UNDOING HUMILIATION, FOSTERING EQUAL CITIZENSHIP: HUMAN DIGNITY IN SOUTH AFRICA'S SEXUAL ORIENTATION EQUALITY JURISPRUDENCE

KATE O'REGAN[†]

The South African jurisprudence on equality employs the concept of human dignity to inform both the interpretation of the South African Constitution's equality clause and its application. The importance of human dignity to South Africa's equality jurisprudence arises in part from the lessons of our apartheid history in which wicked, legalized and systematic racial discrimination was antithetical to the concept of human dignity. This brief note describes how the concept of human dignity has been employed in the equality jurisprudence, particularly in relation to discrimination on the grounds of sexual orientation.

The third of the five subsections of the equality guarantee, section 9(3), 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."[1]

There are several distinctive aspects to this clause. The first is that it is only "unfair" discrimination that is prohibited. The second is that the long list of prohibited grounds includes sexual orientation. The third is the clause's recognition and prohibition of discrimination based on one or more grounds, thus addressing the problem of discrimination on intersecting or overlapping grounds. Fourth, the clause makes plain that the list of grounds, though long, is not exhaustive. Finally, it is clear that both direct and indirect forms of discrimination are prohibited.

Anyone familiar with comparative equality jurisprudence will notice the lessons learned from struggles for equality in other parts of the world. For example, the list of grounds includes pregnancy *and* sex to avoid equal treatment arguments that suggest that treating pregnant women prejudicially is not discrimination on the grounds of sex.[2] The clear assertion that both direct and indirect unfair discrimination will fall afoul of the constitutional provision makes it clear that neutral rules that have an adverse impact on one of the prohibited grounds will fall within the purview of the clause.[3]

[†] Judge of the Constitutional Court of South Africa (1994–2009).

1. S. AFR. CONST. ch. 2, § 9(3) (1996).

2. *Cf., e.g.*, Geduldig v. Aiello, 417 U.S. 484 (1974), *superseded by statute*, 42 U.S.C. § 2000e(k) (2006) (holding that California's disability insurance system's pregnancy discrimination was not sex discrimination).

3. *Cf., e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971) (holding that practices that indi-

Yet section 9 is unusual in its use of the concept of "unfair discrimination." The qualifier "unfair" was not drawn from another constitutional experience. The concept of "unfairness" is used in two ways: to qualify discrimination and to regulate the burden of persuasion. Section 9(5) provides that discrimination on one or more of the listed grounds is unfair, unless it is established that it is fair.

What constitutes "unfair discrimination"? In its first equality case, the South African Constitutional Court noted that:

> Although our history is one in which the most visible and most vicious pattern of discrimination has been racial, other systematic motifs of discrimination were and are inscribed on our social fabric. In drafting section 8, the drafters recognized that systematic patterns of discrimination on grounds other than race have caused, and many continue to cause, considerable harm. . . . [D]iscrimination against people who are members of disfavoured groups can lead to patterns of group disadvantage and harm . . . [and] is unfair.[4]

The interpretation of the concept of "unfair discrimination" thus started from the acknowledgement that discrimination on grounds of group membership can cause harmful patterns of group disadvantage. As the Court observed:

> 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.[5]

The principle of unfair discrimination introduces an asymmetrical approach to equality jurisprudence. As the Court reasoned in the same case:

> We need . . . to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved.[6]

In order to decide whether a particular form of discrimination is unfair, therefore, a court will consider three things: first, whether those who are adversely affected by the discrimination are members of a group that has suffered adverse discrimination in the past; second, the nature of the provision or power that

---

rectly maintained the "status quo of prior discriminatory employment practices" violated Title VII of the Civil Rights Act even in "the absence of a discriminatory purpose.").

4. *Brink v. Kitshoff NO* 1996 (4) SA 197 (CC) at paras. 41–42 (S. Afr.) (O'Regan J. for the Court) (invalidating an insurance statute that treated married men and women differently).

5. *President of the Republic of S. Afr. and Another v. Hugo* 1997 (4) SA 1 (CC) at para. 41 (S. Afr.) (upholding against constitutional challenge a Presidential Act remitting the prison sentences of mothers with young children).

6. *Id.*

caused the discrimination and the purpose sought to be achieved by it; and third, whether the discrimination impairs the dignity of the subjects of the discrimination or impairs their rights or interests in some other comparable way.[7]

Scholars have both criticized[8] and supported[9] the use of "human dignity" as a key element of the determination of unfairness. Critics argue that this approach is indeterminate; that it fails to pay sufficient attention to "substantive equality";[10] and that it focuses on hurt feelings or a sense of affront rather than on material disadvantage.[11] If a court understands human dignity in the sense of personal affront, these criticisms may have merit. Yet the jurisprudence on sexual orientation illustrates the value of an enriched conception of human dignity to equality jurisprudence, as I shall illustrate.

There are two key considerations that impel the importance of dignity to South African equality jurisprudence: the first is textual, and the second is historical and sociological. The repeated references to human dignity in the text of the South African Constitution reveal the great importance of the concept. The very first section of the Constitution that entrenches the founding values states that: "South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms."[12] Human dignity is the first value listed and is repeated in other key places in the Constitution. Section 7, the first clause of the Bill of Rights, states that "the Bill of Rights is a cornerstone of democracy in South Africa, it enshrines the rights of all people in our country, and affirms the democratic values of human dignity, equality and freedom."[13] Section 10 provides that "everyone has inherent dignity and the right to have their dignity respected and protected."[14] Section 36, a general limitations clause, permits rights to be limited by law, if that limitation is "reasonable and justifiable in an open

7. This test was set out in *Harksen v. Lane NO and Others* 1998 (1) SA 300 (CC) at para. 51 (S. Afr.). Although this test was developed in relation to section 8 of an earlier, transitional Constitution, S. AFR. (INTERIM) CONST., 1993, it has been held to be applicable to the 1996 Constitution as well. *See Nat'l Coal. for Gay and Lesbian Equal. v. Minister of Justice and Others* 1999 (1) SA 66 (CC) at para. 15 (S. Afr.).

8. *See, e.g.*, Cathy Albertyn & Beth Goldblatt, *Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality,* 14 S. AFR. J. ON HUM. RTS. 248 (1998); Dennis Davis, *Equality: The Majesty of Legoland Jurisprudence*, 116 S. AFR. L. J. 398 (1999).

9. *See, e.g.*, Sandra Liebenberg & Michelle O'Sullivan, *South Africa's New Equality Legislation: A Tool for Advancing Women's Socio-economic Equality?*, ACTA JURIDICA 70, 83–85 (2001); Susannah Cowen, *Can 'Dignity' Guide South Africa's Equality Jurisprudence?*, 18 S. AFR. J. ON HUM. RTS. 34 (2001). For a comprehensive theoretical analysis of the role of human dignity in South Africa's equality jurisprudence, see the recently published, LAURIE ACKERMANN, HUMAN DIGNITY: LODESTAR FOR EQUALITY IN SOUTH AFRICA (2012).

10. *See* Davis, *supra* note 8, at 404.

11. *See* Albertyn & Goldblatt, *supra* note 8, at 272.

12. S. AFR. CONST. ch. 1, § 1.

13. *Id.* at ch. 2, § 7.

14. *Id.* at ch. 2, § 10.

and democratic society based on human dignity, equality and freedom."[15] Finally, section 39, the interpretation clause in the Bill of Rights, provides that the rights in the Bill of Rights must be interpreted in a manner that "promotes the values that underlie an open and democratic society based on human dignity, equality and freedom."[16]

The textual emphasis is an important basis for human dignity's centrality to equality jurisprudence. Equally important is South Africa's history of racial discrimination. As Justice Edwin Cameron noted in a recent lecture, "there is a sound reason why dignity, for all its indeterminacy, has taken so central a place in the formative jurisprudence of the [Constitutional] Court. It is to be found in South Africa's past of racial indignity—where racial subordination was both premised on and enacted shamefulness and disgrace."[17] Through systematic and legalized discrimination, apartheid sowed material disadvantage that still persists to this day, but it did more. Apartheid, like policies of racial discrimination elsewhere, sowed a deep sense of racial psycho-social harm.[18] Respect for and protection of human dignity clearly rejects the racialized humiliation and harm that was pervasive during the apartheid era.

But the importance of human dignity to equality jurisprudence spreads far beyond the jurisprudence relating to race. It has been important in jurisprudence concerning discrimination based on HIV/AIDS,[19] marital status,[20] citizenship,[21] and sex and gender.[22] And it has been of crucial importance in the jurisprudence relating to sexual orientation.

The first Constitutional Court case involving the prohibition on unfair discrimination on the ground of sexual orientation was a challenge to the common-law crime of sodomy for criminalizing sexual intercourse between consenting

15. *Id.* at ch. 2. § 36.

16. *Id.* at ch. 2, § 39.

17. Edwin Cameron, Understanding Human Dignity, Lecture delivered at Oxford conference on Dignity and Disgrace: Moral Citizenship and Constitutional Protection (June 28, 2012) (on file with author).

18. Exemplary descriptions of this harm include, for example, W.E.B. DU BOIS, THE SOULS OF BLACK FOLK (1903); FRANTZ FANON, THE WRETCHED OF THE EARTH (Richard Philcox trans., 2004). For a South African example, see STEPHEN BANTU BIKO, I WRITE WHAT I LIKE (1978).

19. *See Hoffmann v. S. Afr. Airways* 2001 (1) SA 1 (CC) at paras. 27, 40 (S. Afr.) (holding that denial of employment based on HIV status was unfair discrimination and impaired victim's human dignity).

20. *See Dawood and Another v. Minister of Home Affairs and Others; Shalabi and Another v. Minister of Home Affairs and Others; Thomas and Another v. Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at paras. 36–37 (S. Afr.) (discussing dignity interest in marriages and intimate relationships).

21. *See Khosa and Others v. Minister of Soc. Dev. and Others; Mahlaule and Others v. Minister of Soc. Devel. and Others* 2004 (60) SA 505 (CC) at paras. 72–74 (S. Afr.) (relevance of dignity interest to citizenship).

22. *See Gumede v. President of the Republic of S. Afr.* 2009 (3) SA 151 (CC) at paras. 34–36 (S. Afr.).

men in private.[23] In that case, Justice Ackermann, for the Court, reasoned that the criminal prohibition on sodomy:

> punishes a form of sexual conduct which is identified by our broader society with homosexuals. Its symbolic effect is to state that in the eyes of our legal system all gay men are criminals. The stigma thus attached to a significant proportion of our population is manifest. But the harm imposed by the criminal law is far more than symbolic. As a result of the criminal offence, gay men are at risk of arrest, prosecution and conviction of the offence of sodomy simply because they seek to engage in sexual conduct which is part of their experience of being human. Just as apartheid legislation rendered the lives of couples of different racial groups perpetually at risk, the sodomy offence builds insecurity and vulnerability into the daily lives of gay men. There can be no doubt that the existence of a law which punishes a form of sexual expression for gay men degrades and devalues gay men in our broader society. As such it is a palpable invasion of their dignity and a breach of section 10 of the Constitution.[24]

The Court thus unanimously concluded that the common law crime of sodomy was inconsistent with the Constitution and invalid. The reasoning displays the importance of the concept of human dignity to the decision.

Less than a year later, a second sexual orientation case came before the Court. The Court held that it was unconstitutional for South African immigration law to facilitate the immigration of heterosexual married spouses of permanent residents, but not facilitate the immigration of permanent, same-sex life partners of gay and lesbian residents.[25] Again, the Court's reasoning for this conclusion was based on the importance of human dignity:

> Society at large has, generally, accorded far less respect to [gays and] lesbians and their intimate relationships with one another than to heterosexuals and their relationships. The sting of past and continuing discrimination against 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 relation-

23. *Nat'l Coal. for Gay and Lesbian Equal. v. Minister of Justice and Others* 1999 (1) SA 66 (CC) (S. Afr.). This case was heard on August 27, 1998 and judgment was delivered on October 9, 1998.

24. *Id.* at para. 28.

25. *Natn'l Coal. for Gay and Lesbian Equality v. Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) (S. Afr.). This case was argued on August 17, 1999 and judgment was delivered on December 2, 1999.

ships.[26]

A string of cases followed this decision asserting that laws that afforded benefits to heterosexual, married couples, but not to permanent same-sex life partnerships, were inconsistent with the Constitution.[27]

Then, in 2005, two cases came contemporaneously before the Court challenging, among other things, the common-law rule that defined marriage as the partnership between a man and a woman.[28] Again, the Court focused on the principle of equal worth that informs human dignity and concluded that the common-law definition of marriage was inconsistent with the Constitution:

> The exclusion of same-sex couples from the benefits and responsibilities of marriage, accordingly, is not a small and tangential inconvenience resulting from a few surviving relics of societal prejudice destined to evaporate like the morning dew. It 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, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples.[29]

Importantly, however, this conclusion was qualified in one respect. In South Africa, the Marriage Act permits those who officiate at religious ceremonies to be registered as marriage officers[30] and for the marriage formulae observed by different religions to be used to formalize a marriage.[31] Furthermore, the Act

---

26. *Id.* at para. 42.

27. *See Du Toit and Another v. Minister of Welfare and Population Devel. and Others (Lesbian and Gay Equality Project as* Amicus Curiae) 2003 (2) SA 198 (CC) (S. Afr.) (holding legislation not permitting joint adoption of children by same-sex partners inconsistent with the Constitution); *Satchwell v. President of the Republic of S. Afr. and Another* 2002 (6) SA 1 (CC) (S. Afr.) (holding legislation providing employment benefits to heterosexual spouses and not to same-sex life partners who had undertaken mutual obligations of support inconsistent with the Constitution); *J and Another v. Director-General, Dep't of Home Affairs and Others* 2003 (5) SA 621 (CC) (S. Afr.) (holding legislation providing that husband of a mother of a child born as a result of artificial insemination by a donor will be a legitimate parent of the child, but not affording parental status to same-sex life partner, inconsistent with the Constitution).

28. *Minister of Home Affairs and Another v. Fourie and Another (Doctors for Life Int'l and Others,* Amici Curiae); *Lesbian and Gay Equality Project and Others v. Minister of Home Affairs and Others* 2006 (1) SA 524 (CC) (S. Afr.).

29. *Id.* at para. 71.

30. Marriage Act 25 of 1961 § 3 (S. Afr.).

31. *Id.* at § 30.

provides that a marriage officer who is a minister of religion may refuse to solemnize a marriage that would not conform to the rites or tenets of his or her religion.[32] The Court held that this provision would permit a marriage officer who is a minister of a religion to refuse to solemnize a same-sex marriage if such a marriage would not conform to the tenets or doctrines of the religion concerned.[33] In reaching this conclusion, Justice Sachs reasoned:

> In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other. Provided there is no prejudice to the fundamental rights of any person or group, the law will legitimately acknowledge a diversity of strongly-held opinions on matters of great public controversy. I stress the qualification that there must be no prejudice to basic rights. Majoritarian opinion can often be harsh to minorities that exist outside the mainstream. It is precisely the function of the Constitution and the law to step and counteract rather than reinforce unfair discrimination against a minority.[34]

Following the conclusion that the common-law definition of marriage was inconsistent with the Constitution, the Court, by a majority, decided to suspend the order of invalidity for a year and refer the matter to Parliament to give it an opportunity to introduce legislation to rectify the constitutional infringement.[35]

Just under a year later, Parliament enacted a statute provided for a civil union, defined as "the voluntary union of two [adult] persons, which is solemnised and registered by way of either a marriage or a civil partnership."[36] Marriage, therefore, remains the union of a man and a woman, but the law now recognizes a civil union, which has similar consequences, that may be entered into by gay and lesbian couples. Civil unions are also solemnized by marriage officers.

The inclusion of sexual orientation within the list of prohibited grounds of unfair discrimination was of signal importance to the recognition of the equal worth of gay and lesbian people. But it is the use of the concept of human dignity to inform the meaning of unfairness that has enabled the Court to recognize fully and without equivocation the harm caused by pervasive discrimination against gay and lesbian people. As Justice Cameron said in the speech referred to above:

> The Court's jurisprudence on the equality of gays and lesbians has, therefore, both addressed social and legal equality, and

32. *Id.* at § 31.

33. *Minister of Home Affairs v. Fourie* at para. 97.

34. *Id.* at para. 94.

35. Section 172(1)(b)(ii) authorizes the Court when making a declaration of invalidity to suspend the operation of that order and afford the competent authority an opportunity to rectify the defect. S. AFR. CONST. ch. 8, § 172(1)(b)(ii).

36. The Civil Union Act, 17 of 2006 (29 November 2006).

sought to rectify the subordination of the past by enabling gays and lesbians to assert themselves as equal moral citizens who can fulfill their capacities as humans without shame. Dignity thus enables not conformity, but rather the advancement of those aspects of our lives that have the potential to be distinct and extraordinary: traversing public spaces fearlessly, developing our minds and speaking freely, and perhaps finding love and generativity.[37]

37. Cameron, *supra* note 17, at 19.