

EQUALITY, PLURALITY AND STRUCTURAL POWER

HENK BOTHA*

ABSTRACT

This article deals with the paradox that, in order to remedy discrimination and redress disadvantage, we have to invoke broad social categories and identities which are themselves implicated in relations of inequality and subordination. This paradox is explored from three different angles. First, the article argues for a complex understanding of equality. In terms of this understanding, the right to equality is underpinned by at least three interdependent, yet constantly shifting values, namely dignity, equality and democracy. Secondly, a radical understanding of difference is advocated, which seeks to destabilise the symbolic oppositions and hierarchies that underlie inequality and exclusion, and which avoids the uncritical equation of difference with supposedly self-contained individual and collective identities. Thirdly, the article echoes calls for a memorial understanding of constitutionalism which resists the monumentalisation of past struggles and is concerned with the limits of the law in detecting and responding to disadvantage. It is argued that these three perspectives, taken together, enable a transformative discourse on equality, which remains open to the capacity of disadvantage and difference to resist the closure into which law inevitably lapses.

I INTRODUCTION

It is one of the great paradoxes of South Africa's constitutional transition that the Constitution commits us to a non-racial and non-sexist society,¹ and yet recognises that we can eradicate discrimination and redress disadvantage only if we remain conscious of the deep racial and sexual fault lines characterising our society.² On the one hand, the Constitution is determined to free individuals from the shackles of narrow social categories which have, in the past, been used to determine their identities and circumscribe their life chances.³ On the

* Professor of Law, University of Stellenbosch. This article is based on my inaugural lecture, held at the University of Stellenbosch on 6 March 2008. Thanks to Erin Nel for research assistance, and to Lourens du Plessis, Ockert Dupper, Wessel le Roux, Sandy Liebenberg, André van der Walt, Karin van Marle and two anonymous referees for comments and criticisms. Remaining errors are my own.

- 1 Section 1 of the Constitution of the Republic of South Africa, 1996 (the Republic of South Africa is based, *inter alia*, on the values of non-racialism and non-sexism).
- 2 See for example *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) paras 147–8 (rejecting the notion that South Africa is a 'colour-blind and race-neutral country', as was asserted, within the American context, by the majority of the Supreme Court in *City of Richmond v JA Croson Co* 488 US 469 (1989), and arguing that our Constitution expressly recognises that 'we are far from having eradicated the vestiges of racial discrimination'). See also para 29 per Moseneke J (cautioning against the adoption of American terminology which is steeped in a more formal understanding of equality and subjects measures seeking to redress the effects of past racial discrimination to strict scrutiny).
- 3 The Constitution demands respect for the dignity, equality and freedom of all individuals, regardless of differences of race, gender, sexual orientation, religion, culture, etc. See for example ss 1(c) (the Republic is based on human dignity, the achievement of equality and the advancement of human rights and freedoms), 9 (right to equality), 10 (human dignity).

other hand, it authorises affirmative action programmes which are based on these very categories,⁴ and filters complaints of unfair discrimination through categories such as race, sex, gender, sexual orientation, disability and religion.⁵

The Constitution thus requires us to avoid the extremes both of a denial of the lingering effects of our history of institutionalised racism, sexism and other forms of prejudice, and of uncritical reliance on the master dichotomies which it seeks to transcend. But how can the law recognise difference and register disadvantage while, at the same time, avoiding the reification of identities and retaining a sense that things could be different? How are we to live with the paradox that, in order to transcend the rigid social hierarchies which defined our colonial and apartheid past, we need to acknowledge the ways in which these stratifications have shaped identities and, at the same time, invoke these very categories in an attempt to remedy past injustices?

In this article, I argue for an understanding of equality which is alert to the – often subtle – ways in which misrecognition, material disadvantage and political marginalisation overlap and intersect to (re)produce relations of inequality and subordination. I further argue for a critical interrogation of the various background assumptions which shape our constructions of difference and often result in the reification of social identities and the legitimisation of inequality. Instead, I argue for greater sensitivity to the social construction of difference – and the ways in which difference is domesticated and manipulated to make discrimination appear to be simply the ‘natural’ results of individual ability, private choice and the neutral functioning of the market. Finally, I argue that the capacity of constitutional equality analysis to detect and respond to various forms of inequality and subordination depends, paradoxically, on a critical engagement with the limits of equality analysis.

II VISIONS OF EQUALITY

The Constitutional Court has placed human dignity at the heart of the right to equality. Whether or not a particular statute or conduct constitutes unfair discrimination is made to turn largely on the question whether it violates the complainants’ human dignity.⁶ The justifications offered for the Court’s dignity-based approach include the argument that equality is a comparative

4 Section 9(2). See the discussion of the *Van Heerden* case (note 2 above) under IV(b) below.

5 Sections 9(3) and 9(4). Someone who complains of unfair discrimination is advised to appeal to one or more of the listed grounds of discrimination, as discrimination on these grounds is in terms of s 9(5) presumptively unfair. A complainant is thus encouraged to label herself as, say, black, gay, female, disabled, or Jewish. See S Jagwanth ‘What is the Difference? Group Categorisation in *Pretoria City Council v Walker* 1998 2 SA 363 (CC)’ (1999) 15 SAJHR 200.

6 See for example *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC); *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC); *Harksen v Lane NO* 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC); *National Coalition for Gay and Lesbian Equality (NCGLE) v Minister of Justice* 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC).

concept which has no substantive meaning on its own,⁷ the role of dignity in international and comparative constitutional law,⁸ the affinity between human dignity and the indigenous concept of ubuntu,⁹ and the Court's understanding that the evil of apartheid consisted first and foremost in the systematic denial of the inherent dignity and worth of the majority of the population.¹⁰ But there is also another reason for preferring a dignity-based approach. By grounding the right to equality in the Kantian notion that every human being should be treated as an end in herself rather than as a means to an end, the Court apparently wishes to avoid an instrumentalist approach which would reduce human beings to objects or treat them as expendable.¹¹

The Court's dignity-based approach was initially criticised as being too individualistic to capture the groups-based nature of unfair discrimination. Albertyn and Goldblatt argued that a dignity-based approach is concerned with 'individual personality issues', instead of focusing on 'material systemic issues and social relationships'.¹² These criticisms have since been toned down. The Court has developed a progressive jurisprudence in the area of discrimination against gays and lesbians, which for many has culminated in the finding that the exclusion of same-sex couples from the right to get married is unfairly discriminatory.¹³ Its dignity-based equality analysis has also proved its worth in a case like *Khosa*, where the exclusion of permanent residents from social grants was held unconstitutional.¹⁴ For many, these and other cases prove that dignity is not the exclusive preserve of liberal individualism, that it is compatible with the notion that individuals are forged through a complex network of social ties and relationships, that it recognises social duties as well as individual rights, and that it is able to respond to material disadvantage and

7 LWH Ackermann 'Equality and Non-Discrimination: Some Analytical Thoughts' (2006) 22 *SAJHR* 597; S Cowen 'Can "Dignity" Guide South Africa's Equality Jurisprudence?' (2001) 17 *SAJHR* 34, 48.

8 LWH Ackermann 'Equality and the South African Constitution: The Role of Dignity' (2000) 63 *Heidelberg J of Int Law* 537, 539–40 n 4; A Chaskalson 'The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of our Constitutional Order' (2000) 16 *SAJHR* 193, 196–8.

9 See D Cornell 'A Call for a Nuanced Constitutional Jurisprudence: Ubuntu, Dignity, and Reconciliation' (2004) 19 *SA Public Law* 666.

10 Ackermann (note 8 above) 540–2.

11 For Ackermann (note 8 above) 554–56, this notion translates into the idea of dignity as a 'neutral principle' which allows judges to give principled reasons for their decisions. Even though I am critical of the idea of neutral principles (see H Botha 'Equality, Dignity, and the Politics of Interpretation' (2004) 19 *SA Public Law* 724, 736–43), it is difficult not to agree with the sentiment that litigants should be accorded the basic respect of providing them with reasons which have due regard to their inherent dignity and worth as human beings.

12 C Albertyn & B Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *SAJHR* 248, 258. The Canadian Supreme Court's turn to a dignity-based understanding of equality has attracted similar criticisms. See J Fudge 'Substantive Equality, the Supreme Court of Canada, and the Limits to Redistribution' (2007) 23 *SAJHR* 235, 243 (arguing that the Court has 'tended to emphasise self-worth and integrity and to downplay material and systemic factors in determining whether equality rights have been violated').

13 *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC).

14 *Khosa v Minister of Social Development*; *Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC).

systemic discrimination.¹⁵ However, some doubts remain over the capacity of a dignity-based approach to register subtle forms of discrimination, particularly in cases where such discrimination results from the interplay between supposedly neutral legal norms, material deprivation and societal prejudice.¹⁶

A second approach centres instead upon groups-based material and structural disadvantage. In the view of Albertyn, Goldblatt and others¹⁷ the main evil of our past, as far as the equality clause is concerned, was the subordination and economic exploitation of large sections of the population. Section 9 entrenches a substantive conception of equality, which aims above all at the eradication of the impact of such groups-based disadvantage. To this end, laws must be carefully scrutinised for their impact on vulnerable groups. Measures which reinforce and perpetuate material and systemic disadvantage will generally constitute unfair discrimination. Accordingly, the main focus of the court's inquiry should be 'the socio-economic circumstances and position of the individual in relation to his or her group and to group-based systemic disadvantage'.¹⁸

Importantly, this approach highlights the material deprivation and subordination resulting from our colonial, apartheid and patriarchal past and alerts us to the ways in which facially neutral laws and social practices feed into and perpetuate structural inequality. It also enables an understanding of the equality guarantee which emphasises the need for positive state action and which is alive to the interdependence of the right to equality and socio-economic rights.¹⁹ However, a number of questions are left unanswered. For instance, how does this approach conceive the relationship between recognition and redistribution? Doesn't the emphasis on groups-based disadvantage invite the dangers of essentialism and the reification of social categories? And isn't there a risk that the prominence given to distributive issues might obscure the extent to which struggles for equality are bound up with struggles for equal recognition?²⁰

A third approach conceives equality in terms of plurality and openness to radical difference. Drawing on the work of Drucilla Cornell and Iris Marion Young, Karin van Marle develops an ethical understanding of equality. This

15 See for example Ackermann (note 8 above); Cowen (note 7 above); S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein & M Chaskalson (eds) *Constitutional Law of South Africa* 2 ed OS (2005) Chapter 36. A review of the dignity jurisprudence of the German Constitutional Court confirms that dignity is compatible with the view that citizens are members of and bound to the community. See BVerfGE 4, 7, 15–6 (1954); P Häberle *Das Menschenbild im Verfassungsstaat* 3 ed (2005). See also H Botha 'Dignity in Comparative Perspective' (2009) 20 *Stell LR* 171.

16 See the discussion of the *Hugo, Jordan and Robinson* cases under IV(a) below.

17 See for example C Albertyn & J Kentridge 'Introducing the Right to Equality in the Interim Constitution' (1994) 10 *SAJHR* 149; Albertyn & Goldblatt (note 12 above); C Albertyn 'Substantive Equality and Transformation in South Africa' (2007) 23 *SAJHR* 253.

18 Albertyn & Goldblatt (note 12 above) 253.

19 See S Liebenberg & B Goldblatt 'The Interrelationship between Equality and Socio-Economic Rights under South Africa's Transformative Constitution' (2007) 23 *SAJHR* 335.

20 K van Marle 'Haunting (In)equalities' in R Hunter (ed) *Rethinking Equality Projects in Law: Feminist Challenges* (forthcoming). According to Van Marle, this understanding of equality reduces (in)equality to material (in)equality. An overly materialistic approach tends to ignore the concreteness and diversity of individual needs and desires, and lumps them together under the label of 'the disadvantaged'. See also K van Marle "'No Last Word" – Reflections on the Imaginary Domain, Dignity and Intrinsic Worth' (2002) 13 *Stell LR* 299.

understanding rests, first, upon a concern with singularity, difference, and openness to the radical alterity of others. It affirms the right of individuals to a moral and psychic space in which they are free to imagine and re-imagine their identities. It also insists that this right cannot be reconciled with an equality standard which is based on the worldview and experience of, say, white, middle-class, straight males, as such a standard ultimately negates difference and reduces it to sameness. Secondly, an ethical understanding of equality concerns itself with plurality. It is interested in the possibility of a heterogeneous public sphere in which a plurality of voices can be heard, in which a plurality of needs, interests and viewpoints can be articulated without being assimilated to a single, universalised standpoint.²¹

Importantly, this approach resists the essentialism, instrumentalism and reductionism into which equality discourse so easily slips. By emphasising plurality and difference, it furthermore links equality to the values of democracy and freedom. At the same time, however, it raises a number of questions. In the first place, can an approach which centres upon the right of individuals to imagine and re-imagine their identities respond to material and groups-based disadvantage? Isn't this approach simply too individualistic to capture the groups-based nature of discriminatory laws and practices and the collective aspects of struggles for equality? These are complex issues, and I cannot deal with them here at any length. For the moment, two comments should suffice. First, it is simply not true that this approach is unconcerned with material and distributive issues. On the contrary, it can be argued that a concern with the particularity of people's lives could enable us to pay closer attention to their bodily existence and concrete material circumstances. By resisting a complacent understanding of difference which measures it in relation to some universalised standpoint, we might be in a better position to respond to the concrete needs of the poor and vulnerable.²² And second, a radical conception of difference does not deny the historical importance of race, gender, class, sexual orientation and other social categories. However, it precludes a totalising discourse which assumes an identity of interest among all blacks, all women or all gays, and which denies individuals the right to forge their own identities from the multiple raw materials and life scripts available to them.

Secondly, this approach raises questions over the capacity of (equality) law to respond to the materiality and particularity of people's lives. It could well be asked whether the Constitutional Court's embrace of an objective theory of unconstitutionality and the propensity of constitutional review to remedies that are systemic, rather than tailored to individual needs, allow for an engagement

21 K van Marle 'Equality: An Ethical Perspective' (2000) 63 *THRHR* 595; 2002 *Stell LR* 299 (note 20 above); "'The Capabilities Approach'", "the Imaginary Domain", and "Asymmetrical Reciprocity": Feminist Perspectives on Equality and Justice' (2003) 11 *Feminist Legal Studies* 255; 'Haunting (In)equalities' (note 20 above). See also N Bohler-Muller 'Developing a New Jurisprudence of Gender Equality in South Africa', unpublished LLD thesis, University of Pretoria (2005).

22 See Van Marle 2003 *Feminist Legal Studies* (note 21 above). See also J Barrett 'Dignatio and the Human Body' (2005) 21 *SAJHR* 525 (arguing for a constitutional conception of human dignity which demands respect for the human body).

with radical difference. The courts, when considering challenges to laws that are claimed to be discriminatory, cannot simply focus on the circumstances of the applicant(s), but must consider the impact of the impugned measures on a wider class of persons.²³ The interventions of amici curiae and the submission of statistical data can, admittedly, help the court to come to a more nuanced understanding of the complex ways in which different forms of disadvantage overlap and intersect, but they can never fully bridge the gap between law's generality and the particularity and materiality of people's lives.

Even more fundamentally, it must be asked whether there is not something about the structure of law generally which is unreceptive to particularity and which assimilates difference to sameness. This seems to be Van Marle's view, who argues that law is inherently reductionist and exclusionary and thus cannot rise to the challenge of recognising plurality and radical difference.²⁴ In her view, it is only through critical engagement with the limits of equality jurisprudence that we can hope to remain open to the call of a radical politics – a politics that will forever resist efforts to contain it within legal bounds.

III COMPLEX EQUALITY

The exchanges between proponents of different visions of equality raise difficult questions about the relationship between a constitutional politics of recognition (ie a politics centring upon the demands of individuals and groups for equal recognition and, in some cases, for differential treatment) and a constitutional politics of redistribution.²⁵ For instance, is a dignity-based understanding of equality sensitive enough to material disadvantage? Conversely, can a substantive conception of equality which focuses on material disadvantage and systemic discrimination respond adequately to struggles for equal recognition? And how are struggles for equality related to the constitutional value of democracy?

23 *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) paras 26–8 ('The subjective positions in which parties to a dispute may find themselves cannot have a bearing on the status of the provisions of a statute under attack. The Constitutional Court, or any other competent Court for that matter, ought not to restrict its enquiry to the position of one of the parties to a dispute in order to determine the validity of a law. The consequence of such a (subjective) approach would be to recognise the validity of a statute in respect of one litigant, only to deny it to another. Besides resulting in a denial of equal protection of the law, considerations of legal certainty, being a central consideration in a constitutional state, militate against the adoption of the subjective approach'.) See further, on the objective theory of unconstitutionality embraced by the Court, *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) paras 28–9; *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party* 1998 (4) SA 1157 (CC); 1998 (7) BCLR 855 (CC) para 64.

24 Van Marle 'Haunting (In)equalities' (note 20 above).

25 The category of 'recognition' refers to the Hegelian thesis that our identities are forged through social interaction and that individual self-realisation requires participation in a sphere of mutual recognition. See C Taylor 'The Politics of Recognition' in C Taylor *Multiculturalism: Examining the Politics of Recognition* (1994) 25; N Fraser & A Honneth (eds) *Redistribution or Recognition?* (2003).

I have argued elsewhere²⁶ for a complex understanding of equality which recognises that equality cannot be reduced to a single value, but is underpinned by at least three closely related constitutional values: equality, dignity and democracy.²⁷ These values stand in a dynamic relationship as they sometimes overlap, sometimes converge and sometimes clash. Moreover, the weight accorded to each of these values must depend on the particular context. In this section, I draw upon the idea of complex equality to explore the relationship between these different dimensions of the right to equality.²⁸

(a) Equality and dignity

A complex vision of equality recognises that the wrongs of the past to which the Constitution responds can be captured fully neither in the language of recognition nor in the language of redistribution. For instance, the institutionalised racism of the past rested upon at least three pillars: the ideology of white superiority and its corollary, black inferiority; the economic exploitation and disempowerment of the majority of the people; and the political disenfranchisement of black people.²⁹ These three aspects correspond closely to the three values underpinning a complex understanding of equality. Similarly, discrimination on the grounds of sex and gender needs to be understood in terms of the interplay between status discrimination and sexual role differentiation, the economic marginalisation of women, and the silencing of women's voices.

The values of equality and dignity overlap significantly. Deprivation of basic material needs constitutes an impairment of a person's human dignity, as the Constitutional Court was at pains to point out in *Grootboom* and other cases.³⁰

26 Botha (note 11 above) 724.

27 My understanding of the value of equality closely traces definitions of equality in terms of the need to eradicate material disadvantage and structural inequality, while my understanding of dignity largely corresponds to the Constitutional Court's use of the term. My understanding of the value of democracy is explained in III(b) below.

28 My analysis of equality in terms of these three values resembles the typology of Sandra Fredman, who distinguishes between four dimensions of equality: equal dignity, the affirmation of status-based identities, redistribution, and rights of participation. S Fredman 'Redistribution and Recognition: Reconciling Inequalities' (2007) 23 *SAJHR* 214, 226–7. While Fredman's typology boasts greater refinement, I prefer the more robust three-way analysis, which is meant not as a typology of different equality claims but as an attempt to come to terms with the values underpinning the right to equality. Often, all three of these values will come into play in a given instance, although the weight accorded to each of them will shift according to the context.

29 M MacDonald *Why Race Matters in South Africa* (2006) 34–5 distinguishes between the establishment of white supremacy and the ideology of white superiority. Supremacy refers to power and was already established in the 17th century by means of the subordination of black people. Superiority, on the other hand, refers to intrinsic worth, and its opposite is inferiority. It was only in the 19th century that whites started to legitimate their supremacy with reference to white superiority. This distinction maps quite nicely onto the distinction between the economic and political subordination of black people, on the one hand, and the systematic denial of their inherent dignity and worth, on the other.

30 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) para 83; *Jaftha v Schoeman*; *Van Rooyen v Stoltz* 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) para 39. See also S Liebenberg 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 *SAJHR* 1 (drawing on the work of Martha Nussbaum to argue that respect for dignity requires society to create the material conditions needed to enable persons to develop and exercise their capabilities).

Similarly, systemic inequality is irreconcilable with the idea that individuals have inherent dignity and worth and that they are free to make their own choices, rather than having their choices severely circumscribed by virtue of being black, poor and/or female. Accordingly, a complex vision of equality views these two values as interdependent and mutually supportive. And yet, equality and dignity remain distinct constitutional values which bring different perspectives to bear on constitutional equality analysis. A complex understanding of equality asks how we can sharpen our analyses of discriminatory laws and practices by paying attention to the overlaps, convergences, intersections and conflicts between these values. It is interested in the constantly shifting relationship between equality and dignity, and acknowledges the need for an equality standard which is flexible enough to respond to – often subtle – changes in context.

A complex understanding of equality recognises, then, that different forms of discrimination may require different types of analysis. Discrimination on the grounds of sexual orientation can usually be expressed powerfully in the language of dignity, as discrimination against gays and lesbians is rooted in moral disapproval and results directly in an affront to their dignity and identity.³¹ Admittedly, material disadvantage can also come into play, as where partners in a permanent same-sex relationship are excluded from statutory benefits to which spouses are entitled,³² are denied the right of intestate succession,³³ or are excluded from the benefits and responsibilities flowing from marriage.³⁴ However, the harm is, in the majority of cases, status- rather than class-based.³⁵ And even where material disadvantage is at work, such disadvantage is secondary to – and further highlights – the denial of the dignity and moral citizenship of gays and lesbians.

By contrast, discrimination against women can often not be captured fully in terms of a dignity-based analysis. Such discrimination often results from a complex mix of facially neutral laws, material-structural inequality and

31 As Sachs J wrote in *NCGLLE v Minister of Justice* (note 6 above) para 128, with reference to an article by Edwin Cameron: '[P]recisely because neither power nor specific resource allocation are at issue, sexual orientation becomes a moral focus in our constitutional order. For this same reason, the question of dignity is in this context central to the question of equality'.

32 See *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC) (exclusion of permanent same-sex partners from benefits accruing to the spouses of judges held unconstitutional and cured by reading in).

33 *Gory v Kolver NO* 2007 (4) SA 97 (CC); 2007 (3) BCLR 249 (CC) (omission of permanent same-sex partners from s 1(1) of the Intestate Succession Act 81 of 1987 held unconstitutional and cured by reading in).

34 As stated in *Minister of Home Affairs v Fourie* (note 13 above): 'Marriage stabilises relationships by protecting the vulnerable partner and introducing equity and security into the relationship' (para 69). Moreover, marriage is an important 'source of socio-economic benefits such as the right to inheritance, medical insurance coverage, adoption, access to wrongful death claims, spousal benefits, bereavement leave, tax advantages and post-divorce rights' (para 70).

35 To invoke the terminology of N Fraser 'Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation' in Fraser & Honneth (note 25 above) 7. Fraser proposes a 'perspectival-dualist' approach which does not subsume all questions of justice under either a theory of recognition or a theory of redistribution, but which recognises the need for two distinct analytical perspectives. She treats class as the paradigm instance of the politics of redistribution, and sexual orientation as the paradigm case of the politics of recognition. See *ibid* 16–9.

cultural stereotypes, and may appear to be simply the result of private choice or ‘neutral’ market forces. For instance, women’s subordinate position in the job market results from a complex interplay of factors: tradition, the legacy of past laws which discriminated against women, the sexual division of labour, the fact that ‘women’s work’ is less valued in a capitalist economy, the intersections between institutionalised racism, sexism and economic class, etc. Put differently, gender inequality feeds on a rich diet of misrecognition and maldistribution, of sexual prejudice and female poverty, of status- and class-based distinctions.³⁶ And it is precisely the interplay between these dimensions that renders it invisible. Supposedly neutral cultural presuppositions – about choice, individual merit, marriage, the family home, etc – legitimate inequalities of wealth and power, and render invisible discrimination against prostitutes, unmarried partners in a permanent heterosexual relationship, etc. Conversely, sexist beliefs and attitudes are hidden by the supposedly neutral functioning of the market.³⁷ In short, gender discrimination is best detected and critiqued in terms of an approach which is acutely aware of the complex interplay between the moral-cultural and material dimensions of gender inequality.³⁸

- 36 Cf Fraser (note 35 above) 19–22. Fraser argues that gender is a hybrid category, as gender discrimination encompasses both misrecognition (status subordination) and maldistribution (class subordination). Here, misrecognition takes the form of the valuing of ‘masculine’ and devaluing of ‘feminine’ qualities, as well as of sexual assault, domestic violence, stereotypical depictions in the media, and the exclusion of women from public spheres. Maldistribution refers to the ways in which gender structures, for instance, ‘the fundamental division between paid “productive” labor and unpaid “reproductive” and domestic labor’. Ibid 20. Of course, the same holds for many other forms of discrimination. Even poverty, the paradigm case of class-based discrimination, involves multiple and intersecting strands of disadvantage. Material disadvantage, structural features of the economy like the urban/rural divide, societal prejudice and bureaucratic ineptitude combine with race, gender, HIV/AIDS and other markers of disadvantage to keep the poor locked in poverty.
- 37 See A Honneth ‘Redistribution as Recognition: A Response to Nancy Fraser’ in Fraser & Honneth (note 25 above) 110. Honneth points out that capitalism is not value-free: in capitalist societies, the ‘normative reference point’ for measuring individual achievement is ‘the economic activity of the independent, middle-class, male bourgeois’. Ibid 141. Distributive conflicts often take the form of struggles over the justice of prevailing criteria for measuring individual achievement as, for instance, when women challenge the devaluing of domestic and reproductive labour.
- 38 Whether dignity can provide an overarching conceptual framework capable of detecting and responding to such a complex mix of status-based and class-based discrimination remains a controversial issue. While some political philosophers like Honneth (note 37 above) believe that distributive conflicts can be subsumed under a politics of recognition, others like Fraser (note 35 above) argue for a two-dimensional approach. Even assuming that a dignity-based approach can be made sufficiently attentive to the complex interplay between status-based and class-based disadvantage, the Constitutional Court’s record in the areas of discrimination on the grounds of sex, gender and marital status provides some reason for caution. In the cases discussed under IV(a) below, the Court failed to pay sufficient attention to the overlap between misrecognition, material and structural inequality, and political marginalisation. While the dissenting judgments in these cases suggest that a dignity-based approach can be made responsive to overlapping and intertwining forms of disadvantage, it needs to be asked whether the complacency of the majority judgments was not reinforced by the focus of the dignity-based approach on moral harm. The majority in these cases ascribed the disadvantage to prostitutes and cohabitants to their own choice and judged their claims in terms of conventional attitudes to sexuality and marriage. The focus on moral harm seems to have obscured the structural nature of the disadvantage and facilitated the moralistic turn in the judgments. It is my contention that a pluralistic approach would have made it more difficult for these assumptions about choice, sex and marriage to go unexamined.

However, a complex understanding of equality resists the conclusion that different grounds of discrimination (for example, discrimination on the grounds of race, gender and sexual orientation) can each be assigned a particular standard or test, based on the particular mix of status- and class-based discrimination it involves. Such a conclusion would negate the variety of contexts within which claims of unfair discrimination arise, and ignore the complex ways in which different grounds of discrimination overlap and intersect. What is required, instead, is an appreciation of the complex relationship between the different principles and factors relevant to the determination of unfair discrimination and the variety of contexts within which they may apply. These contexts include not only the grounds of discrimination relied upon, but also the concrete life experiences of those affected, the intersectional nature of disadvantage,³⁹ the nature of the applicants' complaint (for example, whether they complain of unequal treatment or a failure to grant them an exemption from a general legal rule), and the different considerations that may be applicable in different spheres, such as education, employment, welfare and citizenship.⁴⁰

(b) Equality and democracy

Democracy is mostly taken to refer to institutional arrangements and the right to vote and is usually not linked to the right to equality. However, I take democracy to refer to something more than the representation of the electorate in legislative assemblies or, even, their right to participate in decision-making processes which affect them. Instead, my use of the term derives from Hannah Arendt's view of plurality as the *conditio sine qua non* and *conditio per quam* of democratic politics.⁴¹ For Arendt, political action presupposes an agonistic public sphere in which unique individuals reveal themselves in speech and action and thus insert themselves into the human world. Plurality is possible only among equal citizens; at the same

39 This refers both to the ways in which economic disadvantage, political invisibility and moral stigma intersect to constitute relations of domination, and the ways in which patterns of subordination, such as racism, sexism and poverty intersect to subordinate black or poor women (or poor black women) in ways experienced neither by white women or black men. See KW Crenshaw 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' in Crenshaw et al (eds) *Critical Race Theory: The Key Writings that Formed the Movement* (1995) 357. But see also J Conaghan 'Intersectionality and UK Equality Initiatives' (2007) 23 SAJHR 317 on the limits of intersectionality analysis.

40 See M Walzer *Spheres of Justice: A Defense of Pluralism and Equality* (1983).

41 H Arendt *The Human Condition* (1958) 7. Arendt's views on plurality and the public sphere have had a profound influence on critical legal thought in South Africa. See for example AJ van der Walt 'Un-Doing Things with Words: The Colonisation of the Public Sphere by Private-Property Discourse' in G Bradfield & D van der Merwe (eds) *'Meaning' in Legal Interpretation* (1998) 235; W le Roux 'From Acropolis to Metropolis: The new Constitutional Court Building and South African Street Democracy' (2001) 16 SA Public Law 139; K van Marle 'Lives of Action, Thinking and Revolt – A Feminist Call for Politics and Becoming in Post-Apartheid South Africa' (2004) 19 SA Public Law 605; J van der Walt *Law and Sacrifice: Towards a Post-Apartheid Theory of Law* (2005); J Barnard 'Totalitarianism, (Same-Sex) Marriage and Democratic Politics in Post-Apartheid South Africa' (2007) 23 SAJHR 500.

time, however, it is premised upon the unique distinctness of every citizen, as revealed through speech and action.⁴² Political action, on Arendt's understanding, is intimately connected to the human capacity of making new and unexpected beginnings. And this possibility of new beginnings inheres in human plurality – in the uniqueness of every human being who comes into the world.⁴³

My understanding of democracy draws further upon Claude Lefort's insight that, in modern democratic societies, the locus of power has become 'an empty place' which cannot be occupied. According to Lefort, democracy is characterised by the 'dissolution of the markers of certainty' and the 'institutionalization of conflict'.⁴⁴ Democracy, on this understanding, is marked by the lack of an organic unity or single authoritative standpoint. It is, moreover, inconsistent with the monopolisation of power by any particular group or constellation of interests and depends on political division, social dissent and at least some measure of uncertainty for its continued existence and vitality.⁴⁵

The value of democracy overlaps with those of equality and dignity. Measures which are based upon harmful stereotypes or which further entrench the disadvantaged position of a particular social group are clearly inconsistent with a form of democracy which is characterised by plurality and dissent. The idea of structural power – private power and disadvantage which have solidified to such an extent that they have become part of the very structure of society – is abhorrent to the idea that there should be no permanent group of winners or losers in a democracy – that in a democratic society power is an empty place and is exercised by everyone and by no one. In a society characterised by pervasive structural inequality, private wealth and privilege determine access to the means of political power. Such a society thus lacks the most basic differentiation between the public and private spheres and, as Johan van der Walt has argued forcefully, resembles feudalism rather than a pluralistic democracy.⁴⁶

There is also a special affinity between a dignity-based understanding of equality and a vision of democracy which is concerned with plurality and

42 'Plurality is the condition of human action because we are all the same, that is, human, in such a way that nobody is ever the same as anyone else who ever lived, lives, or will live'. Arendt (note 41 above) 8. See also *ibid* 176.

43 See Arendt (note 41 above) 8–9, 177–8, 247.

44 C Lefort *Democracy and Political Theory* (1988) 17, 19. See also Lefort *The Political Forms of Modern Society: Bureaucracy, Democracy, Totalitarianism* (1986) 302–6.

45 Writing from a very different political tradition, Adam Habib reaches similar conclusions. Following political theorists like Robert Dahl and Andreas Schedler, Habib argues that substantive political uncertainty resulting from social mobilisation, extra-institutional action and elite contestation is the essence of democracy. He calls for a number of structural reforms that would institutionalise greater substantive uncertainty. Apart from electoral reform, the establishment of a competitive political system and the erosion of corporatist institutions, he also identifies the 'emergence of an independent, robust civil society' as a means of making political elites 'more responsive to the concerns of poor and marginalized citizens'. A Habib 'South Africa: Conceptualizing a Politics of Human-Oriented Development', <<http://www.iis.ucr.ac.cr/tallerclaco/ponencias/paper-Habib.pdf>>.

46 Van der Walt *Law and Sacrifice* (note 41 above) Chapter 2.

a heterogeneous public sphere.⁴⁷ South Africa's history serves as a stark reminder that dignity is violated where a particular group of citizens are excluded from the right to vote or are in any other way reduced to objects of the political process, instead of being treated as citizens who are capable of self-determination.⁴⁸ Such groups are excluded from a political community based on mutual recognition, and are thus denied the right to exercise their autonomy and to shape their own identities in communication with others. By the same token, plurality is destroyed when we assimilate the other to the self, when we treat the other as an extension of the self or as a means to our own ends. Groups or classes of persons who are discriminated against on the basis of innate characteristics or intimate choices do not only experience an impairment of their private autonomy – their public autonomy as citizens is also violated.⁴⁹ The isolation and fear which result from the deprivation of private freedom and the destruction of intimacy – whether through pass laws,⁵⁰ homelessness⁵¹ or the suppression and stigmatisation of certain forms of sexuality⁵² – must of necessity also make serious inroads into public autonomy. By denying members of marginal groups a space in which they can freely develop their identities and nurture relationships with others, society also deprives itself of its capacity for making new and unexpected beginnings – a capacity,

47 See P Häberle 'Die Menschenwürde als Grundlage der staatlichen Gemeinschaft' in J Isensee & P Kirchhof (eds) *Handbuch des Staatsrechts* 3 ed (2004) 317, 350–3.

48 As MacDonald (note 29 above) 47 writes of the racialisation of citizenship under apartheid: 'Whites valued citizenship for expressive (as well as instrumental) reasons. Expressively, it blessed them with the experiencing of belonging, validating their feeling that the country was theirs ... European manners and customs were adopted and flourished; African ways were snubbed, despised, and invoked as proof of white superiority'. See also *August v Electoral Commission* 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC) para 17 ('The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity'); *Minister of Home Affairs v NICRO* 2004 (5) BCLR 445 (CC) para 28.

49 See J Habermas 'Struggles for Recognition in the Democratic Constitutional State' in C Taylor *Multiculturalism: Examining the Politics of Recognition* (1994) 107, 110–6 on the intimate connection between our private autonomy as individuals and our public autonomy as citizens.

50 One of the characters in Njabulo Ndebele's novel *The Cry of Winnie Mandela* (2003) 69 recalls the agonies of travel in the apartheid era: 'Space was no longer the sense of dimension beyond the self; it had become claustrophobia of the self; the self whose existence could be challenged at any moment in any form. Travel through the landscape of apartheid was prolonged personal risk and vulnerability'.

51 See, on the complex relationship between private property and the public realm, AJ van der Walt (note 41 above); 'The Public Aspect of Private Property' (2004) 19 *SA Public Law* 676; and 'Enclosed Property and Public Streets' (2006) 21 *SA Public Law* 3. Van der Walt is interested in the ways in which boundaries between the public and private not only shield a sphere of intimacy from public visibility, but also thereby facilitate democratic-public exchange and debate. He is, however, critical of absolutist and exclusivist conceptions of property which negate the inter-relatedness of the public and private, and reduce the public interest simply to the sum of private interests.

52 See Barnard (note 41 above) for an Arendtian analysis of the totalitarian tendencies in the South African debates on same-sex marriage.

as we have seen with reference to Arendt, which depends on plurality and irreducible difference.⁵³

Democracy, so conceived, already plays a role in the Constitutional Court's jurisprudence in the areas of sexual orientation and religious and cultural difference. That the Court understands the rights of gays and lesbians to dignity and equality to be closely connected to a plural democracy is evident from the emphasis placed on their citizenship. The Court in the sodomy case not only emphasised the status of gays as a political minority with little leverage in the legislative process,⁵⁴ but also stressed how the prohibition of consensual sex between males reinforces social prejudice and thus makes it more difficult for gays fully to participate in public life. The fear and shame induced by legally sanctioned social prejudice inhibits gays from 'coming out' and from voicing some of their deepest fears and concerns in public. In the words of Sachs J:

In the case of gays, history and experience teach us that the scarring comes not from poverty or powerless, but from invisibility. It is the tainting of desire, it is the attribution of perversity and shame to spontaneous bodily affection, it is the prohibition of the expression of love, it is the denial of full moral citizenship in society because you are what you are, that impinges on the dignity and self-worth of a group.⁵⁵

Closely linked to the moral and social citizenship of gays and lesbians is a second theme: that the Constitution recognises and affirms the rich diversity of forms of intimate associations and family relations to be found in South Africa. In the view of the Court, dignity, equality and moral citizenship require more than simply tolerating those who are different. There is something demeaning about traditional views of same-sex desire as something deviant which will always fall short of the heterosexual norm. Far from requiring conformity to the majority's perceptions of what is sexually 'normal', the Constitution celebrates diversity and refuses to measure difference in relation to some dominant norm:

What becomes normal in an open society, then, is not an imposed and standardised form of behaviour that refuses to acknowledge difference, but the acceptance of the principle of difference itself, which accepts the variability of human behaviour.⁵⁶

The Court also regularly emphasises the multitude of family relations to be found in South Africa. In the *Fourie* judgment, which affirmed the right of

53 See further, on the affinity between dignity and democracy, WE Connolly *Identity/Difference: Democratic Negotiations of Political Paradox* (1991) x ('one significant way to support human dignity is to cultivate agonistic respect between interlocking and contending constituencies'); SC Rockefeller 'Comment' in C Taylor *Multiculturalism: Examining the Politics of Recognition* (1994) 87 (linking the idea of equal dignity to a polity which is characterised by respect for diversity and ongoing questioning and transformation); J van der Walt *tangible mais intouchable, la lois du tact, la loi de la loi: The Future and Futurity of the Public-Private Distinction in View of the Horizontal Application of Fundamental Rights* (2000) (rethinking the public interest in terms of a non-normative dignity which allows for the possibility of more than one person coming together without destroying the singularity of the other or the self).

54 *NCGLE v Minister of Justice* (note 6 above) para 25.

55 *Ibid* para 127.

56 *Ibid* para 134. Cf also para 22 ('The desire for equality is not a hope for the elimination of all differences').

gay and lesbian couples to get married, the Court expressly linked the right to be different to an active notion of citizenship:

The acknowledgment and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation. Accordingly, what is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect.⁵⁷

The toleration of sexual difference, in the Court's view, is not simply about the right of gays and lesbians to be left alone in the privacy of their own homes. It is, more fundamentally, a right to public recognition – the right to equal recognition of their identities and relationships.⁵⁸ Such public recognition is fundamental not only to respect for their basic human dignity, but also to the type of society envisaged by the Constitution. Here, the diversity of the nation, both in respect of their sexuality and the ways their family relations are constituted, is seen as a source of public vitality and strength.⁵⁹

The Court also stressed the right to be different and the state's obligation to act positively to accommodate diversity in cases dealing with discrimination against members of a particular religion or with claims for religious- or culture-based exemptions from general legal rules.⁶⁰ Consider, for instance, the following dictum of Sachs J in his dissent in *Prince*, in which Rastafarians claimed a religious exemption from the ban on the possession and use of cannabis:

[F]aith and public interest overlap and intertwine in the need to protect tolerance as a constitutional virtue and respect for diversity and openness as a constitutional principle. Religious tolerance is accordingly not only important to those individuals who are saved from having to make excruciating choices between their beliefs and the law. It is deeply meaningful to all of us because religion and belief matter, and because living in an open society matters.⁶¹

For Sachs J, freedom of belief and the freedom to express such belief are fundamental not only to the freedom and dignity of the believers concerned, but also to the diversity and openness that are the lifeblood of a democracy. Democracy, Sachs J seems to be saying, presupposes the capability of marginalised and vulnerable minorities to challenge the normative closure into which

57 *Fourie* (note 13 above) para 60.

58 *Ibid* para 78.

59 See *ibid* paras 60, 61.

60 In *MEC for Education: KwaZulu-Natal v Pillay* 2008 (2) BCLR 99 (CC), the Court held that the refusal of a public school to grant an exemption from a ban on the wearing of jewellery to a Hindu learner wearing a nose stud, constituted unfair discrimination on the grounds of religion and culture. See in particular paras 65 (constitutional commitment to diversity), 71–9 (constitutional demand to take reasonable positive steps to accommodate difference).

61 *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC); 2002 (3) BCLR 231 (CC) para 170.

political communities tend to lapse. A political community can only remain free if it values plurality and difference, and allows out-groups to disturb and to challenge deeply held majoritarian beliefs and practices.⁶² For this reason, the critical challenge for our constitutional democracy consists ‘not in accepting what is familiar and easily accommodated, but in giving reasonable space to what is “unusual, bizarre or even threatening”’.⁶³

Thirdly, respect for everyone’s dignity, moral citizenship and right to be different requires consultative and participatory processes in which those affected are given the opportunity to voice their concerns and to participate in the search for an accommodation of conflicting rights and interests. The Constitutional Court has stressed the constitutional obligation of the state to facilitate public participation in the lawmaking process.⁶⁴ It has also required the state to engage meaningfully with occupiers against whom an eviction order is sought, stating that the occupiers must be treated as ‘individual bearer[s] of rights entitled to respect for [their] dignity’, rather than as ‘faceless and anonymous squatters automatically to be expelled as obnoxious social nuisances’.⁶⁵ Again, the values of dignity, equality and democracy converge, requiring public authorities not only to attend to the material need and social displacement experienced by individuals and communities who are about to be evicted, but to do so through consultative processes which treat individuals as ends in themselves, rather than as mere objects of bureaucratic power. Similarly, the Court has emphasised the importance of consultation and dialogue in mediating and accommodating religious and cultural difference. The idea of a ‘reasonable accommodation’ of interests is meant to convey the mutual recognition and willingness to engage in public dialogue which is required of the parties.⁶⁶ The Court has, however, pointed out that extensive public consultation and participation do not immunise decisions from judicial review, and that the courts should still engage in a proportionality exercise in determining whether the public authority has gone far enough in

62 Ibid para 147 (‘practical inconvenience and disturbance of established majoritarian mind-sets are the price that constitutionalism exacts from government’).

63 Ibid para 172.

64 See *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) (two statutes declared unconstitutional because of the failure of the National Council of Provinces to facilitate public involvement); *Matatiele Municipality v President of the RSA* 2007 (1) BCLR 47 (CC) (constitutional amendment redrawing a provincial boundary held unconstitutional because of the failure of the provincial legislature of KwaZulu-Natal to facilitate public involvement).

65 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) para 41. See also paras 39–47 (extolling the virtues of – compulsory – mediation in trying to resolve disputes about evictions); *Government of the Republic of South Africa v Grootboom* (note 30 above) paras 83–4, 88; *Occupiers of 51 Olivia Road, Berea Township v City of Johannesburg* 2008 (5) BCLR 475 (CC) paras 9–23 (giving reasons for the Court’s earlier interim order requiring the parties first to engage with each other and to report back to the Court on the outcome of their engagement, and insisting that the absence of meaningful engagement would ordinarily weigh heavily against granting an ejection order).

66 See *Prince* (note 61 above) paras 146–9, 155–6, 162, 170; *Pillay* (note 60 above) paras 71–83. See also the dissent of O’Regan J in *Pillay* (paras 174, 177, 182) on the importance of consultation and dialogue in accommodating diverse cultures.

accommodating minority viewpoints and practices. This is so because many communities ‘retain historically unequal power relations’ which make it less likely that disfavoured groups will receive a fair deal,⁶⁷ and presumably also because there is no guarantee that the voices of the most vulnerable members of those groups will be heard.⁶⁸

(c) Evaluation

A complex understanding of equality recognises that inequality comes in many different shapes and guises. Inequality may take the form of material disadvantage and/or a failure to recognise the equal dignity and worth of a particular group or class of persons. It also overlaps with the political marginalisation and silencing of vulnerable groups. A complex understanding of equality thus resists reductionist views of equality, insists that constitutional equality discourse must be conversant with the languages of both recognition and redistribution, and claims that different forms of discrimination may require different modes of analysis, depending on the context.

A complex understanding of equality has several advantages. In the first place, it makes sense of s 39(1)’s injunction to interpret the rights in the Bill of Rights in view of the values underlying an open and democratic society based on human dignity, equality and freedom.⁶⁹ Inviting us to articulate some of our most important constitutional commitments with each other – such as democracy and dignity, public and private autonomy, and collective and individual self-realisation – it promises a more holistic constitutional jurisprudence which avoids a simplistic opposition between individual rights and the public interest.⁷⁰

67 *Pillay* (note 60 above) para 83.

68 In *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC), in which a ban on corporal punishment in schools was (unsuccessfully) challenged on the ground that it violated the rights of parents of children in independent Christian schools, the Court regretted the fact that the voices of the children were not heard and that a curator ad litem was not appointed to represent their interests (para 53). Similar issues were raised in *Pillay* (note 60 above). However, the Court found that the failure of the 15-year-old learner to testify was not fatal to her case (paras 55–7, 177).

69 It may be objected that the above account emphasises only three of the five values enumerated in s 39(1). However, it should be clear that the remaining two values – freedom and openness – are also implied. Freedom is closely bound up both with dignity (the right of the individual freely to choose her own ends) and a pluralistic democracy in which oppositional counter-publics can draw upon various freedom rights (freedom of religion, expression, association, etc) to contest majoritarian beliefs and mindsets. Moreover, the form of democracy advanced above is par excellence an open democracy which is bent on avoiding normative and institutional closure. See *Ferreira v Levin NO* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) para 49 (‘Human dignity has little value without freedom; for without freedom personal development and fulfillment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity’); *Pillay* (note 60 above) para 63 (values of dignity, equality and freedom ‘enhance and reinforce each other’); Woolman (note 15 above) 36–6 to 36–19 (analysing different dimensions of dignity, including dignity as self-governance); S Woolman & H Botha ‘Limitations’ in S Woolman et al (note 15 above) 34–113 to 34–127 (analysing the relationship between dignity, equality and the notion of an open and democratic society).

70 See H Botha ‘Transforming State and Society: From the Public/Private Dichotomy to Mutual Cooperation and Destabilisation’ in G van der Schyff (ed) *Constitutionalism in the Netherlands and South Africa* (2008) 207.

Secondly, a complex understanding of equality is likely to result in a nuanced approach which can detect and interrogate subtle forms of discrimination which lie at the intersections of misrecognition, material disadvantage and political marginalisation. And thirdly, a complex understanding of equality resists the assimilation of difference to sameness precisely because it emphasises plurality and dissent. On the one hand, it recognises the capacity of out-groups to challenge dominant norms and beliefs, while on the other it resists the assumption that vulnerable groups represent homogenous social groups with stable identities. Even though it acknowledges that members of disadvantaged groups are likely to have certain experiences, outlooks and worldviews in common which deviate from dominant, middle-class sensibilities, it recognises that the relevant social identities are themselves contested. Like society at large, religious and cultural minorities are also subject to challenges to received norms and interpretations from within.

The Constitutional Court's jurisprudence has not always lived up to the promise of a complex understanding of equality. In the first place, the Court has, particularly in relation to discrimination based on sex, gender and marital status, not been sufficiently attentive to the overlap between status-based distinctions and class-based disadvantage. Discrimination which is deeply rooted in systemic inequality has sometimes been construed as simply the product of the complainants' own choice. Secondly, the Court has failed, outside the contexts of sexual orientation and religious and cultural difference, to have proper regard to notions of democratic plurality and citizenship. And thirdly, it has modelled citizenship and difference on an idealised and romanticised vision of the outsider who, despite differences in outside appearance, religious or cultural background or sexual orientation, is actually not that different from us.⁷¹ The result has been to sideline the democratic struggles of those who do not conform to the Court's idealisations, and to circumscribe the scope for 'legitimate' difference among those groups who purportedly do.

The capacity of a complex understanding of equality to detect and respond to inequality in its various forms and guises and to facilitate a pluralistic democracy in which dominant mindsets and viewpoints are open to continuous disruption and challenge, depends to a significant extent on the way we deal with and construct difference. In the next section I explore some of the pitfalls and begin to develop a more radical understanding of difference.

IV DILEMMAS OF DIFFERENCE⁷²

(a) Normalising pressures: sex, marriage, family

Despite the broadly transformative nature of the Constitutional Court's equality jurisprudence, despite its careful attention to the social and historical context and despite its celebration of difference, some of the Court's decisions

71 See IV(a) below.

72 The phrase 'dilemma of difference' was coined by M Minow *Making all the Difference: Inclusion, Exclusion, and American Law* (1990).

in the areas of sex, gender and marital status display a worrying tendency to downplay the impact of discriminatory measures, to ignore the particularity of the needs and circumstances of those affected, and/or to reify difference. These cases raise concerns over the law's reductionism – its tendency to reduce the particularity and materiality of people's lives to what Karin van Marle terms a 'comfortable difference'.⁷³ Difference tends to be used in a complacent manner, as if the differences among individuals can be reduced to broad social categories such as race, gender or sexual orientation. Ironically, this construction of difference often negates difference and reduces it to sameness, as it starts from the baseline of cultural norms and presuppositions which are rooted in the worldview and experience of a middle-class and professional elite which is still predominantly white (or at least 'westernised') and male. What is disturbing about these judgments is their failure to challenge conventional understandings of marriage, sexuality, choice and consent – understandings which fail to take account of the lived reality of women – and men – whose occupation or lifestyle does not conform to dominant social norms.

In *Hugo*⁷⁴ the exclusion of imprisoned fathers from a presidential pardon was found not to constitute unfair discrimination on the grounds of sex and gender. The Court recognised that the pardon perpetuated some of the root causes of gender inequality such as the gendered division of labour and the stereotype of mothers as (primary) caretakers, but nevertheless found that the discrimination did not impair the dignity or equal worth of imprisoned fathers and, accordingly, was not unfair. It thus missed out on a valuable opportunity to challenge reified understandings of gender roles which tend to keep women locked in a position of subordination and which prevent women and men from re-imagining their identities.⁷⁵

In *Jordan*⁷⁶ and *Robinson*,⁷⁷ as in *Hugo*, the Court failed to take sufficient account of material and structural inequality and missed critical opportunities for allowing marginal social groups to challenge dominant norms. Where *Hugo* illustrates the dangers of gender essentialism, *Jordan* and *Robinson* are paradigmatic of the strong hold of conventional understandings of sexuality and marriage on the constitutional imagination. Despite the Court's proclaimed commitment to the recognition of multiple sexual identities and family formations, the Court in these cases failed to consider the possibility that conventional views on sexuality and marriage may themselves be at the root of subordination and the suppression of difference. In *Jordan*, the majority held that a statute criminalising the conduct of the prostitute but not that of

73 Van Marle 2000 *THRHR* (note 21 above) 600.

74 *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC).

75 Van Marle argues that the judgment rests upon an instrumental vision of transformation. History is seen in linear terms as the transition from an apartheid past to an end goal which has been specified in advance – and all that remains is to find the correct strategy to achieve that goal. This understanding blinds us to the contested nature of historical understanding and precludes alternative visions of the future. Van Marle 2000 *THRHR* (note 21 above) 599–600.

76 *Jordan v S* 2002 (6) SA 642 (CC); 2002 (11) BCLR 1117 (CC).

77 *Volks NO v Robinson* 2005 (5) BCLR 446 (CC).

the client was gender neutral and that the stigma suffered by prostitutes was the result of their own choice. Its judgment ignored the vastly disproportionate impact of the differentiation on women and, unlike the dissenting judgment of O'Regan and Sachs JJ, failed to situate the disadvantage to sex workers within the context of women's subordination, the dire financial need confronting many women (and men) who turn to prostitution, and sexual stereotyping and double standards.

The discrimination involved in the criminalisation of prostitution consisted not only in the way the law sustained structural inequality and violated the dignity of prostitutes but also in the way it prevented oppositional ideas from entering mainstream public discourse.⁷⁸ By adhering uncritically to conventional understandings of what constitutes 'normal' sexual relations, the Court failed to engage with material and structural disadvantage, assimilated the claims of prostitutes to middle-class social norms and expectations, and denied them the 'psychic, political and ethical space' within which they can develop an own autonomous identity.⁷⁹ It also failed to treat sex workers as citizens who can enrich public dialogue by challenging conventional understandings of choice, consent and 'normal' sexual relations. Instead of encouraging the emergence of 'counter-publics'⁸⁰ which are able to develop oppositional ideas on sexuality and choice, the majority effectively drove them underground by portraying their sexuality as aberrant and their plight as exceptional and the product of their own choice.

The reasoning of the majority in *Robinson* was similarly disappointing. In this case, the exclusion of permanent life partners from benefits under the Maintenance of Surviving Spouses Act was found not to infringe their rights to equality and dignity. In reaching its decision, the majority emphasised the importance of the institution of marriage and argued that an extension of the benefits of the Act to unmarried partners would interfere with their freedom of choice. Despite conceding that many of the women in permanent heterosexual partnerships 'are economically dependent on men and are left destitute and suffer hardships on the death of their male partners',⁸¹ the majority insisted that there is no legal impediment to their getting married, that they are free to leave each other sums of money in their respective wills, and that the disadvantage felt by vulnerable partners can only be cured by a more comprehensive legislative response. The responsibility for addressing the disadvantage was thus shifted onto the legislature and the parties themselves.

The rhetoric of choice which is employed here is problematic given the structural nature of the disadvantage. Clinging to abstract notions of free choice, the majority failed to situate its analysis within the context of the

78 See Botha (note 11 above) 745–6.

79 D Cornell *At the Heart of Freedom: Feminism, Sex, and Equality* (1998) 58.

80 The term 'oppositional counter-publics' is borrowed from K Thomas 'Racial Justice' in A Sarat et al (eds) *Looking Back at Law's Century* (2002) 78.

81 *Volks NO v Robinson* (note 77 above) para 63.

vulnerability and material need of surviving partners.⁸² It also failed to see that their exclusion from the benefits in terms of the Act violates the dignity of cohabitants by denying their capacity to enter into responsible, caring and durable relationships. The Court's failure to challenge the stigmatisation of unmarried partners belied its own commitment to the recognition of a diversity of family formations. Its vision of a more inclusive legal regime which respects the diversity of ways in which families are constituted turned out in the end to be rooted in a conception of marriage which, despite being elastic enough to extend to same-sex couples, is nevertheless modelled on a conventional picture of (heterosexual) marriage.

This raises questions about the depth of the Court's commitment to the recognition of sexual and familial difference. Pierre de Vos argues, on the basis of an analysis of the litigation strategy of the National Coalition for Gay and Lesbian Equality and of the Court's jurisprudence in the area of sexual orientation, that

acceptance, true acceptance, only comes to those who wish to make or have the power to make a choice in favour of 'normality' – even though, given the economic, social or cultural position of individuals, this 'choice' might not be open to all. The right to be different then runs the risk of becoming an empty slogan. One might even argue that it becomes merely the right not to be a heterosexual – as long as one conforms to the image of the idealised imaginary heterosexual.⁸³

Ruthann Robson similarly argues that gays and lesbians have been fashioned into 'model sexual minorities' who are presumed to be "just like" the sexual majority' or rather, who have come to 'embody an ideal and romanticized version of [heterosexual] sexuality and relationships'.⁸⁴ This idealised picture has made it easier for gays and lesbians to be accommodated in areas that used to be the preserve of married, heterosexual couples. These victories have, however, come at a price. A 'false unitary community' has been imposed on gays and lesbians,⁸⁵ resulting in a denial of the vast differences among the individuals comprising this disparate group. The result has been to brand difference illegitimate and to turn the struggle for gay and lesbian equality into an elitist project. Only those who conform to the image of the ideal heterosexual (ie those in permanent, stable relationships based on reciprocal support and involving a joint household) have access to the full gamut of constitutional rights that have been won through constitutional litigation. The disadvantage suffered by those who resist assimilation into the mainstream or whose choices are severely restricted, due to poverty or cultural and social prejudice, is viewed simply as the product of their own choice.

82 The two dissenting judgments, one authored by Mokgoro & O'Regan JJ and the other by Sachs J, show far greater sensitivity to the context of economic deprivation and unequal power relations.

83 P de Vos 'The "Inevitability" of Same-Sex Marriage in South Africa's Post-Apartheid State' (2007) 23 *SAJHR* 432, 457.

84 R Robson 'Sexual Democracy' (2007) 23 *SAJHR* 409, 420.

85 *Ibid* 431.

(b) The banality of race⁸⁶

That the racial categorisations of the apartheid era still provide the blueprint for official definitions of race is evident from legislation such as the Employment Equity Act.⁸⁷ Census forms and a myriad other official documents and bureaucratic procedures confirm the impression that, despite the repeal of the Population Registration Act,⁸⁸ the classification of all South Africans into distinct racial groups is still accepted as a given.⁸⁹ The continued reliance on apartheid-time definitions of race tends to be justified by the belief that race in South Africa is largely coterminous with class and that s 9(2)'s injunction to redress past disadvantage is, above all, a call to remedy the effects of past racism.

There is something deeply ironic about the way in which the 'ordinariness' of racial distinctions and identities is affirmed by the post-apartheid state. Apartheid relied precisely upon the capacity of the state to present racial differences as self-evident social facts. The reason why, today, the existence of different race groups with distinct cultural identities is viewed as so self-evident that it is hardly in need of any reflection, has to do with the institutionalisation and sedimentation of racial identities through politics. This was done by racialising citizenship, by making colour the basis of the political community, by dividing urban spaces – and the country as a whole – along racial lines, and by legally instituting a comprehensive system of bureaucratic control designed to police the boundaries between racial groups.⁹⁰ Racial division became such an integral part of everyday life that race was turned into a 'natural' and seemingly immutable feature of the South African landscape.⁹¹

86 The title is taken from G Maré 'Race Counts in Contemporary South Africa: "An Illusion of Ordinariness"' (2001) *Transformation* 75, 76, who refers to 'the banality of race confirmation'. Thanks to Ockert Dupper for this reference and for numerous conversations on the topic. My understanding of the problems relating to racial redress has also benefited from Dupper's inaugural lecture, titled 'Affirmative Action: Who, How, and How Much?', held at the University of Stellenbosch on 17 April 2008. See 'Affirmative Action: Who, How and How Long?' (2008) 24 SAJHR 425.

87 55 of 1998. Chapter III of the Act requires employers to implement affirmative action measures for members of designated groups. In terms of the definition in s 1, 'designated groups' refer to black people, women and people with disabilities. 'Black people', in turn, is used as a generic term which includes Africans, coloureds and Indians.

88 30 of 1950. In terms of s 5 of the Act, all South Africans were classified as either 'white', 'native' or 'coloured'. In terms of Proclamation 46 of 1959, the coloured group was subdivided into 'Cape Coloured, Cape Malay, Griqua, Indian, Chinese and other Asiatic and other Coloured'. The Act was repealed by the Population Registration Repeal Act 114 of 1991.

89 See Maré (note 86 above).

90 For many centuries in South Africa, loyalties based on race had to contend with competing loyalties based on language, ethnicity, religion and levels of civilisation. Prior to the arrival of the British settlers, there was no need for a 'white' racial identity, as 'whites' were bound together by a shared culture and ethnicity. This changed when their cultural homogeneity came to an end. As Michael MacDonald shows, the idea of a united white race only really started taking root in the aftermath of the Anglo-Boer War. The white race, according to MacDonald (note 29 above) 44, was fashioned not on the basis of a common culture and ethnicity, but 'precisely because of ethno-cultural differences' (emphasis in the original).

91 See D Posel 'What's in a Name? Racial Categorisations under Apartheid and their Afterlife' (2001) 47 *Transformation* 50; Maré (note 86 above) for analyses of the processes through which racial identities came to be regarded as basic, irrefutable facts of life under apartheid.

What became hidden from view were precisely the political construction of racial identities and the contradictions inherent in the system of institutionalised racism.⁹² Today, continued state reliance on the racial categories of the apartheid era does little to challenge the crude, ‘common-sense’ view which equates race with biological attributes and uses it as a basis for making cultural generalisations. If we believe that race is a social construct – and a potentially divisive and harmful one at that – we may need to look at finding ways of remedying the effects of past racism which do not perpetuate crude bio-cultural conceptions of race.

The assumption that race and class are coterminous has also been challenged. Economists and political scientists have shown how apartheid, through the system of influx control, created an ‘insider’ class of urban blacks who had access to employment opportunities, better education and social capital, while relegating the majority of black people to the homelands where they were deprived of economic opportunity and condemned to a life of poverty.⁹³ It is mainly the former group which has benefited from race-based redress – the latter group is still locked in a spiral of poverty and inferior education. Of course, these findings do not detract from the severe discrimination to which black people in general have been subjected, nor do they change the basic fact that whites still own a vastly disproportionate share of the country’s wealth and resources. However, they do suggest that racially based forms of redress are a blunt instrument for remedying past disadvantage, and raise concerns about the tendency of race-conscious measures to legitimate inequality. Identity politics, as Michael MacDonald argues, has been embraced as an alternative to a more broad-based economic redistribution. It is assumed that all black people benefit when some of them join the capitalist elite. This assumption of an identity of interest of all black people serves to legitimate the exclusion of the majority of blacks from sharing in the benefits of redistribution and stifles political dissent.⁹⁴ MacDonald is scathing in his critique of the government’s recourse to a culturalist conception of race. He writes:

The main victims of the emphasis on symbolic representation, contra white liberals, are not those who do not see themselves in the persons of the elites, but those diverted by the razzle-dazzle of culturalist representation, those locked by the ‘ethnic census’ into voting for parties that have little incentive to court them with substantive appeals. The political economy defines the poor out of prosperity; culturalism eases them out of representation.⁹⁵

Concerns about the tendency of race-based measures to reinforce racial categories and to legitimate inequality have given rise to proposals for class-

92 Racial policies had to forge political unity and solidarity among the two dominant white ethno-cultural groups in South Africa. At the same time, however, they had to prevent a common ‘black’ identity from taking hold. One of the greatest contradictions characterising apartheid was the way in which it racialised every aspect of social life, and yet sought to de-emphasise black people’s race by privileging their ethnic identities. See MacDonald (note 29 above) 66.

93 See J Seekings & N Nattrass *Class, Race, and Inequality in South Africa* (2005) for a detailed analysis of these findings.

94 See MacDonald (note 29 above) 161–76.

95 Ibid 176.

based affirmative action. It is hoped that redress which turns primarily on socio-economic class rather than race will not only be better able to achieve a more equitable distribution of wealth and resources, but will also be more consonant with the constitutional ideal of a non-racial society. While a class-based approach is unlikely to solve all problems – and may indeed create a few problems of its own⁹⁶ – it could, particularly when supplemented by other criteria, result in a more focused approach which would avoid the reification of any given social category and be alive to multiple strands of disadvantage.⁹⁷

It is instructive to consider the Constitutional Court's judgment in *Minister of Finance v Van Heerden* against the backdrop of these debates. The Court in *Van Heerden* found that a pension scheme which differentiated between members of Parliament who had already been members prior to 1994 and those who joined the ranks after 1994 was not unfairly discriminatory. The majority judgment authored by Moseneke J held that the provision for higher employer's contributions in respect of the latter met the requirements of s 9(2) of the Constitution. It was designed to protect or advance persons or categories of persons disadvantaged by past discrimination and thus promoted the overall achievement of equality. The minority judgments of Mokgoro and Ngcobo JJ, while concurring in the finding that the fund was not unfairly discriminatory, found that s 9(2) was not applicable as it had not been shown that the beneficiaries – those who joined Parliament after 1994 – were all previously disadvantaged. Although the majority of such MPs had been excluded from access to political office in the past, either by virtue of their race or their political affiliation, not all the beneficiaries fell into these categories. Whereas the majority were happy to defer to the way in which the legislature defined the class of beneficiaries,⁹⁸ the minority felt that s 9(2), which effectively insulates remedial measures from scrutiny in terms of s 9(3), is a powerful weapon which must be used only in those cases in which the requirements of s 9(2) are strictly adhered to.⁹⁹

96 Adam Habib points out that class-based measures would neglect the psychological (or recognition) aspect of affirmative action, and are unlikely to deracialise the 'upper echelons of the corporate structure'. Habib 'Time to Rethink Affirmative Action' *Mail & Guardian Online* (28 October 2007).

97 Such an approach need not rely exclusively on class or economic position, but could also incorporate other markers of disadvantage. See for example N Alexander 'Affirmative Action and the Perpetuation of Racial Identities in Post-Apartheid South Africa', edited version of a lecture originally delivered at the East London Campus of the University of Fort Hare, 25 March 2006 (arguing that, instead of simply relying on 'race' as shorthand, affirmative action should be based on different sources of disadvantage, including class and language skills); Habib (note 96 above) (arguing for 'a nuanced, class-defined redress programme, supplemented by race-based initiatives').

98 The majority reasoned that it is often 'difficult, impractical or undesirable to devise a legislative scheme with "pure" differentiation demarcating precisely the affected classes. Within each class, favoured or otherwise, there may indeed be exceptional or "hard cases" or windfall beneficiaries. That however is not sufficient to undermine the legal efficacy of the scheme. The distinction must be measured against the majority and not the exceptional and difficult minority of people to which it applies'. *Van Heerden* (note 2 above) para 39. The test is 'whether an overwhelming majority of members of the favoured class are persons designated as disadvantaged by unfair exclusion' (para 40).

99 *Ibid* paras 85–93 (Mokgoro J); 108 (Ngcobo J).

Van Heerden suggests that the Court will be slow to interfere with legislative attempts to redress past discrimination. The Court will only interfere where the beneficiaries do not constitute a disadvantaged class, where the measures are not designed to protect or advance a disadvantaged category of persons, or where they do not promote the achievement of equality.¹⁰⁰ But how does the Court define disadvantage? On the one hand, the Court does not restrict disadvantage to a few limited grounds like race and gender. In the words of Moseneke J:

This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage.¹⁰¹

On the other hand, the majority's deference to Parliament's definition of the class of beneficiaries leaves little doubt that the legislature has a wide discretion in choosing how to redress disadvantage.¹⁰² Whether redress is best achieved along racial, class or other lines is left to the discretion of the legislature. The Court is thus unlikely to challenge race-based measures on the basis that there is an imperfect fit between race and economic disadvantage or that more nuanced criteria could have been used.

The minority's close scrutiny of the class of beneficiaries signals a greater willingness to subject measures which are over-inclusive to s 9(3) scrutiny. It may also point to a stricter attitude to the question of past disadvantage. It is, for instance, possible that a measure may fall short of the requirements of s 9(2) if the class of beneficiaries, despite having suffered past discrimination, have not been disadvantaged in that particular societal sector. Ironically, though, their approach could also result in the perpetuation of racial categories. If, in cases like the present, race-specific criteria are more likely to comply with s 9(2) than race-neutral ones, Parliament is given an incentive to stick to apartheid-time racial definitions, rather than to devise an approach which might be more consonant with the constitutional ideal of a non-racial society.¹⁰³

This point is made by Sachs J in his concurring judgment. In his view, a more narrowly tailored provision – one which limited the more generous employer's contribution to, say, black people or members of the former liberation move-

100 Ibid paras 36–44.

101 Ibid para 27.

102 Liebenberg & Goldblatt (note 19 above) 348–9 argue that the deferential approach enunciated in *Van Heerden* is particularly problematic in cases where the interests of one disadvantaged group are favoured above those of another disadvantaged group.

103 Mokgoro J suggests that, even if only black people benefited, the measures would still be overbroad as some black people – those classified as 'coloured' or 'Indian' under apartheid – could become members of Parliament before 1994. *Van Heerden* (note 2 above) para 93. It would seem that to pass muster under s 9(2), the class of beneficiaries would have to be restricted to (a) Africans, and (b) non-African members of political parties which were banned before 1994. Such a definition of beneficiaries is certainly more narrowly tailored, but the wisdom of such an overt emphasis on the racial and political fault lines of our apartheid past is questionable.

ments – might fail to comply with s 9(2).¹⁰⁴ Sometimes, he seems to say, there is a need to de-emphasise race, even if the overall goal is to redress past patterns of disadvantage flowing directly from our apartheid past. Sometimes we need to resist the temptations of racialised thinking – despite the fact that our Constitution is not and cannot be colour-blind and despite the fact that it would be irresponsible to deny the deep racial divisions characterising the society we live in. Sachs J's concurrence, which promised to demonstrate the unity of vision underlying the majority and minority judgments,¹⁰⁵ thus ends up emphasising the contested nature of equality and the profound difficulty of reconciling the Constitution's multifarious commitments.

The controversy surrounding the racial classification of the Chinese has done little to dispel questions about the beneficiaries of and justifications for racial redress. In a recent judgment, the Transvaal High Court declared that South African Chinese people fall within the definition of 'black people' for purposes of the Employment Equity Act 55 of 1998 and the Broad-Based Black Economic Empowerment Act 53 of 2003.¹⁰⁶ While some have hailed this judgment as an important advance in the struggle against historical injustice, others have criticised it for reducing the size of the BEE 'cake'.¹⁰⁷ Some of the criticisms are based on crude assumptions about racial identity and overt prejudice.¹⁰⁸ However, underlying the disagreement are also important differences about the nature and objectives of the redress envisaged by the Constitution. Is it best seen as a remedy for past economic deprivation, or do recognition issues also come into play? If it is viewed primarily as a remedy for material disadvantage, the exclusion of Chinese from the definition of 'black people' might perhaps be justified. But then again, wouldn't it be better to introduce a class-based form of redress, rather than proceeding on the basis of generalisations about the impact of past discrimination on different racial groups? If, on the other hand, s 9(2)'s commitment to remedial and restitutionary equality is taken to refer both to past misrecognition and maldistribution, the exclusion of Chinese would be much harder to justify. Prior to 1994, Chinese were deprived of citizenship and were officially classified as coloured. Although they were exempted from certain restrictions flowing from their racial classification,¹⁰⁹ their 'interstitial identity'¹¹⁰ (black

104 Ibid paras 155–6.

105 Sachs J, with his usual gift for seeing connection where others see difference – and vice versa – managed to concur in both the majority and minority judgments. For him, the split between majority and minority, while revealing somewhat divergent views on the 'mechanics' of equality analysis, reflected remarkable similarities in philosophy and outlook. See *ibid* para 135.

106 *Chinese Association of South Africa v Minister of Labour* case 59251/2007 (TPD).

107 'Nafcoc Slams High Court Ruling on BEE for Chinese' *Legalbrief Today* (23 June 2008).

108 The racist comments of Membathisi Mdladlana, the minister of labour, clearly fall into this category. See 'Minister's Warning to Chinese "Coloureds"' *Legalbrief Today* (25 June 2008).

109 Between 1969 and 1984, Chinese could obtain a permit to remain in white areas, subject to the permission of the relevant government department and the acquiescence of white neighbours. The Group Areas Amendment Act 101 of 1984 abolished the permit system and reclassified Chinese as white for purposes of the Act. See K Harris "'Whiteness', 'Blackness', 'Neitherness' – The South African Chinese 1885–1991: A Case Study of Identity Politics' (2002) 47 *Historia* 105.

110 *Ibid* 122.

for some purposes, white for others) increased their invisibility and resulted in the indignity of being at the mercy of state officials and white communities in their negotiation of the permit system and unofficial exemptions. The recent controversy over their racial identity confirms Harris's observation that their identity defies the black/white dichotomy and is best expressed in terms of a separate 'neitherness'.¹¹¹

(c) Rethinking difference

The attempts of courts and legislatures to give effect to the Constitution's vision of a democratic society in which difference is not only respected and celebrated, but is also used as a basis for redressing past disadvantage are riddled with difficulties. The affirmation of difference often results in further stigmatisation and/or disadvantage for those labelled 'different' – whether black people benefiting from affirmative action, mothers qualifying for maternity leave, or children whose special needs are accommodated in the classroom. This is so despite the fact that a failure to consider difference would also be to their disadvantage. Martha Minow describes this, very aptly, as the 'dilemma of difference': we are doomed to perpetuate disadvantage and stigma both if we consider difference and if we don't.¹¹²

A second difficulty is that the attribution of difference tends to abstract from the multiple differences among individuals and focus on a particular trait or group membership. This results in the assumption of the unity of a particular group or category of persons. All gays are thought to conform to the idealised picture of the gay person in a relationship mimicking heterosexual marriage, all blacks are viewed as the beneficiaries of affirmative action and black economic empowerment, etc. There may be strategic advantages in thus leaving over the very real differences among gays, blacks, women, etc. However, there is also a price to be paid. Struggles fought in the name of supposedly unitary social groups by definition exclude those who do not conform to the projected norm.¹¹³ Their continued marginalisation can then be explained away as a result of their own choice – or their moral depravity or lack of natural ability. The assumption of unity, then, serves both to exclude and to bind those who would not conform – or who, due to material deprivation or societal prejudice cannot conform – into the unitary group. It thus not only legitimates ongoing material deprivation and moral harm but also deprives those excluded of a voice, as their interests 'have already been taken care of' in terms of legal and political victories attained by the group, or 'are already represented' by movements lobbying on behalf of the group.

111 Ibid.

112 Minow (note 72 above).

113 Western feminism has often been criticised for universalising the experiences of white, middle-class, heterosexual women. See Van Marle 2003 *Feminist Legal Studies* (note 21 above) for a discussion of some of the theoretical attempts to move beyond the racial, class-based and heterosexist bias of traditional feminism.

There are no easy ways out of these dilemmas. Rather than trying to resolve them, I will recall three distinctions which might assist us in coming to terms with them. The first distinction, made by Martha Minow, is between views of difference as inherent in individuals or as relational. The idea that difference is inherent presupposes that the source of difference lies in the individuals concerned and that difference exists independently of social relations and institutions. Because the status quo is assumed to be natural and uncoerced, the burden of difference must generally be carried by those who are different. To this, Minow contrasts a second view, which rejects the idea that differences simply and objectively correspond to individual traits. Instead, this view accepts that difference is a matter of seeing which depends on one's particular perspective. Moreover, it recognises that the social significance of difference is produced by the relationship between individuals and social institutions, and that institutions have been designed with only some people (for example, men, the able-bodied, etc) in mind. Accordingly, this view is more ready to shift the burden of difference to society at large and less inclined to privilege the status quo.¹¹⁴

A second distinction which is invoked, inter alia, by Nancy Fraser, is that between the affirmation and deconstruction – or transformation – of difference. Fraser and others argue that the affirmation of difference is usually not enough to overcome disadvantage and stigma.¹¹⁵ As argued above, the recognition of difference often perpetuates inequality, as it labels a particular group as different from the norm. Fraser warns, in addition, that such strategies tend to 'reify collective identities', 'drastically simplify people's self-understandings', 'mask the power of dominant fractions' and encourage a 'repressive communitarianism'.¹¹⁶ What is needed is something more radical: the destabilisation of the symbolic oppositions and hierarchies which establish certain persons, traits or lifestyles as 'normal' and brand others as deviant. It is hoped that, by thus dereifying group identities, individuals will be better able to square up to the 'complexity and multiplicity' of group identifications,

114 Minow (note 72 above) Chapters 1–3. The idea of difference as relational is also a prominent theme in the work of Jennifer Nedelsky. See J Nedelsky 'Law, Boundaries, and the Bounded Self' (1990) 30 *Representations* 162; 'Reconceiving Rights as Relationship' (1993) 1 *Review of Constitutional Studies* 1.

115 Fraser (note 35 above) 72–8. See also Albertyn (note 17 above) 256 (arguing for a transformatory approach to difference which goes beyond the mere inclusion of those formerly excluded). It is important to note that Fraser's distinction between affirmation and transformation also extends to the redistribution of wealth and resources. Attempts to alleviate poverty through income transfers are a prime example of an affirmative strategy. These strategies alter the distribution of income without changing the underlying economic structure. They often result in a 'misrecognition backlash', as their beneficiaries are branded as members of an insatiable underclass who fall short of the norm of economically active and self-sufficient citizens. By contrast, transformative strategies aim to transform the economic structures that generate inequality. Because it focuses on the root causes of economic inequality, rather than relying on surface reallocations, this approach avoids the stigmatisation of certain classes.

116 Fraser (note 35 above) 76.

to form alliances across differences, and to resist the pressure to conform to a dominant norm.¹¹⁷

The third distinction, invoked by Karin van Marle and already alluded to above, is that between comfortable and radical difference. Drawing on the work of Drucilla Cornell and others, Van Marle resists the essentialism and reductionism of dominant understandings of difference, which tend to assume that the differences among individuals can be reduced to social categories such as gender, race, sexual orientation, religion, etc. Instead, she calls for a radical understanding of difference, which treats difference as irreducible and grants every individual the right to a moral and psychic space within which she is free to imagine and re-imagine her identity.¹¹⁸

A similar point is made by Bonnie Honig. Rejecting the view of difference as the marker of more or less stable identities, Honig emphasises the disruptive potential of difference. Difference is not what distinguishes the unitary self from other selves, but that which threatens to destroy identity, which resists its closure:

It signals not a difference *from* others but a difference that troubles identity from *within* its would-be economy of the same. Difference is what identity perpetually seeks (and fails) to expunge, fix, or hold in place. In short, difference is a problem for identity, not one of its adjectives.¹¹⁹

Here, difference is viewed not simply as that which distinguishes us from others, but as something internal to the group, the community and the self. There is, therefore, no home – whether metaphorical or literal – where we can withdraw from a world of conflict and difference. This radical understanding of difference requires us to rethink the nation, the community, social categories, the family and the self. These entities can no longer be thought of in unitary terms. Instead, they are best conceived as coalitions in which multiple differences, identities, interests and loyalties are negotiated ‘in a perpetual motion of mutuality, engagement, struggle, and debt’.¹²⁰

These theoretical perspectives share the understanding that difference – and the significance we attach to it – does not reflect inherent, objective properties of individuals or groups, but is produced and reproduced by means of discursive and institutional practices. Difference, in this view, is relational and cannot be detached from social institutions and power relations. There is therefore nothing inevitable about current constructions of difference. This implies that we need to take responsibility for the invidious and exclusionary use of social categories – and that we have the freedom to imagine more humane ways of ordering our social world. The theoretical perspectives referred to above suggest different ways of doing that: by de-emphasising

117 Ibid 77.

118 Van Marle 2000 *THRHR* (note 21 above); 2003 *Feminist Legal Studies* (note 21 above); ‘Haunting (in)equalities’ (note 20 above).

119 B Honig ‘Difference, Dilemmas, and the Politics of Home’ in S Benhabib (ed) *Democracy and Difference: Contesting the Boundaries of the Political* (1996) 257, 258 (emphasis in the original).

120 Ibid 271.

dominant social categories and highlighting the fact that we are all different; by deconstructing the symbolic oppositions underlying current inequalities; and by recognising the radical potential of difference to resist the closure of individual and collective identities.

It may be objected that such a radical – or deconstructive – view of difference could be counter-productive in contexts in which a marginalised group mobilises around a particular identity. The exclusionary side-effects of affirmative strategies, so the argument goes, are a relatively small price to be paid for the advancement of the larger group and can still be challenged through future struggles. Identity politics, in this view, is likely to be more effective than the deconstruction of difference in cases where a shared identity is a source of pride – and therefore lends itself to political mobilisation – or where redress takes place on the basis of certain group characteristics.

The above analysis suggests a number of reasons for approaching these arguments with caution. At the same time, however, we need to accept that our legal and political imagination is constrained by the powerful hold of existing social categories and hierarchies and that, from a strategic point of view, a less radical approach may sometimes be appropriate. This is recognised by Nancy Fraser, who argues that the distinction between affirmative and transformative strategies is not absolute, but contextual. As Fraser notes, strategies which appear to be affirmative can also have transformative effects. For instance, an unconditional basic income grant would do little to change the gender division of labour – in fact, it looks likely to reinforce the role of women as primary caregivers by allowing them to exit and re-enter the labour market as their care-giving responsibilities permit. However, if instituted alongside other reforms such as public childcare, it could alter power relations within households and thus set in motion the transformation of the gendered division of labour. Fraser also uses a second example: the controversy in France over the Muslim headscarf. She argues that, while the recognition of the right of Muslim women to wear the headscarf in public schools would accommodate minority practices without challenging the underlying distinction between Christians and Muslims, it could also have transformative effects – by resisting French majority communitarianism and by allowing the scarf's meaning to be contested from within Muslim communities, rather than favouring the patriarchal meaning accorded to it by male supremacists. On the basis of these examples, Fraser identifies an alternative strategy which she terms 'non-reformist reform'. Here, transformation is pursued through a series of reforms which, on their own, fail to address the root causes of inequality, but in the longer term and taken together, may spark a more radical transformation of social and economic relationships.¹²¹

Given the complexity and multiplicity of differences and identities and their implication in power relations, there is no neutral vantage point from which we can escape the politics of difference. All we can hope for is the always

121 Fraser (note 35 above) 78–82, 40–1. See also S Liebenberg 'Needs, Rights and Transformation: Adjudicating Social Rights' (2006) 17 *Stell LR* 5, 8–10.

temporary negotiation of difference. Whether an affirmative or a more deeply transformative strategy is appropriate in a given instance would depend on a variety of contextual considerations. These include: the type of claim (for example, whether it is a claim for equal or differential treatment); the position of the claimants (whether they constitute a disadvantaged or vulnerable group or category of persons); and the existence of vulnerable sub-classes of persons who may be negatively affected by the affirmation of difference (for example, women in a religious or cultural community or a sub-class of poor women or single mothers).¹²² Also important are the likely impact on broader society (for example, is the affirmation of the particular difference likely to result in the destabilisation of majoritarian norms?); the history and social construction of the particular category (for example, what role did domination and discrimination play in its construction?); and the potential of different strategies to destabilise current constructions of difference and to enable the formation of new alliances.

The judicial debate in the *Masiya* case illustrates some of the difficulties involved. In this case, the Court extended the definition of rape to the non-consensual anal penetration of a woman by a man. However, the majority declined to include, in its definition, instances where the victim of the crime is a man. In its view, judicial restraint was advisable in view of the need to decide one case at a time (the survivor of the crime in that case was a young girl) and the significance of the fact that, historically, rape has been defined in gendered terms, as it constitutes ‘an extreme and flagrant form of manifesting male supremacy over females’.¹²³ Langa CJ rejected these arguments in his dissent. In his view ‘the criminalisation of rape is about protecting the “dignity, sexual autonomy and privacy” of all people, irrespective of their sex or gender’.¹²⁴ He added that the inclusion of men in the definition would not detract from the protection afforded to women:

Indeed, limiting the definition to female survivors might well entrench the vulnerable position of women in society by perpetuating the stereotype that women are vulnerable, which in turn enforces the dangerous cycle of abuse and degradation that has historically led to placing women in this intolerable position.¹²⁵

Langa CJ’s dissenting judgment does not challenge the majority’s insistence that the development of the common law should proceed on an incremental basis. What it does challenge, however, is the majority’s framing of the problem in terms of gender categories that are deeply implicated in sexual violence. Whereas the majority sees before it a case involving the anal penetration of women, the minority construes the case as dealing with the profound trauma of rape, regardless of the victim’s gender, and the arbitrary distinction

122 See *Bhe v Magistrate Khayelitsha*; *Shibi v Sithole*; *SA Human Rights Commission v President of the RSA* 2005 (1) SA 563 (CC); 2005 (1) BCLR 1 (CC) (customary rule of male primogeniture held to be an unjustifiable infringement of the equality and dignity of women and extramarital children).

123 *Masiya v Director of Public Prosecutions (Pretoria)* 2007 (8) BCLR 827 (CC) para 36.

124 *Ibid* para 84.

125 *Ibid* para 85.

at common law between vaginal and anal penetration. The majority is happy to affirm the difference between male and female survivors; the minority, by contrast, is looking to transform it.

V MEMORY AND THE LIMITS OF CONSTITUTIONAL EQUALITY ANALYSIS

(a) Monumental and memorial constitutionalism

The Constitution declares in its preamble:

We, the people of South Africa,
 Recognise the injustices of our past;
 Honour those who suffered for justice and freedom in our land;
 Respect those who have worked to build and develop our country...

What does the constitutional injunction to recognise past injustices and to remember past suffering mean within the context of s 9? How are we to conceive past disadvantage, given the complex array of intertwined and overlapping factors which produced our unequal society? How can we ever come to terms with the complexity of our history of institutionalised discrimination? How are we to resist the inclination to reduce the injustices of the past to a caricature which, at most, honours only a fraction of those who suffered for justice and freedom? How do we carry forward their struggles without reifying them into a new orthodoxy which, once again, serves to marginalise and exclude?

The distinction between monumental and memorial constitutionalism provides some clues to these questions. Drawing on the work of Johan Snyman,¹²⁶ Lourens du Plessis was first to distinguish between the Constitution's monumental and memorial dimensions.¹²⁷ This distinction has since been taken up and developed further by a number of scholars.¹²⁸ In a nutshell, 'monumental constitutionalism' depicts a form of constitutionalism which celebrates the radical break instituted by the Constitution with our colonial and apartheid past. The well-known bridge metaphor captures something of its celebratory mood: the Constitution is portrayed as a bridge between a past of institutionalised racism and violations of human rights and a future founded on democracy and the advancement of human rights and freedoms. 'Monumental constitutionalism' exudes optimism: about our capacity to remember and honour those who struggled for democracy and freedom, about our ability to overcome the divisions of the past, and about the possibility of linking past and future through the enterprise of constitutional interpretation.

'Memorial constitutionalism', by contrast, relies on a different strategy for dealing with the past. Rather than engaging in grand narratives or monumentalising the new beginning signalled by the adoption of a democratic constitution, it is concerned with the victims of past abuses. And since we can

126 J Snyman 'Interpretation and the Politics of Memory' in G Bradfield & D van der Merwe (eds) *Meaning in Legal Interpretation* (1998) 312.

127 L du Plessis 'The South African Constitution as Memory and Promise' (2000) 11 *Stell LR* 385.

128 See W le Roux & K van Marle (eds) *Law, Memory and the Legacy of Apartheid* (2007).

never fully know those victims, since we can remember their trauma, separation and loss only obliquely, we cannot lay claim to a grand vision which comprehends the past and enables us to learn from past mistakes. Consider, for instance, the critique levelled by Pierre de Vos,¹²⁹ André van der Walt¹³⁰ and Wessel le Roux¹³¹ against the image of the Constitution as a bridge between past and future. The bridge metaphor has been criticised for the way it conceives the starting point and the end point of our constitutional journey as more or less fixed points which are knowable in advance. It has been suggested that the bridge metaphor should be reinterpreted to draw our attention not to the linear progression from the apartheid order to a democratic future founded on human rights, but to the suspension between two points, to the way the bridge suspends existing doctrine and certainties, to the abyss beneath it. This critique and reinterpretation of the bridge metaphor is strongly reminiscent of a memorial understanding of constitutionalism. Memorial constitutionalism eschews grand narratives, is wary of the monumentalisation of past struggles, and embraces uncertainty and contradiction. It is, moreover, interested in the continuities between past and present injustice – in the ways in which our current projects and strategies of memorialisation erase certain injustices from memory and render them invisible.¹³²

The Constitutional Court's equality jurisprudence has attracted a fair amount of celebratory discourse and monumental embellishment. The accommodation, through the Court's reading of s 9, of the claims to equal respect and social citizenship of gays and lesbians, non-citizens, religious minorities and other vulnerable groups invites a romantic vision of constitutionalism which highlights the stark contrast between past and future. There is, however, a price to be paid for framing equality analysis in terms of a historical narrative, which emphasises the agency of apartheid's agents and focuses on the most patent violations of equal dignity. The danger is that, when held up against the background of such patent violations, the marginalisation and indignity suffered by sex workers, Rastafarians, unmarried life partners, single mothers

129 P de Vos 'A Bridge too Far? History as Context in the Interpretation of the South African Constitution' (2001) 17 *SAJHR* 1.

130 AJ van der Walt 'Dancing with Codes – Protecting, Developing and Deconstructing Property Rights in a Constitutional State' (2001) 118 *SALJ* 258.

131 W le Roux 'Bridges, Clearings and Labyrinths: The Architectural Framing of Post-Apartheid Constitutionalism' (2004) 19 *SA Public Law* 629.

132 These debates suggest that 'transformative constitutionalism', a term originally developed by Karl Klare and since invoked by numerous scholars and judges, is a contested concept. See K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146 and, within the equality context, Albertyn & Goldblatt (note 12 above); Albertyn (note 17 above); Liebenberg & Goldblatt (note 19 above). At the heart of the disagreement is concern over the instrumentalist conception of law and politics, which informs monumental understandings of our constitutional transition. This point can also be made with reference to the distinction, invoked by Johan van der Walt, between politics and the political. Van der Walt is critical of the reduction of the political to – instrumental – politics in which the public interest is time and again reduced to particular private interests. Van der Walt (note 41 above) 6–7. There is a danger that, in our eagerness to achieve strategic victories for the disadvantaged, we may lose sight of the political (which is concerned with radical plurality and a non-reductionist conception of the public interest) as a precondition of democratic politics and thus fail to remain open to alternative futures.

and farm workers (to mention but a few examples) would appear to be simply the results of personal choice or neutral market forces – regrettable, perhaps, but hardly the stuff of constitutional intervention.¹³³

A second danger is that we may become so engrossed by the rhetoric of rainbow-ism and the accommodation of hitherto excluded groups that we lose sight of the possibility that the very social categories and identities which guide our efforts may be implicated in the legitimation and reproduction of inequality. The accommodation of vulnerable groups, though important, may not be enough to address disadvantage. As argued above, the inclusion of hitherto excluded groups may serve to legitimate and perpetuate disadvantage. What is sometimes needed is a more radically transformative approach which aims to destabilise ‘overweening master dichotomies, such as black/white or gay/straight’, and to replace them ‘with a decentered congeries of lower-case differences’.¹³⁴

(b) Controlling legal meaning

Aubrey Tearle, the protagonist of Ivan Vladislavić’s novel *The Restless Supermarket*,¹³⁵ resides in Hillbrow during the last years of apartheid. Concerned about the rapid social and demographic change he observes around him and about what he can only describe as a decline in standards, he sets out to enlighten his fellow citizens. Being a retired proofreader of telephone books, his efforts focus on the decline in the use of the English language. He is obsessed with language mistakes and has developed an elaborate system for archiving what he calls ‘corrigenda’. At the suggestion of a friend in the Café Europa, he develops this system into the Proofreader’s Derby, a contest in which proofreaders would compete to find and correct the errors in a book he has written, based on the actual corrigenda he has collected.

Tearle’s obsessive proofreading goes beyond his concern with the correct use of English. For him the entire social world becomes a text in need of correction. And what motivates this project is a deep resentment – of the urban

133 Cf Mahmood Mamdani’s critique of the focus of the Truth and Reconciliation Commission (TRC) on victims and perpetrators of apartheid crimes and its resultant neglect of the beneficiaries of apartheid and of the status of the majority of the population as victims. Because of its narrow focus on the agency of apartheid-state operatives, the TRC failed to address systemic disadvantage. Rather than effecting a broad social reconciliation, it gave rise to reconciliation between political elites. Mamdani *When Does Reconciliation Turn into a Denial of Justice?* (1998). Monumental constitutionalism relies on similar notions of agency, and similarly confines the wrongs of apartheid to the most palpable injustices. In a recent contribution, Karin van Marle echoes Mamdani’s concern for social reconciliation. She also links memorial constitutionalism to what Njabulo Ndebele labelled the ‘rediscovery of the ordinary’. In the mid-1980s, Ndebele called upon black South African writers to turn away from the representation of spectacle and to explore instead the complexity of the ordinary, of human feelings and relations. Ndebele ‘The Rediscovery of the Ordinary’ (1986) 12 *J of SA Studies* 143. Van Marle, in turn, warns against the dangers of a brand of constitutionalism that fixates on the spectacle of the transition to democracy and is blind to everyday suffering and social complexity. K van Marle ‘The Spectacle of Post-Apartheid Constitutionalism’ (2007) 16 *Griffith LR* 411.

134 Fraser (note 35 above) 77.

135 (2001).

chaos around him, of the splintering of shared cultural horizons as Hillbrow is flooded by blacks and foreigners, of the superficiality of a postmodern culture characterised by excessive consumerism and the never-ending flow of seemingly unconnected images. His efforts to arrest change, to impose order upon this chaos are, at deepest, connected to a project of memorialisation, to his yearning for a lost (apartheid) past, to his alarm at the rapidly changing urban landscape.¹³⁶

While reading the novel, I was reminded more than once of the law's role in imposing order, in carving up reality into manageable chunks, in reducing social complexity. In fact, proofreading telephone books struck me as a rather fine metaphor for the practice and theory of law. Both activities facilitate relations among strangers and enable community. Both involve a policing of the boundaries between formally equal subjects. And both are reductionist in the way the complexity of social identities and relations is reduced to the symmetry of alphabetically listed inscriptions, in the one case, and to the taxonomies of legal ordering, in the other.

But it is not only Tearle's obsession with order which is reminiscent of the workings of the law. Law, like Tearle's proofreading, is inextricably linked to processes of memorialisation. And, as with Tearle's obsessive archiving, there is a distinct danger that the law's dealings with the past may become, instead, 'procedures for forgetting'.¹³⁷ This may be the case either because the law, like Tearle, becomes so obsessed with trifling technical (legal) details that the bigger social and political picture is obstructed from view. Conversely, it may also be the result of the uncritical way in which law monumentalises the past and hides social complexity and disconnection beneath a veneer of an all-embracing unity, in which we become one with those who have struggled for our freedom.

Finally, like Tearle's attempts to correct the social world, our lawyerly efforts to filter social complexity through preconceived categories and thus to contain difference, are bound to be frustrated by a squirming world of complexity and difference – a world which is forever in flux. It is one of the great ironies of the novel that, through an unforeseen chain of events, the uncorrected versions of the Proofreader's Derby are let loose upon the world, thus allowing the language errors to multiply. The reader of the novel, by contrast, gets to see only the corrected version, which becomes a palimpsest as the reader tries to recover the traces of erased and corrected errors.¹³⁸ Again, there is a resonance with constitutional law. Wessel le Roux has argued recently that our attempts to construct difference and to trace the fault lines of our deeply divided past are perhaps best seen as palimpsests, from which alternative constructions of

136 S Graham 'Memory, Memorialization, and the Transformation of Johannesburg: Ivan Vladislavić's *The Restless Supermarket and Propaganda by Monuments*' (2007) 53 *Modern Fiction Studies* 70.

137 *Ibid* 81.

138 See M Marais & C Backström 'An Interview with Ivan Vladislavić' (2002) 29 *English in Africa* 119, 123–4 (author explaining how he first put together the proofs, drawing on typos and wordplays he collected over the years, and only later corrected the numerous language mistakes and typographical and formatting errors); Graham (note 136 above) 88–9.

disadvantage, identity and difference can never be wholly erased. And it is these forgotten histories, these traces of alternative futures which come back, time and again, to haunt us and to frustrate our efforts at attaining closure.¹³⁹

A critical theory of equality must engage with the lawyerly impulse to monumentalise past struggles, to treat reified social categories as neutral and accurate descriptions of our social world, and to neutralise the disruptive potential of difference through uncritical reliance on the safety and familiarity of existing identities and categories. At the same time, it must remain open to the capacity of historical and ongoing social struggles to destabilise the master dichotomies and narratives which frame our understanding of the world and to open up alternative perspectives.

VI CONCLUDING REMARKS

This article deals with the paradox that, in order to remedy discrimination and redress disadvantage, we inevitably have to invoke broad social categories and identities, which are themselves implicated in relations of inequality and subordination. Rather than trying to resolve the paradox I explored it from three different angles. First, I argued for a complex understanding of the right to equality as being underpinned by at least three values: dignity, equality and democracy. The prominence accorded to each of these values will vary according to the context, resulting in an approach which is sensitive to the complex ways in which different forms of disadvantage intersect and overlap. This approach has a better chance of registering forms of discrimination which may, otherwise, be attributed simply to private choice or the neutral workings of the market.

Because it requires us to articulate some of our most basic constitutional values with each other, complex equality affords us the opportunity to deepen and radicalise our understanding of them. When articulated with dignity, equality and freedom, the idea of an open democracy implies not only the right of individuals and communities to participate in decisions affecting them, but also radical openness to plurality and a commitment on the part of the political community to ongoing processes of self-renewal and regeneration. Human dignity, in this context, similarly emerges as a radical principle which, besides being anti-instrumentalist, calls for a continuous and critical questioning of social hierarchies and the cultural presuppositions legitimating them. Dignity, on this understanding, is a transformative value, as each individual's inherent dignity and worth confront us with the possibility of new beginnings. The same goes for the value of equality, which requires us to subject material disadvantage and structural inequality to a transformative critique. Articulated with dignity, democracy and freedom, equality becomes a radical notion which resists all forms of subordination and demands the democratisation of the workplace, the market and access to basic opportunities.

139 W le Roux 'Memory and Metaphor in Post-Apartheid Constitutional Interpretation', inaugural lecture held at Unisa on 6 November 2007.

Secondly, I argued for a radical understanding of difference. This understanding locates difference in the relations between individuals and social institutions. While celebrating difference, it seeks to destabilise the symbolic oppositions and hierarchies which underlie inequality and exclusion and resists the equation of difference with more or less fixed identities. Differences, in this view, are far more complex and multiple than can ever be captured in terms of master dichotomies such as black/white or male/female. Rather than simply affirming status- (or class-) based identities, the differences between individuals resist the closure of identity – and thus afford the basis for a radical and ongoing questioning of inequality and exclusion.

Complex equality and radical difference hold out the promise of a truly transformative equality jurisprudence. However, questions remain over the law's capacity to register multiple and diverse forms of disadvantage and to appreciate social complexity. The 'comfortable' difference embraced by courts and legislatures in areas as diverse as sex, family, marriage and affirmative action reminds us that law, as an instrument of social ordering, relies on processes of categorisation to filter out complexity. It thus seeks to tame the disruptive potential of social contingency and seeks to assimilate what is different to 'tried and trusted' categories and schemata. But it is not only law's compulsion with order which stands in the way of a transformative equality jurisprudence. The seductive power of commonplace social categories, the unquestioning equation of identity with difference, the widespread assumption that differences are 'natural' and exist independently of social institutions and arrangements, the failure to see that supposedly neutral markets are based upon background rules which reflect contestable cultural presuppositions, and slippages between the generality of law and the particularity of the concrete case all contribute to the domestication and reification of difference.

Thirdly, I argued for a memorial understanding of constitutionalism which resists the monumentalisation of past struggles. This understanding shares the concern of complex equality and radical difference with the complexity of social histories and identities. It also advocates greater openness to the recognition of forms of disadvantage which do not fit comfortably into a master narrative about the evils of apartheid. At the same time, however, this approach urges us to engage with the limits of the law in registering and responding to injustice. Memory, it reminds us, is inextricably linked to forgetting and our memory of the past is invariably selective. Memorial constitutionalism thus urges us to exhume those forgotten histories which press against the limits of current understandings of disadvantage and difference. It also requires us to mourn the impossibility of ever fully heeding this call.

Critical legal theory, then, inhabits that awkward space between the possibilities and limits of equality law. On the one hand, it needs to be uncompromising in its exposure of the gap between the radical promise of an egalitarian constitution which celebrates plurality and difference, and the inadequacy of legislative and judicial efforts to realise that promise. On the other hand, it must constantly be on the lookout for critical opportunities to exploit that gap. Because the law can never be fully self-referential and because

the complexity and flux of our social world keep pushing against the strictures of legal categories, there is room for a transformative discourse which interrogates conventional constructions of disadvantage and difference. Best, then, to use a double-handed approach: to try to make our legal standards as open as possible to the complexity of social identities and relations, while remaining conscious of the impossibility of ever fully responding to past and present injustices.