrom. The arguments might proceed as follows: Against ejection, reliance would be placed on the direct horizontal application of the equality provisions; the differentiation is on a specified ground, therefore it is presumed to constitute unfair discrimination and in any event the impact of the discrimination impairs the trespasser's human dignity. Against this Primus would assert, at least, his right to privacy[53] and his right to freedom of association,[54] contending that there is no "open and democratic society based on human dignity, freedom and equality"[55] which forbids persons to be whimsical or capricious or racist in their social relations or as to whom they will admit to their homes. Primus is asserting a constitutional right and if this right were to be limited by prohibiting ejection this would constitute a severe substantive limitation of a significant right universally recognised in the societies referred to. In granting ejection, the law's enforcement of discrimination is incidental and "[t]he victim of discrimination ... suffers a minor limitation and a limited and unpublic indignity."[56] Henkin suggests that it "may be a different matter when a storekeeper, restaurateur, or innkeeper, who opens to all, refuses entry to some on the basis of race" and that "in these relationships, the state could outlaw the discrimination."[57] One of his reasons for coming to this conclusion is that "[g]enerally, the discrimination is public, blatant, and widespread; the inequality and indignity therefore notorious and extensive, with important communal consequences."

(iii) Primus is a widower. In his will, with discrimination aforethought, he bequeaths his entire, very considerable estate to Secundus, his only son, who spends more time in prison than out and leaves nothing at all to his only daughter Tertia, who has led an exemplary life and is obliged to fund personally and constantly expensive medication for an incurable but not life-threatening disease. Tertia challenges the will.

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[52] Under section 39(2) of the 1996 Constitution and the corresponding provisions of the interim Constitution.

[53] Under section 14 of the Constitution.

[54] Under section 18 of the Constitution.

[55] The norm formulated in section 36(1) of the Constitution's limitation clause.

[56] Henkin, "Notes" (note 50) at 498.

[57] *Id.* at 498.

(iv) Secunda, a widow, has in all prior wills left her estate to her children. Quite capriciously, but in her sound and sober senses, she makes a new will leaving her estate to a friend she has not seen for years and who has no financial need. Her children contest the will.

In these last two examples one is concerned with a clash between, on the one hand, rights of property and freedom of testation and, on the other, with the right to equality. A court would have to consider how important the first mentioned rights are and how serious a limitation of these rights the enforcement of horizontal equality would cause; in particular how serious the impact on the testator's dignity would be. In considering the position of the complainants, the impact on their dignity of the testamentary provisions would have to be assessed and, in particular, the extent to which it can be said to be in public.

There is another reason why the concept of human dignity is felicitous and important for equality adjudication. Constitutional and other courts exercising judicial review against democratically elected legislatures run legitimacy risks, with consequent dangers for constitutionalism, if their reasoning is seen as casuistic, in the pejorative sense, merely intuitive or little more than the expression of a personal subjective preference and not demonstrably rooted in the Constitution. In a young constitutional democracy like ours, operating in a society with many different cleavages and whose many wounds are not yet fully healed, there is a particular need for constitutional decision making that is neutral and principled. In his celebrated article "Towards Neutral Principles of Constitutional Law"[58] Herbert Wechsler insisted, and I agree, that "the judicial process ... must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved" and that cases must be decided "on grounds of adequate neutrality and generality tested not only by the instant application but by others that the principles imply."[59] In *Shelley v Kraemer*[60] the United States Supreme Court, on facts analogous to the racist restrictive covenant in the deed of sale example I have given, unanimously reversed the judgments of state courts enforcing the covenant and rested its judgment on the simple ground that the covenant embodied a discrimination and that the enforcement order of the court was action of the state. While supporting the result of the judgment Herbert Wechsler criticised the reasoning for lacking neutrality and generality because it –

> "[does] not suffice to uphold the judgment, unless it is affirmed that a private discrimination becomes a discrimination by the state whenever it is legally enforced. But such a proposition is absurd and would destroy the law of wills and a good portion of the law of property, which is concerned precisely with supporting owners' rights to make discriminations that the state would not be free to make on the initiative of officials."[61]

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58 Above note 51.

59 *Id.* at 15.

60 Above note 51.

61 Wechsler, The Nature of Judicial Reasoning, in: Hook (ed.), Law and Philosophy (2nd ed. 1970) 290, 295.

Kent Greenawalt, in his "The Enduring Significance of Neutral Principles"[62] supports and elaborates on Wechsler's main thesis in a manner which I, as a member of a new Constitutional Court, find both illuminating and compelling. First he explains that "[a] person gives a neutral reason, in Wechsler's sense, if he states a basis for a decision that he would be willing to follow in other situations to which it applies."[63] Second, he agrees that the principles must be adequately general and neutral and must "reach out beyond the narrow circumstances of the case ... If an opinion is so limited to the facts that the reasoning gives little or no guidance as to how related situations would be treated, ... [it] fails the criterion of generality."[64] Third, he makes the point that, although certain legal standards may refer judges to open-ended assessments of morality or social desirability and that such assessments may have to be made when a judge is deciding between differing possible legal standards, "the legal materials may preclude altogether or greatly affect the weight of a principled argument of considerable moral force."[65] Fourth, he emphasises that principled decision-making must extend to the resolution of all the issues in the case.[66] His final proposition is that a court should, in its judgment, furnish its real grounds of decision and should articulate all of them.[67] It is impossible in the context of this paper to convey with any adequacy the depth and rigor of either Wechlser's or Greenawalt's treatment, nor the important further discussion by the latter of, for example, the limits of Wechsler's thesis, the importance of neutral principles, a defence of their attainability, broader theories of judicial responsibility in constitutional adjudication and so forth.

The application of neutral principles should quite obviously not be seen as a mechanical exercise nor as an infallible route to correct decisions,[68] but rather as a form of jurisprudential discipline and morality. We have emerged in South Africa from a period in our history characterised by much distortion of language, meaning and truth. The new constitutional order constitutes "a bridge away from a culture of authority ... to a culture of justification."[69] Our jurisprudence has no option but to do the same and I believe that neutral principles constitute an indispensable bridge on that road.

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[62] In his article "The Enduring Significance of Neutral Principles" (note 51).

[63] *Id.* at 985, where he also illustrates this idea of neutral principle with the following example: "A says, 'Communists should be allowed to preach Marxist doctrine because everyone has a right to say what he believes as long as he does not encourage imminent criminal acts.' If A would deny a person urging that whites are innately superior to the members of other races the right to speak, then the reason he asserts in defense of the Communist is not one which A subscribes to as a neutral principle."

[64] *Id.* at 987–988.

[65] *Id.* at 989 and footnote 27.

[66] *Id.* at 989.

[67] *Id.* at 990.

[68] Compare Greenawalt, *id.* at 991.

[69] *Prinsloo's* case (note 22) para. 25.

I also do not contend that unfair discrimination can always be determined easily by the dignity route nor that it can ever be determined by a glib application of the dignity test. Yet if we reflect on the palpable ills of apartheid we cannot avoid concluding that dignity was a prime victim and we know what caused it to be a victim. For Isaiah Berlin the acceptance of some irreducible minimum of common values was not only intrinsic to human communication but grounded our conception of a normal human being.[70] Surely he was right when he stated[71] that the possibility of understanding humans at any time depends on the existence of some common values and that a person –

> "who ... literally cannot grasp what conceivable objection anyone can have to ... a rule permitting the killing of any man with blue eyes ... would be considered about as normal a specimen of the human race as one who ... thinks it probable that he is Julius Caesar."

May I suggest that dignity, and its relationship to equality, is one of these common values and that it is an indispensable constituent in neutrally principled and correct adjudication on issues of unfair discrimination.

It is that quality of being human which we gropingly call dignity that distinguishes us from other creatures. Whether one sees fundamental human dignity in purely secular humanist terms, or as the image of some divinity in which humans are created, it was the defiling of human dignity by apartheid that led South Africans to reject apartheid. Admittedly not all have and, amongst those that have, some have done so sooner and more comprehensively than others. Fischer did so very early and very comprehensively. I would like to think that the determinative and principled role played by human dignity in the South African Constitution and in the unfair discrimination jurisprudence under it, would have accorded with Bram Fischer's own concerns with dignity and would have afforded him some satisfaction.

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[70] Berlin (note 8) at xxxi–xxxii.

[71] *Id.* at xxxi.