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JOBNAME: Acta Juridica 15 PAGE: 1 SESS: 9 OUTPUT: Wed Jun 17 15:59:43 2015
/first/juta/Juta/acta–juridica15/ch20

Equality beyond dignity: Multi-dimensional equality and Justice Langa's judgments

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The tendency for South African equality jurisprudence to reduce equality to a single value, namely dignity, has been much debated, especially around the relationship of dignity to disadvantage. In this article we argue for a multi-dimensional idea of equality that moves beyond a dignity/disadvantage paradigm to enable a fuller exploration of the complex harms and injuries that underlie equality claims, and greater elucidation of the multiple principles and purposes of equality. In particular, we argue that substantive equality should be understood in terms of a four-dimensional framework, which aims at addressing stigma, stereotyping, prejudice and violence; redressing socio-economic disadvantage; facilitating participation; and valuing and accommodating difference through structural change. We suggest that this enables a better exploration of the different principles that underlie equality and an open discussion of complementarities and tensions between them. We explore the benefits of this approach through an evaluation of three equality cases in which Justice Langa delivered the leading judgments. Although we do not claim that he fully adopted such an approach, we engage Justice Langa's philosophy on equality as it emerges from these judgments, and evaluate the extent to which we can develop from this a more fully-fledged understanding of equality and its underlying values in the South African Constitution.

I INTRODUCTION

In *Brink v Kitshoff*, the first equality case of the South African Constitutional Court, O'Regan J, writing for the court, identified the purpose of the constitutional right to equality as remedying patterns of disadvantage.[1] However, in a trio of cases that followed this, the court effectively placed dignity at the centre of the equality right, noting that its purpose was to accord equal dignity and equal human worth to all human beings, regardless of their membership of particular groups. This required that everyone be treated with equal concern and respect. This elevation of a largely undefined, and abstract notion of dignity as human worth, and the apparent displacement of other purposes, especially that of remedying

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[1] 1996 (4) SA 197 (CC).

JOBNAME: Acta Juridica 15 PAGE: 2 SESS: 9 OUTPUT: Wed Jun 17 15:59:43 2015
/first/juta/Juta/acta–juridica15/ch20

systemic disadvantage, generated significant debate about the definition and application of the right.[2]

This continued commitment to dignity as the core of the equality right raises several questions: Can dignity act as a placeholder for all the inequalities and harms that the idea of substantive equality seeks to address? Is there no place for other values and principles in evaluating whether the equality right has been violated? Subsuming too much under the heading of dignity risks obscuring the different values and mediating principles that underlie equality and are visible, although not always explicit, in the court's jurisprudence. The core notion of dignity can be seen to address the harms of stigma, humiliation, stereotyping and prejudice. However, the idea of substantive equality clearly encompasses other values that are not reducible to dignity, including redressing social and economic disadvantage, promoting voice and participation, and affirming difference through structural and institutional change.[3] Even more problematically, the sole reliance on dignity gives little guidance on how to address tensions or conflicts between dignity and the other core values of substantive equality, and the different dimensions of (in)equality that they might represent.

In this article, we aim to move beyond the attempt to reduce equality to a single value. The elevation of dignity in South Africa has often meant that disadvantage is not fully explored, if at all, and that issues of difference, diversity and inclusion are often viewed only through the prism of dignity's relation to individual identity formation and self-realisation (rather than their relationship to more systemic disadvantage and structural inequality).[4] Instead, we argue for a multi-dimensional understanding of equality that enables a fuller grasp of the different facets of inequality which the right to substantive equality aims to redress. Dignity on its own could be criticised for being too individualistic, and for privileging stigma harms over socio-economic disadvantage. However, these potential defects can be mitigated if dignity (understood as redressing stigma, stereotyping, and prejudice) is buttressed by other values, such as redressing socio-economic disadvantage, facilitating participation, and accommodating difference through structural change.

[2] C Albertyn & B Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *SAJHR* 248; DM Davis 'Equality: The majesty of legoland jurisprudence' (1999) 116 *SALJ* 398; S Cowen 'Can dignity guide our equality jurisprudence?' (2001) 17 *SAJHR* 34.

[3] For different iterations of the need to recognise different principles, dimensions and values underlying the equality right see: Albertyn & Goldblatt (n 2); S Fredman *Discrimination Law* 2 ed (2011) 8–33; S Fredman 'Redistribution and recognition: Reconciling inequalities' (2007) 23 *SAJHR* 214; H Botha 'Equality, plurality and structural power' (2009) 25 *SAJHR* 1; C Albertyn 'Constitutional equality in South Africa' in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 75.

[4] Albertyn & Goldblatt (n 2).

JOBNAME: Acta Juridica 15 PAGE: 3 SESS: 9 OUTPUT: Wed Jun 17 15:59:43 2015
/first/juta/Juta/acta–juridica15/ch20

Likewise, potentially problematic implications of sole reliance on redressing socio-economic disadvantage are less likely if this value is complemented by the other values which substantive equality embraces. For example, social security schemes which redress disadvantage can generate stigma and exclusion. They should therefore be designed to avoid stigma and enhance participation and social inclusion if they are genuinely to address substantive equality.

Although various scholars have sought to develop singular conceptual frameworks for equality based on dignity[5] or (to a lesser extent) disadvantage alone,[6] we suggest that this risks over-burdening these values with multiple, contested meanings as well as seeking consistency in the jurisprudence, where there is, in fact, contestation. Moreover, with a Constitution based on multiple democratic values and an understanding of equality that is multi-faceted and complex, it makes conceptual and analytic sense to acknowledge and work with these different dimensions and values. No one value should take up all the space – dignity, equality, freedom and others should be interpreted in a generous, progressive and complementary manner, giving each its place within the overall, transformative project of the Constitution.

In this article we therefore argue for a multi-dimensional idea of equality which enables a fuller exploration of the complexity of the harms and injuries that underlie equality claims, and greater elucidation of the multiple principles and purposes of equality. In particular, we argue that substantive equality should be understood in terms of a four dimensional framework, which aims at addressing stigma, stereotyping, prejudice and violence; redressing socio-economic disadvantage; facilitating participation; and valuing and accommodating difference through structural change. We suggest that this approach enables a better exploration of the different principles that underlie equality and, crucially, an open discussion of complementarities and tensions between them.

We explore the benefits of this multi-dimensional approach through an evaluation of three equality cases in which the late Chief Justice Langa delivered the leading judgment: *City Council of Pretoria v Walker*,[7] *Bhe v Magistrate Khayelitsha*[8] and *Pillay v MEC for Education, KwaZulu-Natal*.[9] We suggest that these judgments and his extra-curial writings indicate that

[5] See eg S Woolman 'Dignity' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (2005) chap 36 (in a South African context) and D Reaume 'Discrimination and dignity' (2003) 63 *Louisiana LR* 645 (in a Canadian context).

[6] See eg C McConnachie 'Human dignity, "unfair discrimination" and guidance' (2014) 34 *Oxford Journal of Legal Studies* 609–29, reviewing L Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2012).

[7] 1998 (2) SA 363 (CC).

[8] 2005 (1) SA 580 (CC).

[9] 2008 (1) SA 474 (CC).

JOBNAME: Acta Juridica 15 PAGE: 4 SESS: 9 OUTPUT: Wed Jun 17 15:59:43 2015
/first/juta/Juta/acta–juridica15/ch20

Justice Langa was sympathetic to a more multi-dimensional approach. Although we do not claim that he fully adopted such an approach, we suggest that his work illustrates the possibilities and challenges of balancing different facets of equality to achieve just, substantive equality results. Thus, we engage Justice Langa's philosophy on equality as it emerges from these judgments, and evaluate the extent to which we can develop from this a more fully-fledged understanding of equality and its underlying values in the South African Constitution.

In the next section, we draw out the elements of substantive equality and briefly note their presence in equality jurisprudence. Thereafter, we explore their place in Langa's judgments and, through a critical engagement with these judgments, we suggest that courts reach better results when they take account of all dimensions of equality. Given that two of Justice Langa's three equality judgments deal with the often tricky relationship between gender equality and cultural diversity, we also comment on the extent to which a multi-dimensional approach to the jurisprudence enables an effective interrogation and resolution of both of these important constitutional commitments. Finally, we sum up the possibilities of Justice Langa's equality judgments and suggest that building on his legacy requires the conceptual development and clearer articulation of these various elements or dimensions, and the complex ways in which they interact, so that they can work together to create a powerful substantive vision of equality.

II SUBSTANTIVE EQUALITY

The development of the idea of substantive, rather than formal, equality was well-established in academic literature and some comparative equality law when the South African Constitution was written in the early 1990s, and it is widely acknowledged that the Constitution promotes substantive equality.[10] As a value, the constitutional commitment to substantive equality requires attention to actual social and economic inequalities in society, to remedial and redistributive action and to achieving a society in which every person participates fully and is able to develop to his or her full human potential.[11] As discussed further below, we suggest that substantive equality is best understood as a complex and multi-dimensional concept.

Equality – especially substantive equality – is a contested principle. South Africa is no exception. Generally, a legal commitment to substantive equality emerges from a recognition of the failure of formal equality

[10] For early discussions of this in a South African context, see C Albertyn & J Kentridge 'Introducing the right to equality in the interim Constitution' (1994) 10 *SAJHR* 149; Albertyn & Goldblatt (n 2).

[11] As promised by the preamble to the Constitution.

JOBNAME: Acta Juridica 15 PAGE: 5 SESS: 9 OUTPUT: Wed Jun 17 15:59:43 2015
/first/juta/Juta/acta–juridica15/ch20

to change deep-seated social inequalities based on race, gender, or other status. Simply barring classifications based on race, sex or other status has not been sufficient: instead, it is the disadvantage attached to such classifications that matters. This has led to an important emphasis on remedying socio-economic disadvantage as a core principle of substantive equality. This means that substantive equality is specifically asymmetric: it focuses on the disadvantaged group rather than requiring equal treatment for its own sake. Where equal treatment exacerbates disadvantage, substantive equality might be breached; and conversely, where differential treatment is necessary to redress disadvantage, substantive equality might be furthered. South Africa's commitment to substantive equality has meant that its constitutional equality jurisprudence has always emphasised the effects of differentiation, and recognised that equality is not always served by similar treatment. 'Indirect' discrimination, differential treatment and positive measures are central to understanding South Africa's concept of equality, as is a methodological approach that rejects abstraction and requires proper consideration of context and impact.[12]

More controversial, however, has been the choice of principles and values that define the content and purpose of the right, and provide the standards by which to test whether and when differentiation amounts to impermissible discrimination and inequality. Here, both disadvantage and dignity have vied for prominence in the literature and (to a lesser extent) in the constitutional jurisprudence of South Africa (and Canada). Much more muted is the idea of participation as an element of equality. Perhaps first raised by Justice Sachs in *National Coalition of Gay and Lesbian Equality v Minister of Justice*[13] as an idea that outsider groups (in this case gays and lesbians) should participate fully in decision-making so that their ideas, experiences and moral approaches are fully taken account of,[14] it has also appeared within an understanding of dignity as political vulnerability.[15] Concerns about identity, difference and diversity have also emerged in the jurisprudence, but again are often subsumed by the idea of dignity,[16] and often through the lens of individual identity, rather than their relationship to more systemic disadvantage and structural inequality.[17] Thus several

[12] For a discussion of the legal mechanisms of substantive equality under the South African Constitution, see C Albertyn & B Goldblatt 'Equality' in Woolman & Bishop (n 5) chap 35, 5–7.

[13] 1999 (1) SA 6 (CC).

[14] *National Coalition* (n 13) para 132, citing R Dworkin 'Equality, democracy and constitution' (1990) 28 *Alberta LR* 324.

[15] See eg *Larbi-Odam & Others v MEC for Education & Another* 1998 (1) SA 745 (CC) paras 19–20; *Walker* (n 7) para 48.

[16] See n 2.

[17] See eg *National Coalition* (n 13) para 26; *Fourie and Another; Lesbian and Gay Equality Project and Others v Minister of Home Affairs* 2006 (1) SA 524 (CC) para 15; *Pillay* (n 9) para 53.

JOBNAME: Acta Juridica 15 PAGE: 6 SESS: 9 OUTPUT: Wed Jun 17 15:59:43 2015
/first/juta/Juta/acta–juridica15/ch20

dimensions of equality are visible, if not fully articulated, within the jurisprudence. We turn to examine these dimensions in more detail.

(1) *Dignity and disadvantage*

Led by the equality jurisprudence on sexual orientation, dignity is generally recognised as the core value and standard of s 9(3). Although a contested concept even in South African jurisprudence, the dominant meaning accorded dignity is one of (equal) concern and respect, and the need to affirm an individual's sense of self-worth. The major harms underlying this are recognition-based and relate to stereotyping, stigma and prejudice resulting in exclusion, denigration and harm, and impinging on individual self-worth.

In the context of the sheer degradation and dehumanisation which was a central element of the institutionalised race discrimination under apartheid, the importance of dignity is incontrovertible. It captures the basic instinct that the right to equality should counter stigma, humiliation, prejudice and violence. Incorporating dignity into the right to equality also dilutes the purely relative nature of the equal treatment doctrine. Dignity creates a substantive underpinning of the right to equal treatment: it is inconceivable that treating two people equally badly could fulfil a right to equality as dignity. It means that the right to equality could never be achieved by 'levelling down'.[18]

However, dignity also carries problematic baggage. One aspect of this is the extent to which dignity can cut across and dilute the emphasis on disadvantage. In a controversial series of cases, the Canadian Supreme Court held that the fact of inflicting or perpetuating disadvantage on a protected group was not sufficient to breach the equality principle in s 15 of the Canadian Charter because dignity had not been impaired.[19] A second problematic aspect of dignity is its potential to focus on the individual, rather than on patterns of institutional or structural inequality.[20] Dignity, both as a subjective feeling of individual harm and as a more objective idea of injury to individual self-worth, tends to advance an idea of discrimination as social prejudice against individuals, rather than as systemic, group-based discrimination embedded in the structures, processes and institutions of society.

In some majority and minority judgments, the South African Constitutional Court appeared to recognise, if implicitly, that material disadvantage, while often characterised as affecting self-worth (or dignity), was

[18] Fredman *Discrimination Law* (n 3) 21.

[19] *Gosselin v Quebec* [2002] 4 SCR 429, now overtaken by *R v Kapp* [2008] 2 SCR 483 which held that dignity was a background value, but not a specific legal factor that needed to be proved by the complainant.

[20] See Albertyn & Goldblatt (n 2).

JOBNAME: Acta Juridica 15 PAGE: 7 SESS: 9 OUTPUT: Wed Jun 17 15:59:43 2015
/first/juta/Juta/acta–juridica15/ch20

perhaps an autonomous dimension of inequality. We suggest below that Justice Langa's majority judgment in *City Council of Pretoria v Walker* is an example of the explicit use of material disadvantage as a separate dimension of equality. More commonly, however, social and economic disadvantage, and the exacerbation of material disadvantage, even destitution, were characterised as important aspects of the absence of dignity and the failure to respect common humanity. Thus in separate minority judgments in *Volks NO v Robinson*, Mokgoro and O'Regan JJ, and Sachs J found an impairment of dignity in the law's failure to recognise financial need and dependence in not protecting surviving partners of a cohabiting relationships.[21] In *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* Mokgoro, O'Regan and Van der Westhuizen JJ and Langa CJ concluded that the impairment of dignity related not only to the 'social stigma which may result from such discrimination, but also the material [or financial] impact it may have on refugees'.[22] And in *Khosa v Minister of Social Development,*[23] the majority found that the material (economic) impact of exclusion, and situations where members of outsider groups were forced into 'relationships of dependency upon families, friends and community', 'relegated to the margins of society' and 'cast in the role of supplicants' violated dignity, and thus equality.[24] In socio-economic rights jurisprudence, the idea that 'decisions about the allocation of public benefits represent the extent to which poor people are treated as equal members of society',[25] saw the idea of equal concern and respect require government to attend to people's legitimate needs in acting to provide a minimum core of benefits (although not as a substantive guarantee of this).

Nevertheless, despite a tendency to soak up multiple harms within the broad notion of dignity as intrinsic human worth, there are indicators in the jurisprudence that certain forms of inequality are not reducible to dignity. In particular, dignity does not fully capture the idea of remedying systemic patterns of social and economic disadvantage, entrenched in the structures, institutions and processes of society. It is our argument that dignity, as stigma and prejudice, and disadvantage, as socio-economic inequality and material deprivation, should be treated as separate equality harms. This allows us to recognise the complexity of equality claims, and to understand when they might pull in opposite directions (thus requiring

[21] *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC), per O'Regan and Mokgoro JJ (dissenting); and Sachs J (dissenting).

[22] *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* 2007 (4) SA 395 (CC) paras 122 and 123.

[23] *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC).

[24] *Khosa* (n 23) paras 74 and 76–7.

[25] *Khosa* (n 23) para 74.

JOBNAME: Acta Juridica 15 PAGE: 8 SESS: 9 OUTPUT: Wed Jun 17 15:59:43 2015
/first/juta/Juta/acta–juridica15/ch20

resolution as in *Walker*),[26] where they intersect to exacerbate inequality (such as in *Bhe),*[27] or where one form of equality harm can generate additional, and greater inequality. For example, Mokgoro and O'Regan JJ's minority judgment in *Union of Refugee Women* recognises that prejudice against 'foreigners' (impairment of dignity) can result in material disadvantage. On the other hand, the presence of material disadvantage and poverty might itself generate stigma and prejudice, and thus also impair dignity.[28]

(2) *Additional dimensions of equality: Difference and diversity, inclusion and participation*

Although addressing stigma and material disadvantage are two important dimensions of substantive equality, they do not exhaust the full reach of the equality concept. Also central to equality is the need to affirm difference and diversity, not just on an individual, but also on a structural basis, and to counter exclusion and marginalisation, whether political or social, through fostering inclusion, voice and participation.

(a) Difference and diversity

Difference is a central feature of substantive equality. As noted above, it is not the fact of difference, but the detriment that flows from it, that is of issue. Indeed, differing identities are a valuable part of an individual's life, and conformity should not be the price for equality. To address this, substantive equality needs to affirm differing individual and group-based identities, as will be seen in our discussion of *Pillay* below. This not only requires attention to individual identity formation and self-realisation, as expressed in South Africa's sexual orientation jurisprudence,[29] but also to the manner in which difference is tied to group-based disadvantage. Here structural change may be necessary to ensure that different identities can thrive equally in society. For women, for example, this would require a radical change in the division of labour within the home, and the male-dominated structure of paid working time. For people with disabilities, this might require changes in the built environment, introduction of technologies, changes in working hours or other measures.

Thus the third dimension of equality should affirm difference and contribute to effecting structural change. In general, South African jurisprudence has always recognised that difference may serve equality, and that identity formation, central to dignity, is an important aspect of non-discrimination and equality. However, perhaps because of the

[26] As discussed below.
[27] As discussed below.
[28] *Khosa* (n 23) para 74.
[29] See the cases cited above (n 17).

JOBNAME: Acta Juridica 15 PAGE: 9 SESS: 9 OUTPUT: Wed Jun 17 15:59:43 2015
/first/juta/Juta/acta–juridica15/ch20

emphasis on dignity and individual identity formation as formative of difference and diversity, the links between difference, diversity and group-based disadvantage – and the need for structural change – have not always been clearly identified and interrogated. In particular, should individual identities be accommodated by way of an exception to the dominant norm, thus potentially simply reinforcing that norm, or is more fundamental structural change required? For example, in the context of gender, accommodation of child-caring roles has generally taken the form of part-time work. Yet, because the underlying division of labour in the home is not addressed, part-time work is invariably predominantly female, precarious and low-paid. In such circumstances, instead of reinforcing the norm by accommodating difference, substantive equality requires structural change in working hours, so that both men and women can be participative parents. However, in other circumstances, it might be appropriate to create exceptions to a rule, in particular to accommodate religious difference, rather than removing the rule altogether. Thus, as we will see in *Pillay* below, the court concluded that the cultural requirement on a school girl to wear a nose stud might be better addressed by creating an exception to the rule rather than abolishing it altogether.

(b) Inclusion and participation

A further key problem that substantive equality aims to address is social, economic and political exclusion. This can be conceived of in different ways. John Hart Ely, in his justification of judicial review under the US Constitution, argued that where the political channels are blocked, so that some groups are permanently 'in' and others are permanently 'out', there is a need for intervention. US jurisprudence developed this principle primarily in the context of race discrimination, regarding any classifications disadvantaging a 'discrete and insular minority' as suspect and subject to strict scrutiny under the US equality guarantee, the Fourteenth Amendment. Of course, this speaks to any group that might be seen to be politically vulnerable and excluded from the political process: a point made by the South African Constitutional Court about gay men,[30] permanent residents as non-citizens[31] and whites.[32] However, this is often addressed within the context of evaluating an individual impairment of dignity (as stigma or affecting self-worth) under the equality right, rather than as a factor which contributes in its own right to lack of fulfilment of the right.

[30] *National Coalition* (n 13) para 25.
[31] *Larbi-Odam* (n 15); *Khosa* (n 23).
[32] *Walker* (n 7) as discussed below.

JOBNAME: Acta Juridica 15 PAGE: 10 SESS: 9 OUTPUT: Wed Jun 17 15:59:43 2015
/first/juta/Juta/acta–juridica15/ch20

Exclusion can be viewed more broadly as the social and economic exclusion of persons based on their group membership. This aspect of substantive equality recognises that individuals are essentially social, and marginalisation from social life is particularly dehumanising. Although closely tied to economic disadvantage, it speaks separately to social alienation, 'otherness', and segregation. In a similar fashion, equality is characterised by Fraser as parity of participation,[33] by Collins as social inclusion[34] and by Barnard as solidarity.[35] We suggest that the need to address obstacles to social, economic and political participation associated with being a member of an out-group should be an essential purpose of equality, and adds a further dimension to substantive equality. Fostering inclusion and, particularly, participation are thus crucial to overcoming discrimination and inequality. This aspect of inequality – as exclusion and lack of participation arising from group-based disadvantage – has not been fully drawn out in South African jurisprudence, as discussed below.

(3) *Overlapping, multi-dimensional and contested equality*

Given the overlapping and multi-dimensional nature of these principles of equality, it seems difficult to isolate one of them as the essence of substantive equality. It is more helpful to regard substantive equality as multi-dimensional. In particular, we have suggested that four dimensions can be identified: (i) redressing social and economic disadvantage, (ii) addressing stigma, prejudice, humiliation and violence (dignity), (iii) accommodating and affirming difference, diversity and identity, through structural change, and (iv) enhancing voice and participation. By distinguishing between these dimensions, we are able to understand the complex and multi-faceted nature of inequality, the manner in which different dimensions might conflict or complement one another, or might intersect with or reinforce each other. Where one of the dimensions conflicts with one of the others, it is possible to resolve the tension by referring to the schema as whole. Thus, while dignity should be furthered, it could not, consistently with the multi-dimensional approach, be furthered at the expense of redressing disadvantage. Moreover, if one of the dimensions is neglected in the analysis, a breach of substantive equality might be missed. Nor do the dimensions need to be strictly insulated from each other. Disadvantage could encompass dignity harms, as well as socio-economic harms. Affirming difference and identity also speaks to remedying structural disadvantage. However, it is analytically

[33] N Fraser & A Honneth *Redistribution or Recognition* (2003).
[34] H Collins 'Discrimination, equality and social inclusion' (2003) 66 *MLR* 16.
[35] C Barnard 'The future of labour law: Equality and beyond' in C Barnard et al (eds) *The Future of Labour Law: Libor Amicorum Sir Bob Hepple* (2004) 213.

JOBNAME: Acta Juridica 15 PAGE: 11 SESS: 9 OUTPUT: Wed Jun 17 15:59:43 2015
/first/juta/Juta/acta–juridica15/ch20

useful to keep them separate when evaluating whether a measure or action breaches substantive equality.

We suggest that these dimensions are already present in South African equality jurisprudence, but that they need to be drawn out and elucidated. We seek to do that through an evaluation of Justice Langa's equality judgments. In doing so, however, we are mindful of the philosophical differences that tend to underpin a reliance of dignity over disadvantage, or vice versa, or different approaches to diversity and difference, and to inclusion and participation. As hinted at above, these concepts or dimensions are deeply contested and have different theoretical roots. For example, the principle of remedying systemic disadvantage finds its roots in feminist and critical race thinking, whilst dignity has been prominent in liberal egalitarian thought. We do not have the space, in this article, to develop our understanding of the tensions and overlaps between liberal egalitarian and critical theory in approaching equality. However, both find purchase in South African experiences of inequality and in the jurisprudence. This contestation in the jurisprudence, and the prospect that dignity can be used for both progressive and conservative ends, is often obfuscated in discussions of equality and dignity. By using a multi-faceted approach, we argue that these tensions can be better expressed and mediated. Dignity should not be seen as a rival to the value of redressing economic disadvantage or achieving systemic change: instead, our understanding of dignity must be contextualised and buttressed by a simultaneous recognition of the need to address disadvantage, difference and exclusion through the right to substantive equality. This means that dignity cannot be understood in ways that conflict with these complementary values. Similarly, the value of diversity and accommodating difference needs to be seen in the context of and supported by the need to redress disadvantage, address stigma and facilitate participation. This is particularly pertinent in the context of customary law in South Africa, as we suggest in relation to the *Bhe* case below. While customary law should not be subordinated to the dominant norm, this value cannot trump the other values, by subjecting women to disadvantage, demeaning treatment and voicelessness.

III JUSTICE LANGA'S EQUALITY JUDGMENTS

(1) *Disadvantage, dignity and voice:* City Council of Pretoria v Walker

Walker, the earliest major equality case in which Langa DP, as he then was, gave the leading judgment, raises some acutely difficult questions, particularly regarding the relationships between material disadvantage, dignity as countering stigma and affirming self-worth, and voice – three dimensions of substantive equality that potentially pulled in different directions.

JOBNAME: Acta Juridica 15 PAGE: 12 SESS: 9 OUTPUT: Wed Jun 17 15:59:43 2015
/first/juta/Juta/acta–juridica15/ch20

The City Council of Pretoria had deliberately decided to treat the residents of black townships, Mamelodi and Atteridgeville, differently from those of old Pretoria, by applying a flat-rate tariff to the former and a consumption-based tariff to the latter. A more lenient view on the collection of tariffs had also been applied to the residents of Mamelodi and Atteridgeville than to the residents of old Pretoria. Because old Pretoria was still predominantly white and the former townships overwhelmingly black, the impact of both these measures – more expensive services and greater enforcement of municipal debts – fell predominantly on the white group. The respondents, a group of white residents in old Pretoria, complained of unfair discrimination in both instances, but in neither case did they claim that they had been subject to material disadvantage. Writing for nine out of ten judges, Langa DP recognised that the measure treated the residents of old Pretoria in a different manner to those of Mamelodi and Atteridgeville, and that this amounted to indirect race discrimination. He concluded that the discrimination was fair in relation to the different rates charged, but unfair in the selective enforcement of debts.

Walker was written after the court had established the *Harksen v Lane*[36] test for unfair discrimination: a two-stage enquiry which first tested for discrimination by enquiring whether there was differentiation on a prohibited ground, and then evaluated fairness with an overall regard to whether there had been an impairment of dignity. Disadvantage was present in the test, but only as one of the factors to be taken into account in determining whether dignity was impaired. Although the test's emphasis on context and impact (the effects and circumstances of differentiation rather than differentiation per se) meant that the right to equality in s 8 of the interim Constitution (now s 9 of the 1996 Constitution) was 'substantive' in a legal sense, there remained some debate about whether there could be a breach of the right to equality when no material or other disadvantage had been established, but where there was an alleged violation of dignity (as some kind of impairment of self-worth).

Langa DP had no difficulty in finding that the differential tariffs did not constitute unfair discrimination. Here his approach was a holistic one, recognising and addressing the separate harms of material disadvantage and dignity/stigma. Indeed, when discussing the effects of apartheid, he stated:

> Differentiation on the basis of race . . . was a source of grave assaults on the dignity of black people in particular. *It was however not human dignity alone that suffered*. White areas in general were affluent and black ones were in the main

[36] 1998 (1) SA 300 (CC).

JOBNAME: Acta Juridica 15 PAGE: 13 SESS: 9 OUTPUT: Wed Jun 17 15:59:43 2015
/first/juta/Juta/acta–juridica15/ch20

> impoverished. Many privileges were dispensed by the government on the basis of race, with white people being the primary beneficiaries.[37]

In the case before him, he found no material disadvantage, exclusion, or stigma against the white residents and therefore no breach of their right to equality. He concluded that these measures 'did not impact adversely on the respondent in any material way. There was no invasion of the respondent's dignity *nor was he affected in a manner comparably serious to an invasion of his dignity.*'[38] Although dignity was powerful in the *Harksen* test that Justice Langa sought to apply, he seemed to resist shoehorning poverty and material disadvantage into dignity by retaining a distinction in describing the nature of the harm and its impact on the complainants. Although implicit, this case clearly suggests that dignity might not be the sole defining value in equality cases.

The selective enforcement of debts was more difficult. Although this part of the judgment introduces more dimensions into the analysis, the balance between the various dimensions is uneven. In determining whether discrimination could be triggered by an impairment of dignity (as self-worth), Justice Langa summed up the dilemma as follows:

> The respondent does however belong to a racial minority which could, in a political sense, be regarded as vulnerable. It is precisely individuals who are members of such minorities who are vulnerable to discriminatory treatment and who, in a very special sense, must look to the Bill of Rights for protection. When that happens a Court has a clear duty to come to the assistance of the person affected. Courts should however always be astute to distinguish between genuine attempts to promote and protect equality on the one hand and actions calculated to protect pockets of privilege at a price which amounts to the perpetuation of inequality and disadvantage to others on the other.[39]

All the major dimensions of substantive equality can be discerned in this judgment. It stresses two dimensions which, in this case, attracted particular attention from the court. The first refers to the participative dimension. For the very reason that the respondents belonged to a racial minority which could be regarded as vulnerable politically, they should be able to look to the Bill of Rights for protection. This strongly echoes John Hart Ely's vision of the function of judicial review under the US Equal Protection Clause. The second is the dimension concerned with stigma, prejudice and humiliation. For him, no 'members of a racial group should be made to feel that they are not deserving of equal concern, respect and consideration'.[40] The dimension concerning the need to redress material

[37] *Walker* (n 7) para 46 (emphasis added).
[38] *Walker* (n 7) para 68 (emphasis added).
[39] *Walker* (n 7) para 48.
[40] *Walker* (n 7) para 81.

JOBNAME: Acta Juridica 15 PAGE: 14 SESS: 9 OUTPUT: Wed Jun 17 15:59:43 2015
/first/juta/Juta/acta–juridica15/ch20

disadvantage, however, pointed in the opposite direction (there was no disadvantage). The same is true for the dimension requiring a restructuring of institutions to accommodate difference: in this case, the policy of encouragement and changing the culture of non-payment, and the history of non-payment in the townships as a political issue.

Nevertheless, it was the second dimension, relating to the creation of stigma and prejudice, that eclipsed the others in the judgment on selective enforcement of debt:

> No members of a racial group should be made to feel that they are not deserving of equal concern, respect and consideration and that the law is likely to be used against them more harshly than others who belong to other race groups. That is the grievance that the respondent has and it is a grievance that the council officials foresaw when they adopted their policy. The conduct of the council officials seen as a whole over the period from June 1995 to the time of the trial in May 1996 was on the face of it discriminatory. The impact of such a policy on the respondent and other persons similarly placed, viewed objectively in the light of the evidence on record, would in my view have affected them in a manner which is at least comparably serious to an invasion of their dignity. This was exacerbated by the fact that they had been misled and misinformed by the council. In the circumstances it must be held that the presumption has not been rebutted and that the course of conduct of which the respondent complains in this respect, amounted to unfair discrimination within the meaning of section 8(2) of the interim Constitution.[41]

This dignity approach trumps the idea of disadvantage, leaving no room for evaluating dignity against the fact that the complainants suffered no material harm.

This can be contrasted with the strongly-worded dissent of Sachs J. For him, to establish *prima facie* indirect discrimination,[42] the measure must 'at least impose identifiable disabilities . . . or threaten to touch on or reinforce patterns of disadvantage, or in some proximate and concrete manner threaten the dignity or equal concern or worth of the persons affected.'[43] Sachs J acknowledged that 'the doors of the courts must of course always be equally open to all South Africans, independently of whether historically they have been privileged or oppressed. Indeed minorities of any kind are always potentially vulnerable.'[44] However, he regarded the place of the complainant in the structures of advantage and disadvantage as one of the central elements of the determination of fairness or unfairness.[45] Sachs J also acknowledged that even in the

[41] *Walker* (n 7) para 81.
[42] *Walker* (n 7) paras 107–8.
[43] *Walker* (n 7) para 113.
[44] *Walker* (n 7) para 123.
[45] *Walker* (n 7) para 123.

JOBNAME: Acta Juridica 15 PAGE: 15 SESS: 9 OUTPUT: Wed Jun 17 15:59:43 2015
/first/juta/Juta/acta–juridica15/ch20

absence of concrete disadvantage, the 'symbolic effect of a measure . . . could impair dignity in a way which constitutes unfair discrimination.'[46] However, this would generally arise either where there was specific targeting, or where it was 'so related in impact to patterns of disadvantage as to leave the persons concerned with the understandable feeling that once more they were given the short end of the stick.'[47] Most importantly, he did not regard the white inhabitants of Pretoria as, in the circumstances, a politically vulnerable group.[48] While we would not agree with Sachs J's argument that substantive principles should be included at stage one of the equality analysis, we do agree that it is critical to maintain disadvantage as a substantive value in the analysis of fairness, weighed against, and not subservient to, dignity.

We would argue that had Langa DP explicitly considered all four dimensions, and their interaction with each other, he would have had to articulate explicitly, as did Sachs J, why this issue should take pre-eminence. It is hard to see why political vulnerability and stigma dimensions, although potential risks, were in fact weighty issues in relation to the differential enforcement, which centred on encouragement and changing the culture of non-payment, especially when put in the context of the general affluence, political voice and self-confidence of the respondents, and the history of non-payment in the townships as a political issue.

Many commentators have been sympathetic to, and praised, Justice Langa's judgment as reconciliatory, as a means of bringing recalcitrant whites into the constitutional project.[49] While we accept the constitutional importance of this, we do not believe that it needed to be done at the expense of a complex understanding of equality. As Sachs J notes, the work could have been done under s 8(1), as arbitrary and irrational differentiation.[50]

(2) *Multiple dimensions and conflicting equalities:* Bhe v Magistrate, Khayelitsha

Like *Walker*, the *Bhe* case is challenging because it entails a potential conflict between the different dimensions of equality. In addition, *Bhe* raised the possibility of conflicting equalities generated by the constitutional commitment to cultural diversity and to gender equality, allowing us to investigate whether, and how, a multi-dimensional approach to equality helps to resolve these tensions.

[46] *Walker* (n 7) para 129.
[47] *Walker* (n 7) para 129.
[48] *Walker* (n 7) para 132.
[49] See eg F Michaelman 'Reasonable umbrage: Race and constitutional anti-discrimination law in the United States and South Africa' (2003–2004) 117 *Harvard LR* 1378.
[50] *Walker* (n 7) para 138. See also C Albertyn 'Equality' in H Cheadle et al (eds) *South African Constitutional Law: The Bill of Rights* (2002) 51, 70.

JOBNAME: Acta Juridica 15 PAGE: 16 SESS: 9 OUTPUT: Wed Jun 17 15:59:43 2015
/first/juta/Juta/acta–juridica15/ch20

The South African Constitution has never envisaged equality as standing for conformity or assimilation. The value of accommodating difference and transforming structures to incorporate and affirm diversity is present in several parts of the Constitution.[51] Most importantly, as Langa DCJ puts it in *Bhe*:

> Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated . . . provided the particular rules or provisions are not in conflict with the Constitution.[52]

Therefore, merely 'condemning rules or provisions of customary law on the basis that they are different to those of the common law or legislation . . . would be incorrect.'[53] Recognition of customary law is required by the commitment to equality as affirming diversity. It is only where the form of customary law is one that attaches detriment and disadvantage to a particular form of difference (such as gender) that an equality violation should be triggered. *Bhe* demonstrates the relationship between difference and disadvantage in several ways: It shows how apartheid legislation on customary law created racial difference and inequality that should be overturned, while the cultural differences expressed in unwritten customary law might be affirmed, but in a manner that addresses embedded gender and other inequalities.

The case addresses potential discrimination arising out of two different systems of customary law: the official version of apartheid law and unwritten 'living' law. So far as the regulatory scheme in s 23 of the Black Administration Act 38 of 1927, its regulations and the Intestate Succession Act 81 of 1987 was concerned, the fact that it provided specific consequences to intestacy only for African people meant that it was a blatantly racially discriminatory and unjustified provision, a remnant of the institutionalised inequality of the apartheid past and a clear breach of the requirement that substantive equality address stigma, humiliation and prejudice.[54] Section 23 'provides a scheme whereby the legal system that governs intestate succession is determined simply by reference to skin colour'.[55] It is 'a relic of our racist and painful past. This Court has, on a number of occasions, expressed the need to purge the statute book of such harmful and hurtful provisions'.[56] Not only does it invoke the stigma dimension, it also breaches the requirement to redress socio-economic

[51] See for eg ss 15, 30, 31, 211 and 212 of the Constitution.
[52] *Bhe* (n 8) para 41.
[53] *Bhe* (n 8) para 42.
[54] *Bhe* (n 8) paras 60–74.
[55] *Bhe* (n 8) para 66.
[56] *Bhe* (n 8) para 68.

JOBNAME: Acta Juridica 15 PAGE: 17 SESS: 9 OUTPUT: Wed Jun 17 15:59:43 2015
/first/juta/Juta/acta–juridica15/ch20

disadvantage, although this is expressed in a more limited and indirect manner. As Langa DCJ notes, almost in passing, the only way for Africans to extricate themselves from the regime created by the provision is to make a will. This means that only those 'with sufficient resources, knowledge, education or opportunity to make an informed choice' will be able to extricate themselves.[57] It is regrettable, though, that little is made of the dimension of participation in this regard, in which the barriers to making a will severely hamper the ability to make decisions as to the devolution of one's own property. This is, in itself, a potential breach of substantive equality. Generally, Justice Langa found that there was no justification for the provision: its apparent preservation of customary law was not through respect for difference, but from a desire to maintain inferiority and thus impair dignity.[58]

What is particularly interesting about the court's approach to the official version of the customary law of inheritance is its failure to consider gendered disadvantage and the intersectional impact of official customary law on black women. The emphasis on racial discrimination and impairment of dignity inherent in a system that prescribed legal consequences based on the colour of one's skin had already been established in the earlier case of *Moseneke*.[59] The racial provenance of the regulatory scheme and its impact on dignity cannot be disputed. However, the official law was often more complex in its impact, especially on women. Indeed, the interaction between African cultural representatives and colonial authorities, and between customary and civil law, in codifying rules that prejudice women is well-documented.[60] Here the effects of excluding women from inheritance and condemning them to perpetual minority is not simply stigmatising, it also hinders their access to resources (disadvantage), and deprives women of voice within the family, and the ability to participate in major decisions about themselves and their children. It is only in the justification enquiry in s 36 that Justice Langa raises the racist and sexist nature of s 23 and balances it against the purpose of the law.[61] This seems incorrect: all of the elements of substantive equality should have been considered in the fairness enquiry. In other words, a proper consideration of the multiple dimensions of equality and their impact on

[57] *Bhe* (n 8) para 66.

[58] *Bhe* (n 8) paras 69–72.

[59] *Moseneke and Others v The Master and Another* 2001 (2) SA 18 (CC), discussed in *Bhe* (n 8) paras 60–8. It is interesting to note that the Women's Legal Centre, an amicus curiae in *Bhe*, had raised the issue of gender in *Moseneke*, which was acknowledged but not addressed.

[60] M Chanock *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (1985); S Burman 'Fighting a two-pronged attack: The changing legal status of women in Cape-ruled Basutoland, 1872–1884' and J Guy 'Gender oppression in Southern Africa's precapitalist societies', both in C Walker *Women and Gender in Southern Africa to 1945* (1990).

[61] *Bhe* (n 8) para 73.

JOBNAME: Acta Juridica 15 PAGE: 18 SESS: 9 OUTPUT: Wed Jun 17 15:59:43 2015
/first/juta/Juta/acta–juridica15/ch20

black women might have been a better legal approach and would have better reflected the nature of inequality on the ground.

The evaluation of the customary law of primogeniture, in its own right, as part of a constitutionally-recognised system of law, was more challenging. Here it was much more difficult to determine when the accommodation of difference breached other dimensions of substantive equality, especially those relating to gender equality, and therefore should be eclipsed. The first step is to understand and value the nature of difference. In particular, dignity in the context of customary law (as an affirmation of self-worth of people living according to custom) envisages a potentially far more communal role for the heir than is the case in relation to common law. Inheritance therefore needed to be considered as a system of responsibility, not merely of individual proprietary rights, but as one in which the heir was required to manage the property for the good of the family and wider kinship structure. On the other hand, there was a strong sense in which the role of women had been ossified by the codification of customary law – implicating women's dignity (affecting their self-worth through stigma and prejudice) and socio-economic disadvantage (access to resources and material deprivation). These limitations on women's capacity are strikingly similar to the law of coverture in nineteenth century Britain,[62] and indeed to South African common law, vestiges of which persisted as late as 1993.

The judgment recognises that accommodating and valuing diversity, as represented by customary law, needs to be evaluated in the context of the other dimensions: the need to prevent stigma, redress disadvantage, and enhance participation. For women and extra-marital children, all of these dimensions were breached. Given changing social patterns, including urbanisation, new family structures and different land use, women could no longer rely on the heir to make economic provision for them and were thus were seriously disadvantaged by their inability to inherit on intestacy. Notably, Langa DCJ was also very clear that the dimension of material disadvantage did not constitute the only dimension of inequality. Instead, he recognised that even in the rare cases in which older social structures persisted and in which provision was made for women, the dignity dimension was breached:

> The principle of primogeniture also violates the right of women to human dignity as guaranteed in section 10 of the Constitution as, in one sense, it implies that women are not fit or competent to own and administer property. Its effect is also to subject these women to a status of perpetual minority, placing them automatically under the control of male heirs, simply by virtue of their sex and gender. Their dignity is further affronted by the fact that as

[62] See further S Fredman *Women and the Law* (1997) ch 2.

JOBNAME: Acta Juridica 15 PAGE: 19 SESS: 9 OUTPUT: Wed Jun 17 15:59:43 2015
/first/juta/Juta/acta–juridica15/ch20

> women, they are also excluded from intestate succession and denied the right, which other members of the population have, to be holders of, and to control property.[63]

The same was true for extra-marital children, where the law and social practice 'without doubt conferred a stigma upon them which was harmful and degrading'.[64] Similarly, 'extra-marital children did, and still do, suffer from social stigma and impairment of dignity'.[65]

Finally, although not always made explicit, the elements of inclusion and participation are present, especially when Justice Langa addresses the cultural justification for primogeniture, namely the 'basic social need to sustain the family unit' and balances it against the gender discrimination implicated in the rule.[66] He concludes that while the maintenance of the family remained an important communitarian purpose, the responsibility for this could not be limited to elder males to the exclusion of women (or younger men and unmarried sons). Although uneven and not always explicit, the judgment on unwritten customary law is an example of the use of all four dimensions of substantive equality – and an important (although implicit) development of the dignity approach in previous cases.

There has been considerable debate about the remedies in this case and the manner in which they might limit a proper commitment to legal pluralism. We comment on these further in the conclusion. However, the equality analysis on unwritten customary law – in addressing several dimensions of inequality – seems to provide a flexible and balanced approach to claims that implicate gender equality and cultural diversity. It allows both a detailed interrogation of the nature of gender inequality under customary law, and a full examination of the positive value of custom and culture in a contemporary setting. As such it allows the court to balance cultural diversity with gender equality.

(3) *Affirming difference and diversity:* Pillay

In *MEC for Education, Kwazulu-Natal v Pillay*, decided under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, a complaint of cultural discrimination was brought against a school for failing to allow a learner to wear a nose-ring as a voluntary expression of her culture. In particular, the case considered whether the school should have granted a religious or cultural exemption to the learner in terms of its code of conduct. Cultural discrimination issues in South Africa raise

[63] *Bhe* (n 8) para 92.
[64] *Bhe* (n 8) para 57.
[65] *Bhe* (n 8) para 59.
[66] *Bhe* (n 8) paras 84 and 89–91.

JOBNAME: Acta Juridica 15 PAGE: 20 SESS: 9 OUTPUT: Wed Jun 17 15:59:43 2015
/first/juta/Juta/acta–juridica15/ch20

potentially conflicting ideas of equality: equality across different cultures in the context of racially-based intolerance and exclusion, as well as equality within particular cultural groupings, especially concerning women. If *Bhe* raised issues of gender discrimination within customary law, *Pillay* was solely concerned with defining culture, recognising and affirming cultural diversity and requiring appropriate adaptation and accommodation on the part of mainstream and historically privileged cultures.[67] Although *Pillay* does not raise the more complex issues of cross-cutting inequalities, it does raise the question of how to define culture in such a way that does not foreclose a more detailed evaluation of intra-group inequalities, including gender discrimination, when these become relevant.

Pillay brings the difference dimension of equality to centre stage, with a particular emphasis on questions of cultural identity and participation, and on the dignity dimension of equality. In determining the ambit of discrimination based on culture, the court highlights the importance of membership of cultural communities to individual identity and dignity:

> Dignity and identity are inseparably linked as one's sense of self-worth is defined by one's identity. Cultural identity is one of the most important parts of a person's identity precisely because it flows from belonging to a community and not from personal choice or achievement. And belonging involves more than simple association; it includes participation and expression of the community's practices and traditions.[68]

In affirming cultural difference, the court emphasises the dignity-related interests of identity and self-determination ('respect for the unique set of ends that an individual wishes to pursue'),[69] but also alludes to the importance of participation within the community of one's choice. Perhaps because there was no immediate disadvantage implicated in this case (the learner was not excluded from the school as a price of adhering to her cultural convictions), this aspect is less visible. Nevertheless, Langa CJ is aware of the wider context of structural disadvantage, when he defines the comparator group as 'those learners whose sincere religious or cultural beliefs or practices are not compromised by the Code, as compared to those whose beliefs or practices are compromised'.[70] This is in recognition that '[t]he norm embodied by the Code is not neutral, but enforces mainstream and historically privileged forms of adornment, . . . at the expense of minority and historically excluded forms'.[71]

[67] *Pillay* (n 9) para 44.
[68] *Pillay* (n 9) para 53.
[69] *Pillay* (n 9) para 64.
[70] *Pillay* (n 9) para 44.
[71] *Pillay* (n 9) para 44.

JOBNAME: Acta Juridica 15 PAGE: 21 SESS: 9 OUTPUT: Wed Jun 17 15:59:43 2015
/first/juta/Juta/acta–juridica15/ch20

The judgment, however, only begins to delve into the complex challenges of affirming diversity within a multi-dimensional conception of equality. There are several dilemmas that require resolution. The first concerns the interaction between the participation dimension and that of diversity. Who speaks for cultural norms within the relevant group? While affirming diversity and its value to individual identity is a key element in substantive equality, a multi-dimensional approach to equality requires the parallel recognition that assertions of cultural norms can also be exclusionary and reinforce internal hierarchies. This risk needs to be counteracted by ensuring that the voices of those affected are clearly heard, and that the effect of affirming diversity is not to reinforce internal inequalities. This is particularly important for women. In *Pillay*, the learner's mother consistently spoke for her. The court took some care to establish whether the mother genuinely reflected her daughter's views, ultimately accepting her role, even though the learner had not participated in person. While this might be appropriate in this case and the court clearly signalled some awareness of the importance of voice, it arguably gave too little credence to the risk, for other cases, of reinforcing intra-group hierarchies, particularly given the ease with which dominant voices have been permitted to define cultural norms, often at the expense of women.

The second and related challenge concerns the interaction between affirming diversity and the other dimensions, namely to prevent stigma, prejudice, stereotyping and violence; and to redress disadvantage, which is particularly important in dealing with claims of intra-group inequality. For example, virginity testing, revived as a traditional practice in the past two decades, is widely practised and justified as a cultural practice that protects girls against HIV and unwanted pregnancies, that celebrates their status as girls and virgins, and that instils cultural values of sexual responsibility and self-respect.[72] However it is also strongly contested by human rights and women's groups who claim that it is a new form of social control of women in the context of anxieties over the HIV epidemic,[73] and that it amounts to a harmful practice that violates the rights of girls, places sexual responsibility on girls alone and stigmatises those found to be 'impure'.[74] Balancing these arguments is particularly difficult. In some instances, the issue of individual choice has been used. For example, South African law allows virginity testing on girls over the age of 16 if they consent to this. At the same time, an abstract idea of

[72] Submission of the Human Rights Commission to the Select Committee on Social Services, October 2005; L Law 'Virginity testing: In the best interests of the child?' Briefing Paper 145 for the Catholic Parliamentary Liaison Office (November 2005).

[73] S Leclerc-Madlala 'Virginity testing: Managing sexuality in a maturing HIV/AIDS epidemic' (2001) 15 *Medical Anthropology Quarterly* 533.

[74] Commission for Gender Equality *Virginity Testing*, Report June 2004.

JOBNAME: Acta Juridica 15 PAGE: 22 SESS: 9 OUTPUT: Wed Jun 17 15:59:43 2015
/first/juta/Juta/acta–juridica15/ch20

individual choice might fail to see the context in which girls have little choice but to consent to a practice that is strongly supported by dominant community values.[75] Thus it is important to maintain the multi-dimensional approach: evaluating cultural justifications against evidence of gendered stigma and disadvantage and the possibilities of meaningful consent/choice.

A related concern is that the definition of culture needs to facilitate the exploration of intra-group inequalities and a multi-dimensional approach. This raises important questions about the interpretation of cultural discrimination at step one of the unfair discrimination enquiry, and the content of unfairness at step two.[76] A lower threshold at step one involves a generous interpretation of culture and places a heavier burden on the unfairness enquiry to engage the various dimensions of substantive equality. A higher threshold at step one provides an important filter at the entry stage of the enquiry. Important at step one is whether culture should be subjectively or objectively, individually or collectively, defined. The worry is that an overly individualised and subjective interpretation of culture would mitigate against an exploration of power, contestation and inequalities *within* a particular cultural group.

Here the disagreement between Justices Langa and O'Regan is instructive. Although Langa CJ finds it unnecessary to decide whether a cultural practice should be objectively or subjectively determined, he does find, on the facts, that it was sufficient for there to be a subjective, sincere belief that the nose stud was a cultural practice.[77] He also concludes that a voluntary practice is sufficiently important to the constitutional commitment to diversity for it to be recognised as a constitutionally-protected practice for the purposes of determining discrimination.[78] O'Regan J disagrees with the low threshold set by Langa CJ, citing a number of difficulties with a subjective approach. Two stand out. Firstly, it does not sufficiently acknowledge the associative nature of cultural practice.[79] One needs to distinguish a personal habit or preference from a practice that is recognised by some, if not all of, the community. Secondly, it too easily admits of toleration of an individual's sincere beliefs rather than a real appreciation and respect for cultural diversity.[80] O'Regan J's concern is well-placed. An overly subjective approach tends towards a bounded

[75] See C Albertyn ' "The stubborn persistence of patriarchy": Gender equality and cultural diversity in South Africa' (2009) 2 *Constitutional Court Review* 165.

[76] As with the constitutional equality test set out in *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 53, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 separates the issue of discrimination in s 13 from the determination of unfairness in s 14.

[77] *Pillay* (n 9) para 58.

[78] *Pillay* (n 9) paras 61–7.

[79] *Pillay* (n 9) para 154.

[80] *Pillay* (n 9) para 156.

JOBNAME: Acta Juridica 15 PAGE: 23 SESS: 9 OUTPUT: Wed Jun 17 15:59:43 2015
/first/juta/Juta/acta–juridica15/ch20

view of culture which allows certain cultural representatives to assert a cultural practice, without it being tested against the community. Although Langa CJ does assert a contested view of culture,[81] his approach provides little space to explore the consequences of power within communities. In his defence, one might argue that his approach was, in fact, to assert the subjective, individual view of a vulnerable community member, in this case a girl. But what if the claim was for protection of a subjective, but patriarchal practice, by a male community leader? One needs more than a subjective and sincere belief to test the validity of a cultural claim. Not only must there a full interrogation of contested views to determine whether a particular practice can be deemed sufficiently 'associative' or communal to be deemed a cultural practice, but the place and effects of power and hierarchy must be interrogated, inter alia, we suggest, through considering disadvantage and participation. For example, the fact that President Zuma claimed a particular cultural defence in his 2002 rape trial, namely that he was culturally bound to satisfy a woman who was sexually aroused, does not mean that this qualified as a cultural practice. It must be more than a subjective belief; rather it must be shown to be a 'practice that is shared in a broader community of which he or she is a member and from which he or she draws meaning.'[82] And even then, the consequences of this approach for women and sexual choice would need to be considered. It seems that allowing a subjective belief to constitute a cultural practice is insufficient. There should be some evidence of an associative practice to provide a minimum threshold of protection that will exclude partial and subjective cultural beliefs that have no communal resonance, as well as enable effective dialogue on the constitutionality of the practice.

The approach of Langa CJ might still enable substantive equality if the fairness enquiry was fully interrogated, as required by the provisions of s 14 of the Promotion of Equality and Prevention of Unfair Discrimination Act. However, Justice Langa finds the case to be one in which only a consideration of reasonable accommodation is required (rather than all the criteria of s 14).[83] Here the court's approach is also limited in so far as it interrogates the need for accommodation by way of an exception. This seems to reinforce cultural hierarchies, suggesting that minority cultures can only be affirmed through such a process. Affirmation of difference in a substantive sense requires that institutions and rules be restructured to be fully inclusive. Although we have little space to venture into this debate here, we suggest that there might have been alternative ways of 'accommodating' cultural practices, that were less likely to reinforce dominant norms.

[81] *Pillay* (n 9) para 54.
[82] *Pillay* (n 9) para 159.
[83] *Pillay* (n 9) paras 77–8.

JOBNAME: Acta Juridica 15 PAGE: 24 SESS: 9 OUTPUT: Wed Jun 17 15:59:43 2015
/first/juta/Juta/acta–juridica15/ch20

Pillay leaves much undecided on substantive equality and cultural discrimination, in particular, the definition of culture and the proper relationship between this and the evaluation of unfairness. Again we suggest that an explicit adoption of a multi-dimensional approach to equality, by raising the threshold of defining culture at step one and interrogating all dimensions at step two provides a means of addressing systemic, cultural inequality as well as potential conflicts between culture and other constitutional equality guarantees.

IV JUSTICE LANGA'S LEGACY AND CONTESTED EQUALITY JURISPRUDENCE

This paper has argued for a multi-dimensional approach to equality that takes account of dignity, disadvantage, difference and participation. We thus disagree with the dominant approach of the court, which has been to subsume all equality harms under an idea of the impairment of dignity, as equal human worth, in different forms. Justice Langa's equality judgments seem to suggest an alternative, if not fully articulated, approach (that is also present in some other cases)[84] in which dignity is one aspect of a more balanced and flexible evaluation of equality claims. We do not claim that Justice Langa adopted such an approach, nor do we seek to attribute more to his legacy than it might be able to bear. Rather, we argue that his judgments provide an opportunity for a fuller examination of how to deal with complex inequalities in a manner that is more likely to achieve substantive equality ends.

The first indication of a wider approach to substantive equality was in Justice Langa's independent recognition of social and economic disadvantage in *Walker* and his deep concern with gendered disadvantage in *Bhe*. In both instances, he articulates disadvantage as an important and separate consideration from the dignity-related stigma that attaches to racial and gendered stereotypes. It is also apparent in his extra-curial writings, most obviously in his much-quoted discussion on transformative constitutionalism in which he cites Albertyn and Goldblatt to suggest that a 'new society . . . based on substantive equality'[85] will –

> require a complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines. The challenge of achieving equality within this transformation project involves the eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality. It also entails the development of

[84] We suggest that some of the equality judgments of Justices Mokgoro, O'Regan and Sachs also enable the development of a more multi-dimensional approach.

[85] P Langa 'Transformative constitutionalism' (2006) *3 Stell LR* 351 at 352.

JOBNAME: Acta Juridica 15 PAGE: 25 SESS: 9 OUTPUT: Wed Jun 17 15:59:43 2015
/first/juta/Juta/acta–juridica15/ch20

> opportunities which allow people to realise their full human potential within positive social relationships.[86]

We have also pointed to Justice Langa's concern with diversity and participation. Overall, in all three cases, it is possible to discern a sensitivity to all dimensions of substantive equality, including exclusion, lack of voice and the costs of lack of conformity to dominant norms. In this way, the contours of a multi-faceted understanding of substantive equality are discernible. The fact these are not always explicit within his judgments, or that the dimensions are not fully explicated reveals a developing and contested jurisprudence, rather than a clear commitment to a single approach.

Fundamentally, Justice Langa's equality jurisprudence attests to a jurist who was deeply committed to the constitutional project as an inclusive and reconciliatory, and as entailing a 'social and economic revolution'.[87] It is explicit in his concern with those whom he perceived as weak and the vulnerable, whether women under customary law or young girls of a minority religion and culture, and in his desire to bring all South Africans into this constitutional project. This instinct explains his recognition that white people are a potentially vulnerable political minority and are deserving of equal concern and respect in the proper application of the rule of law, and in his clear insistence that customary law must conform to the Constitution, especially where it included 'old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order'.[88]

Langa set his face against exclusion and disadvantage, whether based on race, ethnicity or gender. He recognised the common humanity in all and the need to build a common South African solidarity and citizenship across difference. In *Bhe* he ordered a remedy that has proved controversial amongst some scholars,[89] namely, to replace the customary law on inheritance with civil law, but to apply this, also, to polygamous unions. He justified this by arguing:

> What should however be borne in mind is that the task of preventing on-going violations of human rights is urgent. The rights involved are very important, implicating the foundational values of our Constitution. The victims of the delays in rectifying the defects in the legal system are those who are among the most vulnerable of our society.[90]

[86] Albertyn & Goldblatt (n 2) 249, cited in Langa (n 85) 352.
[87] Langa (n 85) 352.
[88] *Bhe* (n 8) para 91.
[89] See eg C Himonga 'The advancement of women's rights in the first decade of democracy in South Africa: The reform of the customary law of marriage and succession' in C Murray & M O'Sullivan *Advancing Women's Rights* (2005) 82.
[90] *Bhe* (n 8) para 115.

JOBNAME: Acta Juridica 15 PAGE: 26 SESS: 9 OUTPUT: Wed Jun 17 15:59:43 2015
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Here Justice Langa did not shy away from imbuing customary law with the necessary rights.

If his judgments provide important evidence of the need for a multi-dimensional notion of equality, overall the record of the court in doing so is ambiguous. On the one hand, we find the stark and well-known reversion to formal reasoning and notions of formal equality in *S v Jordan*,[91] and the over-emphasis on abstract notions of choice in *Volks NO v Robinson*.[92] On the other hand, conflicting approaches to the tension between recognition of difference, and the importance of redressing disadvantage, countering stereotyping and facilitating voice and participation are evident in recent decisions on customary law. Thus the majority judgement in *Mayelane v Ngwenyama* underlines the value of customary law and its resistance to incorporation by the dominant common law norm, while also insisting on the right of women to participate in decision-making in relation to future wives of their husbands.[93] Its reluctance to address head-on the equality concerns around polygyny, despite openly referring to them, is both a strategic and a legal concern. It reflects the court's growing acceptance of the need to develop customary law, whenever possible, in line with the dictates of the Constitution, including gender equality. Justice Langa would have signed on to this judgment. However, this approach is contested by a minority of judges who seem more resistant to the resolution of these tensions and the 'intrusion' of constitutional rights in customary law. This was evident in the minority judgments in *Pilane v Pilane*[94] and *Mayelane*,[95] which signal that the balance is tipping towards an accommodation of difference which threatens to undermine the other factors of substantive equality, in particular, participation and voice, redressing disadvantage (both material and in terms of power differentials) and reinforcing of stigma and stereotypes (inferiority of women).

The legacy of Justice Langa in the equality field is a powerful one, even if it does not fully articulate the approach that we advocate for in this article. However, we suggest that our engagement with the late Chief Justice's judgments supports the need for greater attention to the multi-faceted nature of substantive equality and a clearer articulation of the relationship between the facets should guide future courts in addressing breaches of s 9 of the Constitution.

[91] 2002 (6) SA 642 (CC).
[92] *Volks* (n 21).
[93] 2013 (4) SA 415 (CC).
[94] 2013 (4) BCLR 431 (CC). See paras 69–72 which stated importance of constitutional rights to association and expression in traditional communities and possibility of dissent, compared to the minority which resisted these rights and asserted a monolithic view of a traditional authority.
[95] *Mayelane* (n 93).