

Dignity and Justice for All

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“Dignity and Justice for All” is the theme of the year-long celebrations of the 60th anniversary of the Universal Declaration of Human Rights. Celebrating the Universal Declaration is also the theme of this conference, and the title matches that theme. In the context of that theme I have been invited to talk about human rights in South Africa, which will be the focus of my remarks. The Preamble to the Universal Declaration records that:

disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief, and freedom from fear and want has been proclaimed as the highest aspiration of the common people.

It goes on to say that “it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.” This is a reference to the horror of the Second World War, to the inhumanity of the Nazi regime and the repression it imposed within Germany and the territories it occupied, and to the optimism in the wake of that war, that there would be a better world. The vision of the better world contemplated by the Universal Declaration is one in which there would be social justice and respect for the inherent dignity of all people: a world in which fundamental rights and freedoms will be upheld by all nations. The same words would appropriately describe the atmosphere in South Africa in 1994 when

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a democratic constitutional state was established.

On May 10, 1994, President Nelson Mandela was sworn in as South Africa's first democratic President. Speaking to the nation, he captured the spirit of the Universal Declaration's preamble, saying:

We enter into a covenant that we shall build the society in which all South Africans, both black and white, will be able to walk tall, without any fear in their hearts, assured of their inalienable right to human dignity—a rainbow nation at peace with itself and the world.

....

Never, never and never again shall it be that this beautiful land will again experience the oppression of one by another¹

Sixty years after the proclamation of the Universal Declaration of Human Rights, we can see how difficult it has been to realize the aspirations expressed in the Declaration, to secure the universal and effective recognition and observance of its provisions, by all U.N. member states. That is an issue that will be addressed later during this conference.

The Universal Declaration contemplates that everyone should enjoy not only fundamental civil and political rights, but also “economic, social and cultural rights indispensable for his [or her] dignity and the free development of his [or her] personality.”² Our Constitution has similar provisions to which I will refer later. Fourteen years after the establishment of a democratic constitutional state in the place of the egregious apartheid state, although substantial progress has been made towards establishing a legal order based on the rule of law and respect for human rights, we in South Africa can also see how difficult it is to achieve the social justice our Constitution contemplates.

To understand the difficulties that confront us in South Africa, it is necessary to go back to our history. As a result of history, black South Africans, the great majority of the population of South Africa, were for all practical purposes denied the franchise in the land of

1. Nelson Mandela, President of South Africa, Inaugural Address (May 10, 1994), available at <http://www.anc.org.za/ancdocs/history/mandela/1994/inaugpta.html>.

2. Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 22, U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR]. See also *id.* arts. 23–27 (articulating social, economic, and cultural rights).

their birth. This was a privilege reserved for whites. In 1948, the year in which the Universal Declaration was adopted, the white voters of South Africa elected the National Party as their government. The campaign slogan of the Nationalists had been “apartheid,” which literally meant separateness, but really meant white domination and the subjugation of the black population.

Apartheid was the culmination of a process of white supremacy which had been in place for three centuries. Throughout this period, whites, who were a small minority of the population, used their political and economic power to further their own interests, partly through the manner in which they organized the society and allocated its resources, and partly by the enactment of racially discriminatory legislation. Under apartheid this process was deeply entrenched. Apartheid became a powerful ideology, based on the false assumption that blacks were an inferior race. Apartheid was institutionalized in the legal system and affected all aspects of life in South Africa.

Supremacy of Parliament

At that time, the doctrine of supremacy of parliament, a principle of English law, later entrenched in the Republic of South Africa Constitution of 1961, was applied by our courts. Its impact best can be described by referring to a passage from a judgment of the Appellate Division, where the then-Chief Justice said, “Parliament may make any encroachment it chooses upon the life, liberty, or property of any individual subject to its sway . . . and it is the function of the courts of law to enforce its will.”³ This was done as a matter of course under apartheid. Legislation could not be invalidated and, where it was interpreted in a manner which did not meet the satisfaction of the government, the “loophole” could be closed by legislation. Law enforcement provided the means by which discrimination was kept in place and dissent was curtailed. This was done through a draconian system of security legislation similar in many respects to anti-terrorism measures we see in different parts of the world today, which will be the subject of discussion in a later session of this conference. Thus, the practice of parliamentary supremacy

3. *Sachs v Minister of Justice* 1934 A.D. 11 (A) at 37 (S. Afr.) (Stratford, C.J.), cited in CORA HOEXTER, ADMINISTRATIVE LAW IN SOUTH AFRICA 12 (2007), and Kate O’Regan, *Breaking Ground: Some Thoughts on the Seismic Shift in our Administrative Law*, 121 SALJ 424 (2004).

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drew judicial officers into the process of enforcing apartheid, a legacy that still hangs over the courts.

The Universal Declaration warns that tyranny and oppression lead ultimately to rebellion. This is what happened in South Africa. Despite the massive power of the state, there was an ongoing and intense struggle against apartheid fuelled largely by the frustrations of its victims. Many died or were imprisoned during the course of that struggle. Ultimately, the conflict was brought to an end by a negotiated settlement.

The Constitutional Settlement

The settlement was recorded as “a solemn pact” in an interim Constitution which came into force in April 1994. It contained an entrenched Bill of Rights, and a resolution on national unity and reconciliation which formed part of the Constitution. The resolution begins with a statement that:

This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice and a future founded on the recognition of human rights, democracy and peaceful coexistence and development of opportunities for all South Africans, irrespective of colour, race, class, belief or sex.⁴

The resolution goes on to stress the imperatives of unity and reconciliation and the need to lay a firm foundation for the future in order to transcend the divisions and strife of the past.

The interim Constitution made provision for the transition to democracy to be completed in two stages. While there is no time to discuss that process tonight, it is sufficient to say that it led to a new democratic Constitution which came into force in February 1997.

The Founding Values

In the preamble to the Constitution, the injustice of the past is acknowledged, and a commitment is made to improve the quality of life of all citizens and to free the potential of each person. The founding values of the new legal order are identified specifically in

4. S. AFR. (Interim) CONST. 1993, epilogue (National Unity and Reconciliation). The resolution is incorporated into and forms part of the present Constitution which was proclaimed on December 18, 1996 and came into force on February 4, 1997.

the Constitution.⁵ They are: human dignity; the achievement of equality; the advancement of human rights and freedoms,⁶ including non-sexism and non-racism;⁷ and respect for certain of the fundamental principles of democracy—the rule of law, universal adult suffrage, a national common voters roll, regular elections, and a multi-party system of democratic government to ensure accountability, responsiveness, and openness.⁸

The Impact of the Constitution

The Constitution does not simply remove apartheid laws and sanitize the old legal order. It does much more than that. It demands that our society be transformed from the closed, repressive, racial oligarchy of the past, to an open society based on social justice and these founding values—values which must now inform all aspects of our legal order. These changes were, in truth, revolutionary.

The Circumstances Existing when the Constitution Was Adopted

At that time we were, and indeed still are, one of the most unequal societies in the world. The past hung over us, profoundly affecting the environment in which we were living. The great majority of South Africans had been the victims of a system of racial discrimination and repression that had affected them deeply in almost all aspects of their lives. This was seen most obviously in the disparities of wealth and skills between those who had benefited from colonial rule and apartheid, and those who had not. It was seen in the contrast between those with land, and the millions of landless people; between those with homes, and the millions without adequate housing; between those living in comfort, and the millions without access to adequate health facilities, clean water, or electricity; between those with skills and secure occupations, and the millions who, as a result of inferior education, lacked skills required for the professions or managerial positions in commerce and industry, and were either unemployed or had limited employment opportunities. The conflict left in its wake a severely damaged economy, a fragmented and traumatized society, widespread poverty and underdevelopment, and

5. These are entrenched in Chapter 1 of the Constitution. S. AFR. CONST. 1996 ch. 1.

6. *Id.* s. 1(a).

7. *Id.* s. 1(b).

8. *Id.* s. 1(d).

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corruption. It was in this environment that we adopted the new constitutional order.

The Bill of Rights

The founding values are given substance in a bill of rights, which is declared in the Constitution to be “a cornerstone of democracy in South Africa.”⁹ It not only entrenches internationally recognized civil and political rights and freedoms, but, consistent with the Universal Declaration, also makes provision for socio-economic rights.

The Courts

When the new constitutional order was introduced, the existing courts, which had enforced apartheid, were retained, and the existing judges and magistrates remained in office. One new court, the Constitutional Court, was established. It was to be the highest court in respect of all constitutional matters and its decisions on such matters would be binding on all other courts. In my comments I will focus on the role of this Court in developing the new constitutional jurisprudence of our country, paying particular attention to concerns of dignity and equality.

The New Constitutional Order

In contrast with the position of courts under apartheid, our courts now have extensive powers. The exercise of public power, and in many instances, private power, is subject to constitutional control.¹⁰ Courts are required to declare any law or conduct inconsistent with the Constitution to be invalid to the extent of such inconsistency,¹¹ and the Constitution states explicitly that “an order or decision issued by a court binds all persons to whom and all organs of state to which it applies.”¹²

All lawmaking authority must be exercised in accordance with the

9. *Id.* s. 7(1).

10. *Pharm. Mfr. Ass'n of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) paras. 40–45 (S. Afr.).

11. S. AFR. CONST. 1996 s. 7(1) (“The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”).

12. *Id.* s. 165(5).

Constitution, and there is no aspect of law and government that is not affected by it.¹³ This means, as the Constitutional Court has held, that “the legislature and executive in every sphere [of government] are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.”¹⁴ All law, including the common law, must be developed and legislation must be interpreted to promote the spirit of the bill of rights,¹⁵ the core values of which are declared to be human dignity, equality, and freedom. As the Constitutional Court has said, “[n]o-one could miss the significance of the hermeneutic standard set. The values urged upon the Court are not those that have informed our past. Our history is one of repression not freedom, oligarchy not democracy, apartheid and prejudice not equality, clandestine not open government.”¹⁶

How the Courts Have Applied the Constitution

When the Constitution was adopted, effect could be given to its founding values only if fundamental changes were made to the political, social, and economic conditions that previously existed in our country. This has been emphasised by the Constitutional Court on more than one occasion. It has emphasised that “a commitment to . . . transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of the new constitutional order.”¹⁷ This commitment to transformation is key to understanding our Constitution and its interpretation. The Constitution provides the framework within which the transformation is to be carried out. The Preamble, the founding values, and the Bill of Rights that gives effect to them, articulate the goals to be achieved. As the Constitutional Court has said, “the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution’s goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterizes the constitutional enterprise as a

13. *Pharm. Mfrs. Ass’n*, (2) SA 674 para. 44.

14. *Fedsure Life Assurance Ltd. v Greater Johannesburg Transitional Metro. Council*, 1999 (1) SA 374 (CC) para. 58 (S. Afr.).

15. S. AFR. CONST. 1996 s. 39(2).

16. *State v Makwanyane* 1995 (3) SA 391 (CC) para. 322 (S. Afr.).

17. *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) para. 8 (S. Afr.).

whole.”¹⁸

Socio-Economic Rights

The Universal Declaration recalls that “[t]he United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.”¹⁹ There is no dignity in being compelled to live in conditions of abject poverty without access to basic necessities of life such as food, water, health services, and housing. Under our Constitution the government is obliged to address such needs. The Constitution provides that everyone has the right to have access to housing, health care, food, water, and social security.²⁰ It requires the state to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of these rights.²¹ It also deals with land reform²² and access to education.²³

The socio-economic rights give effect to the constitutional value of human dignity, and this influences the approach of the Court to claims for the enforcement of such rights. Dealing with a claim for access to housing, the Constitutional Court held that:

Reasonableness must . . . be understood in the context of the Bill of Rights as a whole. The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality.²⁴

The State is required by the Constitution to “respect, protect, promote and fulfil” rights contained in the Bill of Rights.²⁵ The justiciability of socio-economic rights is therefore not an issue in

18. *Investigating Directorate: Serious Econ. Offences v Hyundai Motor Distrib.* 2001 (1) SA 545 (CC) para. 21 (S. Afr.).

19. UDHR, *supra* note 2, pmbl.

20. S. AFR. CONST. 1996 ss. 26–27.

21. *Id.* ss. 26(2), 27(2).

22. *Id.* s. 25(5).

23. *Id.* s. 29(1).

24. *South Africa v Grootboom* 2001 (1) SA 46 (CC) para. 44 (S. Afr.).

25. S. AFR. CONST. 1996 s. 7(2).

South Africa. The question, as the Court has said, is thus “not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case. This is a very difficult issue which must be carefully explored on a case by case basis.”²⁶ In addressing this issue, arguments about institutional competence and the role of courts in a democracy come to the fore, not in the context of justiciability, but in the context of how courts should deal with claims that positive action be taken by the state to fulfill its constitutional obligations.

Such claims are at the border of the separation of powers between the judiciary and the executive. A balance must be struck between the role of the court as interpreter and upholder of the Constitution, and the role of government in a democratic society as policymaker and lawmaker. That is not easily done. Inevitably, claims for the enforcement of socio-economic rights are hard cases. They are hard, not only because they draw courts into policy matters, including possibly the budget itself, but because of the abject living conditions of many people in our country and their legitimate demands that this be addressed now that apartheid is over.

Positive claims for socio-economic rights are therefore approached carefully, on a case by case basis, bearing in mind that, as the Constitutional Court has said:

courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for . . . deciding how public revenues should most effectively be spent. . . . [and] are ill suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed to rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.²⁷

26. *Grootboom*, (1) SA 46 para. 44.

27. *Minister of Health v Treatment Action Campaign 2002* (5) SA 721 (CC) paras. 37–38

On the other hand, the Court has insisted that such rights are justiciable and subject to evaluation to determine whether or not government action (or inaction) is consistent with the standards prescribed by the Constitution. In doing so it has rejected arguments by the government that the making of policy is its prerogative, and that courts cannot make orders that would have the effect of requiring government not to pursue a particular policy, saying:

Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.²⁸

The state has to manage its limited resources in order to address the extensive needs of millions of people for access to a multiplicity of social goods such as health, housing, food and water, employment opportunities, social security, and the other socio-economic rights entrenched in the Constitution. What the state does in one sphere may affect its ability to deal with needs in other spheres. There will thus be times “when this requires [the state] to adopt an holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals.”²⁹ Where the lack of human or financial resources is put in issue by the state, more than a “bald assertion” of resource constraints will be required.

Details of the precise character of the resource constraints, whether human or financial, in the context of the overall resourcing of the organ of state will need to be provided. The standard of reasonableness so understood conforms to the constitutional principle of accountability, on the one hand, in that it requires decision-makers to disclose their reasons for their conduct, and the principle of effectiveness on the other, for it does not unduly hamper the decision-maker’s authority

(S. Afr.); see also *Rail Commuters Action Group v Transnet Ltd. t/a Metrorail* 2005 (2) SA 359 (CC) para. 86 (S. Afr.).

28. *Treatment Action Campaign*, (5) SA 721 para. 99.

29. *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) para. 31 (S. Afr.).

to determine what are reasonable and appropriate measures in the overall context of their activities.³⁰

The Court has established a framework for dealing with such claims built around three principles.

First, socio-economic rights are justiciable and if claims are brought before the courts, then it is their duty to consider whether or not the State has complied with its obligations under the Constitution. In subjecting the measures taken by the State to constitutional review, all aspects of the state's performance, including policy, if that be relevant to the decision, must be taken into account.

Second, the standard of review to be applied is whether, in the light of the provisions of the Constitution and the State's available resources, the measures taken by the State can be said to be reasonable. Policies and programs must be reasonable "both in their conception and their implementation."³¹ Reasonableness is a legal principle which our courts are required to apply when there is a challenge to the validity of administrative action of the executive. Although the context is different, similar techniques to those applied in administrative law have been adopted to give effect to the constitutional requirement that measures taken must be reasonable. Reasonableness in this context requires an appropriate balance to be struck "between the need to ensure that constitutional obligations are met, on the one hand, and recognition for the fact that the bearers of those obligations should be given appropriate leeway to determine the best way to meet the obligations in all the circumstances."³² It will therefore not

enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent [A] wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.³³

And finally, courts must deal with such matters in a restrained and focused manner, with due regard to their limited institutional

30. *Metrorail*, (2) SA 359 para. 88. For an example of a case where this was done, see *Soobramoney*, (1) SA 765.

31. *Grootboom*, (1) SA 46 para. 42.

32. *Metrorail*, (2) SA 359 para. 87.

33. *Grootboom*, (1) SA 46 para. 41.

capacity, and the multiple social and economic consequences which may result from the Court's order. I should add that these consequences would, of course, include not only those flowing from a decision to uphold a claim, but also from a decision not to do so.

There is no time to examine the specific facts of particular cases in any detail. In applying these principles, the Constitutional Court has held that a national protocol setting priorities for the use of dialysis machines in public hospitals was reasonable;³⁴ but it has held to be unreasonable the housing policy of a municipality which failed to make adequate provision for access to housing by homeless people,³⁵ the policy of the national government in failing to permit doctors in public hospitals and clinics to prescribe an inexpensive antiretroviral drug to combat the mother-to-child transmission of the Human Immunodeficiency Virus,³⁶ and social welfare legislation which excluded permanent residents from its provisions.³⁷ Its decisions in these cases have had far-reaching implications in eviction cases, particularly where the applicant is an organ of the state, in bringing about changes to the state's policy to address the scourge of AIDS, and in cases involving other positive obligations imposed on the state by the Constitution or legislation.³⁸

What the South African experience shows is that it is possible, as Professor Sunstein has noted, to assess claims of constitutional violations of socio-economic rights without requiring at the same time more than existing resources will allow.³⁹ He suggests that the approach adopted by the South African courts "[e]nsures respect for sensible priority setting, and close attention to particular needs, without displacing democratic judgments about how to set priorities."⁴⁰ In so doing, the South African model provides an answer to those who contend that socio-economic rights are not justiciable. It also enables "[t]hose whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril"⁴¹ to turn to the

34. *Soobramoney*, (1) SA 765.

35. *Grootboom*, (1) SA 46.

36. *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) (S. Afr.).

37. *Khosa v Minister of Soc. Dev.* 2004 (6) SA 505 (CC) (S.Afr.).

38. See, e.g., *Rail Commuters Action Group v Transnet Ltd. t/a Metrorail* 2005 (2) SA 359 (CC) (S. Afr.); *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) (S. Afr.); *Jaftha v Schoeman* 2005 (2) SA 140 (CC) (S. Afr.).

39. CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 236 (2001).

40. *Id.* at 227–29.

41. *South Africa v Grootboom* 2001 (1) SA 46 (CC) para. 44 (S. Afr.).

courts if their needs are neglected. That is an important safeguard and one that deserves constitutional protection.

Equality

There are many different forms of inequality that influence the lives of people: inequality of income; inequality of capacity due to lack of access to land, housing, education, health care, or other necessities of life; inequality due to social exclusion because of stereotypical attitudes or prejudices; and inequality because of benefits accorded to others on account of patronage, favoritism, or corruption. There is no end to the possible examples.

The Constitution provides in conventional terms that “everyone is equal before the law and entitled to the equal benefit and protection of the law.”⁴² Linked to the equal protection clause is a clause prohibiting discrimination. Given the history of inequality in South Africa, a formal application of equality and anti-discrimination clauses might have entrenched existing patterns of privilege and hampered the achievement of the constitutional goal of transformation. This was a particular risk in a country like ours with its long history of institutionalized discrimination.

The drafters of our Constitution knew about the evolving principles of equality law in other countries. They were acutely aware of the disputes in the United States over the interpretation and application of the 14th Amendment and, in particular, of the litigation here concerning affirmative action. To avoid such disputes in South Africa, and to ensure that equality is given a substantive and not merely a formal meaning, the Constitution also provides: “[e]quality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.”⁴³

Consistent with this, the anti-discrimination clause targets “unfair discrimination,” providing that: “[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age disability, religion, conscience,

42. S. AFR. CONST. 1996 s. 9(1).

43. *Id.* s. 9(2).

belief culture, language and birth.”⁴⁴ The prohibition against unfair discrimination is then extended to all persons and it is provided that national legislation must be enacted to prevent or prohibit unfair discrimination.⁴⁵ This ensures that the prohibition of unfair discrimination extends to the exercise of private power as well as public power. Such legislation has been enacted.

The Constitutional Court construes the equality clauses as calling for a substantive rather than a formal approach to equality, saying that the Constitution “[h]eralds not only equal protection of the law and non-discrimination but also the start of a credible and abiding process of reparation for past exclusion, dispossession and indignity within the discipline of our constitutional framework.”⁴⁶ And further, that “decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result.”⁴⁷

It follows that some of the debates that have taken place around affirmative action in the context of equal protection clauses in the United States of America may not arise in South Africa and the decisions of our Courts on equality issues may well differ from decisions of the United States courts on similar issues. In a modern society it is impossible for government to perform its regulatory role without making regulations that differentiate between people.

Discrimination, therefore, means something more than mere differentiation. In common parlance it has a pejorative content implying that the person or persons concerned have been prejudiced by unfavorable treatment. The constitutional standard of unfair discrimination requires also that a judgment be made concerning the fairness or unfairness of the particular differentiation. In an early judgment on the issue of discrimination, the Constitutional Court said:

Given the history of this country, we are of the view that “discrimination” has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them. We are emerging from a

44. *Id.* s. 9(3).

45. *Id.* s. 9(4).

46. *Minister of Finance v van Heerden* 2004 (6) SA 121 (CC) para. 25 (S. Afr.).

47. *Bato Star Fishing v Minister of Env'tl. Affairs & Tourism* 2004 (4) SA 490 (CC) para. 74 (S. Afr.).

period of our history during which the humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short, they were denied recognition of their inherent dignity.⁴⁸

The phrase “unfair discrimination” should therefore be understood, said the Court, as denoting differential treatment which impairs the fundamental dignity of the persons affected or impacts on them in a comparably serious manner.⁴⁹

The fundamental dignity referred to is not a narrow criterion; it is a dignity that respects a community in which all are equal members entitled to equal concern and respect. The impact of the discrimination on the complainant is what is crucial. It is not enough for a complainant to show that he or she was subjected to unequal treatment unless it resulted in prejudice of such a nature.

This calls for a nuanced and comprehensive enquiry in which all relevant factors must be assessed “cumulatively and objectively.”⁵⁰ Factors relevant to the inquiry into unfairness include a consideration of the extent to which the discrimination has affected the rights or interests of complainants; the more invasive the discrimination to the interests of those affected by it, the more likely it will be held to be unfair. The position of the complainants in society and whether they suffered in the past from patterns of disadvantage are relevant. The more vulnerable the group, the more likely it is that discrimination will be unfair.⁵¹ The nature of the provision and the aims it seeks to achieve are also relevant; legislation or conduct is less likely to be held unfair if its purpose is directed to achieving equality.⁵²

It is not possible here to catalogue the decisions of our courts to show how they are approaching their task of translating human rights into practice. I have said enough to show how they have given effect to issues of dignity and equality, the core values of the Universal

48. *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) para. 31 (S. Afr.).

49. *Id.* para. 33.

50. *National Coal. for Gay & Lesbian Equal. v Minister of Home Affairs* 2000 (2) SA 1 (CC) para. 41 (S. Afr.).

51. See *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) para. 44 (S. Afr.); *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para. 112 (S. Afr.).

52. See *National Coal. for Gay & Lesbian Equal.*, (2) SA 1 para. 41.

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Declaration.

What our courts are doing must be seen in light of the circumstances of our country, of our constitution, and of our history. Though institutional racial discrimination no longer exists, and much has changed for the better, there is still widespread poverty, landlessness and unemployment, and great disparities between rich and poor. I believe in our country and its future; but, it must be acknowledged that despite the commitments made in our Constitution, we have a long way to go to realize the aspirations of the Universal Declaration.