AN ETHICAL CONCEPTION OF EQUALITY IN A 'POST'-APARTHEID SOUTH AFRICA

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SUMMARY

The fundamental problem identified and placed at the root of this thesis is inadequate social transformation. In this thesis three fundamental questions are answered. First, what is substantive equality, as developed by the Constitutional Court, and why did it not bring about adequate social transformation? Second, what is the South African substantive constitutional revolution and what are the consequences flowing forth therefrom? Finally, this thesis is concluded with a tentative reflection on an ethical conception of equality by asking whether an ethical conception of equality can address the fundamental problem of inadequate social transformation.

Social transformation denotes (*i*) radical change and (*ii*) a process of be-coming. The radical change refers to Ackermann's notion of a substantive constitutional revolution whereas the process of be-coming requires from each one of us to never be complacent with meaning. Lack of social transformation is signified by the pejorative, discriminatory, hegemonic, and other morally abhorrent conceptions of the other still plaguing South Africa. Social transformation seeks transformation of (*i*) the conceptions that we have of each other (that is, transformation of the ontological meaning of man, woman, white, black, homosexual, heterosexual; in short, transformation of subjectivity) and (*ii*) morally shattered relationships between human beings *inter se*. It is proposed that both transformed conceptions of the self and the relationship between human beings ought to be ethical. To this end, both conceptions of the self and the relationship between human beings *ought* to be informed by the African philosophical concept of *Ubuntu*.

In the end it is concluded that social transformation does not start with a theory and most definitely not in the mind of a politician, but also not in that of a philosopher, playwright, or some kind of public speaker. Social transformation starts and ends with the conception of the other and, based on such conception, the manner in which one treats the other.

DEDICATION

To you, my wife.

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CHAPTER 1

There is no such thing as equality achieved.

1. THE RESEARCH PROBLEM

The fundamental problem identified and placed at the root of this thesis is that the process of transformation,[1] provided for in terms of the Interim Constitution[2] and the Constitution,[3] did not bring about adequate social transformation.[4] Social transformation, in addition to material transformation,[5] entails (*i*) radical change and (*ii*) the process of perpetual becoming of our-selves and society (that is, the perpetual (re)imagination and (re)constitution of the social, which includes the perpetual transformation of both the self[6] and society). Social transformation *ought* to contribute to improving and promoting social cohesion, but the fundamental problem is exacerbated by the fact that current transformative and equality jurisprudence has alienated South Africans from each other. Flowing from the fundamental

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1 The most influential theoretical or philosophical movement in this process has been transformative constitutionalism and thought aligned with primarily eradicating systemic forms of domination (systemically entrenched power relations) and systemic disadvantage (systemic inequality). As regard to the former I refer the reader to, among others, Klare, K.E., *Legal Culture and Transformative Constitutionalism,* Vol. 14, No. 1, (1998), South African Journal on Human Rights, pp. 146-188; Marius, P., *What do We Mean When we Speak About Transformative Constitutionalism?,* Vol. 20, No. 1, (Jan., 2005), South African Public Law, pp. 155-166; Langa, P., *Transformative Constitutionalism,* Vol. 17, No. 3, (Jan., 2006), Stellenbosch Law Review, pp. 351-360; Van Marle, K., *Transformative Constitutionalism as/and Critique,* Vol. 20, No. 2, (Jan., 2009), Stellenbosch Law Review, pp. 286-301; Moseneke, D., *Transformative Constitutionalism: Its Implications for the Law of Contract,* Vol. Vol. 20, No. 1, (Jan., 2009 2009), Stellenbosch Law Review, pp. 3-13. As regard to the latter I refer the reader to Albertyn, C. & Goldblatt, B., *Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality,* Vol. 14, No. 2, (1998), South African Journal on Human Rights, pp. 248-277; Moseneke, D., *The Fourth Bram Fisher Memorial Lecture: Transformative Adjudication,* Vol. 18, No. 3, (2002), South African Journal on Human Rights, pp. 309-319. These strands of thought are not necessarily distinguishable from each other and it would not be inaccurate to group all of the articles cited in this footnote as 'transformative thinkers', whether carrying or designated by transformative constitutionalism or not.

2 The Constitution of the Republic of South Africa Act, No. 200 of 1993 (hereinafter referred to as the "Interim Constitution").

3 The Constitution of the Republic of South Africa, 1996, (hereinafter referred to as the "Constitution").

4 The fundamental problem of inadequate social transformation is hereinafter referred to as the "fundamental problem". I attribute content and meaning to the notion of social transformation by relying on Cornell's interpretation of the subject of transformation and in this regard see below at p. 8.

5 With material transformation I mean transformation or structures and systems or then the material and lived experiences of people. In specific, material transformation would refer to affirmative action measures and other legal rules intended to be relied on to attain equality through representivity as well as broad based black economic empowerment.

6 The reference to 'self' within the context of inadequate social transformation relates to, in the most widest sense, the (ontological) meaning of being human and, more specific in a legal context, the (ontological) meaning of legal subject. See below at pp. 21-25 for additional detail.

problem is the fundamental fallacy tied up in the law's (*i*) conception of the legal subject and (*ii*) perception of and value attached to the relationship between legal subjects. The aforementioned ultimately leads to a-contextual and ineffective legal rules and remedies that, I submit, can be counteracted by transformation of the manner in which the law conceives the legal subject and the relationship between legal subjects. The fundamental problem is addressed in this thesis by reflecting on if and how an ethical conception of equality can influence the present conception of substantive equality[7] to, at minimum, inform, but, at best, transform such conception into one inspired by and following notions of ethics.

South Africa is plagued by its past that is characterising its society, as, among other things, materially unequal.[8] More importantly, apartheid, in addition to material inequality, bequeathed South Africa with morally shattered relationships, as between its citizens, as well as disparate, which includes hegemonic, racist, sexist, and other morally abhorrent, ontological conceptions of each-other. It is irrefutable that a process of *social* transformation[9] is called for and the positive duty on each one of us to transform our society and to redistribute wealth and power along egalitarian lines enjoys constitutional recognition.[10] Recognition of a positive duty is a tacit acceptance that equality is as much a *lived experience* as its meaning is indeterminate and abstract. However, the constitutional and aspirational ideal of achieving equality becomes a meaningless and an abstract ambition if there is inadequate or no constructive participation in the process of achieving our aspirational ideal. Merely transforming material reality through recourse to, among other things, notions of restitutionary equality might bring about substantive (material) equality, which has been equated with identity representivity,[11] but most certainly does not result in social transformation. South African transformative jurisprudence – including the Court's equality jurisprudence – can no longer ignore subjectivity and relationships between legal

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7 Unless stipulated otherwise or unless the context indicates otherwise, substantive equality refers to the CC's dignity-based substantive approach to equality, as discussed, in detail, in Pt. II, and is hereinafter referred to as the "court's equality jurisprudence".

8 See, for example, *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC) at para. [29] and Van Marle, K., *Reflections on Post-Apartheid Being and Becoming in the Aftermath of Amnesty: Du Toit v Minister of Safety and Security,* Vol. 3, No. 1, (Jan., 2010), Constitutional Court Review, pp. 347-367, at p. 351. In terms of recent data, 40% of South Africans live below the 2015 lower-bound poverty line valued at R657.00 spent per month and in 2015, 9 out of every 10 poor people in South Africa (93%) were Black – Wilkinson, K., *Factsheet: South Africa's Official Poverty Numbers* (E-Pub. Date: Feb. 15, 2018) Africa Check [Accessed on: Jul. 14, 2018].

9 Meaning continuous (re)imagination and (re)constitution of the meaning of being human as well as transformation of the relations between human beings to become informed by and based upon notions of ethics. Social transformation denotes the elements of (*i*) radical change and (*ii*) a process of perpetual becoming of our-selves and society.

10 See Pt. II in which the notion of social transformation is discussed, in detail.

11 See Pt. I, Ch. 3 at p. 103 & fn. 257 on p. 118. Representivity carries a specific meaning and is used throughout various legislative instruments. See, for example, s. 15(3) of the Employment Equity Act, No. 55 of 1998 (hereinafter referred to as the "EEA"), read with *Barnard* 2014 (CC) at para. [54], and s. 29(3) of the EEA.

subjects. A process of transformation that is abstracted from social reality in an attempt to transform materiality is destined to alienate and no process of transformation can bring about *social* transformation for as long as sections of society are alienated during the process and, consequently, refuse to partake in the process itself. South African transformative jurisprudence, inclusive of the Court's equality jurisprudence, narrowly and a-contextually, focuses on transforming material inequality and the state of being systemically disadvantaged. However, social transformation denotes more than mere radical material transformation. In transcending materialism, social transformation is also posited on disillusionment of society and transforming conceptions of subjectivity.

South Africa is not socially transformed because, even if the entire legal system has undergone a substantive constitutional revolution through which a new moral and legal order have been established, legal subjects remain the actors within such a new order and these legal subjects have not transformed. The Constitutional Court acknowledged that "[c]alling a … [black] African a '*kaffir*' thirteen years deep into our constitutional democracy … suggest[s] that very little attitudinal or mind-set change has taken place since the dawn of our democracy".[12] The Constitutional Court was enjoined to this acknowledgement in a unanimous judgment where a white employee of the South African Revenue Service said to his black superior "[*e*]*k kan nie verstaan hoe kaffirs dink nie*"[13] and "A *kaffir* must not tell me what to do".[14] Answering the ethical call of social transformation would cause a rupture within and disillusionment of society's ontologically biased and intolerant consciousness whereby the shackles of pejorative, discriminatory, hegemonic, and other morally abhorrent ontological conceptions of the other are removed. Social transformation can disillusion society and, thereby, facilitate transformation of the subject (self) by proclaiming that every human being is possessed with the capacity to imagine his or her being-in-the-world, which includes being (existing *as*) a human being entitled to equal respect and concern, irrespective of being perceived as different or the other to the self.

As the above Constitutional Court judgment pointedly illustrates, the being of a black human being still remains to be perceived as lesser than or inferior to a white human being by some South Africans. It is up to the subjects within our transformed legal order to transform the *social* order (society) in both a material and social sense. Simply put, it is not the Constitution that effects social transformation, but rather legal subjects. By having regard to the *social* within social transformation one is committing oneself to a process of transformation that (*i*) is ethically

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12 *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* 2017 (1) SA 549 (CC) at para. [7].

13 Directly translated from Afrikaans: I cannot understand how *kaffirs* think.

14 *SARS* 2017 (CC) at para. [7].

cognisant of and compassionate for the ethical relations towards others, (*ii*) emphasises and prioritises (perpetual be-coming of) the being(*s*) of human beings, (*iii*) harbours respect for (the difference of) the other, and (*iv*) instils nuance and sophistication to transcend our past with and within the process of social transformation. Although social transformation is alive to the consequences of transformation on segments of our society, it cannot countenance transformation that is tainted by a lack of respect and concern for the other, a-contextual programs, principles and rules, and a general sense of malice that parade under the guise of material or substantive transformation. On the flip-side, social transformation enjoins South Africans to understand and appreciate that advocating for and insistence upon mere and absolutist formal equality is *per se* insulting but, in addition, seeks to make a mockery of our constitutional ideal of the achievement of equality.

I submit that we predominantly conceive each other as abstractions of reality, disengaged and distanced from each other, primarily concerned with self-interest and only willing to act in relation and concert with each other for mutual benefit if such benefit corresponds with self-interest. The concomitant problematic tied up within the law is the manner in which the law perceives us as atomic abstractions of reality and the relationship between us as one where individuals act in their own interest and only thereafter in the mutual interest together with others. As such, the law perceives and deals with the interests of individuals ***as*** individuals. However, the law *ought* to perceive and deal with the interests of an individual ***as*** an individual in his or her relationship towards others – in his or her being-with others and being-together-with the community. Once we recognise each other's capacity to imagine or to conceive the meaning of being human, we can accept that there must be a multiplicity of conceptions of human beings – a multiplicity of ways of being human. It is submitted that for a socially transformed society to be a lived for aspiration the relationships between South African subjects must be open towards continuous (re)imagination and (re)constitution. Before being open towards continuous (re)imagination and (re)constitution (a sense of be-coming), the morally shattered relationships between South African subjects must be (re)imagined and transformed into ethical relations resonating from alternative, creatively adapted,[15] ontological meanings of being (existence *as*) human in a 'post'-apartheid South Africa.

In concise terms, this thesis aims to emphasise the importance in realising that every human being within society has the capacity to (re)imagine its own being as well as the prevailing notion(s) of equality. Transformation of the self and mending of moral relationships between

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15 This term is used by Gaonkar – see Gaonkar, D.P., *Toward New Imaginaries: An Introduction,* Vol. 14, No. 1, (2002), Public Culture, pp. 1-19 at p. 12. See also Pt. II, Ch. 5 at p. 178.

South Africans cannot be neglected or ignored, lest any attempt at achieving equality transcending materialist substantive equality be met with utter failure ascribable to the sacrifice of social transformation on the altar of radical neo-liberationist material transformation.

2. BACKGROUND AND MOTIVATION

Whilst sitting in one of my second-year employment law lectures I heard of the (in)famous Barnard-saga. At that stage the case was before the Supreme Court of Appeal.[16] I wondered how can one 'rationally' refuse appointment of any candidate based on the fact that (*i*) the person best qualified and vested with the most expertise is a white woman and (*ii*) no other suitably qualified black candidate is available. In 2013, the Supreme Court of Appeal found, as I suspected, that the refusal to appoint Captain Renate M. Barnard[17] constituted unfair discrimination, only to be surprised, in 2014, by the Constitutional Court's decision that, in essence, held that job reservation on the basis of racial representivity is constitutional. I must qualify my statement and indicate that my "surprise" was occasioned, not by racism, based on the mere fact that I am white, but by limited knowledge of the Court's equality jurisprudence, at that stage. Whilst I still disagree with equating representivity with equality, which equation provides for job reservation, quotas, and absolute barriers to employment as opposed to directory, discretionary, and proposed job designation, I remain cognisant of the need for and justifiability of social transformation.

With the Constitutional Court's judgment, I was confronted with two simple questions. First, what is the meaning of substantive equality? Second, can it be said that the Constitutional Court's judgment is just? The case of *South African Police Service v Solidarity obo Barnard*[18] was, accordingly, the instigator of my undergraduate research project in which I investigated the concept of substantive equality and the right to equality in a 'post'-apartheid context. In short, in this case the Constitutional Court had to decide whether the decision of the National Commissioner of the Police Service[19] amounted to unfair discrimination on the ground of race in breach of section 9(3) of the Constitution and section 6(1) of the EEA. The decision taken was not to promote Ms. Barnard after the interview panel as well as the Divisional Commissioner recommended Ms. Barnard as the first choice candidate for the post.[20] The National Commissioner stated in a letter that the recommendation does not "address representivity and

16 *Solidarity obo Barnard v South African Police Service* 2014 (2) SA 1 (SCA).
17 Hereinafter referred to as "Ms. Barnard".
18 *Barnard* 2014 (CC).
19 Hereinafter referred to as the "National Commissioner".
20 *Barnard* 2014 (CC) at paras. [13] & [15].

the posts are not critical and the *non-filling* of the posts will not affect service delivery" [own emphasis].[21] The *dictum* of the Constitutional Court, as developed in *Barnard*, that a white woman may be *refused* appointment because white women, as a category defined by race and sex, are already adequately or over-represented in the occupational level to which she sought appointment, has subsequently been confirmed and even expanded upon by the Constitutional Court, to include, within this *dictum*, any race as well as sex.[22]

My undergraduate project enticed investigation of ethics and led me to an ethical realisation of (*i*) the inability of humans to act autonomously from social prejudice and, in consequence, (*ii*) the impossibility of achieving equality. I have termed this realisation the ethical realisation. I then sought to adopt an ethical conception of equality and started to study the work of van Marle, specifically her articles *The Doubly Prized World: on Transformation, Ethical Feminism, Deconstruction and Justice*,[23] *Equality: An Ethical Interpretation*,[24] and *In Support of a Revival of Utopian Thinking, the Imaginary Domain and Ethical Interpretation*.[25] Although I place heavy reliance on her work[26] in developing my own ethical conception of equality, I diverge from her thinking on a multiplicity of levels. First, I ground my conception of equality within the Constitution, based on my ethical interpretation of the Constitution.[27] The notion of the social imaginary, as well as the African philosophical concept of *Ubuntu*, are but two different concepts upon which I place reliance on and draw substantive content from. More pertinent was my realisation, which I had during preparation of my L.LM dissertation,[28] that the current processes of transformation have neglected the transformation of subjectivity or the self. The ethical conception of equality that I am suggesting, therefore, incorporates and insists on the importance of be-coming 'post'-apartheid; that is, continuously (re)imagining and (re)constituting the self or then subjectivity *and* society.

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21 *Ibid.* at para. [15].

22 *Solidarity v Department of Correctional Services* 2016 (5) SA 594 (CC) at paras. [38]-[40].

23 Van Marle, K., *The Doubly Prized World: on Transformation, Ethical Feminism, Deconstruction and Justice,* Vol. 29, No. 3, (Nov., 1996), Comparative and International Law Journal of Southern Africa, pp. 329-337.

24 Van Marle, K., *Equality: An Ethical Interpretation,* Vol. 63, No. 4, (2000), Tydskrif vir Hedendaagse Romeins-Hollandse Reg, pp. 595-607.

25 Van Marle, K., *In Support of a Revival of Utopian Thinking, the Imaginary Domain and Ethical Interpretation,* Vol. 13, No. 3, (2002), South African Law Journal, pp. 501-511.

26 I also refer the reader to Van Marle, K., *Towards an "Ethical" Interpretation of Equality* LLD Thesis (1999).

27 See the Appendix under the heading entitled "An Ethical Interpretation of The Constitution".

28 I have, subsequently, with the requisite approval, been allowed to convert my proposed L.LM dissertation into and pursue this L.LD thesis.

Whilst I applaud the work done by the Constitutional Court through substantive equality,[29] the Court's equality jurisprudence requires a conception of equality that is more nuanced than substantive equality. Rather than rejecting substantive equability outright, I *question* substantive equality by asking questions such as ought a conception of equality not rely on multidirectional progression as opposed to linear progression (that of substantive equality)? Ought a conception of equality not be open to a perpetual (re)definition of concepts? Ought the *Harksen*-test[30] not be open to progressive (re)definition? In the context of transformation, ought the definition of a previously disadvantaged individual not be open to progressive contemporaneous (contextual) (re)definition? Ought we not move beyond the shackles of a grand narrative of history and an irresponsible polemical relationship with the world?[31]

3. RESEARCH QUESTIONS & STRUCTURE

In this thesis three fundamental questions are addressed. The first two precede, contextualise, and enable a discussion of the ethical conception of equality that I develop. The final question seeks to address the fundamental problem directly by asking whether an ethical conception of equality can bring about social transformation. The first two questions precede reflection on my conception of equality because the first question contextualises the fundamental problem and the second acts as a constitutional enabler for the ethical conception of equality that I elaborate on in Chapter 6. The endeavour throughout this thesis is guided by my

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29 See the following cases for examples: *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at para. [60] (hereinafter referred to as "*Sodomy* 1999 (CC)") (declaration of unconstitutionality of the offence sodomy); *Minister of Home Affairs v Fourie (Doctors for Life International as amici curiae); Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC) at para. [144] (recognition of unconstitutionality of the exclusion of homosexual couples from entering into a marriage and "enjoying the same status, entitlements and responsibilities accorded to heterosexual couples through marriage"); *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) at paras. [28], [32], [34]-[35] & [37] (acknowledgement of the role of prejudice and systemic disadvantage within the context of equality, in general, and discrimination, in specific); *MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) at para. [65] (*celebration* of difference); *Sodomy* 1999 (CC) at paras. [61]-[62]; *Minister of Finance v Van Heerden* 2004 (6) 121 (CC) at para. [30]; *Barnard* 2014 (CC) at para. [30] (recognition of remedial equality falling within substantive equality and reinforcing the value of achieving equality).

30 In *Harksen v Lane* 1998 (1) SA 300 (CC) at para. [53] the CC formulated the so-called *Harksen*-test. For critique of this approach see van Marle, (2000, *An Ethical Interpretation*); Van Marle, K., *Reflections on Teaching Critical Race Theory at South African Universities/Law Faculties,* Vol. 12, No. 1, (2001), Stellenbosch Law Review, pp. 86-100, at p. 91 where she argues that the "*Harksen* test is a step towards *reification* of substantive equality and avoidance of its indeterminate meaning" [original emphasis].

31 Another fundamental motivation for this project is a discussion with one Johan van Rooyen, a beloved old friend of almost more than ten years. Van Rooyen enquired from me, at that stage an overzealous undergraduate law student, what the Constitutional Court was thinking and the impact of this case on White individuals. More pertinently, he posed the questions such as "Why can there be such a thing as affirmative action"? and "Why do we not allow the best person to 'get the job'?". More pertinently, he asked me whether the judgment is "right" and, if my opinion is that it is not "right", why do I not "do something about it". I then proceeded to convert his question of "right" to "just" and started research into 'post'-apartheid equality jurisprudence only to discern that we are faced with an additional and more concerning problem of inadequate social transformation.

understanding of social transformation. Accordingly, this thesis finds its context squarely within transformation, but more specifically, *social* transformation.[32] My impending discussion of both the research questions and the structure of this thesis is, accordingly, interlaced with a discussion of the meaning and content of social transformation.

The fundamental problem is placed at the centre of this thesis and, as such, a thorough exposition and nuanced understanding of the social transformation is of utmost importance. My understanding of social transformation finds inspiration from Cornell's two-pronged interpretation of the subject of transformation, since it encapsulates more than mere material transformation. Accordingly, social transformation not only encapsulates material or structural transformation – it transcends material transformation. The first prong of her interpretation translates transformation as radical change causing a dramatic restructuring of the system – political, legal, or social – to such an extent that the 'identity' of the system itself is altered.[33] The second part turns on the question "what kind of individuals do we have to become in order to open ourselves to new worlds".[34]

3.1. PART I: THE FIRST RESEARCH QUESTION

The first research question asks what substantive equality is, as developed by the Constitutional Court, and why did it not bring about social transformation. Chapter 2 and Chapter 3 are the constituent parts of Part I of this thesis entitled: "Substantive Equality & Inadequate Social Transformation". Part I represents both (*i*) an analysis of what substantive equality *is* and (*ii*) identification of *why* such conception of equality did not bring about adequate social transformation. In Chapter 2, I analyse the Court's equality jurisprudence to answer the first part of the question; that is, what is substantive equality. Following thereon, Chapter 3 is dedicated to (*i*) restitutionary or remedial equality and (*ii*) the second part of the first research question; namely, showing the reader why substantive equality did not bring about adequate social transformation.

3.1.1. CHAPTER 2: THE FIRST PART OF THE FIRST RESEARCH QUESTION

The Constitutional Court's dignity-based substantive approach to equality is analysed in Chapter 2 and Chapter 3. Chapter 2 sets out the purposes of section 9 and a focused analysis of substantive equality within the paradigm of three themes of substantive equality. These themes

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32 Social transformation is not limited by material and socio-economic connotations as such, but rather transcends a conception of social justice limited to mere re-distribution of resources. In other words, whilst the social within social transformation includes socio-economic concerns, it is not defined nor limited thereby.

33 Cornell, D., *Transformations: Recollective Imagination and Sexual Difference*, (1993), at p. 1.

34 *Ibid.*

place emphasis on the legal subject and the potential important role and capacity of equality to make difference in the life of a legal subject. The themes, thus, focus on what possible difference (impact) equality can make (have) in a legal subject's experience of humanity. Building upon the third theme I turn to discuss the dignity-based approach, forming part of substantive equality and, hence, my description of the Court's equality jurisprudence as a dignity-based substantive approach to equality. The chapter is concluded with an overview of section 9, but for section 9(2). Section 9(2) is analysed in Chapter 3, which leads to a discussion of the fundamental problem, which discussion is weaved into the entirety of Chapter 3.

3.1.2. CHAPTER 3: THE SECOND PART OF THE FIRST RESEARCH QUESTION

Chapter 3 provides content to and articulates the fundamental problem in terms of pervading morally abhorrent ontological conceptions of each other, which conceptions are exacerbated by (*i*) a grand narrative of our history and (*ii*) the irresponsible polemical relationship with the world, as displayed by the Constitutional Court, academia, and the State. This grand narrative and irresponsible polemical relationship are showcased by the infamous 'essential context' of the Constitutional Court that it religiously and a-contextually has recourse to when deciding cases involving race, racism, racially offensive conduct, or language (more specifically Afrikaans). Chapter 3 is structured to provide content to my argument that the Court's equality jurisprudence sets the scene for (*i*) systemic and materialist prominence, (*ii*) an uncritical approach towards 'identity representivity', (*iii*) an essentialist understanding of our history culminating in a grand narrative of our history, and (*iv*) the ossification of subjectivity. This chapter indicates that the inadequacy of social transformation is an inadequacy of transforming subjectivity or notions of the self. Transformation of the conceptions of the other has not taken place, but for the regressive (re)definition of being and difference. In short, a white person is perceived – not as a human being – but as (a representation of) or the epitome of advantage(d). The humanity is annexed from the white person's existential being and replaced with politically instigated and motivated notions of (assumed) advantage. The converse is also true, a black person is perceived – not as a human being – but as (a representation of) or the epitome of disadvantage(d). The humanity is annexed from the black person's existential being and replaced with politically instigated and motivated notions of (assumed) disadvantage. The dignity (worth) and meaning of both black and white South Africans are disregarded and ignored. We are cast and relegated to the realm of ontological non-being (existence *as*) a human being (*Da-Sein*) or beings (a *res*). Unbeknownst corruption of the right against unfair discrimination with the purpose of restitutionary equality provides for jurisprudential uncertainty and a notion of substantive equality that is excessively and perilously materialist as well as

dissonant towards ontological (re)definition of being. South Africa is encumbered with materialist and a-social transformative jurisprudence in terms of which the human being has been relegated to the periphery of constitutional obedience in the name of achieving a 'transformed' as opposed to an equal South Africa. Transformation has been equated with equality, since, as shown in Chapter 3, racial representivity has been equated with equality. By adopting equality jurisprudence that is not first concerned with the ethical relation between human beings we are perpetuating the apartheid pedagogy in the name of neo-liberationism.[35] The relationship between human beings is of no concern to transformative thought that disregards the meaning of being or purposefully (re)defined being predominantly on the basis of race and sex in the name of an absolutist notion of racial disadvantage and sense of victimhood. Absolute disadvantage means disadvantage that is incapable of being addressed and thereby establishing the everlasting sense of victimhood.

3.2. PART II: THE SECOND RESEARCH QUESTION

The second research question asks what is the South African substantive constitutional revolution and the consequences thereof. Chapter 4 and Chapter 5 are the constituent parts of Part II of this thesis entitled: "The South African Substantive Constitutional Revolution and The Consequences Thereof". Whilst Chapter 4 and Chapter 5 are dedicated to a substantive exposition and description of my understanding of the meaning of social transformation, Chapter 4 primarily focuses on the transformation undergone by the South African legal order, whereas Chapter 5 primarily focuses on the transformation of the 'social', which includes transformation of conceptions of the self and society. Thus, the divide between the legal order and social order is elevated in Part II. Chapter 4, on the one hand, demonstrates the radical change undergone by South Africa's legal order through reliance on the South African substantive constitutional revolution. Chapter 5, on the other hand, emphasises the *possibility* of transforming the social (order) through reliance on the social imaginary and the multiple modernities thesis.

[35] As regard the apartheid pedagogy, see Pt. I, Ch. 3 at p. 87, Pt. II, Ch. 4 at pp. 148-149, & Pt. III, Ch. 6 at pp. 234-235. In short, in terms of this pedagogy we have been taught and disciplined to conceive each other's being in terms of already *a-priori* defined ontological meanings. In other words, the meaning of being (existence *as*) a human being is defined to the benefit of one and the detriment of the other. Lastly, it is a pedagogy not only because we are taught to understand the other in terms of *a priori* ontological definitions, but we are taught and compelled to accept that these definitions are aimed at controlling (political) and regulating (legal) the existence of humans; in other words, their being-in-the-world. As regard to neo-liberationism see Pt. I, Ch. 3 at pp. 86-87.

3.2.1. CHAPTER 4: THE FIRST PART OF THE SECOND RESEARCH QUESTION

Chapter 4 is dedicated to an exposition of the meaning of the South African substantive constitutional revolution, but simultaneously considered, the second research question pulls one towards Cornell's interpretation of the subject of transformation. The answer to the first part of the second research question (what is the South African substantive constitutional revolution) provides content to Cornell's two-pronged interpretation of the subject of transformation, which, in turn, provides inspiration to my understanding of social transformation. The first prong of her interpretation translates transformation as radical change causing a dramatic restructuring of the system – political, legal, or social – to such an extent that the 'identity' of the system itself is altered.[36] The second part turns on the question "what kind of individuals do we have to become in order to open ourselves to new worlds".[37] Cornell's interpretation is linked with Ackermann's notion of a substantive constitutional revolution,[38] which, in turn, denotes (*i*) a dispensational change, (*ii*) the displacement and replacement of the ideological substance of an entire legal order, and (*iii*) as a process of perpetual transformation.[39]

As further explained in Chapter 4, Ackermann's notion of a substantive constitutional revolution is composed of three constituent elements. The first element denotes a *de jure* dispensational change and the second denotes the displacement and replacement of the substantive ideology underlying the legal order. In Chapter 4, the first two elements are married with and give content to Cornell's first prong of her interpretation of the subject of transformation. These two elements entail the displacement and replacement of the old legal order with a new legal order (dispensational change) as well as a change in the substantive ideological content underlying the new legal order (substantive change). The term *Grundnorm* is relied on to give content to the meaning of 'replacement of the ideological substance' and, in the context of this thesis, *Grundnorm* denotes the adoption of the achievement of equality as *a*, not the, standard that must inform all law and against which all law and conduct must be tested for constitutional consonance.[40] I submit that three Western democratic values of freedom, equality, and human dignity, together with the African philosophical concept of *Ubuntu*, are South Africa's

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36 Cornell, *Transformations: Recollective Imagination and Sexual Difference*, (1993), at p. 1.

37 *Ibid.*

38 See Pt. II, Ch. 4 for an in-depth discussion.

39 See Ackermann, L.W.H., *The Legal Nature of the South African Constitutional Revolution,* No. 4, (2004), New Zealand Law Review, pp. 633-679. Also see Moseneke, (2009, *TC: Its Implication for the Law of Contract*), at p. 4 where it is made abundantly clear that "the character of our democratic transition … is a constitutional *revolution*" [own emphasis].

40 Alongside equality, the other two core constitutional and democratic values are freedom and equality. For justification that South Africa is possessed with three core foundational values standing beside each other see *S v Mamabolo (E TV, Business Day and Freedom of Expression Institute Intervening)* 2001 (3) SA 409 (CC) at para. [41].

new ideological substance. These values together with *Ubuntu* are, therefore, constitutive of and constitute the *Grundnorms* of 'post'-apartheid South Africa. Additional depth is added by my submission that the ideological substance of South Africa has undergone radical change by submitting, as I do in Chapter 4, that South Africa is a *Rechtsstaat* in the substantive sense in terms of which liberty is not protected for the sake of liberty itself. Rather, freedom is protected since a person cannot be free to exercise liberties without "full and equal enjoyment of all rights and freedoms [liberties]".[41]

The third and final element of a substantive constitutional revolution denotes the perpetual nature of a substantive constitutional revolution and is, in the final part of Chapter 4, connected to Cornell's second prong of her interpretation. The Constitution is "transcendental in the sense that, given the imperfections … of human beings and human society, the vision it [the Constitution] incorporates may never be fully realised".[42] The continuity of the South African substantive constitutional revolution is eloquently described by Cornell & Fuller:

> "The Dignity jurisprudence of South Africa lies at the very heart of the … [substantive constitutional revolution]; an *on*[-]*going revolution* that demands the transformation of South Africa from a horrifically unjust society to one that aspires to justice for all of its citizens".[43] [own emphasis]

Cornell interprets the following passage of Ackermann as evidencing that "there can be no final Constitution because it will be up to the people of South Africa to continually transform South Africa as guided by the great idea[l]s of dignity, equality[,] and justice":[44]

> "[T]he ultimate fate of the Constitution, a bridge with a very long span,[45] will not be decided by the jurisprudence of its courts alone, however devoted and inspired that may prove to be. A

41 S. 9(2) of the Constitution provides that "[e]quality includes the full and equal enjoyment of all rights and freedoms".

42 Ackermann, L.W.H., *Human Dignity: Lodestar for Equality in South Africa*, (2012), at p. 15.

43 Cornell, D. & Fuller, S., *Introduction*, in Cornell, D., Woolman, S. C*., et al.* (Eds.), *The Dignity Jurisprudence of the Constitutional Court of South Africa*, Vol. 1, (2013), at p. 3.

44 Cornell, D., *Bridging the Span toward Justice: Laurie Ackermann and the Ongoing Architectonic of Dignity Jurisprudence,* (2008), Acta Juridica, pp. 18-46, at p. 18.

45 The epilogue of the Interim Constitution set the scene for jurists to be captivated by a metaphoric conception of the Interim Constitution. In this regard see Mureinik, E., *A Bridge to Where-Introducing the Interim Bill of Rights,* Vol. 10, No. 1, (1994), South African Journal on Human Rights, pp. 31-48, at pp. 31-33; De Vos, P., *A Bridge Too Far: History as Context in the Interpretation of the South African Constitution,* Vol. 17, No. 1, (2001), South African Journal on Human Rights, pp. 1-33; Van der Walt, A.J., *Dancing with Codes: Protecting, Developing and Deconstructing Property Rights in a Constitutional State* Vol. 118, No. 2, (2001), South African Law Journal, pp. 258-311; Le Roux, W., *Bridges, Clearings and Labyrinths: the Architectural Framing of Post-Apartheid Constitutionalism,* Vol. 19, No. 1, (Jan., 2004), South African Public Law, pp. 629-664; Ackermann, (2004, *The Legal Nature of the South African Constitutional Revolution*), at pp. 651 & 678; Van Marle, K*., et al.*, *Memory, Space and Gender: Re-Imagining the Law,* Vol. 27, No. 2, (Jan., 2012), Southern African Public Law, pp. 559-574.

> transforming Constitution such as ours will only succeed if everyone, in government as well as in civil society at all levels, *embraces and lives out its vales and its demands*."[46] [own emphasis]

In Chapter 4, I incorporate and link van Marle's argument that South Africa is not 'post'-apartheid and that South Africa must still be-come 'post'-apartheid with that of a perpetual substantive constitutional revolution. This sense of be-coming incorporates both a perpetual be-coming of the South African society (which includes its political, economic, and legal systems) as well as the perpetual be-coming of the society's legal subjects. My argument is as follows: as we continuously (re)imagine and (re)constitute ourselves though the process of be-coming, so we (re)imagine and (re)constitute society. I argue in Chapter 5 and Chapter 6 that the South African substantive constitutional revolution *provides* for the *possibility* of an ethical interpretation of the Constitution and, consequently, an ethical conception of equality. South African transformative jurisprudence, including substantive equality, fixates on transforming the system to ultimately bring about material (substantive) equality. Substantive equality, forming part of the transform*ing system*, takes account of the status of some legal subjects as being systemically disadvantaged. In addition, substantive equality enables and is conducive towards transforming lived realities. Whilst I am not critiquing this aspect of substantive equality on its own, I maintain that substantive equality privileges material concerns to the exclusion of the transformation of the legal subject and mending of morally shattered relations. Contemporary South African transformative jurisprudence, including equality jurisprudence, neglected the transformation of the legal subject in 'post'-apartheid South Africa.

Chapter 4 includes my argument that once we *realise* the inability of humans to act autonomously from social prejudice and, in consequence, the impossibility of achieving equality, we would have reached the ethical realisation. This ethical realisation also entails ethical understanding; that is, the *understanding* that it is impossible for human beings to act autonomously from (without the influence of) socially constructed prejudice (ontological bias). To be free from socially constructed prejudice – such as, racism, sexism, and homophobia – would be to act autonomously from socially constructed bigotries (ontological intolerance). Social prejudice or socially constructed prejudice is representative of ontological bias; that is, a preconceived opinion of the ontological meaning of another's being (existence *as*) a human that is not based on prior experience that is not *ab initio* polluted by social prejudice, such as racism or sexism. Socially constructed bigotries are, in turn, representative of socially constructed intolerance; that is intolerance of the *ontological differences attributed* to the other's being (existence *as*) human. For any of us to be an individual that is open to new worlds we must first become

46 Ackermann, (2004, *The Legal Nature of the South African Constitutional Revolution*), at pp. 678-679.

disillusioned by the ethical moment; which is understanding that nobody is capable of not thinking (whether consciously or subconsciously), at some point in time, that he or she is superior to or more deserving than any other based on personally held characteristics and appreciating (understanding the entire situation by grasping implications translating into acceptance) that he or she *ought* not to do so. We ought to be and are disillusioned because we are disappointingly accepting the 'discovery' that we are less good than we had previously thought. To become disillusioned by the ethical moment is to attain ethical appreciation of our own imperfections. To be open to any new world, we must, first, realise that we are not *ab initio* free and autonomous individuals and, thereafter, be willing to deconstruct the current 'reality' so as to open our world ('appearances') to the possibility of new worlds (another 'reality'). As van Marle puts it "[d]econstruction seeks to disrupt the present or the given without at the same time seeking to replace the 'old' with the 'new', ensur[ing] the possibility of transformation and justice".[47]

Relevant to deconstruction and the disruption of the present or the given is the notion of be-coming, as explored by van Marle. Be-coming includes the assertion of a "ceaseless challenge".[48] Within our new constitutional democracy, the South African substantive constitutional revolution is not completed, and will never be completed, because in be-coming, not only 'post'-apartheid, but a socially just society there must be a ceaseless questioning and challenging of the *status quo*. This ceaseless challenge of the *status quo* includes challenging dominant conceptions of the self and equality. However, the ceaseless challenge does not stop at mere disruption of the dominant *status quo*, but also entails (re)imagining the self, which translates into (re)imagining the social (society), and thus current notions of equality. The latter leads to a creative adaptation[49] of Cornell's question into a statement which reads as follows: perpetual be-coming of ourselves opens us to (the possibility of) new worlds. Chapter 4 ultimately concluded with the following statement: social transformation denotes the elements of (*i*) radical change and (*ii*) a process of perpetual be-coming of our-selves and society. The notion of be-coming delineates the role of the law as opposed to the role of society and elevates the divide between the legal order and social order in the process of social transformation. The be-coming of the individual human being (legal subject) is further particularised and expanded upon in Chapter 5 through the notion of the social imaginary. In addition, and very importantly, the (re)imagination and (re)constitution of the social order is also considered in Chapter 5, at length, through incorporation of the multiple modernities thesis into my ethical conception of equality.

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47 Van Marle, (1996, *The Doubly Prized World*), at pp. 336-337.

48 Van Marle, (2010, *Reflections on Post-Apartheid Being and Becoming*), at p. 351.

49 This term is used by Gaonkar – see Gaonkar, (2002, *Toward New Imaginaries*) and Pt. II, Ch. 5 at p. 178.

The South African substantive constitutional revolution, therefore, leads to the possibility of a 'post'-apartheid modernity, which is the topic under discussion in Chapter 5. Chapter 4, in its final instance, unveils to the reader that, once ethically perceived, the South African substantive constitutional revolution is occasioned by, as consequences, (the possibility of) (*i*) a 'post'-apartheid modernity, elaborated upon and developed in Chapter 5, as well as (*ii*) an ethical interpretation of the Constitution.

3.2.2. CHAPTER 5: THE SECOND PART OF THE SECOND RESEARCH QUESTION

The second part of the second research question (the consequences of the South African substantive constitutional revolution) is answered in Chapter 5. In aligning Chapter 5 to the fundamental problem, it is reiterated that Chapter 4 relates to the first element of social transformation and that Chapter 4 ends with creatively adapting Cornell's second prong with my notion of be-coming. I creatively adapt the second prong of her interpretation into the following statement: perpetual be-coming of ourselves opens us to (the possibility of) new worlds. Worlds (in Heidegger's term a 'there') are different conceptions of society or the social order. The integral relationship between the (re)imagination and (re)constitution of the self is with the (re)imagination and (re)constitution of society cannot be overstated. In contrast with Chapter 4, Chapter 5 builds on the final part of Chapter 4 and concerns the (re)imagination and (re)constitution of the self and society. Chapter 5 addresses both the 'micro' and 'macro' element of the transforming the 'social'. The 'micro element' of be-coming of the self is expanded upon with the notion of the social imaginary. In turn, the 'macro element', denoting the be-coming of society, finds elucidation with the multiple modernities thesis.

The *possibility* of an ideal social order, which is investigated in Chapter 5, is a consequence of the South African substantive constitutional revolution. Part II of this thesis is concluded with Chapter 5 that concerns the perpetual (re)imagination and (re)constitution of the 'social'. The social imaginary is relied upon to enlighten members of society to realise that each one *must* participate in the process of be-coming, which means active participation in the continuous (re)imagination and (re)constitution of the self and society; that is, to participate in the process of social transformation. Social transformation does not start with a theory and most definitely not in the mind of a politician, but also not in that of a philosopher, playwright, or some kind of public speaker. Social transformation starts and ends with the conception of the other and, based on such conception, the manner in which one relates to and treats the other. I wish to make it plain that, in contrast with the social imaginary that focuses on the 'micro element' of the second leg of social transformation, the multiple modernities thesis focuses on the 'macro element' of the second leg of social transformation. Whereas the micro focuses on the individual, the macro

focuses on the society. The multiple modernities thesis provides content to the macro element; in other words, I rely on the thesis in arguing for the perpetual be-coming of society or, otherwise put, the perpetual (re)imagination and (re)constitution of society. The *possibility* of an ideal society is, thus, pursued through reliance on this thesis, whilst the thesis, at its core, is ethical by being radically indeterminate and open towards continuous (re)imagination and (re)definition; that is, akin to the be-coming of society. I then proceed in Chapter 5 to incorporate *Ubuntu* in my ethical conception of equality and thereby provide content to Cornell's second prong of her interpretation of the subject of transformation by occasioning the assertion of *a* meaning of being in *an* event during the process of be-coming 'post'-apartheid and emerging into a 'post'-apartheid modernity that is creatively adapted by *Ubuntu*. My submission is that in (re)imagining a 'post'-apartheid South African modernity, the ontological meaning of being human *ought* to be influenced by *Ubuntu* and, among other things, its notions of interconnectedness, group solidarity, conformity, compassion, respect, human dignity, humanistic orientation, and collective unity. *Ubuntu* addresses the "ethical relation",[50] which relation (*i*) places emphasis on the kind of person each one of us *ought* to become to develop a non-violative relationship with the other and (*ii*) concerns itself with a way of being (existing) in the world.[51] *Ubuntu* addresses both be-coming a person to develop a non-violative relationship with the other and a *way* of being-in-the-world – in other words, *Ubuntu* can address the ethical relation in its totality.

I must pause and convey to the reader the argument that I have developed up to this point. I have placed the inadequacy of current notions of equality and transformation at the centre of this thesis. Thus, I identified the fundamental problem bound up within current processes of transformation, which is the inability or oversight to transform the (conception(s) of the) self. In other words, I submit that we are still shackled by pejorative and other morally abhorrent ontological conceptions of each other. Developing therefrom and forming part thereof,[52] we predominantly conceive each other as abstractions of reality, disengaged and

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50 Van Marle, (1996, *The Doubly Prized World*), at p. 332.

51 *Ibid.*

52 Although difficult to articulate and understand, the reader must understand that conceiving legal subjects as individuals abstracted from reality who primarily act in their own self-interest and only to the mutual benefit of others when such benefit corresponds with self-interest is not morally abhorrent *per se*. What must be realised is that the dominant conception of the self as a disassociated individual preoccupied with his or her own interest rather than that of others and the social conceived of being constituted by disassociated individuals rather than an individual forming part of and being constituted by an already constituted society leads to and has led to the other to the self being excluded from and being dominated by the self. Whilst society is constituted by individuals, those within society wielding dominant power defined and defines the identity of the individual (self) that constituted society within which it exists (being). Thus, because society is constituted by individuals, the dominant meaning of the being that exists in society is determined and perpetuated by the individuals wielding constitutive power.

distanced from each other, primarily concerned with self-interest and only willing to act in relation and concert with each other for mutual benefit if such benefit corresponds with self-interest. I identified the concomitant problematic tied up within the law, which is the manner in which the law perceives us as atomic abstractions of reality and the relationship between us as one where individuals act in their own interest and only thereafter in the mutual interest together with others. I, therefore, submit that the law perceives and deals with the interests of individuals ***as*** individuals. However, the law ought to perceive and deal with the interests of an individual ***as*** an individual in his or he relationship with others – in his or her being together-with others. I have also indicated and reiterated that I place reliance on the notion social imaginary to enlightened society so that it comes to the realisation that each one of us can (re)imagine our own being; that is those characteristics that makes us human beings. In continuing this line of argument, once we recognise each other's capacity to imagine or to conceive the meaning of being human, we can accept that there must be a multiplicity of conceptions of human beings – a multiplicity of ways of being human.

A homosexual man can contemplate being in a relationship with another man, how to relate to such man or men, and how to relate to others his erotic attraction to members of his sex (men).[53] If such contemplation is acted upon one acts in the realm of imaginary realisation and once observed an experienced by the actor and others, the actors find themselves in the realm of imaginary experience. The imaginary contemplation has been influenced by dominant conceptions of being and we are, by way of example, currently experiencing heteronormativity permeating our society, although not formally or legally. Heteronormativity denotes that heterosexuality is the norm (denotes its 'normality') and ultimately denotes legitimisation of superiority. In a heteronormative world, far reaching and informal practices as well as legal regulation erects a hierarchy of sexual desires, practices, and identities.[54] This hierarchy influences the way we understand the world through law and social practices.[55] I, therefore, submit that the social imaginary has been infiltrated to such an extent that heterosexuality is regarded as 'normal'. It has been normalised as an unquestionable *status quo* – the only way of being (existing *as*) a human. The law has, fortunately, adopted a conception of being inclusive of homosexuality and the celebration of difference. With the performative possibilities tied up within the law one can only hope for imaginary contemplation that is inclusive of, accepting of, and celebrates homosexuality as an instantiation of being human that leads to imaginary realisation of an

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53 See Cameron, E., *Sexual Orientation and the Constitution: A Test Case for Human Rights,* Vol. 110, No. 3, (Aug., 1993), South African Law Journal, pp. 450-472, at p. 452 for a definition of homosexual.

54 De Vos, P., *From Heteronormativity to Full Sexual Citizenship?: Equality and Sexual Freedom in Laurie Ackermann's Constitutional Jurisprudence,* (Jan., 2008), Acta Juridica, pp. 254-272, at p. 452.

55 *Ibid.*

alternative conception of being and ultimately imaginary experience of acceptance and celebration of the difference accompanying homosexuality. Through all these layers of philosophical and legal argument I conclude my summation as follows: recognition of mutual capacity to imagine designates mutual concern and respect for each-other's imagined being.

3.3. PART III: THE THIRD RESEARCH QUESTION

The third and final research question is sought to be answered in Part III of this thesis. Chapter 6 is the constituent part of Part III and is entitled: "An Ethical Conception of Equality". My ethical conception of equality, at its core, concerns (*i*) the meaning of being (existence *as*) human and, flowing from such meaning, (*ii*) ethical relations between human beings. Both such meaning and relations are fundamentally concerned with the *lived experiences* of human beings. The ethical, in this context, entails the indeterminate nature of the meaning of being, but in the sense of being open towards (re)imagination and (re)constitution of such meaning. Such indeterminate nature ties into my understanding of be-coming. Since the meaning of being (existence *as*) human is of fundamental importance it follows that, in terms of my ethical conception of equality, the meaning of being (existence *as* human) is investigated and questioned, disadvantage occasioned by ontological intolerance and bias is exposed, and ontological claims are made. There is no single meaning of being (existence *as* human), nor is there a single way of being (existing *as*) a human. Consequently, *difference* is central to my ethical conception of equality and difference is accompanied by indeterminacy and openness, as already alluded to in this paragraph. Neither the meaning of being nor difference can and ought to be define, in a final sense.

Investigation, critiquing, and transformation of subjectivity and (ontological) identity lies at the centre of this thesis, which is evident from the fundamental problem. The meaning of self and, thus, the meaning of being (existence *as*) human without question concern the nature and give rise to an investigation of human subjectivity. Jurisprudentially considered, my ethical conception of equality is posited upon rendering jurisprudence, jurisprudence *of the* subject. Thus, equality jurisprudence ought to be equality jurisprudence *of the* subject. This jurisprudential element brings us back to the *lived experience* of a legal subject (human being), which is vital, but more so the meaning attached to the being (existence) of humans, since such meaning carries *attributed* value and worth, and has a direct impact on the *experience of humanity,* which takes us back to human dignity, as discussed in Chapter 2. As regard to human dignity, in Chapter 2 I linked section 9 with the right to life (a dignified life) and said that section 9 prevents life from being undermined by various commissions and omissions that endanger the right to live the life of a human being. The right to life and, thereby, dignity influence the right to equality precisely

because of the devastatingly harmful consequences of unequal treatment in the constitutional sense on a person's *experience* of humanity.

4. CONTEXT, APPROACH, AND METHOD

The focus of this thesis is equality and equality is placed squarely within a transformative context. *Barnard* is indicative of the manner in which the law allows and provides for transformation of a materially unequal society such as South Africa, but disregards, at minimum, the performative effect of the judgement on the meaning of being or, at worse, plainly disregards the meaning of being in preference of materialist transformative thought and neo-liberationism posited on the mistaken understanding of equality *as* racial representivity. The transformative context of this thesis is cast wider than the judgment in that the context understood and described as social transformation is indicative of not only how the society is structured and how systemic disadvantage is experienced, although this is where current transformative jurisprudence, including the Court's equality jurisprudence, stops. The second element of social transformation builds upon and broadens the context of this thesis into the realm of social transformation in its widest possible sense to include within the meaning of transformation the transformation of the 'social', which includes both conceptions of subjectivity or the self and society. The fundamental problem concerns inadequate social transformation and social transformation, in turn, denotes, among other things, perpetual be-coming. Be-coming, in turn, requires the perpetual (re)imagination and (re)constitution of the meaning of being (existing *as*) a human. When referring to the meaning of being as existing as a human being such reference equally relates to the meaning of conceptions of the self or subjectivity. However, the reader is reminded that the (re)imagination and (re)constitution of the meaning of being, self, or subjectivity leads to and ultimately results in the (re)imagination and (re)constitution of society. With placing the transformation of the self at the core of this thesis I now turn to certain fundamental concepts informing my jurisprudential and philosophical approach in my endeavour in developing an ethical conception of equality.

4.1. FUNDAMENTAL CONCEPTS, TERMINOLOGY, & PHILOSOPHICAL THOUGHT INFORMING THE APPROACH

The being of human beings is explored and critiqued, since it is ultimately submitted that the (re)conceptualisation of the self (or then the being of human beings) *is* the gateway through which we can continuously (re)imagine and (re)constitute ourselves and society.[56] *Terse*

[56] The law provides further particularisation and context to this study. Accordingly, the self is interrogated in this thesis through a focus on the legal subject. In other words, one can understand the self to be the *genus*

philosophical analysis of the study of being and existence is, therefore, justified. I write the following passages in trepidation and in acknowledgement of my theoretical and intellectual background.[57]

In the following passages strands of metaphysics,[58] ontology,[59] and phenomenology,[60] are investigated and elaborated upon for the specific context of this thesis. In other words, the context and substantive relevance of the thesis delineates relevance and importance identifying certain concepts, terminologies, and philosophies (or strands of philosophy) as fundamentally important and the fundamental important concepts, terminologies, and philosophies (or strands of philosophy) delineates context and relevance of substantive content. In addition, I would be committing a grave fraudulent misrepresentation if I do not (*i*) declare to the reader the influence of philosophy on my thoughts and (*ii*) articulate *how* such influence impacts this thesis.[61] I expressly bring my theoretical and intellectual background to the fore, lest I and the reader be overcome and ultimately misled by misplaced self-confidence, inordinate and deceitful (self)conferred knowledge, insight, and wisdom, which would uncompromisingly signify the untimely death of this project even before it found its inception.

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and the legal subject a *de jure specie* of the self. The argument submitted in this thesis is that conceptions of the self influence conceptions of the legal subject.

57 I admit that my qualifications (BCom Law (*cum laude*) and L.LB (*cum laude*)) is wholly insufficient in the context of philosophy.

58 See Solomon, R.C. & Higgins, K.M., *The Big Questions: A Short Introduction to Philosophy*, (2010), at p. 7 where it is opined that metaphysics can be understood as "the theory of reality and the ultimate nature of all things. The aim of metaphysics is a comprehensive view of the universe, an overall worldview." See Carroll, J.W. & Markosian, N., *An Introduction to Metahysics*, (2010), at p. 3 where it is stated that philosophy consists of epistemology, ethics, and metaphysics with the consequence that if you "subtract epistemology and ethics from philosophy one ends up with metaphysics which entails, among other things, ontology; the nature of time; the Mind-Body Problem; the problem of personal identity; the problem of freedom and Determinism; the nature of the laws of nature; the nature of causation; and the nature of material objects".

59 See Carroll & Markosian, *An Introduction to Metaphysics*, (2010), at p. 3 where it is stated that ontology is roughly understood as "the study of being, including the attempt to come up with a list of all the main categories of things that exist" and Solomon & Higgins, *The Big Questions: A Short Introduction to Philosophy*, (2010), at pp. 7 & 110 who describe ontology as "the study of 'being', an attempt to list in order of priority the various sorts of entities that make up the universe." Put otherwise, the study of reality, that which is 'real', to establish a hierarchy of levels of reality. Thus understood as the study of being and existence. Ontology includes defining and classifying entities/things/beings (physical or mental), the nature of their properties, and the nature of change.

60 See Sokolowski, R., *Introduction to Phenomenology*, (2000), at p. 2 where phenomenology is defined as "study of human experience and of the ways things present themselves to us in and through such experience". Otherwise put by Moran, D., *Introduction to Phenomenology*, (2000), at p. 4:

> "Phenomenology is best understood as a radical, anti-traditional style of philosophising, which emphasises the attempt to get to the truth of matters, to describe *phenomena,* in the broadest sense as whatever appears in the manner in which it appears, that is as it manifests itself to consciousness, to the experiencer."

61 I expressly bring my theoretical and intellectual background to the fore, lest I and the reader be overcome and ultimately misled by misplaced self-confidence, inordinate and deceitful (self)conferred knowledge, insight, and wisdom, which would uncompromisingly signify the untimely death of this project even before it found its inception.

4.1.1. THINKING ABOUT BEING HUMAN

Normal or classical ontological questions ask (*i*) whether an entity/thing/being exist and, if so, (*ii*) what are the characteristics or properties of the thing *that exists*. Normal or classical ontological questions do not ask what is existence (being) or what is 'that' which renders something to exist, to be, or that which makes a being count *as* a being.[62] Ontology, in terms of traditional Western metaphysics, would state that some-thing (being) exists because, for example, it is made up of atoms or has a certain essence.[63] Metaphysics is, thus, to think about the existence of beings beyond their physical and perceptual being – *transcendence*. Ontology, as a composite part of metaphysics, concerns the '*reality*' *behind the appearances*; that is, a postulation of a 'reality' behind the appearances.[64] Ontology is an intellectual attempt to "account for the sequence of events seen in terms of other events unseen".[65]

> "Primitive mythologies populate this *world behind the scenes* with spirits, demons, gods, and goddesses. Science populates it with atoms and electrons and electromagnetic forces. Christianity fills it with God and a spiritual world only dimly perceived by those of us in this one – it is that eternal world that is far more important than the mere passing appearances of this one."[66] [own emphasis]

The concept 'reality' is necessitated by the distinction between (*i*) that what we 'simply see' or that 'what appears to be the case' from (*ii*) the 'deeper picture' that enables us to *explain* 'what we see'.[67] Reality is a view of the world – or another world altogether – that "allows us to *understand* the world of ordinary appearances" [own emphasis].[68] The ways things appear to us and their inner reality are distinguished thereby enabling explanation of things to ourselves to make sense of them.

When a black female human being or a white male human being appears before another human being, the latter does see (perceive) someone and he or she is indeed confronted with an appearance of a person. Without detailing to the reader a detailed imagined appearance of the black female and white male I shall simply state that a *physical phenomenon* is the object of the observer's perception; the *b*lack or *white* human being is that which is noticed by the *senses*. However, what your *mind* or *consciousness* conceives[69] (as opposed to perceives) as 'reality' is different than and ultimately based on something beyond the presence of the *physical phenomenon*.

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62 In this regard see the Appendix under the heading "'being' and 'being'".

63 Solomon & Higgins, *The Big Questions: A Short Introduction to Philosophy*, (2010), at p. 117.

64 *Ibid.* at p. 111.

65 *Ibid.*

66 *Ibid.* at pp. 111-112.

67 *Ibid.* at p. 112.

68 *Ibid.*

69 Conceived (v.) defined to mean to "form or devise (a plan or idea) in the mind", which includes to "form a mental representation of; imagine" – *Oxford Dictionary of English (British English)*: *Apple Dictionary*, (2016), Ver. 2.2.1 (194).

What the observer might mentally conceive as being represented by the *physical phenomenon* – *b*lack *w*oman – is an unchaste[70] animal[71] that is an irrational, angry, and lazy black woman, whilst the *w*hite *m*an might be conceived as an intelligent, rational, well-tempered, sophisticated, and diligent white man. Whatever the basis of such a conception might be I have shown that when describing someone as a white man or black female reference is made to a metaphysical and ontological conception of the 'reality' *behind* the *physical phenomenon*. In other words, a conception of the being of the subject; that is the being of human. Being in this context refers to the self: a conception of the thinking subject's essential being that distinguishes it from others. Transformation of pejorative, oppressive, demeaning, and humiliating ontological conceptions of being is *an* object to be transformed, which is central to social transformation and, as such, this thesis.

Finally, whilst the aim might be to deconstruct and transform the dominant meaning of being (existence *as*) human, I firmly reject any possible 'science of being human'. It is impossible to understand human nature or, in my words, the being of humans, to the extent that "the improvisations of living [as a human] will be totally pre-empted [(thus, understood)] by the execution of scientific plans, like programs for a computer".[72] The contingencies and variables intrinsic to being human that ultimately present itself as the concrete 'here and now' can never be fully fathomed by human reason even when the mighty consciousness of the self (the I)[73] is equipped with past experience and the innate capacity to imagine a new adaptation through creative agency. Yes, we, human beings, are far too sophisticated in our being-in-the-word as ultimately phased by our being-with to the 'reality' of 'non-cognition' of an always and ever self-constituting being of humanity.[74] Any and every thought of attributing final designation or

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70 Crenshaw, K., *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,* (1989), University of Chicago Legal Forum, pp. 139-168, at p. 158. See Wriggins, J., *Rape, Racism and the Law,* Vol. 6, (1983), Harvard Women's Law Journal, pp. 103-142, at pp. 117-123 for a discussion of historical and contemporary evidence to the effect that black women are generally not thought to be chaste. Historical accounts include stereotypical images of black womanhood based on the myth that all black women are immoral and sexually loose as well as the justification of white men, for centuries, abuse of black women on the claim that black women are licentious, always 'ready' for a sexual encounter.

71 See Crenshaw, (1989, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*), at p. 158, n. 47 where she quotes a man stating in 1902: "I sometimes hear of a virtuous Negro woman but the idea is so absolutely inconceivable to me ... I cannot imagine such a creature as a virtuous Negro woman".

72 Shevrin, H., *Essay: Is There a Science of Being Human,* Vol. 21, No. 1, (Autumn 1971), DePaul Law Review, pp. 191-206, at p. 201.

73 That is "[t]he object or subject of self-consciousness; the ego" – *Oxford Dictionary of English (British English)*: *Apple Dictionary* (2016), Ver. 2.2.1 (194).

74 See Parasidis, E., *Defining the Essence of Being Human,* Vol. 13, No. 2, (2012), Minnesota Journal of Law, Science and Technology, pp. 825-865, at pp. 834-841 & 841-845 for an extensive exposition of the well documented inability of 'sciences' to *definitively* distinguish human beings as a unique species, whether through anthropology or comparative genomics.

understanding to the phenomena of being human is simultaneously self-limiting and an act of self-denial; that is denial of the other self. Every enunciation on the being of humans pronounced to be complete, final, settled, or certain defies the reality of non-cognition of being human. The ethical trace uncovered by the aforementioned revelation marks an ethical realisation that – whatever the being of human beings might be – any final pronunciation thereon or definition thereof designates an understanding and attributes meaning to being human equivalent to that of a mere being. To do so would defy and amount to the rejection of humanity's 'reality' of non-cognition with the consequence that to finally pronounce on the being of human is to relegate the self to the being of beings.

4.1.1.1. *DA-SEIN & BEING-IN-THE-WORLD*

Although I am not directly incorporating and relying on the phrase *Da-sein* throughout this thesis, I am again cognisant of its meaning, especially in so far as it informs the phrase being-in-the-world. *Da-sein* as being-there means *Da-sein* is being-in-the-world. *Da-sein*, therefore, leads my thought towards understanding being-in-the-world and informs my thought accordingly, although indirectly. With such influence of *Da-sein* it is my understanding that the being of humans is fluid and refers to an *expression of the ways of being* (existing *as*) *human*. An *expression of the ways of being* human refers, in turn, to habits, customs, behaviour, and systems of humans, which is informed by both the past and the possibilities of the future. Such reference coincides with and supports reliance on the notion of the social imaginary, as discussed in Chapter 5. As opposed to a mere fixed state of existence, the being of humans is different, more fluid than the being of beings. A being cannot think for itself nor about its being (objective presence). It becomes clear in this thesis that the social imaginary and the multiple modernities thesis supports an understanding of being of humans as an expression of the ways of being (existing *as*) humans.[75] I adopt being-in-the-world to acknowledge the being of human beings as Being-in-the-world entailing that we (humans) are essentially involved in a context, humans' relation to the world is conceived as active engagement, and rejection of the isolation of the individual in the world.[76]

> "Being-in-the-world, the world is always the one that I share with Others. The world of *Da-sein* is a with-world [*Mitwelt*]. being-in is being-with Others."[77]

75 For additional detail as regard to *Da-sein* see the Appendix under the heading "'Being of a Human and '*Da-sein*'".

76 For additional detail as regard to being-in-the-world see the Appendix under the heading 'Being-in-the-world'.

77 Heidegger, M., *Being and Time*, (1927), at p. 155.

A central feature of *Da-sein* is 'being-with', which signifies that humans are not isolated from other humans.[78] Rather, human beings are "so constituted that our being is, in principle, available to one another, even prior to our experience" of each other.[79] Being-with seeks to reject individual isolation in the *social world* through the constitution of *Da-sein* in the same way that the being-in-the-world rejects individual isolation in the world *per se*. Therefore, being-with aims to overcome the traditional Cartesian account of the isolated self.[80]

4.1.1.2. Self

The central importance 'self' in this thesis justifies further discussion as regard to its meaning. Philosophers have called the 'real self' the essential self; that is, the set of characteristics that defines a particular person.[81] Descartes presented a simple and elegant argument in terms of which the self is the first thing that each of us can know for certain and that this self, whose existence is indubitable, is nothing else but the thinking-self, the self that is aware of itself.[82] It is submitted that the view of persons as autonomous individuals draws heavily on Descartes and Kant.[83] Traditional metaphysics or then ontology typically conceives the self (understood as that which makes up the identity of a person) as being able to step back from any particular project, question, and decide whether continued pursuance is what he or she wants.[84] This corresponds with the Kantian view of the self, which is the view that the "self is prior to its socially given roles and relationships".[85] According to Kant, the self is only free if "it is capable of holding these features of its social situation at a distance and judging them according to the dictates of reason".[86] As Rawls puts it, "the self is prior to the ends that is affirmed by it".[87]

In contrast, Sartre, an existentialist, defined existentialism as the view that for human beings "existence precedes essence".[88] For Sartre any theory in terms of which the self is to be found in consciousness is misconceived.[89] The self is not and cannot be reduced to simply thinking or a memory of the past. "The self is what each of us chooses for ourselves, our projection into our future, our intentions to *be-come* a particular kind of person" [own

78 Bunnin, N. & Yu, J., *The Blackwell Dictionary of Western Philosophy,* (2004) at p. 79.
79 *Ibid.*
80 *Ibid.*
81 Solomon & Higgins, *The Big Questions: A Short Introduction to Philosophy*, (2010), at p. 185.
82 *Ibid.* Here I am referring to the famous phrase 'I think, therefore I am'. My response to the latter is simple, which is before the 'I' can 'think' the 'I' already 'am', since only that which already exists can partake in the thought of existence.
83 Adams, M., *Individualism, Moral Autonomy, and the Language of Human Rights,* Vol. 13, No. 4, (1997), South African Journal on Human Rights, pp. 501-513, at p. 504.
84 *Ibid.*
85 *Ibid.*
86 *Ibid.*
87 Rawls, J., *A Theory of Justice: Original Edition*, (2005), at p. 560.
88 Polt, R., *Heidegger: An Introduction*, (1999), at p. 164.
89 Solomon & Higgins, *The Big Questions: A Short Introduction to Philosophy*, (2010), at p. 202.

emphasis].[90] We cannot ever fully achieve this[91] and, thus, the self never really exists in full. At best, the self is our image of what we want to be, to which we strive.[92] The self always lies in the future in being what we aim toward in and through any attempt at making ourselves into something.[93] Consequently, there is no self, at least, no fixed and finished self as long as we are alive. The self is an open question; in other words, there is no fixed human nature – only human freedom.[94] Only we can, "create our own values and make ourselves into whoever we choose to be".[95] Whilst not accepting the centrality of freedom to the self as in the case with Sarte, I do agree that the self is an open question; in other words, there is no fixed human nature.

4.2. METHOD

The reader has been referred to the Appendix. The content contained in the Appendix is *in addition to* the content contained in the Chapters. I have decided to use the Appendix to include *additional* content to this thesis for several reasons. First, the Appendix provides insight into philosophical thought that influenced my understanding. Second, the ethical interpretation of the Constitution is included in the Appendix, since I seek to show that one can *apply* the ethical conception of equality that I propose in judicial proceedings and, as such, in *jurisprudence* in general. The fact that the Constitution is susceptible to an ethical interpretation merely re-enforces the *possibility* of the ethical conception of equality that I propose. Such an interpretation does not add content to the ethical conception, since the converse is the case. Third, I have included analysis of section 9(1), section 9(3), section 9(4), and section 9(5) in the Appendix as I intend to indicate to the reader that I have conducted research in the positive law in order to understand exactly what the law *is* before embarking on an endeavour to critique such positive law. Again, the inclusion does not detract from my argument, but rather adds to and provides additional content as well as insight into the project itself and what sources informed my understanding more generally.

The methodology adopted in this thesis is a non-empirical conceptual analysis. My non-empirical conceptual analysis of equality is occasioned by a critical methodological approach. Critical theory can be seen as an instance of separation for it "defies the system, suspects all totalising thought and homogeneity and opens space for the marginal, the different and the

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90 *Ibid.*

91 Even when our ambitions are fulfilled we can always change our mind, formulate new ambitions, and so on.

92 Solomon & Higgins, *The Big Questions: A Short Introduction to Philosophy*, (2010), at p. 202.

93 *Ibid.*

94 Polt, *Heidegger: An Introduction*, (1999), at p. 164.

95 *Ibid.*

'other'".[96] The various strands of thought that will inform my writing can be summarised under the following 'headings': the 'death of the subject', the 'subject and the legal system', the 'political agenda of postmodernism' and 'semiotics and legal theory'.[97]

The 'death of the subject' refers to the indeterminacy thereof; in other words, I will embrace a critique in terms of which emphasis is placed on the "inadequacy of traditional social categories".[98] These social categories define individual identity and particular individual agency[99] and, in terms of the adopted critique, such categories are to be deconstructed[100] to bring about the possibility of ontologically different and creatively adapted conceptions of the self, or then being human, which has been expressed as the *ways* of being human. In the context of 'the subject and the legal system', the above-mentioned critique seeks the commencement of a "shift [in] the focus of jurisprudence from a study of the properties the legal system is thought to have[101] to the nature of the legal subject who apprehends the legal system and judges it to have these properties".[102] I endorse the belief of Balkin that we must "transform the subject of jurisprudence into the jurisprudence of the subject".[103] I further submit that meaning is constructed, which leads me to conclude then that the legal subject is socially constructed. What is then of utmost importance is the manner in which this social construction influenced the legal subject's understanding of the legal system. The jurisprudence what Balkin is calling for is then a:

> "… [j]urisprudence that recognises that questions about the nature of law must equally be concerned with the ideological, sociological, and psychological features of our understanding of the legal system".[104]

Under the 'political agenda of postmodernism', one locates a popular theme, which is that of subversion.[105] Subversion is the "commitment to undermine dominant discourse".[106] Thus, one can relate this to the calling into question of the self by the other or deconstructing the dominant interpretation. Postmodernism can, accordingly, be associated with the deployment of strategies to liberate subjugated narratives left hidden by privileged master narratives.[107]

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96 Freedman, M., *Lloyd's Introduction to Jurisprudence*, (2008), at p. 1410.
97 *Ibid.* at pp. 1410-1418.
98 *Ibid.* at p. 1410, categories such as women, homosexuals, and blacks.
99 Agency refers to a person acting to bring about a predetermined result, where the end is determined by someone else, the dominant – for example the normality of women staying at home and taking care of the children, this normality is seen as a social norm to which women are presumed to *have to subscribe* to.
100 Freedman, *Lloyd's Introduction to Jurisprudence*, (2008), at p. 1411.
101 Order, coherence, determinacy etc.
102 Balkin, J.M., *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence,* Vol. 103, (1993), Yale Law Journal, pp. 105-176, at p. 106.
103 *Ibid.* at p. 107.
104 *Ibid.*
105 Freedman, *Lloyd's Introduction to Jurisprudence*, (2008), at p. 1414.
106 *Ibid.*
107 *Ibid.*

Postmodern critique is consequentially illuminating exposing the unjustifiability of the result of grand narrative. This result is the assertion of "exception to the rule, counter-tradition or minority perspective" status on differing social visions and postmodern critique exposes the "underside of master narratives".[108] The underside of grand narrative is nothing else than the consequence of conferring meaning by constructing "similarities and dissimilarities that do not exist in themselves".[109] This consequence is the inevitable subordination of that which is different from the sameness – alternative social visions. The last heading is that of 'semiotics and legal theory'. I subscribe to an approach which traces the way in which the system itself constructs meaning, as opposed to ascertaining the meaning only from the intention of the author or the intended meaning of the text.[110]

> "The semiotician traces the way the system produces meaning … and tries to see gaps or uncertainties within the structure, the many different levels at which rhetorical tropes can occur [that is representable arguments], and the many possible ways of re[-]describing them".[111]

4.2.1. Ethical Scholarship

In conclusion, I must reiterate that as an ethical scholar, subscribing to, among other things, my own ethical conception of equality, I do not merely levy critique. Accordingly, this thesis is an attempt at shifting equality thought to, among other things, transcend material inequality, materialist notions of transformation, and the ossification of subjectivity. Through, among other things, accepting the possibility of a multiplicity of Selves we can attain both social cohesion, that transcends current conceptions of being human, and social justice; that is, justice transgressing the boundaries of equality, as currently understood and (ab)used in contemporaneous material and systemic transformative jurisprudence. My submission is that our path to social cohesion and social justice is paved by an ethical conception of equality that is principally aimed at and inclusive of social transformation. Ethics is not *only* critique without any opportunity for constructive comment as to the *status quo* and what it *ought* to be.[112] An ethical

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108 *Ibid.*

109 van der Walt, J., *The Language of Jurisprudence From Hobbes to Derrida (the Latter's Quest for an Impossible Poem),* (1998), Acta Juridica, pp. 61-96, at p. 74.

110 See Freedman, (2008) at p. 1418.

111 *Ibid.*

112 I therefore distance myself from critique for the sake of critique or then "trashing" – see Gravett, W.H., *Of 'Deconstruction' and 'Destruction': Why Critical Legal Theory Cannot be the Cornerstone of the LLB Curriculum,* Vol. 135, No. 2, (2018), South African Law Journal, pp. 285-323, at p. 308 where Gravett states that strands of critical-theory scholarship, adopted by scholars in South Africa, has adopted ideological viewpoint in terms of which the aim of critique is critique. Gravett critiqued what he termed "critical-theory scholarship regarding legal education in South Africa that is rooted in the heterodox Critical Legal Studies ('CLS') movement". References made by Gravett of scholars falling within this category include Madlingozi, T., *Legal Academics and Progressive Politics in South Africa: Moving Beyond the Ivory Tower*, in Van Marle, K. (Ed.) *Pulp Fictions* (2006); Van Marle, K., *Jurisprudence, Friendship and the University as Heterogenous Public Space,* Vol. 127, No. 4, (2010), South African Law Journal, pp. 628-645; Van Marle, K. & Modiri, J., *What Does Changing the*

approach, as opposed to a pure 'critical' approach, is not limited to only critiquing the dominant perception of subjectivity, being the totalising self, but is directed at causing a rupture within human consciousness so as to influence such consciousness to open human beings up to the possibility of a multiplicity of selves. In a legal context, an ethical approach provides for the possibility of a legal subject alternative to the conception thereof inherited from Western modernity. An ethical approach, I submit, involves, among other things, ethics of difference, which is important for two reasons. In the first instance, ethics of difference rejects the notion of a totalising self and acknowledges the possibility of a multiplicity of selves. Secondly, flowing from the possibility of a multiplicity of selves is the possibility of different conception(s) of being (existing *as*) a human being.[113] The legal subject can be (re)imagined, never finally (re)defined, to conform to South African circumstances and conception(s) of being (existing *as*) a human being. A conception of subjectivity that is unique to and a product of a South African modernity. Without reproducing they remainder of this thesis here, I note that the thesis is a representation and a product of ethical scholarship.[114]

World Entail? Law, Critique and Legal Education in the Time of Apartheid, Vol. 129, No. 2, (2012), South African Law Journal, pp. 209-218; Modiri, J., *Transformation, Tension and Transgression: Reflections on the Culture and Ideology of South African Legal Education,* Vol. 24, No. 3, (2013), Stellenbosch Law Review, pp. 455-479; Modiri, J., *The Crises in Legal Education,* Vol. 46, No. 3, (2014), Acta Academica, pp. 1-24; van Marle, K., *Reflections on Legacy, Complicity, and Legal Education,* Vol. 46, No. 3, (Jan., 2014), Acta Academica, pp. 196-215; Zitzke, E., *Stop the Illusory Nonsense! Teaching Transformative Delict,* Vol. 46, No. 3, (2014), Acta Academica, pp. 52-76; Modiri, J., *The Time and Space of Critical Legal Pedagogy (sic),* Vol. 27, No. 3, Stellenbosch Law Review, pp. 506-534. One of Gravett's main concerns is:

> "The extensive South African critical-theory critique of the South African legal system is purely negative and without any constructive potential. These critical theorists want to unmask the South African legal system, but not to make the law into an effective instrument of good public policy or equality. The aim of their critique is critique. Trashing the *status quo* is the game – a game that would be spoiled if the critical-theory scholar had to assume responsibility for devising social arrangements to replace those to be discarded."

Whilst there is merit in Gravett's submission I must issue a warning not to attach, without more, labels to respected and reputable legal scholars. For example, to read the work of van Marle as 'critique for the sake of critique' would be a fundamental mistake, since there is a difference between arguing for indeterminacy and rejecting finality in definition of concepts, such as difference and equality, as opposed to merely critiquing the *status quo* for the sake of critiquing the *status quo.*

113 I must indicate that being (existence) is but a first ontological abstraction. That is, interrogation of whether something exists or not – analysis of whether something exist as opposed to being non-existent. The second level of ontological abstraction is 'what is existence' or 'what renders something to exist'? The latter is referred to as being. To relate the latter to this thesis, being within human being refers to the question of existence in the context of being (existing *as*) a human being. being refers to what is 'that' which a being to exist *as* a human?

114 An ethical approach does not unnecessarily concern itself with the political project of de-colonial and post-colonial thought. For additional detail in this regard see in general Madlingozi, T., *Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution,* Vol. 28, No. 1, (Jan., 2017), Stellenbosch Law Review, pp. 123-147 and Ramose, M.B., *Reconciliation and Reconfiliation in South Africa,* Vol. 1, No. 5, (2013), Journal on African Philosophy, pp. 20-39.

PART I:
SUBSTANTIVE EQUALITY & INADEQUATE SOCIAL TRANSFORMATION

CHAPTER 2: SUBSTANTIVE EQUALITY IN 'POST'-APARTHEID SOUTH AFRICA

1. INTRODUCTION

Part I of this thesis represents (*i*) an analysis of what substantive equality *is* and (*ii*) identification of *why* such conception of equality did not bring about adequate social transformation. In other words, it concerns the first fundamental question. Substantive equality and human dignity form the golden thread tying the Court's equality jurisprudence[1] together and aiming it in a direction adhering to the values of human dignity, the achievement of equality, the advancement of human rights and freedoms, and non-racialism and non-sexism.[2] The important role of human dignity within the Court's equality jurisprudence has caused such jurisprudence to be aptly designated as the dignity-based approach. To crystallise the exact nature of the Court's equality jurisprudence and link human dignity with substantive equality I submit that the Court's conception of equality, and, thus, equality in a 'post'-apartheid South Africa, *is* a dignity-based substantive approach to equality.

Rather than rejecting the substantive equality outright, I *question* such equality jurisprudence by asking questions such as: ought a conception of equality not rely on multidirectional progression as opposed to linear progression (that of substantive equality)? Ought a conception of equality not be open to a perpetual (re)definition of concepts?[3] Ought the *Harksen*-test[4] not be open to progressive (re)definition? In the context of transformation, ought the definition of previously disadvantaged individual not be open to progressive contemporaneous (contextual) (re)definition? In the remainder of the introduction, I provide a backdrop against which I submit the Court's equality jurisprudence must be understood.

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1 Unless stipulated otherwise or unless the context indicates otherwise, substantive equality refers to the CC's dignity-based substantive approach to equality, as discussed in Pt. II, and is hereinafter referred to as the 'Court's equality jurisprudence'.

2 s. 1(*a*)-(*b*) of the Constitution.

3 See Pt. II, Ch. 4 at pp. 164-165.

4 In *Harksen* 1998 (CC) at para. [53] the CC formulated the so-called *Harksen*-test. For critique of this approach see van Marle, (2000, *An Ethical Interpretation*); van Marle, (2001, *Reflections on Teaching Critical Race Theory at South African Universities/Law Faculties*), at p. 91 where she argues that the "*Harksen*[-]test is a step towards *reification* of substantive equality and avoidance of its indeterminate meaning" [original emphasis].

1.1. STRUCTURE OF THE CHAPTER

The Constitutional Court's dignity-based substantive approach to equality is analysed in Chapter 2 and Chapter 3. This analysis starts with an introductory discussion of the fundamentality of equality (differentiation) and the role of the law and society. Following the introductory discussion is an exposition of how section 9 has been interpreted, which interpretation produces the purposes of the right. Progression and inroads are made with the analysis thereafter in that the notion of substantive equality is analysed within the paradigm of three themes of substantive equality. The themes place emphasis on the legal subject and the potentially important role and capacity of equality to make difference in the life of a legal subject; that is, what difference (impact) equality can make (have) in the experience of humanity. The 'dignity-based approach', which is part and parcel of substantive equality, is thereafter discussed. In other words, the emphasis on and the fundamental importance of human dignity within substantive equality is specifically discussed under a separate heading, although, as I have stated patently, Chapter 2 and Chapter 3[5] represents an analysis of the Court's equality jurisprudence, which *is* a dignity-based substantive approach to equality. In the remainder of Chapter 2 I turn to a more doctrinally focused analysis of section 9, which remains an analysis of the dignity-based approach to substantive equality. My focus merely turns to the 'nuts and bolts' of sections 9(1), 9(3), 9(4), and 9(5).

1.2. DIFFERENTIATION & THE RIGHT TO EQUALITY

Differentiation lies at the heart of the Court's equality jurisprudence in general and of the section 9 rights in particular.[6] The mischief sought to be addressed by the right to equality is legally prohibited differentiation and to remedy its consequences.[7] Only once this fundamentality of equality is understood *and* appreciated can we speak the language of equality. Thus understood, the purpose of the right to equality is located, firstly, in a concern with and a prohibition of any rule or conduct differentiating between people or categories of people that

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5 In Ch. 3 reference is made and discussion is had regarding equality in the context of parliamentary statutes in addition to the Court's equality jurisprudence.

6 *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) at para. [23], in this judgment s. 8 of the Interim Constitution was referred to, but currently equality rights are contained in s. 9 of the Constitution. See De Vos, P., *Equality for All? A Critical Analysis of the Equality Jurisprudence of the Constitutional Court,* Vol. 63, No. 1, (2000), Tydskrif vir Hedendaagse Romeins-Hollandse Reg, pp. 62-75, at p. 64 who erroneously submits that the CC "… situated the anti-discrimination principle firmly at the heart of its approach to equality".

7 The common-law mischief rule provides that the purpose of enacted law is to suppress mischief. I use mischief in this sense.

constitutes unequal treatment or unfair discrimination "in the constitutional sense".[8] Secondly, equality, in the context of the Constitution as memorial,[9] is concerned with and influenced by a recognition that the unjust consequences of prolonged unfair discrimination, in the constitutional sense, requires rectification – through the auspices of *fair* discrimination – lest consequences of unjust hegemonic and bigoted treatment of people reign supreme, since equality delayed is equality denied.[10] The Court's equality jurisprudence's language and narrative of substantive equality[11] ties in with the Constitution's conception of legal subjects as living breathing morally equal human beings. Ethically considered, the right to equality ***ought*** to be constituted by and within a constitutional concern for and idealisation of attributed, innate, and incalculable worth (dignity) of human beings whose humanity is expressed in being in a relationship with other human beings.

1.3. The Role of The Law and Society

The notion substantive constitutional revolution describes the change undergone by South Africa since the end of apartheid.[12] The revolution marked both a change in form, a dispensational change, as well as a change in substance, the imposition of an objective normative value system. Both changes are changes in law, not reality. The existence of the Interim Constitution does not remedy the consequences of decades of systemic and institutionalised hegemony in one instantaneous magical and fairylike moment. The role of the law in the lives of *all* South Africans is different: the law does not permit, but rather forbids unfair discrimination. However, it is inadequate for the Constitution to merely prohibit unfair discrimination. An interpretation of the right to equality being inclusive of positive legal measures to discriminate (although not unfairly)[13] on the grounds of race, gender, and so forth to bring about a socially just society[14] is confirmed by the Constitutional Court, almost *ad nauseam*.[15] The role of the law is

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8 In *S v Ntuli* 1996 (1) SA 1207 (CC) at para. [19] Didcott, J. held, *obiter*, that "[i]t is trite … that differentiation does not amount *per se* to unequal treatment in the constitutional sense". Didcott, J.'s *obiter* statement had subsequently been accepted by the majority in *Prinsloo* 1997 (CC) at para. [17].

9 See Pt. I, Ch. 2 at pp. 33-34.

10 *Sodomy* 1999 (CC) at para. [60].

11 See L'Heureux-Dube, C., *Making a Difference: The Pursuit of Equality and a Compassionate Justice,* Vol. 13, No. 3, (1997), South African Journal on Human Rights, pp. 335-353, at p. 336 where L'Heureux-Dube opines that first, "equality … [is] a language like any other", second, "language is more than a form of communication, [i]t is an embodiment of the norms, attitudes, and cultures that are expressed through that language[,]" and third, "we [Canada] finally committed ourselves to learning to speak in terms of substantive rather than formal equality".

12 See Ch. 1 & Pt. II, Ch. 4.

13 This is the interpretation of s. 9(2) of the Constitution as per Moseneke, J., as he was then, writing for the majority, and Sachs, J., writing in a concurring but separate judgment, in *Van Heerden* 2004 (CC) at paras. [32], [33], [36], & [140].

14 *Ibid.* at para. [23] where it was held that "[i]n effect the commitment of the Preamble is to restore and protect the *equal worth* of everyone; to heal the divisions of the past and *to establish* a caring and *socially just society*" [own emphasis].

not ambiguous and it is imperative that we understand and appreciate that the law, through allowing and advocating for restitutionary measures, does not bring about social transformation because a "socially inclusive society *idealised* by the Constitution is a function of[, among others] … the individual and collective agency of its *citizenry*" [own emphasis].[16] In Chapter 3 it is shown that the law, through the analysis of various judicial authority and legislative instruments, does not envisage *social* transformation, as conceived in Chapter 1[17] and throughout this thesis. In fact, the law conflates the process of attaining material equality with social transformation.

Lourens Du Plessis' conception of the Constitution as an aesthetic creation is relevant in the context of juxtaposing the role of the law against the role of the society at large in a 'post'-apartheid South Africa. Conceiving the Constitution as such, Du Plessis distinguishes between the Constitution as a monument and the Constitution as memorial.[18] In the context of remembrance (memory), a monument celebrates whereas a memorial commemorates.[19] As a monument the Interim Constitution celebrates by acknowledging the *constitution* of a new objective normative legal order[20] and professing – in emotive language – that in this order there is equality between men, women, and people of all races.[21] The Interim Constitution was *constitutive* of our new objective normative legal order through a substantive constitutional revolution, turning the old legal order on its head and replacing the 'old' with a 'new'. This 'monumental narrative' is maintained in the Constitution by laying the foundations for an open and democratic society.[22] The Constitution is aesthetically designated as a monument because it signifies what the newly constituted objective normative legal order *is*. The (Interim)

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15 In *Hugo* 1997 (CC) at para. [41] the CC held that:

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

Consequently, it follows why, in *Sodomy* 1999 (CC) at para. [60], the CC held that:

> "Past unfair discrimination frequently has on[-]going negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied."

Ultimately, as per the ink of Moseneke, J., as he was then, in *Van Heerden* 2004 (CC) at para. [31], it means that:

> "Absent a positive commitment progressively to eradicate socially constructed barriers to equality and to root out [systemic] or institutionalised under[-]privilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow."

16 *Barnard* 2014 (CC) at para. [33].

17 See Ch. 1 at p. 8.

18 Du Plessis, L., *The South African Constitution as Memory and Promise,* Vol. 11, No. 3, (2000), Stellenbosch Law Review, pp. 385-394.

19 *Ibid.* at p. 385.

20 See *S v Makwanyane* 1995 (3) SA 391 (CC) at para. [7] where Chaskalson, P. made it clear that the Interim Constitution is a "transitional constitution[,] but one which itself *establishes* [or in my own words 'constitutes'] a new [legal] order in South Africa" [own emphasis].

21 Preamble of the Interim Constitution.

22 Preamble of the Constitution.

Constitution as memorial, on the other hand, warns us that, even though a new legal order has been constituted, a materially equal society characterised by social justice (in other words, a society transform*ing* socially) is the ideal, yet to be achieved and it is up to the individual and collective agency of its citizenry to act pro-actively in aspiring toward achieving this ideal of a socially just society – because one cannot characterise a materially unequal society as socially just.

Ethically considered, a society permeated with (achieved) equality and, thus, characterised by social justice is the ideal, but is yet to be achieved and also impossible to be achieved fully. At the centre of the Constitution as memorial lies the acceptance of the inequalities permeating our society as well as the acknowledgement that the obligation rests on us, not the law, to bring about social transformation in striving for social justice. Embracing the Constitution as memorial is an acceptance of the limits of the law in that the law cannot, by itself, bring forth substantive equality even though the law provides for the *possibility* of substantive equality with phrases such as that "[e]quality includes the full and equal enjoyment of all rights and freedoms".[23] The Constitutional Court has, in its most recent judgment on race, racism, and contemporaneously considered, "racially offensive conduct", provided the following insightful acceptance, which is, in my opinion, recognition of the limits of the law and, although implicitly, the impossibility of ever achieving equality fully:

> "Regrettably, so far the Constitution has had a limited impact in eliminating racism in our country. Its shortcomings flow from the fact that it does not have the *capacity to change human behaviour*. There are people who would persist in their racist behaviour regardless of what the Constitution says. It is[,] therefore[,] the duty of the courts to uphold and enforce the Constitution whenever its violation is established."[24] [own emphasis]

The juxtaposed role of the law and that of society is the background against which the entire South African 'post'-apartheid equality jurisprudence must be approached and understood, and, consequently, Chapter 2 & Chapter 3 of this study. Section 9(1) & section 9(3) – section 9(5) of the Constitution provide for the monumental break from the past, whereas section 9(2) is the legal acknowledgement of the need and mandate for positive measures to remedy the consequences of the wrongs of that self-same past that are still present and haunting us. The Constitution, thus, implicitly gives the proverbial constitutional nod of acceptance for a conception of the Constitution as memorial. I understand the Constitution as memorial to both mandates and enjoins a project of transformation in terms of which we, the people of South Africa, are taken to task so as to actively strive towards social transformation and thereby bring forth into *reality* a *socially just society*.

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23 S. 9(2) of the Constitution.

24 *Duncanmec (Pty) Limited v Gaylard N.O.* 2018 (11) BCLR 1335 (CC) at para. [6].

2. INTERPRETATION OF SECTION 9

The Court's equality jurisprudence found its genesis in section 8[25] of the Interim Constitution and thereafter developed under section 9[26] of the Constitution. Interpretation of and principles established through the interpretation and application of section 8 applies without more to section 9.[27] The interpretation of the right to equality, a human right contained in the Bill of Rights,[28] must be purposive,[29] value-laden,[30] grounded in text,[31] solidified in context,[32] and

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25 "**8 Equality**
(1) Every person shall have the right to equality before the law and to equal protection of the law.
(2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.
(3)*(a)* This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.
(b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.
(4) *Prima facie* proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established."

26 "**9 Equality**
(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

27 In this regard see *Sodomy* 1999 (CC) at para. [15] where Ackermann, J. proceeded "on the assumption that the equality jurisprudence and analysis developed by … [the CC] in relation to s[.] 8 of the [I]nterim Constitution is applicable equally to the 1996 Constitution, notwithstanding certain differences in the wording of these sections" and the *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at para. [32] (hereinafter referred to as "*Immigration* 2000 (CC)") where Ackermann, J. followed "the approach laid down by … [the CC] in various of its judgments as collated and summarised in [*Harksen*] … and as applied to s[.] 9 of the Constitution in [*S*]*odomy*" [footnotes omitted].

28 The context in which the Bill of Rights is to be interpreted was described by Chaskalson, P. in *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC) at para. [8]:

> "We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring."

29 In *S v Zuma* 1995 (2) SA 642 (CC) at para. [15] Kentridge, A.J. quoted a passage from the judgment of the Canadian Supreme Court in *R v Big M Drug Mart Ltd* 1985 (18) DLR (4th) 321 at p. 395 with approval and in *Makwanyane* 1995 (CC) at para. [9] Chaskalson, P. referred to Kentridge, A.J. and his reliance on *Big M* with approval. The passage in *Big M* reads as follows:

> "The meaning of a right … guaranteed by the Charter was to be ascertained by an analysis of the *purpose* of such a guarantee; it was to be understood, in other words, in the light of the ***interests*** it was meant to protect. … [T]his analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character [or ethos] and larger *objects* of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights

generous.[33] Section 39(1)(*a*) of the Constitution provides for three foundational[34] and core[35] democratic values; namely, human dignity, the achievement of equality, and freedom.[36] These values are of hermeneutic importance[37] when interpreting and ascertaining the content of the right to equality as well as establishing whether a limitation of the right is justifiable. Accordingly, it follows that the achievement of equality, as a value, and the interpretation of section 9 are interrelated because the values human dignity, the achievement of equality, and freedom are of fundamental importance to our constitutional democracy and play a hermeneutic role. As per the majority in *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs*, the value of human dignity informs the interpretation of the right to equality,[38] but the achievement of equality, as a value, also informs the right to equality and this is evident from section 1(*a*) of the Constitution listing "the achievement of equality" as one of the founding values of the Republic of South Africa.

> and freedoms with which it is associated within the text of the Charter. The interpretation should be … a generous rather than legalistic one, aimed at fulfilling the purpose of a guarantee and the securing for individuals the full benefit of the Charter's protection." [own emphasis]

30 In terms of s. 39(1)(*a*) of the Constitution "[w]hen interpreting the Bill of Rights, a court, tribunal or forum … must promote the value that underlie an open and democratic society based on human dignity, equality[,] and freedom". Fundamentally, the interpreter must give effect to the values that underlie our constitutional democracy – *Zuma* 1995 (CC) at para. [17]; *Makwanyane* 1995 (CC) at para. [9].

31 It is must be understood that any interpretation of a right is limited to or constrained (Du Plessis, L., *Chapter 32: Interpretation*, in Woolman, S. C. & Bishop, M. (Eds.), *Constitutional Law of South Africa* (2014), at Ch. 32, p. 10). The following passage written by Kentridge, A.J. in *Zuma* 1995 (CC) at para. [17] is informative:

> "While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single 'objective' meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean".

32 *Makwanyane* 1995 (CC) at para. [10]; *Soobramoney* 1998 (CC) at para. [16]; *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) at para. [26].

33 *Zuma* 1995 (CC) at paras. [14]-[16]; *Makwanyane* 1995 (CC) at para. [9]. See also Currie, I. & De Waal, J., *Interpretation of the Bill of Rights*, in Currie, I. & De Waal, J. (Eds.), *The Bill of Rights Handbook* (2013), at pp. 138-140. In summary, when interpreting the right to equality an interpreter pays due regard to the language (text), ascertains the purpose of the right and is generous to enable full and substantive enjoyment of the right – *Zuma* 1995 (CC) at paras. [14]-[16]; *Makwanyane* 1995 (CC) at para. [9].

34 In terms of s. 1(*a*) of the Constitution the Republic is "founded" on these values; *Mamabolo* 2001 (CC) at para. [41].

35 The CC holds these values to be "foundational to the [R]epublic" and has emphasised the thorough fashion (these values occur in ss. 7(1), 9, 10, 12, 36(1) & 39(1)(*a*)) in which these values have been included in the Bill of Rights – *Mamabolo* at para. [41].

36 In *Prinsloo* 1997 (CC) at para. [19], the majority quoted and expressly relied on s. 35 of the Interim Constitution (the interpretation clause and equivalent of s. 39 of the Constitution) to interpret the then s. 8 of the Interim Constitution (now s. 9 of the Constitution).

37 O'Regan, C., *From Form to Substance: The Constitutional Jurisprudence of Laurie Ackermann,* No. 1, (2008), Acta Juridica, pp. 1-17, at p. 15; ss. 36(1) & 39(1)(*a*) of the Constitution.

38 *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 946 (CC) at para. [35].

In following a purposive interpretation regard must be had to the larger character or ethos of the Constitution.[39] Equality and dignity are foundational values *and* justiciable human rights;[40] their importance transcends that of mere values with corresponding rights. Human dignity "informs the interpretation of many, possibly all, other rights"[41] and "the guarantee of *equality* lies at the very heart of the Constitution[: i]t permeates and defines the very *ethos* upon which the Constitution is premised" [own emphasis].[42] The achievement of equality is "a standard which must inform all law and against which all law must be tested for constitutional consonance".[43] In the context of the value "the achievement of equality" the Constitutional Court has stated that the Constitution can and has been described as an *egalitarian* constitution and, in the light of our particular history (inequality) and vision (a substantively equal society), the Constitution was written with equality at its centre in order for equality to be afforded the status of an organising principle (*Grundnorm*).[44] This core and foundational value goes to the "bedrock of our constitutional architecture"[45] and, lying at the heart of our Constitution, the guarantee of equality defines the ethos[46] upon which the Constitution is premised.[47] As such, the value, on the one hand, is "a standard which must inform all law and against which all law must be tested for constitutional consonance" and, on the other hand, provides content to a "guaranteed and justiciable right".[48] An object of our Constitution is the establishment of an *egalitarian* society, characterised by non-racialism and non-sexism, and founded upon human dignity, the rule of law, a democratic ethos and human rights.[49] It is from this object that we

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39 *Zuma* 1995 (CC) at para. [15]; *Makwanyane* 1995 (CC) at para. [9].

40 See *Dawood* 2000 (CC) at para. [35] where O'Regan, J. held that "[s.] 10 … makes it plain that dignity is not only a *value* fundamental to our Constitution, it is a justiciable and enforceable *right* that must be respected and protected" [original emphasis], *Van Heerden* 2004 (CC) at para. [22] where Moseneke, J., as he was then, held that "the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value" and, *Duncanmec* 2018 (CC) at para. [2] where the CC held racism and racially offensive conduct to be antithetical to our constitutional order at the heart of which lies a concept of equality that is both an entrenched right and a foundational value that constitutes the bedrock of the order. See also Albertyn & Goldblatt, (1998, *Facing the Challenge of Transformation*), at p. 249 regarding equality as a value and a justiciable right; Cowen, S., *Can 'Dignity' Guide South Africa's Equality Jurisprudence?,* Vol. 17, No. 1, (2001), South African Journal on Human Rights, pp. 34-58, at pp. 46-47 regarding dignity and equality as a value and justiciable right.

41 *Dawood* 2000 (CC) at para. [35]; see *Sodomy* 1999 (CC) at para. [120].

42 *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC) at para. [20]; *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) at para. [74].

43 *Van Heerden* 2004 (CC) at para. [22].

44 *Hugo* 1997 (CC) at para. [74].

45 *Van Heerden* 2004 (CC) at para. [22]; *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC) at para. [52]; *Fraser* 1997 (CC) at para. [20]; *Hugo* 1997 (CC) at para. [74]; *Bel Porto School Governing Body Premier, Western Cape* 2002 (3) SA 265 (CC) at para. [6]; *Satchwell v President of the Republic of South Africa* 2002 (6) SA 1 (CC) at para. [17].

46 That is the characteristic spirit of a community as manifested in its attitudes and aspirations.

47 *Fraser* 1997 (CC) at para. [20].

48 *Van Heerden* 2004 (CC) at para. [22].

49 *Ibid.* at para. [26].

derive "a conception of equality that goes beyond mere non-discrimination requiring identical treatment, whatever the starting point or impact".[50]

Since the achievement of equality is a *Grundnorm* of our post-apartheid legal order, it follows why section 7(1) of the Constitution renders constitutional values legally recognised *interests worth protecting* by declaring the Bill of Rights the cornerstone of democracy and affirming the values of human dignity, equality, and freedom.[51] Thus considered, the right to equality promotes and protects the interests (values) of human dignity, the achievement of equality, and freedom. A purposive interpretation enjoins a reading of the right to equality within its context.[52] Striking a balance between adhering to the text and drawing content from values requires an interpreter to make a value judgment[53] regarding what interests *ought* to be protected or promoted by the right. Reliance on context aids an interpreter in making the value judgment. Context[54] refers to the text,[55] historical and political context,[56] and the position of a complainant.[57] Regarding text, a Court, in interpreting the right to equality, may have recourse to other provisions or rights contained in Constitution and the Bill of Rights.[58] As to historical context, like any other right, the right to equality must be understood in its social and historical context[59] and be construed in its "context, which includes the history and the background to the

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50 *Ibid.*

51 See Cornell, D. & Van Marle, K., *Exploring Ubuntu: Tentative Reflections,* Vol. 5, No. 2, (Jan., 2005), African Human Rights Law Journal, pp. 195-220, at p. 205 where the authors define values (i.e. human dignity, equality, and freedom) as that which is "actually liked, prized, esteemed, or approved of by actual groups or individuals". It must be noted that the authors only define values as "what are actually liked…" and do not refer to interests as I do. Values are, as contemplated in the Constitution and in my opinion, fundamental *interests* that are actually liked, prized, esteemed, or approved of by South Africans.

52 Currie & De Waal, *Interpretation of the Bill of Rights*, (2013), at p. 140. Although a purposive interpretation does not unduly bind the interpreter to the ordinary meaning of words, it does not vest an interpreter with the absolute prerogative to indulge in an uninhibited value grabbing exercise.

53 Regarding value judgment in this conetxt see Du Plessis, *Chapter 32: Interpretation*, (2014), at Ch. 32, p. 10; Currie & De Waal, *Interpretation of the Bill of Rights*, (2013), at p. 137.

54 In *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at para. [22] Yacoob, J. made the point quite succinctly:

> "Interpreting a right in its context requires the consideration of two types of context. On the one hand, rights must be understood in their textual setting. This will require a consideration of Chapter 2 and the Constitution as a whole. On the other hand, rights must also be understood in their social and historical context."

55 *Walker* 1998 (CC) at para. [26].

56 *Makwanyane* 1995 (CC) at para. [10].

57 In *Hugo* 1997 (CC) at para. [112] O'Regan, J. held that "[t]he more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair", which principle was accepted and followed in *Walker* 1998 (CC) at paras. [45]-[49].

> "[T]he Constitution does not presuppose that a holder of rights is an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times."

58 *Makwanyane* 1995 (CC) at para. [10]; *Soobramoney* 1998 (CC) at para. [16]; *Grootboom* 2001 (CC) at para. [22]. In *Walker* 1998 (CC) at paras. [26] & [45]-[49] the Court referred to the constitutional context within which one must determine whether s. 8 of the Interim Constitution had been breached.

59 See *Grootboom* 2001 (CC) at para. [22].

adoption of the Constitution…".[60] Historical context includes political history.[61] The right to equality cannot mean whatever we want it to mean and, consequently, section 9 can only be given a broad or generous interpretation as far as the language permits.[62]

Even a cursory analysis of different approaches to or conception of equality identifies a lack of universally accepted rules and principles for identifying a breach of an equality or non-discrimination right.[63] It would, thus, be erroneous to transplant the conception of or approach to equality of another jurisdiction into our equality jurisprudence.[64] Section 9 is a product of our particular history, its interpretation must be grounded in its language and our constitutional context.[65] In justifying its interpretation of section 9, the Constitutional Court has referred to South Africa's recent history and, in particular, the systematic discrimination suffered by black (and other) South Africans under apartheid.[66] In a non-discrimination context, emphasis is placed on systemic disadvantage and discrimination as well as patterns of disadvantage and discrimination.[67] Consequently, the constitutional prohibition of unfair discrimination is reinforced by the recognition of systemic group based disadvantage.[68] Such emphasis is a

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60 *Makwanyane* 1995 (CC) at para. [10].

61 See Currie & De Waal, *Interpretation of the Bill of Rights*, (2013), at pp. 141-142.

62 *Attorney-General v Moagi* 1982 (2) BLR 124 (CA); quoted with approval in *Zuma* 1995 (CC) at para. [17]. The language of the Constitution must be respected, because when language is ignored in favour of a total deference to values one is not preoccupied with the task of interpreting written text but rather caught in an orgy of unrestrained conjuring and imposition of personal and subjective morality.

63 *Prinsloo* 1997 (CC) at para. [18]. In *Brink v Kitshoff N.O.* 1996 (4) SA 197 (CC) at para. [39] O'Regan, J. concluded, after having investigated the jurisdictions of Canada, India, the United States of America, and various other international conventions on equality, that the wording of the various conventions and constitutions, as well as the interpretations given to those constitutions, are different thereby representing different conception of and approaches to equality.

64 *Prinsloo* 1997 (CC) at para. [19]. In *Brink* 1996 (CC) at para. [39] O'Regan, J. ascribed the difference between national constitutions and conceptions of equality to the text and the different historical circumstances as well as jurisprudential and philosophical understandings of equality.

65 *Brink* 1996 (CC) at para. [40]; *Prinsloo* 1997 (CC) at para. [21].

66 De Vos, (2001, *A Bridge Too Far: History as Context in the Interpretation of the South African Constitution*), at p. 29. See *Brink* 1996 (CC) at para. [40] for O'Regan, J.'s description of our past:

> "The policy of apartheid, in law and in fact, *systematically* discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as 'white', which constituted nearly 90% of the landmass of South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are *still visible* in our society. *It is in the light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted.*" [own emphasis]

67 *Brink* 1996 (CC) at para. [41]. In *Hugo* 1997 (CC) at para. [88] Kriegler, J., with reference to para. [41] of *Brink*, stated that "s. 8 [now s. 9] and … outlawing gender or sex discrimination were designed to undermine and not to perpetuate patterns of discrimination…". See *Prinsloo* 1997 (CC) at para. [20] and *Harksen* 1998 (CC) at paras. [50], [95]-[96], [124], but especially para. [50] where Goldstone, J. held that "s. 8(2) [now s. 9(3)-(4)] seeks to prevent the unequal treatment of people based on such criteria which may, amongst other things, result in the construction of patterns of disadvantage such as has occurred only too visibly in our history".

68 One can also refer to this recognition as recognition of equality as group-parity or the anti-hierarchy principle in terms of which "it is cause for legal concern when social practices appear to cause or contribute toward a visible group-by-group disparity in wealth, power, status or access to the means (for

recognition that systemic discrimination against members of a disfavoured group leads to patterns of group disadvantage.

The following terminology analysis identifies the meaning of 'systemic' and 'patterns'. Systemic disadvantage – resulting from systemic discrimination – leads to a state of being systemically disadvantaged. Disadvantage, within the context of equality, is fundamentally concerned and inextricably associated with differentially conferred advantage and subjected disadvantage. Such differentiation amounts to discrimination if it is based on grounds that has the *potential* to infringe dignity; differentially put, if based on personally held characteristics (the identity of a person or a group). Disadvantage can only be adjectively described as systemic if differentially conferred advantage and subjected disadvantage have occurred over a prolonged period of time, and temporally considered, created patterns of advantage and disadvantage or then entrenched advantage and disadvantage. It, therefore, follows why the first sentence reads systemic disadvantage resulting from systemic discrimination. Thus considered, systemic discrimination creates patterns of disadvantage or entrenches systemic disadvantage and ultimately results in the state of being systemically disadvantaged. Based on the above, structural racism is both an instance (act of discriminating) and a consequence of (result of having been discriminated against) systemic racial discrimination, but with a specific emphasis on the consciousness of the subject and the group in which he or she falls. Because of constant past discriminatory conduct, practices, and sometimes even systems people have been constantly, almost perpetually, discriminated and disadvantaged in a multiplicity of spheres and instances within our society to such an extent that the *status quo* has been ingrained in the consciousness of the subject (whether white or black, female or male etc.) causing a reification of the *status quo* as 'usual', 'normal' and 'acceptable'.

In a 'post'-apartheid context, the most visible pattern of discrimination and disadvantage is race, although other systemic patterns are also inscribed on our social fabric.[69] The Constitution recognises, by providing for a non-exhaustive list of prohibited grounds of discrimination, that systemic patterns of discrimination and disadvantage on grounds other than race have and will continue to cause harm if not remedied.[70] Considering the fundamental notion that the mischief[71] sought to be addressed by the right to equality is legally prohibited differentiation and to remedy its consequences it follows that the purpose(s) of section 9 is to (*i*)

example, jobs) to those things" – Michelman, F., *The Meanings of Legal Equality,* Vol. 24, No. 3, (1986), Harvard Blackletter Law Journal, pp. 24-37, at p. 28.

69 *Brink* 1996 (CC) at para. [41].

70 *Ibid.*

71 See n. 7 above.

prohibit patterns of discrimination and disadvantage and (*ii*) *remedy* the results of these patterns of discrimination and disadvantage.[72]

3. SUBSTANTIVE EQUALITY

Since the Constitutional Court's conception of equality is "the Constitution's [conception] of equality"[73] the Court's equality jurisprudence must be forthcoming from its interpretation and understanding of section 9. The language of substantive equality and the fundamental import of human dignity within such substantive notion of equality are the primary impetuses that inform the Court's interpretation and understanding of section 9. A harmonious reading of all the provisions of section 9 is a prerequisite for a comprehensive understanding of the Constitution's conception of equality,[74] which, if taken to heart, brings forth three themes of substantive equality; namely, (*i*) a conception of legal subjects as living breathing human beings existing within a specific context (*ii*) who are both radically different from each other (heterogeneity) and (*iii*) equal in respect of their human dignity. I now turn to each of these themes.[75]

3.1. LEGAL SUBJECTS: LIVING BREATHING HUMAN BEINGS EXISTING WITHIN A SPECIFIC CONTEXT

Substantive equality is context sensitive[76] and I submit that substantive equality perceives the legal subject as a living breathing human being existing – *experiencing humanity* – within a specific context. Substantive equality is submerged in the specific context of legal subjects that

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72 *Brink* 1996 (CC) at para. [42].

73 *Van Heerden* 2004 (CC) at para. [28].

74 *Ibid.*

75 These themes constitute the substantive equality jurisprudence of the legal subject in a 'post'-apartheid South Africa as opposed to the subject of jurisprudence in this context being substantive equality. In other words, the emphasis is on the legal subject and the impact of or difference that the right to equality has on the legal subject's *experience of humanity*.

76 In one of the earliest articles regarding equality in 'post'-apartheid South Africa Albertyn & Kentridge address context under the heading "[i]n search of substantive equality – lessons from abroad" – Albertyn, C. & Kentridge, J., *Introducing the Right to Equality in the Interim Constitution,* Vol. 10, No. 2, (1994), South African Journal on Human Rights, pp. 149-178, at pp. 153-155. De Vos correctly described the CC's approach to equality as a "contextual approach" – De Vos, (2000, *Equality for All? A Critical Analysis of the Equality Jurisprudence of the Constitutional Court*), at p. 66. Cowen, (2001, *Can 'Dignity' Guide South Africa's Equality Jurisprudence?*), at p. 37. De Vos reiterated his comment that the CC's approach to equality is a "contextual approach" in De Vos, P., *Grootboom, the Right of Access to Housing and Substantive Equality as Contextual Fairness,* Vol. 17, No. 2, (2001), South African Journal on Human Rights, pp. 258-276, at p. 265. In Dlamini, C.R.M., *Equality or justice? Section 9 of the Constitution revisited – Part II,* Vol. 27, No. 1, (2002), Journal for Juridical Science, pp. 15-32, at p. 18, Dlamini referred to the fact that the CC has opined that our equality jurisprudence should "develop slowly, and hopefully surely" and on a "case-by-case basis with special emphasis on the *actual context* in which the problem arises" [own emphasis] (Dlamini quoted *Ntuli* 1996 (CC) at para. [19], which was accepted in *Prinsloo* 1997 (CC) at para. [20]). Albertyn, C., *et al.*, *Introduction: Substantive Equality, Social Rights and Women - A Comparative Perspective,* Vol. 23, No. 2, (2007), South African Journal on Human Rights, pp. 209-213, at p. 209.

are radically different from each other and who are (*i*) possessive of incalculable and inalienable worth (dignity) and, consequently, (*ii*) morally equal[77] agents. The question then is what does this theme of substantive equality mean or entail?

The Constitution does not "… presuppose that a holder of rights is an isolated, lonely[,] and abstract figure possessing a disembodied and socially disconnected [S]elf. It acknowledges that people live in their bodies, their communities, their cultures, their places[,] and their times".[78] An atomistic approach to individuals, self-worth, and identity runs contrary to the Constitution that does not conceive dignity so narrowly.[79] The individual human being, as the bearer of dignity, is not perceived as an isolated and unencumbered self.[80] The Constitutional Court has recognised the communal nature of human beings, and, thus, recognised the communal nature of human dignity. Such recognition of communality within human dignity is protected by means of so-called "associational individual rights".[81] In developing a conception of the self transcending the liberal self the Court has relied upon the African understanding of the individual[82] and specifically incorporated the African concept of *Ubuntu* into its equality jurisprudence within the context of culture and belief.[83] Most importantly, dignity – under the Constitution and in the light of *Ubuntu* as a *Grundnorm* – contains individualistic as well as collective impulses.

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77 Moral equality refers to "respect for human beings' equal and inherent moral worth" and "if human dignity is an assertion of human beings' moral equality then it follows that most, if not all, serious wrongs against human beings are also inconsistent with the respect that is owed to others as moral equals" – McConnachie, C., *Human Dignity, 'Unfair, Discrimination' and Guidance,* Vol. 34, No. 3, (Feb., 2014), Oxford Journal of Legal Studies, pp. 609-629, at p. 617. The aforementioned was quoted by van der Westhuizen, J in *Barnard* 2014 (CC) at n. 178. See Botha, H., *Equality, Dignity, and the Politics of Interpretation,* Vol. 19, No. 1, (Jan., 2004), South African Public Law, pp. 724-751, at p. 739 where reference is made to "violation of somebody's equal moral worth"; Albertyn, C., *Adjudicating Affirmative Action within a Normative Framework of Substantive Equality and the Employment Equity Act – An Opportunity Missed? South African Police Service v Solidarity obo Barnard,* Vol. 132, No. 4, (2015), South African Law Journal, pp. 711-734, at pp. 721 & 725; Cowen, (2001, *Can 'Dignity' Guide South Africa's Equality Jurisprudence?*), at pp. 53-54; Ackermann, L.W.H., *Equality and Non-Discrimination: Some Analytical Thoughts,* Vol. 22, No. 4, (2006), South African Journal on Human Rights, pp. 597-612, at p. 598.

78 *Sodomy* 1999 (CC) at para. [117].

79 *Barnard* 2014 (CC) at para. [174].

80 *Bernstein v Bester* 1996 (2) SA 751 (CC) at para. [65].

81 *Chairperson of the National Assembly, Ex Parte: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC) at paras. [22]-[27]. These associational individual rights are:

> **"31 Cultural, religious and linguistic communities**
> (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –
>> (*a*) to enjoy their culture, practise their religion and use their language; and
>> (*b*) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.
>
> (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

82 *Pillay* 2008 (CC) at para. [53].

83 *Ibid.* See Pt. II, Ch. 5, at pp. 193 & 195-196.

In further developing the notion of context,[84] by not being ignorant of the past, substantive equality enjoins due consideration being afforded to material inequality and systemic disadvantage.[85] Thus, the Constitution enjoins us to dismantle the existing patterns of disadvantage or exclusion and to prevent the creation of new ones.[86] We are so enjoined to engender a longing and active commitment to our aspirational and ideological end of a society based on social justice. The actual or material position of an individual is important and taken into consideration, which is inextricably linked to historical context. In 'post'-apartheid South Africa, a materially disadvantaged person's unequal position is *usually* a product of a historical injustice perpetrated on the basis of racist, sexist, and heteronormative colonial and other ideologies.

As alluded to further hereunder, the Court has adopted a dignity-based approach and the importance of human dignity within our constitutional democracy flows from our past in which the majority of South Africans were denied their equal dignity. They were dehumanised, treated as mere means to an end, and this was all based on socially constructed bigotry; that is ontological intolerance based on personally held characteristics. Apartheid was a frontal attack on the anatomy of humanity. Separating human beings from each other and structuring society on the basis of a bigoted understanding of such anatomy. That is, 'to be' meant to be separated from the other and the white man's being-in-the-world was separateness from and domination over the other. Dignity was affronted because differentiation was bigoted. Consequently, bigoted differentiation (an affront to dignity) is the *condictio sine qua non* of the *disadvantage* of those who are systemically disadvantaged. A nuanced and ethical understanding[87] of historical context is non-essentialist and not polemical in that it acknowledges that the existence of *some*, not all, systemic disadvantage is directly attributable to the dehumanisation as described. Consequently, substantive equality embraces human dignity in its prohibition of discrimination[88] and is infused with notions of transformation.[89]

However, in Chapter 3 it is shown how non-acknowledgement of empowerment and a lack of progressive understanding and reasoning results in inadequate social transformation. Social transformation is left at the door of progressive reasoning haunted by the partisan call for

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84 See above at pp. 35-41 regarding interpretation of the right to equality and context, which includes history, as well as the discussion pertaining to the importance of history in interpreting the right to equality.

85 *Brink* 1996 (CC) at para. [42].

86 *Van Heerden* 2004 (CC) at para. [25]. See also *Hoffmann* 2001 (CC) at paras. [28], [32], [34]-[35] & [37] regarding prejudice, stereotyping, and systemic disadvantage.

87 Ethical understanding in this context specifically denotes openness in that history is not proverbially 'stuck in time' nor the victim of neo-liberationism, as discussed in Pt. I, Ch. 3.

88 Prohibition of the creation of new patterns of disadvantage and resultant systemic disadvantage.

89 Rectification of the consequences of systemic disadvantage (the state of being systemically disadvantaged).

pseudo-liberationism in 'post'-apartheid South Africa thereby resulting in a unilateral and exclusionary conception of context and, thus, history. I lament any refusal to interpret context beyond previously disadvantaged and advantaged in the same vein as I bemoan any refusal to transform or recognise the need.

As regard transformation, it has become trite within South African constitutional jurisprudence that the Constitution is inherently transformative and, therefore, committed to transformation.[90] In our constitutional democracy, the constitutional text provides for the *legal paradigm* within which transformation must occur, the history, as context, provides for the *reason* why transformation is sought and justified, and the 'real life' and lived reality, as context, is the *object* of transformation. It is palpable that transformation of the self or then the legal subject is not contemplated by the constitutional context. Transformative jurisprudence includes a commitment to substantive equality[91] and a commitment to substantive equality is one of the central tenets of transformative constitutionalism.[92] Substantive equality requires examination of the context within which the right to equality or the right against unfair discrimination was infringed.[93] The context within which the right to equality[94] was infringed is of utmost importance for substantive (transformative) equality because that is what is being sought to be transformed. Substantive equality is integral to the Constitution's transformative design, which in

90 *Barnard* 2014 (CC) at paras. [29] & [78], Moseneke, A.C.J., writing for the majority, observed that the Constitution has "a transformative mission and permits government to take remedial measures to redress the lingering and pernicious effects of apartheid" and Cameron, Froneman, J.J. and Majiedt, A.J. added that "[i]t does this even though this commitment means that individuals may be adversely affected by the process of transformation"; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at para. [76], Ngcobo, J., as he then was, described transformation as a process and that "profound difficulties … will be confronted in giving effect to the constitutional commitment of achieving equality. We must not underestimate them"; *Van Heerden* 2004 (CC) at para. [25], Moseneke, J., as he then was, again writing for the majority, affirmed that "our Constitution heralds … the start of a credible and abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of our constitutional framework"; *Bel Porto* 2002 (CC) at para. [7], Chaskalson, C.J. explained that "[t]he difficulties confronting us as a nation in giving effect to these commitments are profound and must not be underestimated. The process of transformation must be carried out in accordance with … the Constitution and its Bill of Rights. Yet, in order to achieve the goals set in the Constitution, what has to be done in the process of transformation will at times inevitably weigh more heavily on some members of the community than others"; see also Langa, (2006, *Transformative Constitutionalism*), at p. 351 where the previous chief justice draws attention to *Makwanyane* 1995 (CC) at para. [262] where it was acknowledged that "the Constitution expressly aspires to … provide a transition from … grossly unacceptable features of the past to a conspicuously contrasting … future" and *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) at para. [157], for yet another example where the Constitutional Court accepted that "[the Constitution] is a document that seeks to transform the *status quo ante* into a new order".

91 Moseneke, (2002, *The Fourth Bram Fisher Memorial Lecture: Transformative Adjudication*), at p. 317.

92 Langa, (2006, *Transformative Constitutionalism*), at p. 355. With transformation comes the inevitable discussion of transformative constitutionalism, but that discussion is best left for Pt. I, Ch. 3 at pp. 123-126.

93 *Hugo* 1997 (CC) at para. [41]; *Harksen* 1998 (CC) at para. [52(a)]; *Walker* 1998 (CC) at paras. [46]-[47] & [128]; *Van Heerden* 2004 (CC) at para. [27].

94 The right to equality here is used in its widest as possible sense and includes, for example, the right against unfair discrimination.

the monumental sense, holds great promises for our new society[95] in that substantive equality is infused with normative content with the aspiration to bring about transformation.[96] Albertyn & Goldblatt opines that the Constitutional Court's adoption of a substantive equality reflects a commitment to a transformative project and the creation of "an indigenous jurisprudence of transformation"[97] directed at, among other things, addressing and remedying material inequalities.[98] After contrasting substantive equality with "a formal or abstract notion equality[,] which ignores concrete differences in a quest for equal treatment regardless of those differences"[99] the authors concluded by stating that:

> "[a] commitment to substantive equality involves examining the context of an alleged rights violation and its relationship to systemic forms of domination within a society. It addresses structural and entrenched disadvantage at the same time as it aspires to maximise human development."[100]

The substantive view of equality entails "an approach to analysis or evaluation of impugned conduct or law"[101] that is context sensitive.[102] This approach enjoins a Court to have regard to the historical and social context of the alleged violation as well as its "relationship to systemic and structural forms of domination within society".[103] The aim of the latter sensitivity to context is the remedying of disadvantage and subjugation.[104] I conclude that in terms of the Court's equality jurisprudence and the academic interpretation thereof and commentary thereon substantive equality's object of transformation is material reality that is born out from past injustices that created patterns of disadvantage and, as such, entrenched disadvantage. This material reality also denotes a dismantling of structural disadvantage or then the notion of structural racism and sexism. Material reality and constitutional context do not, however, denote and is not cognisant of subjectivity, the meaning of being, or self nor its transformation.

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95 The Constitution was adopted to "heal the divisions of the past", to establish "a society premised on democratic values, social justice and fundamental human rights" and to improve "the quality of life of all citizens and free the potential of each person" – Moseneke, (2002, *The Fourth Bram Fisher Memorial Lecture: Transformative Adjudication*), at p. 313.

96 See *Bel Porto* 2002 (CC) at para. [6]; *Grootboom* 2001 (CC) at para. [1], where Yacoob, J. stated that the commitment to achieve such a society is not only as an abstract constitutional commitment and that "[t]he people of South Africa are committed to the *attainment* of *social* justice and the improvement of the quality of life for *everyone*" [own emphasis]; *Van Heerden* 2004 (CC) at para. [25] Moseneke, J., as he then was, stated "[o]f course, democratic values and fundamental human rights espoused by our Constitution are foundational. But just as crucial is the commitment to strive for a society based on *social justice*" [own emphasis].

97 Albertyn & Goldblatt, (1998, *Facing the Challenge of Transformation*), at p. 250.

98 *Ibid.*

99 *Ibid.*

100 *Ibid.*

101 Cowen, (2001, *Can 'Dignity' Guide South Africa's Equality Jurisprudence?*), at p. 37. Whether a conception of equality can be essentialised as merely an approach to analysis is questionable.

102 *Ibid.* See *Hugo* 1997 (CC) at para. [41] regarding context.

103 Cowen, (2001, *Can 'Dignity' Guide South Africa's Equality Jurisprudence?*), at p. 37.

104 *Ibid.* See *Sodomy* 1999 (CC) at para. [63] regarding remedial aspects.

3.2. LEGAL SUBJECTS: RADICALLY DIFFERENT FROM EACH OTHER

Substantive equality prescribes treatment of individuals *as equals*, not identically or equally, having regard to race, religion, ethnic origin, gender, sexual orientation, status etc.[105] Thus, substantive equality is not only accommodating of difference but insists on the recognition[106] and celebration.[107] Related to difference is vulnerability of people on the basis of forming part of a group, which vulnerability depends to a significant extent on past patterns of disadvantage and stereotyping.[108] This is another reason why an enquiry into past disadvantage is important. I submit that substantive equality cannot exist without theoretically and doctrinally incorporating formal equality through the auspices of the right to equality (acting rationally when differentiating) and the prohibition of unfair discriminating (not unfairly differentiating on the basis of social bigotries). This notion requires further theoretical analysis and, to understand the Court's equality jurisprudence through a holistic reading of section 9, I must discuss rule formalism and formal equality.[109]

Rule formalism requires that any *case* that is regulated by a *valid* rule of law to be regulated in accordance with that rule.[110] Rule formalism is bound up within the notions of jurisdiction and the logic of validity.[111] The law, being a self-contained system of norms, enjoins a judge to apply

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105 *Prinsloo* 1997 (CC) at para. [32]; *Walker* 1998 (CC) at para. [128]. Dlamini, C.R.M., *Equality or justice? Section 9 of the Constitution revisited – Part I,* Vol. 27, No. 1, (2002), Journal for Juridical Science, pp. 14-40, at pp. 29-30 although not referring to substantive equality *per se* Dlamini says:

> "But having accepted that all people are human beings and therefore worthy of being treated as such, with dignity and respect, this does not mean that for all practical purposes they will be treated identically whatever their individual circumstances."

Ngwena, C. & Pretorius, J.L., *Substantive Equality for Disabled Learners in State Provision of Basic Education: A Commentary on Western Cape Forum for Intellectual Disability v Government of the Republic of South Africa,* Vol. 28, No. 1, (2012), South African Journal on Human Rights, pp. 81-115, the authors referred to *Pillay* 2008 (CC) at para. [153] in reiterating that, since nature of equality is substantive equality, equality does not require identical treatment, but instead require treatment with equal concern and respect, which includes treating people differently, if need be, to achieve equality.

106 In the words of Ackermann, J. in *Sodomy* 1999 (CC) at para. [63]: "The desire for equality is not a hope for the elimination of all differences. … To understand 'the other' one must try, as far as is humanly possible, to place oneself in the position of 'the other'".

107 *Pillay* 2008 (CC) at para. [153], Langa, C.J. held that "our constitutional project … not only affirms diversity, but promotes and celebrates it. We cannot celebrate diversity by permitting it only when no other option remains". In *Fourie* 2006 (CC) at para. [60] it was held that:

> "The acknowledgment and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the *right to be different*, and celebrates the diversity of the nation." [own emphasis]

108 *Immigration* 2000 (CC) at para. [44].

109 Unlike Albertyn & Goldblatt, I do not simply marry *formal* equality with legal *formal*ism – see Albertyn, C. & Goldblatt, B., *Chapter 35: Equality*, in Woolman, S. C. & Bishop, M. (Eds.), *Constitutional Law of South Africa*, Vol. 1, (2014), at Ch. 35, p. 6.

110 Michelman, (1986, *The Meanings of Legal Equality*), at p. 25.

111 See Veitch, S*., et al.*, *Jurisprudence: Themes and Concepts* (2012), at pp. 117-123 and the discussion of Kelsen as a formalist.

the valid rule of law to the applicable case without any recourse to extra-legal considerations. To illustrate, a rule stating, for example, that 'any natural person may marry any other natural person' provides for the possibility of a homosexual marriage. However, if the rule provided that 'any man may marry any woman', the rule provides only for heterosexual marriages. Thus, where the rule itself does not provide for equal treatment or merely recognition of difference, equality, as such, is divorced from the rule itself. The rule is an abstraction, divorced from the legal subjects in respect of whom it finds application. For as long as the legal rule is *formally* valid rule formalism only requires that the applicable *cases* be dealt with in accordance with the *formally* valid rule. Formal (negative)[112] equality prescribes *equal* (same)[113] *treatment* irrespective of race, religion, ethnic origin, gender, sexual orientation, status etc.[114] The focus shifts from treatment of (the same and applicable) cases in accordance with a valid rule of law to (sameness in) treatment of individuals on a basis completely divorced from their social, economic, and political position within a society. It is in this sense rather absolutist in that recognition of difference is abhorrent to its insidious need to impose neutrality and homogeneity (sameness) on society. Formal equality is primarily based on the anti-discrimination principle or then (formal) equality of opportunity, which requires insistence on a meritocratic ideal.[115] In accordance with the anti-discrimination principle, trepidation is called for when "individuals are treated relatively disadvantageously" because of their specific group-membership.[116] Formal equality is contextually barren, appropriately formulated for the narrow-minded, and devastatingly effective at reinforcing the *status quo* by being intolerent of difference and conceiving inequality as irrational and arbitrary anomalies because it is premised on the assumption that everyone *is* equal and ought to be treated the same. Formal equality is bound up within two statements where the one is positive and the other normative. The positive statement declares that everyone *is* equal before the law, provides for equal protection and benefit of the law, and prohibits unfair discrimination *because* we all *are* equal, and it is irrational to differentiate or take difference into

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112 *Sodomy* 1999 (CC) at para. [117].

113 By referring to "sameness and similar treatment" De Vos labelled formal equality as the "traditional, liberal conception of equality" and said that the CC rejected "the Lockean notion that human are all born free and equal and that the harm of discrimination is situated in the failure of a government to treat all humans as equally free"– De Vos, (2000, *Equality for All? A Critical Analysis of the Equality Jurisprudence of the Constitutional Court*), at p. 66.

114 Cowen mentions that "identity of treatment of those that are alike" has been "unhelpfully" described as formal equality and that the CC has rejected formal equality – see Cowen, (2001, *Can 'Dignity' Guide South Africa's Equality Jurisprudence?*), at pp. 40-41. See also Albertyn & Goldblatt, (1998, *Facing the Challenge of Transformation*), at p. 250 who also opines that the CC rejected formal equality. I reiterate my disagreement with a statement to the effect that the CC has rejected formal equality in an absolutist sense, since formal equality is inclusive of and substantive conception of equality.

115 That is, the success of a job-application is determined solely by an applicant's productive capabilities and qualifications – Meyerson, D., *How Useful Is the Concept of Racial Discrimination,* Vol. 110, No. 3, (1993), South African Law Journal, pp. 575-580, at p. 575.

116 Michelman, (1986, *The Meanings of Legal Equality*), at p. 28.

account. The second, the normative statement, denotes the requirement that we all *ought* to be treated the same. Accordingly, if the right to equality requires everyone to be treated the same irrespective of difference – sameness is treatment *is* equality. Consequently, differential treatment on basis of 'arbitrary' grounds (such as race, religion, ethnic origin, gender, sexual orientation, status etc.) is irrational.[117]

In *Fourie* the Constitutional Court recognised a substantive conception of equality by taking into account the context, which includes historical and contemporary societal and material circumstances, and decided that the discrimination in question is unfair and that homosexual people should receive the *same* benefits and responsibilities of marriage afforded to heterosexual people. The Court held that: "… the common law and s[ection]30(1) of the Marriage Act[118] are inconsistent with s[ectons] 9(1), 9(3), and 10 of the Constitution to the extent that they make no provision for same-sex couples to enjoy the status, entitlements and responsibilities it accords to heterosexual couples".[119] In other words, homosexual people should, in this context, be treated *the same as* heterosexual people. Thus, in applying a substantive conception of equality, in recognising the right to be different and the past patterns of discrimination prevalent in the structure of our society, the Court concluded that *sameness* in treatment would best bring about the goal of achieving equality. Even though homosexual people are different, such difference should not be treated with disdain and should not preclude homosexual persons from entering into a valid marriage. I conclude that a formal conception of equality was applied to move towards a future in which both homosexual and heterosexual people are substantively equal. Substantive equality, as a notion, cannot be conceived without the normative statement tied up within and constitutive of formal equality. The quintessence of (the group-based and systemic concern of) substantive equality is the recognition that – although we all *are* equal before the law and new patterns of disadvantage must be prohibited from forming – an insistence on sameness in treatment will perpetuate systemic inequality (the state of being disadvantaged) because (although we all *ought* to be treated the same *as* equals, which entails being treated the same irrespective of difference) we all are not currently equal (in the material and substantive sense).

Sachs, J. first alluded, *obiter*, to the right to be different in *Sodomy*.[120] By penning the majority in *Fourie*[121] the right to be different became part of the Court's equality jurisprudence.

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117 Albertyn & Goldblatt, *Chapter 35: Equality*, (2014), at Ch. 35, p. 6. See Currie & De Waal, *Equality*, (2013), at pp. 213-214; Michelman, (1986, *The Meanings of Legal Equality*), at p. 25; Fredman, S., *Redistribution and Recognition: Reconciling Inequalities,* Vol. 23, No. 2, (2007), South African Journal on Human Rights, pp. 214-234, at p. 216.

118 Marriage Act, No. 25 of 1961.

119 *Fourie* 2006 (CC) at para. [118].

120 *Sodomy* 1999 (CC) at para. [134].

Sachs, J. held that "[t]he Constitution *acknowledges* the *variability of human beings* (genetic and socio-cultural), *affirms* the right to be different, and *celebrates* the *diversity* of the nation" [own emphasis].[122] From social transformation, especially the lack thereof, ascends an innate need to affirm the very character of our society as one based on tolerance (acceptance) and mutual respect, since if the process of transformation had been completed no such affirmation would have had been called for and the "… test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one *accommodates the expression of what is discomfiting*" [own emphasis].[123] Acknowledgement and acceptance of difference is of fundamental importance, since group membership has been the basis of conferred advantage and subjected disadvantage.[124] The Constitution requires acknowledgement of the variability of human beings and the affirmation of equal respect and concern that to all *as they are*. Statistical normality no longer determines legal normativity,[125] since 'constitutional normality' is expansive and includes the widest range of perspectives to acknowledge, accommodate, and accept vast iterations of difference(s).[126] In an open society normality is not an imposed and standardised form of behaviour that refuses to acknowledge difference.[127] Within the Constitution's envisioned open, democratic, and egalitarian society, elimination or suppression of difference is antithetical to equality, which rather entails equal concern and respect across difference.[128] Equality requires affirmation of self and its various (re)iterations, not the denial of the other's self, which is my and your or than our self.[129] Homogenisation of behaviour or extolling one form as supreme is similarly antithetical to equality.[130] Equality emphatically banishes difference that is inextricably connected to and inheres a leading role on the planes of exclusion, marginalisation, and stigma.[131]

To conclude this discussion, the Court, in *Sodomy* held that the desire for, longing for, and aspirational commitment towards the achievement of equality is not a hope for the elimination of all differences, since the past experience of subordination; that is – above all – personal subordination lies behind the vision of the achievement of equality.[132] Even more intriguing is an ethical standpoint adopted by Ackerman, J. by stating that we, as human beings,

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121 *Fourie* 2006 (CC) at para. [60].
122 *Ibid.*
123 *Ibid.*
124 *Sodomy* 1999 (CC) at para. [134].
125 *Ibid.*
126 *Ibid.*
127 *Ibid.*
128 *Fourie* 2006 (CC) at para. [60].
129 *Ibid.*
130 *Ibid.*
131 *Ibid.*
132 *Sodomy* 1999 (CC) at para. [22].

can understand "'the other'" by placing ourselves – as far as is humanly possible – in the position of "'the other'".[133] Consequently, it is *im*possible to fully place ourselves in the position of other human beings and, as such, it is *im*possible to understand other human beings, whether they might be black, white, or then expressed as the other.[134]

3.3. LEGAL SUBJECTS: EQUAL IN RESPECT OF HUMAN DIGNITY

The Constitution, through its protection of dignity, enjoins acknowledgement of the value and worth of all individuals as members of our society.[135] The Constitutional Court placed this relational claim[136] at the centre of its equality jurisprudence, which is that everyone is equal *vis-à-vis* another in relation to their dignity. Otherwise put, human beings "are inherently equal in dignity".[137] The ontological claim, in turn, relates to the fact that we are equal *vis-à-vis* each other *because* we are human beings and, based on the mere fact that we are human beings, we are of incalculable and infinite worth. It, thus, relates to the meaning of being (existing *as* a) human, which denotes a sense of superior cognitive ability to that of other beings (such as animals).[138] What is of utmost importance is recognising that every legal subject is of incalculable worth,

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133 *Ibid.*

134 In *Sodomy* at para. [22] the CC quoted the Supreme Court of Canada in *Vriend v Alberta* [1998] 1 S.C.R. 493 at para. [69]:

> "It is easy to say that everyone who is just like 'us' is entitled to equality. Everyone finds it more difficult to say that those who are 'different' from us in some way should have the same equality rights that we enjoy. Yet so soon as we say any … group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of … society are demeaned. It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour or sexual orientation are less worthy" [own emphasis]".

135 *Sodomy* 1999 (CC) at para. [28]. Similarly, the Universal Declaration of Human Rights declares that "[a]ll human beings are born free and equal in dignity and rights" – Art. 1 of UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, (available at: http://www.refworld.org /docid/ 3ae6b3a84.html) [accessed Nov. 14, 2018]. It is submitted by Grant, in Grant, E., *Dignity and Equality,* Vol. 7, No. 2, (May 10, 2007), Human Rights Law Review, pp. 299-329, at p. 300, that the aforementioned "bold" assertion contained in Art. 1 caused equality to be placed at the top of the international human rights agenda more five decades ago. See Loenen, T., *Towards a Common Standard of Achievement? Developments in International Equality Law,* No. 1, (2001), Acta Juridica, pp. 197-213.

136 See McConnachie, (2014, *Human Dignity, 'Unfair, Discrimination' and Guidance*), at p. 616, the relational claim relates to the manner (how) human beings ought to be treated; the acceptance that some forms of conduct are inconsistent with, or required by, respect for the intrinsic worth of all human beings.

137 See *Prinsloo* 1997 (CC) at para. [31]. This relational claim has been reiterated by the CC. See also *Hugo* 1997 (CC) at para. [41] where it was held that:

> "At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups."

and *Hoffmann* 2001 (CC) at para. [27], where Ngcobo, J., as he then was, made the following conclusion from the cases in which dignity was placed at the centre of equality (i.e., *Hugo* 1997 (CC) at para. [41]; *Prinsloo* 1997 (CC) at paras. [31]-[33]):

> "At the heart of the prohibition of unfair discrimination is the recognition that under our [C]onstitution all human beings, regardless of their position in society, must be accorded equal dignity."

138 It has been expressed as the cognitive ability of agency. In other words, agent refers to a rational human being who is the subject of action and we, as cognitive agents, can decide to act or not. Once having decided to act, we can deliberate how to act and, once the means of acting are chosen, we have the ability to apply the means to bring about certain changes. The capacity intrinsic to an agent is called agency. For this comment see Bunnin & Yu, *The Blackwell Dictionary of Western Philosophy*, (2004) at p. 19.

irreplaceable and, thus, entitled to equal respect and concern. Every legal subject must be treated like any other legal subject within society, whether he or she is perceived to be different. Thus, no single legal subject is more deserving than or worth more than any other legal subject – irrespective of difference(s).

4. THE DIGNITY BASED APPROACH: SUBSTANTIVE EQUALITY & HUMAN DIGNITY

> "Political leaders, jurists and philosophers have increasingly alluded to the dignity of the human [being] … as the basic *ideal* so generally recognised as to require no independent support. It has acquired a resonance that leads it to be invoked widely as a legal and moral ground for the protection against degrading and abusive treatment. No other *ideal* seems so clearly accepted as a universal social *good*."[139] [own emphasis]

The second defining element of the Court's equality jurisprudence is human dignity's fundamentally important role in its equality jurisprudence.[140] An acute understanding of human dignity, both as a right and as value, is a prerequisite for comprehending the relationship between the right to equality and human dignity as a value.[141] The Constitutional Court, in its interpretation of the equality clause, placed human dignity, as a value, at the centre of its equality jurisprudence[142] in that: (*i*) human dignity is used to differentiate between mere differentiation and discrimination (for differentiation to constitute discrimination, the differentiation between people or categories of people must be based on one or more grounds that has the *potential* to impair the human dignity of the complainant), (*ii*) human dignity is a factor taken into consideration when determining whether the discrimination in question is unfair; that is, in the assessment of the *impact* of the discrimination in question on the complainant in question (to be unfair, the complainant's human dignity must, *in fact*, have been impaired by the discrimination in question), and (*iii*) human dignity is also considered in the section 36 limitation analysis.

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139 Schachter, O., *Human Dignity as a Normative Concept,* Vol. 77, No. 4, (Oct. 1983), The American Journal of International Law, pp. 848-854, at pp. 848-849.

140 There is one sphere within equality jurisprudence where dignity will not *ab initio* be taken into consideration and that is where the facts *only* deals with "mere differentiation" *and* does *not* constitute discrimination. See *Prinsloo* 1997 (CC) at paras. [21] & [31] and *Harksen* 1998 (CC) at para. [54].

141 This relationship is succinctly contained in the following expression: everyone is equal *vis-à-vis* another in relation to their dignity.

142 See Cowen, (2001, *Can 'Dignity' Guide South Africa's Equality Jurisprudence?*), at pp. 35-37 where she has indicated a triple layered influence of dignity on the Court's equality jurisprudence. The first is that dignity determines whether differentiation amounts to discrimination. Following hereon, dignity is a factor for analysing the impact of the discrimination so as to establish whether the discrimination is unfair. Lastly, if it is found that the impugned differentiation constitutes unfair discrimination, dignity is relevant in the proportionality exercise conducted to determine whether the limitation of the right no to be unfairly discriminated against is reasonable and justifiable. See also Albertyn, (2015, *Adjudicating Affirmative Action within a Normative Framework of Substantive Equality and the Employment Equity Act – An Opportunity Missed? South African Police Service v Solidarity obo Barnard*), at p. 274.

However, the dignity-based approach requires further and more nuanced analysis. It is of utmost importance to understand *what* this dignity-based approach means as well as *how* this dignity-based approach of the Constitutional Court came about.

Under South African law, dignity is both a foundational value and a justiciable right.[143] The meaning of human dignity[144] is influenced and moulded by the *social* context within which the value and right are to find application, which context is inclusive of historical context. The fundamental importance of the value of human dignity in our constitutional framework is unquestionable;[145] it is well and truly a *Grundnorm* informing the entire objective normative legal order:

> "Human dignity … informs constitutional adjudication and interpretation at a range of levels. It is a *value* that informs the interpretation of many, possibly *all*, other rights. Th[e Constitutional Court] has already acknowledged the importance of the *constitutional value of dignity* in *interpreting rights* such as the *right to equality* … Human dignity is also a *constitutional value* that is of central significance in the limitations analysis. Section 10 … makes it plain that dignity is not only a *value fundamental* to our Constitution, it is a justiciable and enforceable *right* that must be respected and protected. In many cases, however, where the *value of human dignity* is offended, the primary constitutional breach occasioned may be of a more specific right such as … the *right to equality*."[146] [own emphasis and footnotes omitted]

The function of human dignity, as a *Grundnorm*, is twofold. Firstly, the Constitution positions dignity to contradict our past,[147] and, secondly, the Constitution adopts human dignity as an (ethical) value that informs our envisioned future of an ideal society.[148] The Constitution asserts human dignity as a value to articulate the ethical direction for our future as respect for the intrinsic worth[149] of all human beings.[150]

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143 *Dawood* 2000 (CC) at para. [35].

144 Etymologically considered, dignity can be traced to the old French word *dignite* meaning "dignity, privilege, honour" and also to the Latin term *dignitatem* (nominative *dignitas*) which means "worthiness" and is derived from *dignus* meaning "worth (n.), worthy, proper, fitting" – *Online Etymology Dictionary*, (Date Accessed: 10 Jun. 2018), [Address: https://www.etymonline.com/search?q=dignity]. See also Schachter, (1983, *Human Dignity as a Normative Concept*), at p. 849.

145 *Dawood* 2000 (CC) at para. [35].

146 *Ibid.*

147 *Ibid.* Our particular past is characterised by apartheid as a period in our history during which the most egregious legal and institutional discrimination and segregation took its toll on humanity culminating in the denial of the human dignity of, among others, black South Africans.

148 *Ibid.*

149 I subscribe to a Kantian notion of *worth*, which stands in contradiction to *price*. Things have a *price* and can be replaced by *something* else, whereas human beings have *worth* that is infinite and cannot be replaced by any *thing*. Thus, my use of *value* is indicative of *price* as opposed to *worth* – relating to human dignity or human worth. See in this regard Ackermann, *Human Dignity: Lodestar for Equality in South Africa*, (2012), at p. 4.

150 *Dawood* 2000 (CC). The words used by O'Regan, J. was "[i]t [the Constitution] asserts it [the value of human dignity] … to *inform* the future, to invest in our democracy *respect for the intrinsic worth of all human beings*" [own emphasis].

In considering the passage of time it seems that Western states have, and South Africa is no different, subscribed to a conception of human dignity in terms of which (*i*) every human being has – by virtue of his or her humanity ('status' as a human being) – inherent dignity, irrespective of external characteristics,[151] (*ii*) inherent dignity, as the source of some, if not all human rights, demands respect for human rights,[152] and (*iii*) dignity inheres in every human being, irrespective of external characteristics. Accordingly, by virtue of the status of being a human being, every such human being is entitled to enjoy his or her human rights without suffering any unequal treatment or unfair discrimination, in the constitutional sense, based on external characteristics.

As a value dignity must signify something more abstract than and, thus, informs the meaning of the right to dignity. But in the context of equality, as already explained above, the starting point of any interpretation section 9 is consideration of constitutional values (interests), since any interpretation thereof must be purposive and *value-laden*. The relevant constitutional values, for the purposes of section 9, are the rule of law,[153] in the case of mere differentiation, and human dignity, in the case of unfair discrimination. Human dignity and equality are connected,[154] and inseparable from each other: the normative content of (the achievement of) equality flows from the value of human dignity, which value then provides for the substantive content of the right to equality in the same manner in which the value of achievement of equality provides for the substantive content of the right to human dignity.

South Africa places *emphasis on equality, formally and substantively*, because of the recognition of "equal and inherent worth of all human beings".[155] The notion that no one is to be treated as a mere object develops intuitively and almost indiscernibly into the notion of equal dignity and the Constitutional Court has emphasised the centrality of the concept of dignity and self-worth within the idea of equality.[156] Indeed, the Constitutional Court has recognised a Kantian conception of human dignity as inherent worth entailing a prohibition of treating human beings as mere means to an end or objects within equality:

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151 These characteristics includes, but is not limited to, sex, age, race or ethnicity, religious or political belief, nationality, status, sexual orientation, or mental or physical condition – see *Harksen* at para. [50].

152 *Makwanyane* 1995 (CC) at para. [83] and see authorities cited there.

153 *Prinsloo* 1997 (CC) at para. [25].

154 See *Sodomy* 1999 (CC) at paras. [124]-[126] where Sachs, J. indicated how the role of dignity within s. 9 differs to that in s. 10 and how equality informs dignity in the context of s. 10.

155 *Barnard* 2014 (CC) at para. [176], in this light I refer the reader to *Pillay* 2008 (CC) at para. [63] where the court indicated that the value freedom cannot be divorced from the values of equality and dignity (this is an equality judgment) and also *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA (CC) at para. [49] where the court addressed the relation between freedom and dignity.

156 *Sodomy* 1999 (CC) at para. [120].

> "We are emerging from a 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."[157]

Following hereon, the Constitutional Court also held that the prohibition of unfair discrimination is informed by the purpose of our new constitutional and democratic order, which is the "establishment of a society in which all human beings *will* be *accorded equal dignity and respect regardless of their membership of particular groups*" [own emphasis].[158] The right to equality is, therefore, premised on a recognition that the "ideal of equality will not be achieved" in the absence of a concerted and calculated effort to deal with and eradicate the consequences of those inequalities and disparities caused by discriminatory laws and practices in the past.[159] Finally, the Constitutional Court was unambiguous in the context of listed or specified grounds of discrimination in that it:

> [… cautioned] against any narrow definition of these terms. What the specified grounds have in common is that they have been used (or misused) in the past … to categorise, marginalise and often oppress persons who have had, or who have been associated with, these attributes or characteristics. These grounds have the *potential*, when manipulated, to *demean persons in their inherent humanity and dignity*. There is often a complex relationship between these grounds. In some cases, they relate to *immutable biological attributes* or *characteristics*, in some to the *associational life* of humans, in some to the intellectual, expressive and religious *dimensions of humanity* and in some cases to a combination of one or more of these features. … Section 8(2) [now section 9(3) and section 9(4)] seeks to prevent the unequal treatment of people based on such criteria which may, amongst other things, result in the *construction of patterns of disadvantage such as has occurred only too visibly in our history*."[160] [own emphasis]

Turning to the identified themes of substantive equality, the first two themes flow forth from and is a product of human dignity precisely because human dignity is a *condictio sine qua non* for (*i*) a conception of the legal subject as an individual human being whose humanity is expressed in and through his or her relationship with other human beings[161] and (*ii*) the recognition of inalienable, incalculable, and innate worth irrespective of and as expressed and articulated within and by radical difference between human beings who are primordially devoid,

157 *Prinsloo* 1997 (CC) at para. [31]. See also in general *Makwanyane* 1995 (CC) at paras. [26], [57], [59], [166], & [328], *Dawood* 2000 (CC) at para. [35] (quoted with approval in *NM v Smith (Freedom of Expression Institute as Amicus Curiae)* 2007 (5) SA 250 (CC) at para. [50]), and *S v Dodo* 2001 (3) SA 382 (CC) at para. [38].

158 *Hugo* 1997 (CC) at para. [41].

159 *Walker* 1998 (CC) at para. [46].

160 *Harksen* 1998 (CC) at para. [50].

161 See Pt. II, Ch. 5 at pp. 190-201 regarding *Ubuntu* in (a) 'post'-apartheid South Africa (modernity).

contrary to past conceptions of being (existing *as* a) human, of a single overarching ontological essence.

In order to further particularise the content of human dignity (worth) I have recourse to Ackermann's description that postulates (*i*) certain qualities – that attaches to every human being – that (*ii*) enable us to perform certain functions.[162] These qualities are "those aspects of the human personality that flow from human intelligence and moral capacity, which in turn separate human beings from the impersonality of nature" and the functions enabled thereby are "to have self-awareness, to have a sense of self-worth, to exercise their own judgment, to exercise self-determination, to develop their personalities, to shape themselves and nature, to strive for self-fulfilment in their lives", and to form meaningful relationships with other human beings.[163] To reiterate, these qualities and functions together constitute Ackermann's 'description' of human dignity, with which I agree and will follow in my description of human dignity. It is these qualities and functions that ought to attribute meaning to the phrase 'dignified human life' and is my starting point as to the meaning of the value of human dignity.

I do not submit that Ackerman's description is *not* ethical, but whether it forms part of be-coming human, as envisaged in Chapter 4 is doubtful, to say the least. My conception of dignity is not only tolerable of ethics but is inherently ethical by always being open towards further (re)imagination and (re)constitution. South Africa, as a nation, is (*i*) believed to have common or collective aspirations,[164] ideals[165] and, most importantly, common values[166] and (*ii*) not regarded as stagnant anymore but is – consciously – moving in a moral and ethical direction.[167] The immediately aforementioned (*ii*) is a *normative* statement, since, as I show in Chapter 3, South Africa, as a nation, has become ontologically stagnant and reified.

At first blush, it seems that content can be attributed to the right to equality through the prism of a conception of the value of equality that draws content from difference and

162 Ackermann, *Human Dignity: Lodestar for Equality in South Africa*, (2012), at p. 86.

163 *Ibid.* These functions are listed by Ackermann on p. 86 of his book, but I took it upon myself to re-arrange the sequence of these functions and also to include the forming of meaningful relationships with other human beings as an independent function.

164 *Makwanyane* 1995 (CC) at paras. [74] & [262], *Kaunda and Others v President of the Republic of South Africa* 2005 (4) SA 235 (CC) at para. [155]; *Jaftha v Schoeman, Van Rooyen v Stoltz* 2005 (2) 140 (CC) at para. [28] as referenced by Malan in Malan, K., *Politokrasie: 'n Peiling van die Dwanglogika van die Territoriale Staat en Gedagtes vir 'n Antwoord Daarop*, (2011), at p. 23.

165 *Matatiele Municipality v President of the Republic of South Africa* 2006 (5) SA 47 (CC) at para. [97].

166 *Makwanyane* 1995 (CC) at para. [180]; *Kaunda* 2005 (CC) at paras. [60] & [156]; *Bato Star* 2004 (CC) at para. [106].

167 *Makwanyane* 1995 (CC) at paras. [262]-[263]; *Kaunda* 2005 (CC) at paras. [60] & [156] as referenced by Malan, *Politokrasie: 'n Peiling van die Dwanglogika van die Territoriale Staat en Gedagtes vir 'n Antwoord Daarop*, (2011), at p. 23.

disadvantage as the "key characteristics of equality".[168] I disagree. During apartheid the law purposefully disadvantaged specifically identified and defined groups of people. Advantage was bestowed upon others through the instrumentality of the law and on the basis of personally held characteristics such as race, sex, gender, sexual orientation, and birth. Simply put, legal differentiation between people and categories of people was based on grounds that has the *potential* to impair human dignity. To this day advantage is still bestowed through the instrumentality of the law on the basis of race, sex, and disability; in other words, grounds that has the *potential* to impair human dignity. However, 'post'-apartheid restitutionary discrimination is not unfair, since such discrimination advances the achievement of equality – a core and fundamental value of our Constitution. Contrary to what Albertyn & Goldblatt submits, equality cannot draw content from the difference (between people that perpetuates subordination of a disadvantaged group) and disadvantage alone.[169] Rather, content must and are drawn from (*i*) the *act* of differentiation considered *together* with the *grounds on which* people or categories of people are *and* have been differentially disadvantaged and (*ii*) the consequence thereof, which has been alluded to above as a state of being disadvantaged.[170] Overemphasis on difference and (entrenched (systemic)) disadvantage fixate on the *consequence* of discrimination without due cognisance and identification of the root cause of such disadvantage, which is differentiation based on grounds that have the capacity to infringe on a person's human dignity. South Africans are not equal in relation to their difference nor their relative advantage or disadvantage. The converse is true; South Africans are (un)equal in relation to their relative (un)dignified position within society.

> "The prohibition of unfair discrimination … seeks *not only* to avoid discrimination against people who are members of disadvantaged groups. It seeks *more* than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional … order is the *establishment* of a society in which all human beings will be accorded *equal dignity* … *regardless of their membership of particular groups*. The achievement of such a society … is the goal of the Constitution [and] should not be forgotten or overlooked."[171] [own emphasis]

The interpretation of section 9 is grounded on differentiation and draws content from both the value of equality (the achievement of equality) as well as the value of human dignity proclaiming everyone to be equal in dignity (equal respect and concern). However, the proclamation that we are all equal in dignity and the objective fact of living in a society in which everyone is, in fact, and substantively considered, afforded equal respect and concern are

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168 Albertyn & Goldblatt, (1998, *Facing the Challenge of Transformation*), at pp. 252-253.
169 *Ibid.*
170 See the terminology analysis on p. 40 above.
171 *Hugo* 1997 (CC) at para. [41].

diametrical opposites. The former is a normative statement, also referred to as moral equality,[172] whereas the latter is a question of fact. The dignity-based approach, as I understand it, is far more nuanced than recourse to critical theory through the auspices of difference and disadvantage as key characteristics of equality of the value of (the achievement of) equality.

I now turn to my analysis and exposition of the dignity-based approach from a different perspective, but one that ultimately reaches the same destination as the Constitutional Court. I endeavour to particularise a relation between life, dignity, and equality. My submission is life, as envisaged by the Constitution, is a dignified (humane) experience of humanity uninhibited by unequal treatment in the constitutional sense that can affect an individual human being on an existential and experiential level. This analysis is another reason as to why the dignity-based approach of the Constitutional Court is preferred above what has been called for by various authors, which is drawing from the value of equality rather than from human dignity when interpreting and providing content to the right to equality.

4.1. THE RIGHT TO LIFE, HUMAN DIGNITY, & EQUALITY

Life itself, or then the right to life, is antecedent to human dignity.

> "The right to life is the most basic, the most fundamental, the most primordial and supreme right which human beings are entitled to have and without which the protection of all other human rights becomes either meaningless or less effective. If there is no life, then there is nothing left of human dignity. Only when life exists can we be concerned with how to make it *worth living* and to prevent it from being *undermined by various acts and omissions* that endanger it. The protection of life is therefore an essential pre-requisite to the *full enjoyment of all other human rights*."[173] [own emphasis]

The Constitution seeks to "[i]mprove the quality of life of all citizens and free the potential of each person" and section 9(2) makes it clear that "[e]quality includes the full and equal enjoyment of all rights and freedoms". An individual's right to life is the most fundamental of all human rights and, thus, antecedent to all other fundamental rights, since without human existence there cannot reasonably be any justifiable reference to or need for the existence of human dignity[174] and, logically speaking, without life itself being present within a legal subject, such subject can neither exercise nor be the bearer of any rights.[175] It, therefore, follows why the

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172 McConnachie, (2014, *Human Dignity, 'Unfair, Discrimination' and Guidance*), at p. 616, the statement that everyone is equal in respect of human dignity is moral equality or to be accorded equal dignity irrespective of difference is moral equality.

173 Desch, T., *The Concept and Dimensions of the Right to Life as Defined in International Standards and in International and Comparative Jurisprudence,* Vol. 36, No. 1, (1985), Österreichische Zeitschrift für Öffentliches Recht und Völkerrecht, pp. 77-188, at pp. 77-78 as found in Pieterse, Marius, *Chapter 39: Life* in Woolman, Stuart Craig & Bishop, Michael (Eds.) *Constitutional Law of South Africa* (2014, 2nd Ed.), South Africa: Juta & Co., [Accessed on: 12 Dec. 2016], at Ch. 39, p. 2.

174 *Makwanyane* 1995 (CC) at para. [83] and see authorities cited there.

175 *Ibid.* at para. [326].

right to life and dignity has been held to be "values of the highest order under our Constitution"[176] and the most important of all human rights as well as the source of all other rights contained in the Bill of Rights.[177] It must then be accepted that – by reason of our committal to the advancement of human rights and freedoms[178] – we must value these rights above all others.[179] The purpose of enshrining the right to life in the Constitution exceeds protection of mere biological or legal existence in that life, in the context of the right to life, signifies life beyond existence of organic matter.

Life signifies an *experience* of living human beings. The emphasis is, therefore, on the lived experience of the legal subject. The signified, and that which the Constitution values, is the right to live the life of a human being *as understood and provided for* in the Constitution and, more specifically, the Bill of Rights. Life is the noun denoting the period between the birth and death of a human being and live, as a verb, denotes one leading one's life in a particular manner or under particular circumstances. This thesis only concerns itself with the manner in which or circumstances under which an individual leads his or her life. Thus, we are "concerned with how to make … [life] *worth living* and to prevent … [life] from being undermined" [own emphasis].[180] Human dignity and the achievement of equality influence and can influence the meaning of the right to life or the right to life can influence the *meaning and content* of the right to equality and dignity. The influence of these values and rights will now be examined.

The value of human dignity provides content to the phrase 'the right to live the life of a human being', since the Constitution protects more than mere biological human existence by enjoining constitutional protection of the right to live a humane life. Thus considered, we are concerned with a humane experience of humanity; that is a life of a human being that is worth living is one qualified and signified by human dignity and, thus, a humane experience. The Constitution requires from us the recognition of a right to lead a dignified life – to live life as a human being who is (*i*) endowed with incalculable and inalienable worth (dignity) and (*ii*) equal in dignity.

In order to justify this interpretation of the right to life influenced by the value human dignity, recourse is had to judgments of the Constitutional Court. In *Makwanyane* O'Regan, J. phrased the right to live the life of a human being as the "right to a human life: the right to live *as* a human being, to be part of a broader community, [and] to share the *experience of humanity*" [own

176 *Ibid.* at para. [111].
177 *Ibid.* at para. [144].
178 See the s. 1(*a*) of the Constitution.
179 See *Makwanyane* 1995 (CC) at pata. [144].
180 See Desch, (1985, *The Concept and Dimensions of the Right to Life as Defined in International Standards and in International and Comparative Jurisprudence*), at pp. 77-78.

emphasis].[181] The right to life incorporates the *experience* of humanity and such experience ought to be, without question, if history has taught us but one irrefutable normative necessity, a dignified one. This conclusion – that the right to life incorporates a *dignified experience* of humanity – is buttressed by Chaskalson, P. who held, in *Soobramoney*, that access to health services, housing, food, water, employment opportunities, and social security constitutes "aspects of the right to … human life".[182] In reading these two judgments one finds that they complement each other. This is the case not only because Chaskalson, P. quoted O'Regan, J.'s piece in *Makwanyane* in which she interweaved the right to life with human dignity by justifying a right not to be killed on the basis of human dignity. They also complement each other because the value of human dignity influences the right to life on an existential level (the right ('freedom' or 'liberty') not to be killed) as well as on an experiential level (the right to a dignified experience of humanity). These two judgments, therefore, provide for an exposition of how human dignity, as a value, influences the right to life both in a civil-political rights context as well as in a socio-economic rights context.[183]

The Constitution guarantees and protects both the right to life and human dignity simultaneously and concurrently because what is cherished in our constitutional dispensation is a dignified (humane) human life. The right to life, therefore, incorporates the right to have your dignity respected and protected thereby interweaving human dignity and the right to life and thereby expanding the right to life beyond the periphery of mere biological existence and attributing content to the right to life as the right to be treated *as* a human being imbued with dignity.[184] O'Regan, J. held that "without dignity, human life is substantially diminished … [and] [w]ithout life, there cannot be dignity",[185] but I will add that the **only** life *worth* living is a *dignified* life for how can one claim the acknowledgement and celebration of dignity in a life lived in the absence of the basic sustenance of life, which might include access to food, water, housing, and

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181 *Makwanyane* 1995 (CC) at para. [326]; the reader must note that O'Regan, J. never explicitly referred to the value 'human dignity' and my argument is based on inferential reasoning.

182 *Soobramoney* 1998 (CC) at para. [31] – the quotation by Chaskalson, P. of a phrase of O'Regan, J. found in *Makwanyane* 1995 (CC) at para. [326] is the precise quote in the main text of this work.

183 I must, however, add a reservation, which is, I understand that a complainant will most often than not bring a grievance on the basis of a specific right, such as the right to health care, food, water and social security, rather than the right to life. This is because, as has been shown, the source of all other human rights is the right to life. Our Constitution gives effect to the right to a humane life by way of affording and protecting other rights. Therefore, even though the right to life does not include the right to force the state to provide life prolonging medical treatment in circumstances where medical treatment only defers inevitable death flowing from an incurable terminal illness because s. 27(2) of the Constitution provides for progressive realisation for the right to have access to health care services found in s. 27(1) of the Constitution, one can – possibly – force the state to provide *lifesaving* medical care on the basis that you have a right to life.

184 *Makwanyane* 1995 (CC) at para. [327].

185 *Ibid.* at paras. [326]-[327].

health care.[186] Consequently, the meaning of human dignity *ought* to inform what a dignified human life entails because it is abundantly clear that there cannot be a conception of human dignity without human life.

Section 9 of the Constitution is a section preventing life, in the context of the right to life as discussed above, from being undermined by various commissions and omissions that endanger the right to live the life of a human being. The right to life and, thereby, dignity influence the right to equality precisely because of the devastatingly harmful consequences of unequal treatment in the constitutional sense on a person's *experience* of humanity. Some might label my argument that unequal treatment can lead to the deterioration of life to such an extent that life is (almost) not worth living as an exaggeration or ill-founded over-amplification of the consequences of unequal treatment. However, apartheid provides for a point of reflection during which one identifies a system that used oppressive and dehumanising legislative regulation of an individual that ranged from his or her existential meaning and value (existing *as* a black woman or man) to every experiential facet of his or her life. Apartheid is, therefore, a basis for stating that unequal treatment can lead to the deterioration of human life that renders my above statement anything but an ill-founded over-amplification of the consequences of unequal treatment. To elaborate, experiential, in this context, entails legislative regulation of where one can live, apply for employment or be employed,[187] receive any form of education,[188] and own immovable property, if any.[189] In addition, it includes with whom one may enter into intimate personal relationships,[190] which translates into family relations and broadens towards a sphere of friends and culminating in a cultural group. Experiential legislative regulation may even go as far as stipulating where a person may freely travel at specific times of a day.[191] To summarise:

> "The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life. black people were prevented from becoming owners of property or even residing in areas classified as 'white', which constituted nearly 90% of the landmass of South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities,

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186 See Chaskalson, A., *The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of Our Constitutional Order* Vol. 16, No. 2, (2000), South African Journal on Human Rights, pp. 193-205, at p. 204.

187 Mines and Works Act, No. 12 of 1911; Native Building Workers Act, No. 27 of 1951.

188 Bantu Education Act, No. 47 of 1953; Extension of University Education Act, No. 45 of 1959.

189 Natives Land Act, No. 27 of 1913; Native Trust and Land Act, No. 18 of 1936.

190 S. 1(1) of the Prohibition of Mixed Marriages Act, No. 55 of 1949 provides that "[a]s from the date of commencement of this Act a marriage between a European and a non-European may not be solemnised, and any marriage solemnised in contravention of the provisions of this section shall be void and of no effect".

191 Natives (Urban Areas) Act, No. 21 of 1923.

> including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided."[192]

Race, as the criterion of differentiation, resonates at an existential level because being (existing as or the essence of) black was to be the *other* to European or white. It meant that one belonged to an inferior race whom the Europeans or white people were entitled to rule over and refuse to admit to social or political equality.[193] To be black was to be the other to human or to be 'not fully human' because one belonged to an inferior race; one of lesser worth which placed a black man or woman beyond the legally accepted definition of a human being entitled to equal respect and concern. A black person was, therefore, not entitled to experience humanity in the same manner as a white person precisely because he or she was regarded as the other to the (white) human being or then self. A black person was – for all intents and purposes – dead as an equal human being bringing us back to the existential facet of the right to life (the right not to be killed). The oppressive and dehumanising legislative regulation of black persons on the basis of their race had the consequence that they were never alive, to begin with. More troubling is the fact that differential treatment was to the benefit of white people and to the detriment of, among others, black people.[194] One can, therefore, submit, although with the greatest sense of empathy, that a legislatively regulated black life could not have been worth living as such black individual was moulded and sculpted as a *res* so as to fulfil a particular function in society[195] rather than to experience humanity *as* a human being.

Any differential treatment based on characteristics forming part of an individual's identity – for example race, ethnicity, sexual orientation, gender, and sex – that leads to a diminution of a dignified human experience and providing for a life less or not worth living will constitute an infringement of the right to equality by reason of the fact that the dignity of a person has been diminished. This conclusion is exactly what has been accepted by the Constitutional Court where it has held that unfair discrimination means "treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity".[196] The only difference between the reasoning of the Constitutional Court in *Prinsloo* and my own is that I have shown the palpable relationship between the right to life and the value of human dignity – as already accepted by the Constitutional Court. In addition, and to

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192 *Brink* 1996 (CC) at para. [40].

193 See *Moller v Keimoes School Committee* 1911 AD 635 at p. 643.

194 See, for example, *Walker* 1998 (CC) at paras. [14]-[27]; *Brink* 1996 (CC) at para. [40].

195 To provide but one example: cheap black labour and in this regard see Allsobrook, C.J., *A Genealogy of South African Positivism*, in Vale, P., Hamilton, L., *et al.* (Eds.), *Intellectual Traditions in South Africa: Ideas, Individuals and Institutions* (2014), at p. 101; Ch. 5 & Ch. 6 in Terreblanche, S., *A History of Inequality in South Africa, 1652-2002*, (2002), at pp. 153-178 & pp. 179-217.

196 *Prinsloo* 1997 (CC) at para. [31].

expand upon the relationship between the right to life and human dignity, I uphold a specific understanding of the right to life as the right to lead a dignified life – to live life as a human being endowed with incalculable and inalienable dignity. By showing that unequal treatment has a direct influence on a person's experience of humanity, as I did above, it has been shown that such treatment has an impact on the right to life, albeit indirectly and only to the extent of theoretically substantiating that the right to equality has been incorporated in our Constitution so as to protect and promote everyone's right to a dignified human experience, or then, a dignified human life.

In our objective normative legal order constituted by the Interim Constitution the individual value of each member of our community is recognised and treasured, but the society in which the individual value of each member of our community is recognised and treasured is still to be established and it is up to us to turn the constitutional ideal into a social reality.

5. SECTION 9: AN OVERVIEW

Section 9 can, doctrinally considered, be divided into three constituent parts or elements. The first denotes 'equality as rationality' and regulates unequal treatment in the constitutional sense.[197] The second denotes 'equality as fairness' and regulates unfair discrimination in the constitutional sense.[198] The third denotes 'equality as fair discrimination' and regulates constitutionally mandated measures aimed at transforming an unequal society.[199] The first two elements or parts of equality finds concretisation through the *Harksen*-test and the third finds its concretisation through the notion entitled restitutionary equality.[200]

197 'Equality as rationality' is discussed in the Appendix under the heading "Section 9(1): Equality as rationality".

198 'Equality as fairness' is discussed in the Appendix under the heading "Sections 9(3)-(5): Equality as Fairness"

199 See Pt. I, Ch. 3.

200 The notion "restitutionary equality" was first used by Ackermann, J. in *Sodomy* 1999 (CC) at paras. [61]-[62]. The aforementioned matter did *not* concern any restitutionary measures but merely alleged unfair discrimination.

5.1. THE *HARKSEN*-TEST

The determination as to whether section 9 has been infringed cannot be undertaken in a vacuum and must be based on both the wording of section 9 and constitutional context.[201] In *Harksen*, the Constitutional Court formulated the *Harksen*-test to deal with challenges of alleged infringement of the right to equality[202] that does not directly involve a claim to or a consideration of restitutionary equality. This approach (*Harksen*-test) adopted by the Court involves three enquiries.[203] In relation to the first two enquires one asks whether the differentiation between people or categories of people in question amounts to *mere differentiation* or *discrimination*.[204] Section 9 deals with differentiation in two ways. First, section 9(1) regulates differentiation which does not involve unfair discrimination (mere differentiation). Second, section 9(3) – section 9(5) regulate differentiation which does involve unfair discrimination.[205]

During the first enquiry, a determination is made as to whether the *differentiation* bears a rational connection to a legitimate governmental purpose. If the differentiation is not so rationally connected, such differentiation constitutes an infringement of section 9(1) and the third enquiry becomes relevant and necessary. The third enquiry entails a determination as to whether the infringement is reasonable and justifiable in an open and democratic society based on the values of human dignity, equality and freedom.[206] The second enquiry, normally, but not necessarily,[207] arises if the differentiation bears a rational connection. The second enquiry entails a determination as to whether the differentiation amounts to unfair discrimination.

201 *Walker* 1998 (CC) at para. [26].

202 *Harksen* 1998 (CC) at para. [53].

203 *Ibid.* For critique of this approach, see Van Marle, (2000, *An Ethical Interpretation*); Van Marle, (2001, *Reflections on Teaching Critical Race Theory at South African Universities/Law Faculties*), at p. 91 where she argues that the "*Harksen* test is a step towards *reification* of substantive equality and avoidance of its indeterminate meaning" [original emphasis].

204 See *Prinsloo* 1997 (CC) at para. [23] where the majority held that "[t]he idea of differentiation … lie[s] at the heart of equality jurisprudence in general and of s. 8 [now s. 9] right or rights in particular…".

205 *Ibid.* See also *Prinsloo* at para. [31] where it is said that discrimination, in the context of our particular history, has acquired a "pejorative meaning" which relates to the "unequal treatment of people based on characteristics attaching to them".

> "[U]nfair discrimination … principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity."

206 *Van der Merwe v Road Accident Fund* 2006 (4) SA 230 (CC) at para. [59]. In other words, this entails the so-called limitation analysis in terms of s. 36(1) of the Constitution. I am not aware of any CC judgment where *unfair* discrimination has been held to constitute a reasonable and justifiable limitation of the right to equality. One *can* possibly argue that, conceptually considered, s. 9(2) measures constitutes a reasonable and justifiable limitation on an individual's right against unfair discrimination, although that analysis would be within the realm of s. 36(2) rather than s. 36(1).

207 See *Sodomy* 1999 (CC) at para. [18] where the Court held that the rationality test does not inevitably precede the unfair discrimination test, and that the "rational connection inquiry would be clearly unnecessary in a case in which a [C]ourt holds that the discrimination is unfair and unjustifiable". Before considering whether the conduct amounts to discrimination, the differentiation *per se* is analysed. One need not consider differentiation and only thereafter the discrimination, but the methodology of the doctrine established by the CC moves from (ir)rational differentiation to (unfair) discrimination ending up at justifiability.

'Discrimination' denotes differentiation on either a ground listed in section 9(3) or any other that has the *potential* to impair the complainant's human dignity.[208] 'Unfair' requires assessment of the impact of the discrimination; that is determining whether the discrimination impacted on the complainant unfairly.[209] Where the differentiation does not amount to unfair discrimination, the enquiry ends and there is no infringement of section 9(3) or section 9(4). However, if the discrimination is unfair, the third enquiry again entails a determination as to whether the infringement is reasonable and justifiable in an open and democratic society based on the values of human dignity, equality, and freedom.

6. RESTITUTIONARY MEASURES

Section 9(2)[210] finds application when a defendant argues that differentiation between people or categories of people is an attempt to protect and advance people disadvantaged by past discrimination. The purpose of section 9 is, among other things, *remedying* the results of patterns of discrimination and disadvantage. Section 9(2) gives effect to this purpose. For a defendant to succeed in his, her, or its defence against a claim of unfair discrimination, a defendant may "meet the claim by showing that the measure is contemplated by section 9(2) in that it promotes the achievement of equality and is designed to protect and advance persons disadvantaged by unfair discrimination".[211] Determining whether a lawful measure is a restitutionary or remedial measure as contemplated in section 9(2) entails a three-stage enquiry: (*i*) does the measure *target* persons or categories of persons who have been *disadvantaged by unfair discrimination*, (*ii*) is the measure *designed* to protect or advance such persons or categories of persons, and (*iii*) does the measure *promote the achievement of equality*?[212] The pivotal question is whether a measure complies with these three requirements. A Court cannot use the *Harksen*-test, as the Supreme Court of Appeal did in *Solidarity obo Barnard v South African Police Service*[213] where it must decide on the lawfulness or constitutionality of a restitutionary measure.[214] If a Court were to find that a measure does not

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208 *Harksen* 1998 (CC) at para. [54]. Note that Ackermann, J. held in *Sodomy* 1999 (CC) at para. [18] that it "does not mean, however, that in all cases the rational connection inquiry of stage (*a*) must inevitably precede stage (*b*). The stage (*a*) rational connection inquiry would be clearly unnecessary in a case in which a court holds that the discrimination is unfair and unjustifiable".

209 *Harksen* 1998 (CC) at para. [52].

210 In contrast with s. 9(1) and s. 9(3) (or s. 9(4)).

211 *Van Heerden* 2004 (CC) at para. [37].

212 *Ibid.*

213 *Barnard* 2014 (SCA) at paras. [50] & [55].

214 *Ibid.* at para. [143].

fall within the ambit of section 9(2), and it constitutes discrimination on a prohibited ground, the *Harksen*-test must be applied.[215]

This aspect of equality has been referred to as restitutionary equality and it is my opinion that one should apply the principles underlying restitutionary equality primarily when dealing with a case concerning restitutionary measures and section 9(2). I am not arguing that the principles of restitutionary equality should not inform equality jurisprudence in general. The principles of restitutionary equality must inform the interpretation and application of section 9(1) and 9(3) or 9(4), respectively. In *Fourie* the Court did not apply section 9(2) and rightly so.[216] When asking whether homosexual people are discriminated against when prohibiting such people from entering into a marriage, the Court was not asked to decide whether a measure put in place to remedy the *results* of past discrimination was constitutionally consonant. In assessing the impact of the discrimination, the Court did acknowledge that homosexual people has been victims of past discrimination and, therefore, the impact of the discrimination is severe.[217] The Court understood that by finding that such discrimination was unfair, it not only prohibited the perpetulisation of such patterns of disadvantage, it was a first step in remedying such patterns and systemic form of disadvantage. The judgment itself served as a confirmation of homosexual persons being fully human. As such, the judgment is constative in that it serves as a statement declaring homosexual persons being humans – not failed humans. By disrupting society's socially constructed prejudicial perception of normality vested in heterosexuality, the judgment is performative. The perceived normativity of homosexuality is formally and legally displaced and that which remains is for the society to follow suit.

7. CONCLUSION

This chapter sets out the purposes of section 9, which is forthcoming from its interpretation, as discussed in the first section of the chapter. Following thereon I extract certain themes of substantive equality that emphasises the legal subject and how the right to equality ought to make a difference in the life of the legal subject. The emphasis is on the jurisprudence of the subject rather than the subject of equality jurisprudence. Building upon the third theme I turn to a discussion of the dignity-based approach, which is part and parcel of the Court's substantive conception of equality, hence my description of the Court's equality jurisprudence as a dignity-based substantive approach to equality. The chapter comes to an end with an overview

215 *Van Heerden* 2004 (CC) at para. [36], here the CC referred to assessment of the impact of the discrimination on the complainant(s) as set out in *Harksen* 1998 (CC) at para. [52].

216 *Fourie* 2006 (CC).

217 *Ibid.* at paras. [49] & [50].

of section 9, but the doctrinal analysis of section 9(1) and sections 9(3)-(5) is found in the Appendix. The only remaining aspect of the Court's equality jurisprudence is section 9(2) or then remedial or restitutionary equality, which, in turn, leads to a discussion of the fundamental problem of inadequate social transformation.

CHAPTER 3: SECTION 9(2) & INADEQUATE SOCIAL TRANSFORMATION

1. INTRODUCTION

Allow me to introduce this Chapter with a paragraph regarding the constitutional context of section 9(2), as I understand it. Considering the language of the Constitution, the Constitution is directed at a specific goal or end. This goal is not the affirmation of the *status quo* because the Constitution is future-orientated, not complacent, and transformative. The people of South Africa adopted the Constitution to heal the divisions of the '*past*' and '*establish*' a society based on democratic values, social justice, and fundamental human rights. Emphasis is placed on the 'past' because the Constitution is conscious of our past and this inference is valid because the value found in section 1*(a)* is not equality *per se*, but the *achievement* of equality. Therefore, if equality is to be achieved, then one must accept that the *status quo* is characterised by that which is not that which is to be achieved, and that is an unequal society. Emphasis is placed on 'establish' because the Interim Constitution constituted a new *legal* order in which there is equality between men and women and people of all races.[1] As such, the constituted a new legal order, but is directed to establish a *society* in which there is equality between men and women and people of all races. The Constitution as memorial relates to the following statement: a legal order in which everyone is equal before the law is not necessarily, and certainly not in a South African context, the equivalent of a materially equal society. The (Interim) Constitution as memorial, on the other hand, warns us that, even though a new legal order has been constituted, a materially equal society characterised by social justice (in other words, a society transform*ing* socially) is the ideal, yet to be achieved and it is up to the individual and collective agency of its citizenry to act pro-actively in aspiring toward achieving this ideal of a socially just society – because one cannot characterise a materially unequal society as socially just.

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1 See the Preamble of the Interim Constitution indicating a clear need for a "new order" and *Makwanyane* 1995 (CC) at paras. [7], [58] & [262] where the CC held that the Interim Constitution established (constituted) a new *legal* order.

Against this background, I make it plain and state that the principle concern of this chapter is inadequate social transformation; that is, addressing the second part of the first fundamental question asking why substantive equality did, as developed by the Constitutional Court, not bring about adequate social transformation. My argument in this chapter includes a submission that the Constitutional Court's conception of substantive equality sets the scene for (*i*) systemic and materialist prominence, (*ii*) an uncritical approach towards 'identity representivity' (and, accompanying, narrow and exclusionary understanding of quotas), (*iii*) an essentialist understanding of our history culminating in a grand narrative of history, and (*iv*) the ossification of subjectivity, the meaning of being human, or then the self. The ossification of the meaning of being (existence *as*) human is the signifier of the fundamental problem and is the result of (*i*) to (*iii*). Inadequate social transformation is, I submit, at the prejudice of ethical relations between human beings and transformed conceptions of each other. I remind the reader that, concisely put, social transformation denotes (*i*) radical change and (*ii*) a process of be-coming. The process of be-coming requires each one of us to never be complacent with the meaning of being (existence *as*) being. The inadequacy of social transformation is signified by the pejorative, discriminatory, hegemonic, and other morally abhorrent conceptions of the other still plaguing South Africa. Social transformation seeks transformation of (*i*) the conceptions that we have of each other (that is, transformation of the ontological meaning of man, woman, white, black, homosexual, heterosexual; in short, transformation of subjectivity) and (*ii*) morally shattered relationships between human beings *inter se*.

In Chapter 2, I made it clear that historical context is important when interpreting section 9. Such importance is ascribable to our past injustices and, thus, apartheid and, whilst not disagreeing with the import thereof, the manner in which and consequences attached to a version of our history is especially problematic. The essentialist understanding of our history that has seen the light of day culminated in and is, thus, the epitome of a grand narrative of our history. Such version of history is occasioned by the exclusionary and disadvantageous ontological (re)definition of being (existence *as*) human as well as difference between and amongst human beings. The constitutional context of this (re)definition is transformation and the doctrinal *locus* is section 9(2). In short, transformative equality jurisprudence is plagued by a grand narrative of history and has culminated in the disadvantageous (re)definition of human beings as well as the difference between and amongst them. This problem is exacerbated by an overemphasis of and preoccupation with material transformation whilst disregarding the ethical relation between human beings. The consequence is then a sheer inadequacy in transforming our society socially that is signified and occasioned by a lack in social cohesion.

Flowing from the fundamental problem of inadequate social transformation is the identification and recognition of the fundamental fallacy tied up in (*i*) the legal conception of the legal subject (self) and (*ii*) the manner in which the law perceives the relationship between legal subjects. South Africa is not socially transformed because the self and the manner in which we perceive the being of our-selves have, quite astonishingly, remained unchanged. Let me introduce this problem forthwith. I submit that transformative equality jurisprudence is the problem in that it caused renewed ossification of subjectivity (the meaning of being (existing *as* a) human being). The being of a black human being, still, whether by some or all white South Africans, remains to be perceived as lesser than or inferior to the white human being. From another perspective, the being of a white human being is conceived as representing immeasurable and inexhaustible white privilege and the personification of racism, whether overt, unconscious, or as the architect of structural racism. Considered otherwise, black means the victim of racism, in its various forms, and the impossibility of being a racist, whereas white means the historical, present, and future perpetrator of heinous racist acts. Considered from a further alternative perspective, to be white means to be previously and currently advantaged and to be black means to be previously and currently disadvantaged. I do not argue that no black South African is in a disadvantageous position nor am I disregarding the existence of white racism (whilst also acknowledging black racism). My submission is: in 'post'-apartheid South Africa human subjectivity has been reduced to the duality of black and white and the metaphysical 'reality' represented thereby. In other words, the meaning of being (existence *as*) human has been (re)defined by ontological characteristics found beyond the appearance of any black or white South African. The consequence of again defining white and black is (re)definition of difference itself.

It is up to the subjects within our transformed legal order to transform the *social* order (society) in both a material *and* social sense. It is not the Constitution that effects transformation, but rather legal subjects. My identification, discussion, and critique of the fundamental problem should not be misinterpreted and misunderstood to the effect that I reject material transformation, which includes employment equity and broad-based economic empowerment. My argument does not amount to an outright rejection of the past and its consequences. I merely seek to bring human beings back into themselves and to emphasise their existence (being-with) in a relationship with the other. My aim is to develop a language of equality that in fact speaks *about* human beings and their lived experiences. Whilst being at risk of flogging a dead horse, material transformation is justified in principle, but the manner in which we *ought* to transform must include refined programs of material transformation. In addition, transformation must be

understood as social transformation as opposed to mere (material) transformation. Accordingly, by having regard to the social within social transformation one is committing oneself to a process of transformation that (*i*) is ethically cognisant of and *compassionately*[2] concerned for the ethical relations towards others, (*ii*) emphasises and prioritises (perpetual be-coming of) the being(*s*) of human beings, (*iii*) harbours respect for (the difference of) the other, and (*iv*) instils nuance and sophistication to transcend our – not so distant – past with and within the process of social transformation. Although social transformation is alive as regard to the consequences of transformation on segments of our society, it cannot countenance transformation that is tainted by a lack of respect and concern for the other, a-contextual programs, principles and rules, and a general sense of malice that parade under the guise of material or substantive transformation. On the flipside, social transformation enjoins South Africans to understand and appreciate that advocating for and persistence upon mere and absolutist formal equality is *per se* insulting to the other but, in addition, seeks to make a mockery of our constitutional ideal of equality. Current transformative jurisprudence is not assisting in transforming the social order, since it places excessive emphasis on transforming the lived reality of individuals with phrases such as substantive equality is focused on "systemic forms of domination within society" to "reorder systemic and entrenched disadvantage" as well as "optimise human development".[3] In the same vein, one finds that the Constitution enjoins dismantling of existing "levels and forms of social differentiation and systemic under-privilege" as well as preventing the creation of "new patterns of disadvantage" within our society.[4] This narrative relates to and is found in what has been advocated for by Albertyn & Goldblatt under the rubric of transformation as the "redistribution of power and resources" and "eradication of systemic forms of domination".[5] However, I proceed from the recognition that because a "socially inclusive society is idealised by the Constitution"[6] equality is to be regarded as the ideal[7] to be strived for while recognising that in aspiring to become an equal society social transformation must follow, which is not limited to only material transformation.

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2 See Pt. II, Ch. 5 at p. 190 regarding *Ubuntu* and compassion.

3 Moseneke, (2002, *The Fourth Bram Fisher Memorial Lecture: Transformative Adjudication*), at p. 317.

4 *Van Heerden* 2004 (CC) at para. [27].

5 Albertyn & Goldblatt, (1998, *Facing the Challenge of Transformation*), at p. 272.

6 *Barnard* 2014 (CC) at para. [33].

7 Equality as an ideal is not foreign to the CC, see, for example *Walker* 1998 (CC) at par. [46] where Langa, D.P., as he was then, refereed to "the ideal of equality".

1.1. STRUCTURE OF THE CHAPTER

This chapter is structured to unpack the fundamental problem of inadequate social transformation. Although an exposition and articulation of the fundamental problem forms the first section of this chapter, the articulation of the fundamental problem is carried through and weaved into the entirety of this chapter. The fundamental problem is articulated with reference to (*i*) jurisprudential inadequacy, (*ii*) the shackles of a grand narrative of history, and (*iii*) the ossification of subjectivity. The shackles of a grand narrative of history and the ossification of subjectivity also informs and broadens the jurisprudential inadequacy by identifying and explaining the so-called 'essential context' adopted by the Constitutional Court. After articulation of the fundamental problem, I turn to a generalised discussion and introductory assessment of section 9(2) of the Constitution; that is, remedial or restitutionary equality. The underlying theoretical basis of restitutionary equality is investigated where after I attend to a doctrinal analysis of section 9(2), which is divided in two parts. First, qualification as a section 9(2) remedial or restitutionary measure and, second, application of section 9(2). Before concluding this chapter, the interaction between transformation and race relations is analysed. In specific, the public perception of race relations and the relationship thereof with transformation is analysed with specific emphasis on the impact of such perception and transformation on minority groups, which is not only white people. After the latter analysis the chapter is formally concluded.

2. JURISPRUDENTIAL INADEQUACY: SOCIAL TRANSFORMATION

The fundamental problem is occasioned by a jurisprudential inadequacy that is signified by the Constitutional Court's misinterpretation of "social transformation". The Court held that it "has emphasised on many occasions … [that the] Constitution is a document committed to social transformation".[8] In justification of the latter statement, O'Regan, J. referred to *Makwanyane,*[9] *Soobramoney*[10] *Van Rooyen v S*,[11] *Bato Star*,[12] and *Van Heerden*.[13]

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[8] *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign and Others v MEC for Local Government & Housing in the Province of Gauteng* 2005 (1) SA 530 (CC) at para. [6].

[9] *Makwanyane* 1995 (CC) at para. [262]:

> "All constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people, and which discipline its government and its national institutions; the basic premises upon which judicial, legislative and executive power is to be wielded; the constitutional limits and the conditions upon which that power is to be exercised; the national ethos which defines and regulates that exercise; and the moral and ethical direction which that nation has identified for its future. In some countries. the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and

unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic. The past institutionalised and legitimised racism. The Constitution expresses in its preamble the need for a "new order … in which there is equality between … people of all races". Chapter 3 of the Constitution extends the contrast, in every relevant area of endeavour …. The past was redolent with statutes which assaulted the human dignity of persons on the grounds of race and colour alone; [s.] 10 constitutionally protects that dignity. The past accepted, permitted, perpetuated and institutionalised pervasive and manifestly unfair discrimination against women and persons of colour; the preamble, [s.] 8 and the postamble seek to articulate an ethos which not only rejects its rationale but unmistakenly recognises the clear justification for the reversal of the accumulated legacy of such discrimination. The past permitted detention without trial; [s.] 11(1) prohibits it. The past permitted degrading treatment of persons; [s.] 11(2) renders it unconstitutional. The past arbitrarily repressed the freedoms of expression, assembly, association and movement; [ss.] 15, 16, 17 and 18 accord to these freedoms the status of "fundamental rights". The past limited the right to vote to a minority; [s.] 21 extends it to every citizen. The past arbitrarily denied to citizens on the grounds of race and colour, the right to hold and acquire property; [s.] 26 expressly secures it. Such a jurisprudential past created what the postamble to the Constitution recognises as a society "characterised by strife, conflict, untold suffering and injustice". What the Constitution expressly aspires to do is to provide a transition from these grossly unacceptable features of the past to a conspicuously contrasting: "future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex."

10 *Soobramoney* 1998 (CC) at para. [8]:

"We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring".

11 *Van Rooyen v S* 2002 (2) SACR 222 (CC) at para. [50]:

"… [T]ransformation involves not only changes in the legal order, but also changes in the composition of the institutions of society, which prior to 1994 where largely under the control of whites and, in particular, white men. The Magistrates Commission, constituted as it was in 1993, could not be expected to escape this process".

12 *Bato Star* 2004 (CC) at para. [73]:

"South Africa is a country in transition. It is a transition from a society based on inequality to one based on equality. This transition was introduced by the interim Constitution, which was designed "to create a new order based on equality in which there is equality between men and women and people of all races so that all citizens should be able to enjoy and exercise their fundamental rights and freedoms." This commitment to the transformation of our society was affirmed and reinforced in 1997, when the Constitution came into force. The Preamble to the Constitution "recognises the injustices of our past" and makes a commitment to establishing "a society based on democratic values, social justice[,] and fundamental rights". This society is to be built on the foundation of the values entrenched in the very first provision of the Constitution. These values include human dignity, the achievement of equality and the advancement of human rights and freedoms" [footnotes omitted].

13 *Van Heerden* 2004 (CC) at paras. [22]-[23]:

"The achievement of equality goes to the bedrock of our constitutional architecture. The Constitution commands us to strive for a society built on the democratic values of human dignity, the achievement of equality, the advancement of human rights and freedom. Thus[,] the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance.

For good reason, the achievement of equality preoccupies our constitutional thinking. When our Constitution took root a decade ago our society was deeply divided, vastly unequal and uncaring of human worth. many of these stark social and economic disparities will persist for long to come. In effect the commitment of the Preamble is to restore and protect the equal worth of everyone; to heal the divisions of the past and to establish a caring and socially just society. In explicit terms, the Constitution commits our society to 'improve the quality of life of all citizens and free the potential of each person" [footnotes omitted].

Whilst it might be *said* that the Court has referred to a distinct concept entitled social transformation in these cases, it, in reality, did not. The Court has not, to date, with any degree of certainty or intent articulated an understanding of the 'social' in social transformation. The Court has referred to social justice as denoting, among other things, substantive enjoyment of human rights and freedoms, which includes substantive equality and, thus, substantive equality (of outcome) between different social groups. However, it has left the ethical relation *vis-à-vis* legal subjects virtually untouched. Whilst the focus is on attaining material equality and dismantling of structural and systemic privilege and unequal power relations, little to no attention is had to the relationship between human beings or the manner in which they perceive each other and how the law perceives legal subjects.

In continuance with this inchoate and hollow conception of social transformation that is overwhelmed by materialist and structuralist concerns, I have traced, within the judgments of the Court, such a materialist concern for, emphasis upon, and development of transformative elements within equality jurisprudence aimed at achieving material equality. These elements merely show that the social, within social transformation, has been overlooked. In exacerbation of this problematic, I submit that substantive equality has reified to such an extent that the *human* has been overlooked to such an extent that we (humans) are overlooked in our own process of (social) transformation – or then be-coming.[14]

When the Court considered unfair discrimination and the interpretation of the equality clause, the then section 8 if the Interim Constitution, for the first time, it was unanimously held by O'Regan, J. that our equality clause must be interpreted in light of our particular history.[15] In light of this history of visible and vicious "pattern[s] of discrimination" and "systematic motifs of discrimination … inscribed on our social fabric" the drafters of section 8, now section 9, recognised that "*systematic patterns of discrimination* on grounds …[, such as,] race have caused, and may continue to cause, considerable *harm*" [own emphasis]. As such, section 8, now section 9, was adopted with the recognition in mind that discrimination against people who are members of disfavoured groups can lead to *patterns* of *group disadvantage* and *harm*. A few years later Goldstone, J. held that:

> "At the heart of the *prohibition of unfair discrimination* lies a *recognition* that the *purpose* of our new constitutional and democratic order is the *establishment of a society* in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. … [S.] 8(3) [of] the [I]nterim Constitution contains an express recognition that there is a *need for measures* to seek to *alleviate the disadvantage* which is the product of *past discrimination*. We need, therefore, to develop a

14 See Pt. II, Ch. 4, regarding social transformation and be-coming.

15 See Pt. I, Ch. 2 at pp. 35-41 regarding interpretation of s. 9 of the Constitution.

> *concept of unfair discrimination* which recognises that, although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, *we cannot* achieve that goal by *insisting upon identical treatment in all circumstances before that goal is achieved*."[16] [own emphasis]

Goldstone, J. expressly linked "restitutionary equality"[17] with unfair discrimination law, which is not – in and of itself – wrong, but, if misunderstood, can lead to a skewed conception of, and thus, process of social transformation. The principles of restitutionary equality *must inform* the interpretation and application of section 9(1) and section 9(3) or section 9(4), respectively, even if the case is not one where it is argued that the impugned conduct is justifiable as it is a restitutionary measure. What is problematic with both *Brink* and *Hugo* is the emphasis on material inequality and invocation of restitutionary equality thought within unfair discrimination law, which is not incorrect *per se*. However, a more enabled, open, and clear articulation and the difference between the two 'elements or parts' of our equality jurisprudence would have been prudent, to say the least. In moving along the chronology, in *Prinsloo* the Court referred to and quoted *Brink* when it referred to the *history* of South Africa. Ackermann, O'Regan, and Sachs, J.J. continued to hold that:

> "Our country has diverse communities with different historical experiences and living conditions. Until recently, very many areas of public and private life were invaded by *systematic legal separateness* coupled with legally enforced advantage and disadvantage. The impact of *structured* and *vast inequality* is still with us despite the arrival of the new constitutional order. It is the majority, and not the minority, which has suffered from this legal separateness and *disadvantage*. While our country, unfortunately, has great experience in constitutionalising inequality, it is a newcomer when it comes to ensuring constitutional respect for equality. At the same time, South Africa shares *patterns of inequality* found all over the globe, so that any development of doctrine relating to s[.] 8 would have to take account both of our specific situation and of the problems which our country shares with the rest of humanity."[18] [own emphasis]

The Court, thereafter, referred to *Brink* and emphasised that the equality clause must be interpreted within our context and in terms of our jurisprudential and philosophical understanding of equality.[19] However, whilst recognising that the right to equality means the right to be treated as equals, which does not always mean the right to receive equal treatment,[20] the Court proceeded by quoting paragraph 41 of *Hugo*, which is quoted above. The consequence of referring to *Hugo* is that the Court referred to the fact that *identical* treatment is uncalled for in

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16 *Hugo* 1997 (CC) at para. [41].

17 The notion "restitutionary equality" was first used by Ackermann, J. in *Sodomy* 1999 (CC) at paras. [61]-[62]. The aforementioned matter did *not* concern any restitutionary measures but merely alleged unfair discrimination.

18 *Prinsloo* 1997 (CC) at para. [20].

19 *Ibid*. at para. [21].

20 *Ibid*. at para. [32].

a case that concerned mere differentiation, which again is not wrong *per se*. However, overemphasis on patterns of and systemic discrimination, disadvantage, and, thus, material inequality to the extent that such reliance is in of itself irrational will overshadow the alleged irrationality of the differentiation, which would be in breach of section 9(1). In principle, section 9(1) is not infringed because benefits are conferred, or burdens are imposed *unevenly*, but because such benefits are conferred, or such burdens are imposed without a *rational* basis.[21] Accordingly, restitutionary equality concerns can only be relevant to the extent that such considerations can render the basis on which benefits were conferred or burdens imposed either rational or irrational.

Without merely disregarding my analysis in Chapter 2, I submit that the Court's equality jurisprudence is a-social. The Court is ostensibly alive towards and considerate of a claimant's position within society and his or her reality. Reality, in this context, refers to one's material (economic),[22] political,[23] personal, and group-related[24] (as opposed to social (relational)) conditions. The Court has, to an extent at least, but in its totality, at worst, disregarded the meaning of being (existence *as*) human. The Court's equality jurisprudence speaks a language of equality in terms of which substantive equality is the subject of 'post'-apartheid equality jurisprudence whereas it ought to be the equality jurisprudence of the subject in a 'post'-apartheid context. Simply put, emphasis on subjectivity and its meaning is insufficient.

During apartheid the law purposefully disadvantaged specifically identified and defined groups of people. Advantage was bestowed upon others through the instrumentality of the law and on the basis of personally held characteristics such as race, sex, gender, sexual orientation, and birth. Legal differentiation between people and categories of people was based on grounds that has the *potential* to impair dignity. To this day advantage is still bestowed through the instrumentality of the law on the basis of race, sex, and disability; in other words, grounds that has the *potential* to impair human dignity. However, post-apartheid restitutionary discrimination (affirmative action) is not unfair, irrespective of actual disadvantage or socio-economic conditions as the notion of disadvantage is abstracted from the realm of 'appearance' (the perceptive reality of experienced disadvantage) into the realm of ontological 'reality' (the attributed and purported 'reality' disadvantage) by race and transformative racism.

21 *Van der Merwe* 2006 (CC) at para. [49].

22 See *Walker* 1998 (CC) for *an* example where the CC considers economic disadvantage.

23 See also *ibid.* where the CC recognized white people as a political minority.

24 See *Sodomy* 1999 (CC) where the CC has held that gay men – as a group – are victims of systemic discrimination.

Contrary to what Albertyn & Goldblatt submits, equality cannot draw content from the difference (between people) that perpetuates subordination of a disadvantaged group and disadvantage alone,[25] but rather from the *act* of differentiation considered *together* with the grounds on which people or categories of people have been differentially disadvantaged and the consequence thereof, which is a state of being disadvantaged. Overemphasis on difference and entrenched (systemic) disadvantage fixate on the *consequence* of discrimination without due cognisance and identification of the root cause of such disadvantage. South Africans are not equal in relation to their difference nor their relative advantage or disadvantage, nor should they be defined thereby. As shown hereunder, South Africans are *ontologically* defined by their (perceived and assumed) advantage and disadvantage. The converse is true; South Africans are (un)equal in relation to their relative (un)dignified position within society. An overemphasis on difference and, especially, disadvantage is erroneous and, if such an understanding is adopted, one is missing the point and showcasing a lack of understanding. Section 9(2) *is* the materialist proxy showcasing a concern for group-based disadvantage *and* equal concern and respect. Material equality and group-based disadvantage is, by virtue of the value achievement of equality and section 9(2), already and *ab initio* a constitutional concern. Insistence without more on systemic concerns and group-based disadvantage is transplantation of section 9(2) jurisprudence and pollution of section 9(1) or section 9(3) jurisprudence. In the case of section 9(3) jurisprudence an objective and an individualistic conception of *dignity* must be allowed to tame and limit systemic and group-based materialist concerns. In other words, there are instances where transformative notions of equality and concerns for systemic disadvantage and inequality are constitutionally irrelevant. To take these notions and concerns into consideration and justify the conduct of a previously disadvantaged individual where he or she commits overt acts of racism would unduly and unjustifiably trample on the dignity of the previously advantaged (white) person. Even more worrisome is the fact that such justification infringes upon the society's own (collective) dignity. To do so would be akin to using white people *merely* as a means to an end, but more than that, where systemic concerns run rampant irrespective of fact and relevance, substantive equality is transformed into formal (a-contextual) unequal treatment, unfair discrimination, and a starting point for the creation of new patterns of disadvantage. Substantive equality is transformed into (a-contextual) unequal formal inequality. This is exactly what transpired in *Duncanmec (Pty) Ltd v Gaylard N.O.*[26]

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25 Albertyn & Goldblatt, (1998, *Facing the Challenge of Transformation*), at pp. 252-253.

26 *Duncanmec* 2018 (CC).

3. SHACKLES OF A GRAND NARRATIVE OF OUR HISTORY AND THE OSSIFICATION OF SUBJECTIVITY

In the introduction of this chapter I have said that my proffered argument, discussed in this chapter, includes a submission that the Constitutional Court's conception of substantive equality sets the scene for (*i*) systemic and materialist prominence, (*ii*) an uncritical approach towards 'identity representivity' (and, accompanying, narrow and exclusionary understanding of quotas), (*iii*) an essentialist understanding of our history culminating in a grand narrative of our history, and (*iv*) the ossification of subjectivity, the meaning of being human, or then the self. The ossification of the meaning of being human is the signifier of the fundamental problem and is the result of (*i*) to (*iii*). Under this heading I articulate the fundamental problem of inadequate social transformation in terms of a grand narrative of our history and the irresponsible polemical relationship with the world that is displayed by the Constitutional Court, academia, and the State. This grand narrative of our history and irresponsible polemical relationship is then showcased by the infamous 'essential context' of the Constitutional Court that it religiously, and as shown below a-contextually, has recourse to when deciding cases involving race, racism, racially offensive conduct, or language, more specifically Afrikaans. It is reiterated that this articulation of the fundamental problem of inadequate social transformation is carried through and weaved into the remainder of this chapter, which is a discussion and critique of remedial or restitutionary equality and measures.

In terms of a grand narrative of history causality is attributed to fictive and invisible entities that *always* ultimately determines a subject's life, work, and way of living; in other words, the experience of humanity.[27] As such, the history of South Africa can be reduced to a single totalising and seamless continuity of a series of interconnected phenomena of subjection (slavery, Colonialism, Imperialism, and apartheid). Such an account of history necessitates an uncritical acceptance that the struggles experienced by *the* South African subject, especially black Africans, in representing himself or herself as a subject of free will, liberated from domination, is *exclusive* attributable to the still enduring *consequence* of this long history of subjugation (referring to, among other things, apartheid). In this context it is appropriate to refer to De Vos who submits that when the Constitutional Court interprets *any* right contained in the Bill of Rights it has recourse to South Africa's past and that the Constitutional Court has created and used a

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27 Mbembe, A., *African Modes of Self-Writing,* Vol. 2, No. 1, (2001), Identity, Culture and Politics, pp. 1-39, at p. 5. I note that Mbembe referred to a "metaphysical account of history", but I decided to refer to a grand narrative based on my link with the work of De Vos – De Vos, (2001, *A Bridge Too Far: History as Context in the Interpretation of the South African Constitution*), at p. 8.

grand narrative of South African history, which narrative is based on Mureinik's famous bridge metaphor,[28] to justify its interpretations.[29]

The Court draws from the text of the Interim Constitution (Post-amble/epilogue)[30] and the Constitution (Preamble)[31] in developing its version of history.[32] The version of the past relied upon is, in this sense, a constitutionally recognised past[33] in that it is the version captured in the text of the Interim Constitution and the Constitution.[34] No rational thinking human being[35] can argue against the irrefutable factual occurrence of apartheid and its empirically justified

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28 The postamble of the Interim Constitution described the Interim Constitution as a "historic bridge" that simultaneously formed the "secure foundation" for a 'post'-apartheid society. In terms of the postamble the Interim 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 co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex". In addition, the postamble continues by reading as follows: The "… adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past".
See Mureinik, (1994, *A Bridge to Where-Introducing the Interim Bill of Rights*), at p. 32 where the author, now, famously opined that:

> "If the new Constitution is a bridge away from a culture of authority, it is clear what it must be a bridge to. It must lead to a culture of justification – a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion."

See *Makwanyane* 1995 (CC) at para. [156] and *Azanian Peoples Organization (AZAPO) v President of the Republic of South Africa* 1996 (4) SA 672 (CC) at paras. [3], [18]-[19] & [48]-[49] where the CC referred to the methaphor.

29 De Vos, (2001, *A Bridge Too Far: History as Context in the Interpretation of the South African Constitution*), at p. 8. See Le Roux, (2004, *Bridges, Clearings and Labyrinths: the Architectural Framing of Post-Apartheid Constitutionalism*) and Van der Walt, (2001, *Dancing with Codes: Protecting, Developing and Deconstructing Property Rights in a Constitutional State*) for critique regarding the use of the metaphor.

30 In *Ex parte Chairpersonof the ConstitutionalAssembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) at para. [5] (hereinafter referred to as "*First Certification* 1996 (CC)") the post[-]amble of the Interim Constitution is quoted by the CC and De Vos, (2001, *A Bridge Too Far: History as Context in the Interpretation of the South African Constitution*), at p. 12 opined, by referring to and quoting *First Certification* 1996 (CC), that the CC has expressed its view of South Africa's past by relying heavily on the wording of the post-amble to the Interim Constitution by describing South Africa's past as that of a "deeply divided society characterised by strife, conflict, untold suffering and injustice" which "generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge". See also *Makwanyane* 1995 (CC) at para. [262]. In *Du Plessis* 1996 (CC) at para. [125] Kriegler, J., in a dissenting judgement, argues that South Africa's past is not merely one of repressive use of state power: "It is one of persistent, institutionalised subjugation and exploitation of a voiceless and largely defenceless majority by a determined and privileged minority. The untold suffering and injustice of which the postscript speaks do not refer only to the previous years, nor only to Bantu education, group areas, security and the similar legislative tools used by the previous government."; in *AZAPO* 1996 (CC) at paras. [1]-[3] Mahomed, D.P. provided an exposition of South Africa's history by quoting, relying on, and discussing the entire epilogue of the Interim Constitution entitled "National Unity and Declaration".

31 *Van Heerden* 2004 (CC) at paras. [23] & [72]. In *Barnard* 2014 (CC) at para. [77], with specific reference to the Constitution's Preamble, it was held that "[t]he Constitution commits us to recognis[e] and redress … the realities of the past".

32 De Vos, (2001, *A Bridge Too Far: History as Context in the Interpretation of the South African Constitution*), at p. 15.

33 It is more than a mere 'official version of the past'.

34 See De Vos, (2001, *A Bridge Too Far: History as Context in the Interpretation of the South African Constitution*), at p. 14 regarding divergent versions of the past.

35 In other word, not short-sighted and subdued by racial or other emotions.

consequences thereof. In other words, we can take judicial notice[36] that apartheid happened and disadvantaged the lives of millions of South Africans. However, taking such judicial notice impacts on both white and black, male and female, homosexual and heterosexual South Africans, and the previously advantaged and those presently advantaged. For the purpose of this thesis I do not entertain analysis of differing versions of our apartheid past.[37] Although there is no single accepted version of our past or history,[38] the past provides for *a* context within which the right to equality can be interpreted and a source from which content of the right to equality might be drawn from with little to no influence of a judge's personal, political, and philosophical views and ideologies. A judge is forced to interpret a right within the context of the South African history as contained within and signified by constitutional text. The (Interim) Constitution itself draws from the past to signify an ideal new society that is in stark contrast with such past and marked by ideals irreducible to subjective interests. The Constitution enables the possibility of social transformation because it is cognisant of the past in its own self-consciousness and enjoins us to never again dehumanise our own (selves) and to move forward and aspire towards the envisioned ideal society that *is* socially just or then characterised by social justice.

Deference in favour of and excessive use of the grand narrative can entrench one version of history, which can, if so deployed or left unchecked, limit or prohibit new meanings in the constitutional interpretation of the right to equality and, thereby, stifle progression. Unwillingness of or if, for some reason, the Constitutional Court finds itself unable to reflect on the entrenched version of this grand narrative it would stifle discovery or recognition of other (new) forms of oppression and marginalisation. Whilst possibly being saddled with a degree of certainty regarding the meaning of the right to equality, the right will not mature together with the increasing knowledge of South Africans as to who they are and how they fit into the world. The Constitutional Court has progressed past its initial grand narrative of history *sourced from or influenced by* constitutional text. Although it seems *prima facie* as a positive development it,

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36 Judicial notice denotes an obligation; that is legally obliged recognition of a *fact*. I use this notion in a broader sense to denote an ethical obligation as opposed to only a legal obligation. Thus, the obligation to take judicial notice is never absolute in that the *facts* can be altered with the consequence that such ethical obligation can come to an end. The facts are, therefore, open towards (re)constitution in terms of the passage of time and progression. With the change of facts, I specifically refer to the *effects* that the consequences of apartheid have on the lived experiences of human beings in a 'post'-apartheid South Africa, which effects cannot remain *as* prevalent as on the advent of democracy in circumstances when the law allows and *enforces* fair discrimination to achieve equality in terms of value *achievement of* equality.

37 In general, see Terreblanche, *A History of Inequality in South Africa, 1652-2002*, (2002) regarding South Africa's *long* history of bigoted inequality.

38 For example, leftists on the political spectrum or those adhering to Africanist or black consciousness views reject the notion that the political compromise reached during the transition is fair or just. They consider the Constitution as a stumbling block, as opposed to a vehicle, in the transformation of South Africa to a truly just society. De Vos, (2001, *A Bridge Too Far: History as Context in the Interpretation of the South African Constitution*), at p. 15.

unfortunately, is anything but positive, since, as difficult as it might seem to believe, history includes the years including and following 1994 to date. A refusal to concede that history has progressed beyond the circumstances and state of affairs of 1994 precludes 'post'-apartheid progressive interpretations of the right to equality. Simply put, we, as South Africans, will only perpetuate the general misconception that *all* black South Africans *are still* disadvantaged, marginalised, discriminated against, and perceived – whether by white South Africans or others – as sub-human if *all of us* do not recognise that **not** *all* black South Africans are in the same position as on 27 April 1994, recognising that *some* progression has been made – some black South Africans have been empowered. Such a recognition includes acceptance, as the Constitutional Court did, that black South Africans are a political majority rendering white South Africans a vulnerable political minority.[39] The next step ought to be a recognition of black empowerment that had already taken place. This refusal to accept positive consequences of transformation is one of the reasons why South Africa is not socially transformed. In the same breath, white South Africans must appreciate the reality of the need for and existence of the transformative project. Rejecting the need to transform is a rejection of our history and undertaking to become a socially just society in which equal dignity is accorded to black and white as well as man and woman. There is no longer a place for white South Africans refusing to partake in the process of transformation simply because the rejection of the need for transformation and empowerment black people, women, and other categories of people *as* human beings is a rejection of their previous subjection as non- or not full human beings. I shall assume, for the current purposes, that the Constitutional Court has not insensibly deferred in favour of and excessive relied on the grand narrative of history that is unjustifiably reliant on the version of history as articulated in the (Interim) Constitution. However, another grand narrative has entrenched a neo-liberationist version of history, as alluded to below.

Related hereto is an irresponsible polemical relationship with the world in terms of which African's "… quest for sovereignty and … desire for autonomy are almost never accompanied by self-criticism".[40] The South African quest for achieving equality is, similarly so, almost never accompanied by constructive recognition of progress, change, and the empowerment of the previously disadvantaged. ***Whilst I am not denying the current state of affairs***,[41] I am unequivocally stating that the lack in recognising progress, change, and the empowerment of the

39 *Walker* 1998 (CC) at para. [48].

40 Mbembe, (2001, *African Modes of Self-Writing*).

41 See for example Henderson, R., *White Males Still SA's Top Managers, Despite Push for Employment Equity across Race and Gender* (E-Pub. Date: 25 Apr. 2016) Electronic Newspaper Article: Times Live [Accessed on: 18 Oct. 2016].

previously disadvantaged is nothing else than bigoted, selfish, and power-hungry partisan and populist politicking that has taken our quest for achieving equality hostage.

In recent – racially sensitive – judgments it has become apparent that certain (black) justices of the Constitutional Court have developed an essentialist conception and account of South Africa's history and one that is devoid of any objective impartiality. The absolutist and exclusionary version of history will disallow the right to equality any opportunity to mature together with the increasing knowledge of South Africans *as to who they are and how they fit into the world*. In recent judgments Afrikaans speaking white South Africans have been informed that Afrikaans is irreversibly tainted by the historical injustices perpetrated in and through the use of and advancement of Afrikaans and have been disallowed a constitutional and interest or right based sense of belonging. This conclusion is based on and sought to be justified by the Court's interpretation of and exclusionary consequences attached to its infamous 'essential context'. The heading "[e]ssential context" is found above paragraph 2 in the majority judgment penned by Mogoeng, C.J. in *City of Tshwane Metropolitan Municipality v Afriforum*.[42] The heading "[e]ssential context" is similarly found above paragraph 3 in the majority judgment penned by Mogoeng, C.J. in *South African Revenue Service v Commission for Conciliation, Mediation, and Arbitration*[43] as well as above paragraph 1 in *Afriforum v University of the Free State*.[44] The essential context and its consequences has culminated in the most a-contextual and internally contradictory judgment of the Constitutional Court, to date.[45]

3.1. THE ESSENTIAL CONTEXT

In *City of Tswhane* Afriforum applied for an interdict to prohibit the removal and changing of old street names by the City of Tshwane Metropolitan Municipality. Quite astonishingly and unacceptably Afriforum made the following statement in its founding affidavit: "*so-called* 'historical injustices of the past'" [original emphasis].[46] Afriforum lost the case with that statement alone. Be that as it may, in the majority of *City of Tswhane* the following is, without more, taken as fact without any reference to examples of the cities and towns that "reverberate with great sounds of veneration for the architects of apartheid" and the relentless full-scale-and-without-exception challenging of progressive or potentially conciliatory change to city, town, or street names:

42 *City of Tshwane Metropolitan Municipality v Afriforum* 2016 (6) SA 279 (CC).
43 *South African Revenue Service v Commission for Conciliation, Mediation, and Arbitration* 2017 (1) SA (CC).
44 *Afriforum v University of the Free State* 2018 (2) SA 185 (CC).
45 That is, *Duncanmec* 2018 (CC).
46 *City of Tshwane* 2016 (CC) at para. [120].

> "[C]olonialism or apartheid is a system so stubborn that its divisive and harmful effects continue to plague us and retard our progress as a nation more than two decades into our hard-earned constitutional democracy. *Almost all cities, towns*[,] *and street names continue to reverberate with great sounds of veneration for the architects of apartheid, heroes and heroines of our oppressive and shameful colonial past*. *Virtually no progressive or potentially conciliatory change to city, town or street names goes unchallenged*. There are fairly regular challenges to the equitable distribution of honour to heroes of all cultural or racial groups and a concomitant determination to preserve exclusivity to privilege and meaningful control."[47] [own emphasis]

Mogoeng, C.J. continued and held that:

> "The injustices of the past are *not to be pampered or approached with great care or understanding or sympathy*. And the immeasurable damage racism or cultural monopoly has caused requires that *stringent measures* be taken to undo it. *That approach* will help us move away from exclusivity to opportunities, racial domination[,] and intolerance to *inclusivity, social cohesion*[,] *and equitable access to opportunities*."[48] [own emphasis]

Mogoeng, C.J. believes that the injustices of the past are to be approached with a lack of care, understanding, and sympathy, which would then, inconceivably, lead to inclusivity, social cohesion, and equitable access to opportunities. The current lack of social cohesion is ascribable to such an irresponsible and arrogant approach. If I may be so bold to refer our learned Chief Justice to the post-amble of the Interim Constitution entitled "National Unity and Reconciliation":

> "The adoption of this [Interim] Constitution lays the secure foundation for the people of South Africa to *transcend the divisions and strife of the past*, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt[,] and revenge.
>
> These can now be *addressed on the basis* that there is a *need for understanding* but not for vengeance, a *need for reparation* but not for retaliation, a *need for* [*U*]*buntu* but not for victimisation." [own emphasis]

In the same vein, Jafta, J. wrote a separate concurring judgment which has, as an implication, that "… any reliance by white South Africans, particularly white Afrikaner people, on any historically rooted cultural tradition finds no recognition in the Constitution, because that history is inevitably rooted in oppression".[49] In a minority judgment Froneman and Cameron, J.J., two white male justices, took the two judgments to task. They stated that a repressive, domineering, or discriminatory history may also be of concern to those who take pride in the achievements of King Shaka Zulu (despite the controversy about his reign) as well as those who nurture the memory of Mahatma Gandhi's struggles in South Africa (despite the repugnant

47 *Ibid.* at para. [4].
48 *Ibid.* at para. [6].
49 *Ibid.* at para. [130] read with para. [164].

statements made by him about black Africans).[50] The justices quite correctly stated that our country's history is rich and complex, but in addition, such complexity means that history has a meaning for each of us, in diverse ways, which the Constitution accommodates and respects.[51] They were emphatic by holding that "[t]he complexities of history cannot be wiped away, and the Constitution does not ask that we do so", whereas Jafta, J. is of the mistaken belief that:

> "The fact that the oppressive racist history exists at the level of fact does not mean that it deserves any recognition in the Constitution. Therefore, the implication which the second judgment says may be drawn from the first judgment, would be the correct one. … [R]acist and oppressive cultural traditions have no place in our constitutional order, even though they may exist in history. In contrast, such traditions belong in the dust-bins of history where they ought to be buried." [52]

The Constitution must recognise the existence of and can never ignore objective fact or truth, since to do so would to impute a legal faction of non-existence upon the existence of an objective fact or truth.[53] However, the Constitution determines the manner in which legal subjects can justifiably claim recognition and *protection* of (a sense of belonging grounded in) such fact or truth, which can then, naturally include a culture, tradition, practice, or even religion rooted in the past. Once this nuance is understood one would come to take cognisance of the slippery slope upon which Jafta, J. and Mogoeng, C.J. lost their judicial (impartiality) balance. Their argument reaches the following nonsensical conclusion: the fact that white Afrikaans people was pre-dominantly complicit in the injustices associated with apartheid means that white people cannot have a sense of belonging to *any* of their shared heritage, culture, and practices, since *anything* white, and especially Afrikaans, can be linked or related back to a 'sense, reminder, signified or signifier, or otherwise of (racial) oppression, domination, or control'.

What is a racist and oppressive cultural tradition and who determines that a cultural tradition is racist? My own experience within the workplace is sufficient to explain the problematic that I am identifying, articulating, and delineating. I was involved in a discussion with two colleagues at the office, one white female and the other black female. Whilst engaged in the conversation I made a sarcastic comment to the white Afrikaans female colleague that she should "*ken jou plek*" (know your place). Both the Afrikaans white female employee and the black female employee found the comment quite entertaining – to the extent that the black female employee printed the words "*ken jou plek*" on an A4 white paper and proceeded to place it on the

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50 *Ibid.* at para. [132].
51 *Ibid.*
52 *Ibid.* at paras. [165] & [174].
53 I refer the justice to *Du Toit v Minister for Safety and Security* 2010 (1) SACR 1 (CC) at paras. [31]-[32], [44]-[45], [51]-[53], & [55] and *The Citizen 1978 (Pty) Ltd v McBride (Johnstone, amici curiae)* 2011 (4) SA 191 (CC) at paras. [52]-[72].

wall for all to survey. Another black female employee, not privy to the banter, found the paper on the wall offensive as referring to past and perpetual domination of white people over black people. She remained unaffected even after she was informed of the context within which the paper came about. With utmost respect, the statement is contextually sexist, if at all, before under any stretch of imagination racist. I ultimately removed the paper, but what became clear is that (*i*) as a white Afrikaans male I had no choice but to remove the paper, both from my own ethical conviction, but also based on (*ii*) my political and historically instigated and contemporaneously perpetuated disadvantage based on projected strict culpability and, thus, liability, whether social, moral, or ethical, for past injustices. Simply put, the risk of being branded a racist for uttering the words "*ken jou plek*" to a white female and those words being reduced to writing and placed on a wall by a black female is too excessive for a white male in 'post'-apartheid South Africa, simply because of the manner in which our history is interpreted and consequences thereof attributed to the entirety of the group without more and on an a-contextual basis. No conceivable definition of racism[54] or racist[55] can encapsulate my conduct, but the *laissez faire* approach currently running rampant within 'post'-apartheid South Africa leaves nothing for the imagination. My example is an epitome of a grand narrative of our history, as referred to above, in terms of which causality is attributed to fictive and invisible entities that always ultimately determines a subject's life, work, and way of speaking.

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54 I follow Taylor, Taylor, P.C., *Race: A Philosophical Introduction*, (2004), at pp. 33-34, in understanding the meaning of racism, which, for me, means:

> "… an ethical disregard for people who belong to a particular race and '[d]isregard' in this context means the withholding of respect, concern, goodwill, or care from members of a race. We might do this because we dislike people with certain traits, and because we believe that membership in the race in question involves possessing these undesirable traits."

The aforementioned disregard can be based on extrinsic or intrinsic racism. Taylor, *ibid* at p. 34, submits that the advantages of conceiving racism as 'disregard' are plenty:

> "First, speaking of disregard (and of disrespect and the rest) allows us to cover a range of attitudes all at once, from outright hatred, to the simple failure to notice that someone is suffering, to the related failure to notice that there is a person in front of you, as opposed to the personification of a pre-existing stereotype. I disregard you when I assume that racial stereotype accurately describes you."

The following passage from Blum, in Blum, L., *'I'm not a Racist But …': The Moral Quandary of Race*, (2002), at p. 9, also informs my understanding:

> "Personal racism consists in racist acts, beliefs, attitudes, and behaviour on the part of individual persons. Social (or sociocultural) racism comprises racist beliefs, attitudes, and stereotypes widely shared within a given population and expressed in cultural and social modes such as religion, popular entertainment, advertisements, and other media. Institutional racism refers to racial inferiorising or antipathy perpetrated by specific social institutions such as schools, corporations, hospitals, or the criminal justice system as a totality."

55 The following point made by Blum, in Blum, *'I'm not a Racist But …': The Moral Quandary of Race*, (2002), at pp. 14-15, is of fundamental and utmost importance:

> "A racist person is not merely someone who commits one racist act or acts on a racist motive on a small number of occasions. Motives and attitudes such as bigotry, antipathy, and contempt must be embedded in the person's psychological makeup as traits of character. In this sense, being racist is like being hateful, dishonest, or cruel in implying an *ingrained pattern of thought and feeling as well as action*." [own emphasis]

As concisely put by Matolino in Matolino, B., *There is a Racist on my Stoep and he is Black: A Philosophical Analysis of Black Racism in Post-apartheid South Africa,* Vol. 20, No. 1, (2013), Alternation, pp. 52-77, at p. 60: "… there is a difference between saying a person is a racist and saying that some of her actions are racist".

In *SARS* a white employee of the South African Revenue Service said to his black superior "[*e*]*k kan nie verstaan hoe kaffirs dink nie*" and "A *kaffir* must not tell me what to do".[56] In this judgment there was also reference to the (in)famous essential context. Whilst such reference *in casu* is not incorrect, my argument is the *pattern* of recourse to such essentialist understanding of history is problematic. In ignoring my critique for now, I wish to make it absolutely clear and submit, without a shadow of a doubt, that the employee's conduct *in casu* is racist. I am willing to submit that the employee is also a racist in that the tenor of his comments indicates an "ingrained pattern of thought and feeling as well as action".[57]

In *Afriforum* the Constitutional Court was asked to decide whether "Afrikaans has been 'downgraded' from the status of a major medium of instruction for genuine and constitutionally sound reasons or in the furtherance of some historical and insensitive score-settling agenda".[58] Consistent with his *modus operandi*, Mogoeng, C.J. sketched his (in)famous essential context. As regard to Afrikaans:

> "The level of development attained by the Afrikaans language is in demonstrable ways connected to aspects of history of colonial-settler domination and particularly in its latter phases to the dominant position of a sector of the Afrikaans-speaking communities in the apartheid order. *Afrikaans* became the *language most closely associated with the formalisation and execution of apartheid*. To a great proportion of South Africans it probably calls up first and foremost *associations of discrimination, oppression and systematic humiliation of others*.
>
> These associations understandably often affect the approaches people take to the role and future of Afrikaans. That history of association with racism and racially based practices is often one that Afrikaans-speaking communities will have to confront and deal with. That is part of the challenge of healing, reconciliation and reparation our society will continue to face for a considerable time to come."[59]

In a minority judgment Froneman, J., (Cameron J., and Pretorius, A.J. concurring) held that the majority judgement, penned by Mogoeng, C.J., neglects to mention that the Gerwel Committee recommended that the universities in Stellenbosch and Potchefstroom be designated as 'custodians' of academic Afrikaans, but the Ministry, however, rejected this suggestion.[60] The Ministry, nevertheless, "acknowledged 'that Afrikaans as a language of scholarship and science is a national resource' and[,] therefore supported 'the retention of Afrikaans as a medium of academic expression and communication in higher education' more broadly".[61] The justices also

56 *SARS* 2017 (CC) at para. [7].
57 Blum, *'I'm not a Racist But ...': The Moral Quandary of Race*, (2002), at pp. 14-15.
58 *Afriforum* 2018 (CC) at para. [1].
59 *Ibid*. at para. [89]. Language Policy for Higher Education, November 2002 (Ministerial Policy).
60 *Ibid*. at para. [90].
61 *Ibid*.

mentioned that, *in casu*, it was said, at the least in respect of white students at the University, to be impossible to distinguish the use of Afrikaans from its speakers. The justices aptly emphasised the importance of realising that "the burden of the undeniable injustices perpetrated by white Afrikaans speakers in the past, which are necessarily and justifiably condemned, should not be visited disproportionately and *uncritically*[62] on future generations of white Afrikaans speakers" [own emphasis].[63] It would be appropriate and advisable to be cognisant of JRR Tolkien's sound insight that it is necessary "to distinguish, as far as that is possible, between languages as such and their speakers" and to remember that languages "are not hostile one to another".[64] The language of your enemy will only share (in) your hatred for your enemy in times of hostility.[65] In addition, the use by Mogoeng, C.J. of language such as "downgraded" and "score-setting agenda" merely perpetuates Sachs, J.'s description of: "a genuinely-held, subjective fear that democratic transformation will lead to the down-grading, suppression and ultimate destruction of the Afrikaans language and the marginalisation and ultimate disintegration of the Afrikaans-speaking community as a vital group in South African society".[66]

This essential context has become a grand narrative of the Court and in two out of the three cases discussed white justices had to take the majority to task. This narrative is excessively one-sided and exclusionary in nature. It consequently entrenches a single version of history that has limited and prohibited the development of new meanings of terminology relevant to the right to equality and, thereby, stifled progression. The right to equality has been stifled simply because of the manner in which the law perceives white South Africans. For example, in *City of Tshwane* both Mogoeng, C.J. and Jafta, J. *assumed* that Afriforum is a racist organisation, or that all its members are, without Afriforum having been provided an opportunity to prove the contrary. For some reason the Court is unable to reflect on the entrenched version of this grand narrative that has not only stifled discovery or recognition of other new forms of oppression and marginalisation. This grand narrative has contributed towards the creation of new patterns of disadvantage and already entrenched disadvantage. This version is complicit in neo-liberationism that has ensured the meaning of being (existing as) human to be (re)defined. South Africans have been similarly reconstituted in their ontological being-in-the-world as had been the case in terms of the apartheid pedagogy. The reason for so submitting is this grand narrative of our history

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62 The author is referring the reader to the irresponsible polemical relationship with the world in terms of which African's quest for sovereignty and desire for autonomy are almost never accompanied by self-criticism.

63 *Afriforum* 2018 (CC) at para. [91].

64 Tolkien, J.R.R., *English and Welsh*, in Tolkien, C. (Ed.) *The Monsters and the Critics and Other Essays* (2013), at p. 178.

65 *Ibid.* at p. 179.

66 *Gauteng Provincial Legislature* 1996 (CC) at para. [48].

always operates *along* racial lines as well as sex or otherwise. These judgments clearly define white Afrikaans persons as the advantaged, the oppressor, *prima facie* racist, 'sophisticated and developed', and wealthy.

Segments of the Constitutional Court, although less radical and overt, seems to be aligning themselves with neo-liberationism. What ought to inform a more nuanced conception of equality, which would be an ethical conception by virtue of its emphasis on the ethical relation between human beings, is the rejection of neo-liberationism that is vested with the exclusive purpose of manipulating (sometimes so-called) false appearances (the fashionable false consciousness) in an attempt to *construct* a new hierarchy of exclusion, domination, and political majoritarian racially informed and defined hegemony built on a totalising, indisputable, and ontologically defining historical culpability based on and informed by a grand narrative of history that is inescapably and palpably directed to shame the other whilst carefully avoiding self-criticism evidencing an irresponsible and polemical relationship with the world. An ethical conception of equality calls for a progressive[67] realisation of equality and not a regressive manipulation of 'reality'. It demands responsibility in and when striving for the ideal of equality by recognising the dignity of each human being as an ideal attribution. Under such a conception, subjectivity or identity cannot be (re)imagined to the exclusion of or in *ill-founded* opposition towards the other, or then everything white, especially Afrikaner and Western, more generally speaking. It is expressly stated that neither restitutionary equality nor substantive equality is neo-liberationist nor a *per se* advancement thereof. When restitutionary equality seeks to 'transform' our society through an insistence on a-contextual programmes that disregards the humanity of the other and the need for contemporaneous disadvantage that is a consequence of past unfair discrimination, then it furthers the agenda of neo-liberationism and the ideology of the apartheid pedagogy. Neo-liberationism and the apartheid pedagogy are, therefore, but two contributing and constituting factors of the causes of the fundamental problem. Therefore, substantive equality in and of itself is not neo-liberationist nor a manifestation of the apartheid pedagogy, but restitutionary equality and the need to transform our grossly unequal society has been (mis)used to further the neo-liberationist cause and perpetuate the apartheid pedagogy. I reason and submit that this is the case because a lack, within substantive equality, of ethical concern and regard for the meaning of being (existing *as*) a human being and the relationships between human beings.

An alternative modernity of and for 'post'-apartheid South Africa is on the horizon, ripe for us to (re)imagine and (re)constitute our-selves as well as our perceptions and conceptions of

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[67] Progressive in this context does not relate to gradual realization *per se*, but rather to conduct engaged in or constituting forward looking objectives.

each other's being (existence *as*) human. In the process of be-coming, both as (re)imagined and (re)constituted selves and as a society we can emerge into a new world, a truly 'post'-apartheid modernity signified by a culture of true recognition, respect for, and empathy towards the other, which includes the other's beliefs, culture, customs, opinions and the rest. What stands at the doorstep of the current modernity (characterised and being overrun by racially and politically instigated and inspired neo-liberationism) is (re)imagination and (re)constitution of the totality of our being-in-the-world and I submit that an ethical conception of equality is a *step* in the right direction towards a truly (re)constituted 'post'-apartheid modernity and being-in-the-world. The possibility of such an alternative 'post'-apartheid modernity saw the light of day with the advent of the Interim Constitution, but is subject to banishment by neo-liberationism in the name of raw – racially drenched – political power founded on the partisan and populist narrative of an absolutist and exclusionary construction of post-democracy 'liberation'.

The *Duncanmec* judgment[68] is used as the most recent example to illustrate the extent to which a-contextual recourse to history has 'captured' the minds of the Constitutional Court. This case concerned nine black employees who participated in an unprotected strike and decided to sing a so-called 'struggle song'.[69] The nine employees, whilst participating in an unprotected strike at the employer's premises, danced and sang struggle songs, refused to listen to managers who attempted to address them, and ignored an ultimatum. The lyrics they sang in isiZulu were translated into the following words: "Climb on top of the roof and tell them that my mother is rejoicing when we hit the *boer*".[70] The Court posed to itself two questions it had to answer, but only one is relevant for current purposes; namely, "… whether the conduct of the employees in singing the struggle song in question constituted racism".[71] The racially insensitive, if I am overtly deferent in favour of the employees, was exclusively one-sided; that is, black against white. Irrespective of this fact, the Court found it *necessary* to refer to the history of the oppression of black people at the hands of white people and failed to investigate the meaning of *boer* as it has developed, especially after the advent of democracy.[72] This selective extraction of history was ultimately relied upon and used to justify a finding that a group of black employees were *not*

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68 *Duncanmec* 2018 (CC).

69 *Ibid.* at paras. [10]-[12]. I use the term 'so-called', since a song sang *during* the existence of apartheid can be a struggle song and sang as such. However, apartheid is relegated to the books of history and so must a song sang during the struggle against apartheid. The song can no longer be a struggle song that is sang in the struggle against apartheid, since one ought rather rejoice in and sing about the defeat of apartheid as opposed to the – now non-existent – struggle against the apartheid order. I am alive to arguments that there remains a struggle, such as against the consequences of apartheid. My submission must be taken in the context of this thesis as a whole. If so done it would become patent that I am not blind towards the consequences of apartheid that is still operative in our society today.

70 *Ibid.* at para. [10].

71 *Ibid.* at para. [36].

72 See *ibid.* at paras. [2]-[7].

racist, but only guilty of behaving racially offensive.[73] In answer to the question posed Jafta, J. was "… willing to approach the matter on the footing that the employees were guilty of a racially offensive conduct".[74]

The Court refused to engage on the social, political, and jurisprudential meaning of *boer* that has developed over time including since the dawn of democracy.[75] For the Court history cannot progress past 1994 and the all-embracing, all-inclusive, and irrefutably just referent of apartheid as the justification of its decision. The Court could not desist from the all too eloquent references such as "the false notion and belief that the white race was superior and that the other races were inferior".[76] Whilst I agree with this statement, the case concerned *black* persons who acted racist or racially offensive *against white* people. Instead of recalling the history of apartheid the Court ought to have referred to its own jurisprudence that established a test to determine whether words used are derogatory, in the context of a matter. In *Rustenburg Platinum Mine v SAEWA (obo Bester)* the Court held that the test to be applied is "whether a reasonable, objective[,] and informed person would, on the *correct facts* perceive it to be racist or derogatory" [original emphasis].[77] Although the past can impute meaning on a context, it seems that the past can surgically extract and sanitise overt racist or racially offensive conduct. Based on the Court's grand narrative of our history that cannot progress past the advent of democracy a black person can commit housebreaking with the intent to commit a crime against me *because I am white*, whilst singing a so-called 'struggle song' containing the words 'my mother is rejoicing when we hit the *boer*'. The black person will, hopefully, be found guilty of housebreaking with the intent to commit a crime, but a Court will be unable to declare that the crime has been committed by a racist on the basis of singing of the song that represents a profession of the black person's racist conception of my being, since we must distinguish between "… singing the song and referring to someone with a racist term". By *committing* the crime *because* I am white might hopefully be racist (I can but only hope). However, singing a *racially offensive* song whist committing the crime and singling out my house *because* I am white is not, because one must distinguish between singing the racially offensive song and referring to someone with a racist term.

In developing this narrative of critiquing neo-liberationism, I reiterate and wish to emphasise that restitutionary equality and measures (as understood in terms of section 9(2) as well as affirmative action measures in terms of the EEA), defines groups of people as either

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73 *Ibid*. at paras. [37]-[39].

74 *Ibid*. at para. [39].

75 For a historical account on the meaning of "*Boer*" see *Afri-Forum and Another v Malema* 2011 (6) SA 240 (EqC) at paras. [2]-[5].

76 *Duncanmec* 2018 (CC) at para. [3].

77 *Rustenburg Platinum Mine v SAEWA (obo Bester)* 2018 (5) SA 78 (CC) at para. [47].

advantaged or disadvantaged without more and without any recourse or import given to context of socio-economic circumstances and the question of actual disadvantage or destitute of persons falling within the groups of people disadvantaged by past discrimination. I would term this tendency of substantive equality, more particularly restitutionary equality, to a-contextually define persons on the basis of personally held characteristics (in other words identity traits) as the ossification of subjectivity (identity or self) and the meaning of being in 'post'-apartheid South Africa. Such ossification is the opposite of and fundamentally unethical considering the place and prominence that the notion of be-coming has within my ethical conception of equality. As South Africans, we are not alien to characterisations of white South Africans as 'the privileged' denoting them as beneficiaries of white privilege and bearers of white power. White privilege is not chosen, nor alienable and once you are born as a white person you *are* privileged *irrespective* of your material circumstances or lived reality. In other words, even if you are *de facto* born into poverty, *de jure* and **politically**, you are deemed to be a descendant of a white lineage representing inexhaustible advantage or privilege. To be white is to be advantaged; otherwise put, ontologically considered (in Heidegger's sense), when existing *as* a white human being, the difference you make in the lives of the other is being (perceived and/or assumed and thus constituted) as (the epitome of) privilege(d) and previously as well as perpetually advantage(d). The converse is also true; to be a black (South) African is to be previously and currently disadvantaged. It not chosen, nor alienable and once you are born as a black African you *are* disadvantaged *irrespective of your* material circumstances or 'lived reality'.

Substantive equality is characterised by the ossification of the subjectivity by fixating on a grand narrative of our history as well as real and constructed material disadvantage. Equality jurisprudence cannot identify the intricacies of radical alterity, although difference is recognised and celebrated.[78] To reiterate, by acknowledging that being a black South African is not the same as being white and being a man is different than being a woman is giving effect the substantive notions of equality. However, the ossification of subjectivity has led to us (re)defining the difference between white and black South Africans *as* solely or determinatively advantage and disadvantage. Such a (re)definition of subjectivity *is* antithetical to an ethical conception of equality and van Marle reminds us that an ethical dimension of an ethical conception of equality

[78] See *Pillay* 2008 (CC) at para. [65].

is the understanding that accommodation of difference is impossible.[79] Consequently, difference cannot and ought never be defined or provided for in a mechanical or doctrinal test.[80]

I now proceed to analyse remedial or restitutionary equality and remedial or restitutionary measures as well as their application. Throughout my discussion I continuously uphold my critique. The ossification of the meaning of being human is the signifier of the fundamental problem and this theme of critique is carried through the remainder of this chapter.

4. SECTION 9(2): REMEDIAL OR RESTITUTIONARY EQUALITY

O'Regan, J. held, in *Brink*, that one of the purposes of the right to equality[81] is to remedy the results of patterns of discrimination and disadvantage.[82] Section 9(2) of the Constitution and section 8(3)(*a*) of the Interim Constitution is the constitutional authority for what has become to be understood as remedial or "restitutionary equality",[83] which *is* the aspect or element of equality that seeks to give effect to the purpose of remedying the results of patterns of discrimination and entrenched disadvantage by providing for *positive* steps to that effect. I first analyse the achievement of equality together with remedial or restitutionary measures where after I investigate the measures themselves by considering their nature and consequence.

4.1. THE ACHIEVEMENT OF EQUALITY AND REMEDIAL OR RESTITUTIONARY MEASURES

The *achievement* of equality preoccupies our constitutional thinking, since, with the inception of the Constitution more than two decades ago our society was deeply divided, disproportionately unequal in its socio-economic structure, and definitively uncaring of human worth (dignity).[84] These glaring socio-economic disparities will persist for long to come and, as such, we have committed ourselves to a process of transformation aimed, in the first instance, at restoring respect for and protecting the equal worth of everyone.[85] The importance of this role of the right to equality cannot be overstated, since apartheid was a system that entrenched

79 Van Marle, *Towards an "Ethical" Interpretation of Equality* LLD Thesis (1999) at p. 161, Van Marle, (2000, *An Ethical Interpretation*), at p. 595.

80 Van Marle, *Towards an "Ethical" Interpretation of Equality* LLD Thesis (1999) at p. 161, Van Marle, (2000, *An Ethical Interpretation*), at p. 595.

81 The right to equality in this context refers to the right as contained in s. 8 of the Interim Constitution and s. 9 of the Constitution. In other words, it encapsulates the entirety of s. 8 or then s. 9 and not merely, for example, the right against unfair discrimination.

82 *Brink* 1996 (CC) at para. [41]. See Pt. I, Ch. 2 at pp. 35-41 for a discussion of the interpretation of s. 9.

83 The notion "restitutionary equality" was first used by Ackermann, J. in *Sodomy* 1999 (CC) at paras. [61]-[62]. The aforementioned matter did *not* concern any restitutionary measures but merely alleged unfair discrimination.

84 *Van Heerden* 2004 (CC) at para. [23].

85 *Ibid.*

political power and socio-economic privilege in the hands of a minority and deprived the majority of the right to self-actualisation and control their own destinies.[86] In addition, apartheid targeted disadvantaged individuals for oppression and suppression with the consequence that it degraded its victims and systematically dehumanised them whilst striking at the core of their human dignity. "The disparate impact of the system is today still deeply entrenched"[87] and the commitment to achieve equality must include eradication of the precarious consequences of our past in the process of be-coming a caring and socially just society;[88] that is, be-coming 'post'-apartheid South Africa. The Constitution commits our society to "improve the quality of life of all citizens and free the potential of each person"[89] and, as such, the Constitution is pre-occupied with and places excessive, although justifiably so, emphasis on equality.

As is the case with other constitutions, the Constitution confers upon everyone the right to equal protection and benefit of the law and the right against unfair discrimination. However, in addition thereto, the Constitution is constitutive of a positive duty placed on all organs of state to protect and promote the achievement of equality, which duty binds the judiciary too.[90] The Constitution values a commitment towards becoming a society based on social justice,[91] which commitment finds particularisation and is given effect to through the auspices of section 9(2) and its concomitant remedial or restitutionary measures.

> "In this fundamental way, our Constitution differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities. Our Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result. We are required to do more than that. The effects of discrimination may continue indefinitely unless there is a commitment to end it."[92] [footnotes omitted]

A chief constitutional object is the creation of a non-racial and non-sexist egalitarian society underpinned by human dignity, the rule of law, a democratic ethos and human rights. From this object:

> "… emerges a conception of equality that goes beyond mere formal equality and mere non-discrimination[,] which requires identical treatment, whatever the starting point or impact". This substantive notion of equality recognises that besides uneven race, class and gender attributes of

86 *Ibid.* at para. [71].

87 *Ibid.*

88 *Ibid.* at para. [23].

89 Preamble of the Constitution.

90 Ss. 7(2) and 8(1) of the Constitution, see also *Van Heerden* 2004 (CC) at para. [24].

91 *Bel Porto* 2002 (CC) at para. [6]; *Grootboom* 2001 (CC) at para. [1]; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) at para. [21].

92 *Bato Star* 2004 (CC) at para. [74].

> our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist.[93] The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage."[94] [footnotes omitted]

The Constitution requires re-imagination of power relations within society and, thus, enjoins us to:

> "… take active steps to achieve substantive equality, particularly for those who were disadvantaged by past unfair discrimination. This was and continues to be necessary because, while our society has done well to equalise opportunities for social progress, past disadvantage still abounds."[95]

We must never forget or ignore the following wise words of Moseneke, D.C.J. where he, in effect, hints towards social transformation in terms of which we must realise that we, the people of South Africa, must transform society.

> "We must remind ourselves that restitution measures, important as they are, cannot do all the work to advance social equity. A socially inclusive society idealised by the Constitution is a function of a good democratic state, for the one part, and the individual and collective agency of its citizenry, for the other."[96]

What would have placed the statement squarely in the realm of social transformation would have been a recognition that we must transform our conceptions of each other. When reading the statement in context of *Barnard* it becomes clear that Moseneke, D.C.J., unfortunately, stopped short of social transformation and merely held that we all have to participate in the process of economic or material transformation.

Even more troublesome than a lack of recognition by the Constitutional Court of the need to adhere to the social within social transformation is the wider underlying theoretical grounding of restitutionary measures that is purportedly contextual with its excessive emphasis on structural and material inequality, but which is in fact formalistically a-contextual. It is incumbent on Courts, in determining the fairness or otherwise of a discriminatory act or practice (which includes a remedial measure),[97] to scrutinise, the light of the values of our Constitution,

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93 Mokgoro, J. held similarly, in *Van Heerden* 2004 (CC) at para. [75], that:

> "… s[.] 9(2) acknowledges that our notion of substantive equality requires measures to be enacted to make up for that part of the past which cannot simply be corrected by removing the legal bars to equality of treatment."

Sachs, J. at para. [146] held:

> "A substantive approach to equality eschews preoccupation with formal technical exactitude. It is algebraic rather than geometric, relational rather than linear. Its rigour lies in determining in a rational, objective way the impact the measures will have on the position in society and sense of self-worth of those affected by it. The critical factor is not sameness or symmetry, but human dignity, a quality which by its very nature prospers least when caged."

94 *Ibid.* at para. [26].

95 *Barnard* 2014 (CC) at para. [29].

96 *Ibid.* at para. [33].

97 Such a measure *does* discriminate, but does *not* discriminate unfairly – *Van Heerden* 2004 (CC) at para. [30].

the situation of the complainants in society, the complainants' history and vulnerability, the history, nature, and purpose of the discriminatory practice, and whether it ameliorates or adds to group disadvantage in real life context. However, in the assessment of fairness *or otherwise* a flexible, but 'situation sensitive', approach is indispensable because of *shifting patterns* of hurtful discrimination and stereotypical response in our evolving democratic society.[98] Thus, care must be had that the steps taken (measures adopted) to promote substantive equality do not unwittingly infringe the dignity of those who were themselves previously advantaged. In other words, black individuals who were not *themselves previously disadvantaged* must be distinguished from those who were *themselves previously disadvantaged*. In other words, black individuals born before the advent of constitutional democracy and those born thereafter. In developing contextual distinctions, those who are currently being *disadvantaged* by or suffering from the *consequences* of past discrimination must be distinguished from those who cannot possibly be suffering therefrom. Consequently, cognisance must be had to the empowerment and advantage afforded to the black South Africans who are empowered and has become themselves quite wealthy *and* – in a similar sense than white people – privileged. Moseneke, A.C.J., unfortunately, continued not to adhere to the nuances that ought to be taken into account when writing about disadvantage, which is quite evident from the following passage:

> "Remedial measures must be implemented in a way that advances the position of people who *have suffered* past discrimination. Equally, they must not unduly invade the human dignity of those affected by them, if we are truly to achieve a non-racial, non- sexist and socially inclusive society."[99]

The first sentence ought not be applicable to black individuals who *themselves* are *not* suffering from the *consequences* of past discrimination. The statement ought to have red 'remedial measures must be implemented in a way that advances the position of people who are still suffering from and being disadvantaged by the consequences of past discrimination'. One can argue that the aforementioned are mere semantics, but as shown below a-contextual statements and considering of equality claims – especially section 9(2) related claims – leads to a formalistic application of section 9(2), which constitutes the opposite of formal equality that is not substantive equality, ironically enough, but rather formal *in*equality by an absolutist refusal to look beyond race and purported or perceived disadvantage and interrogate actual disadvantage or, more conservative, the actual position of a black and/or female person.

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98 *Van Heerden* 2004 (CC) at para. [27].

99 *Barnard* 2014 (CC) at para. [32].

5. THE NATURE AND CONSEQUENCE OF REMEDIAL OR RESTITUTIONARY MEASURES

Section 9(2) reads as follows:

> "Equality [(*i*)] *includes* the full and equal enjoyment of all rights and freedoms. To promote the [(*ii*)] *achievement of equality*, legislative and other [(*iii*)] *measures* designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken." [own emphasis and additions]

I have highlighted three aspects contained in section 9(2) that is of utmost importance in the context of remedial or restitutionary equality. First, the wording of section 9(2) is unambiguous when stating that "[e]quality *includes* the full and equal enjoyment of all rights and freedoms". In other words, remedial or restitutionary equality is but an *aspect* of or *element* within or *composite part* (*a* building block) of the dignity-based substantive approach to equality, as developed by the Constitutional Court and envisaged by the Constitution. Remedial measures that properly fall within the requirements of section 9(2) are not presumptively unfair because[100] such measures are not a derogation from, but a substantive and composite part of, the equality protection envisaged by section 9, in specific, and of the Constitution, as a whole.[101] This is why it has been held that section 9 *read as a whole* embraces a substantive conception of equality inclusive of measures aimed at remedying existing inequalities.[102] Their primary object is to promote the achievement of equality and, to that end, differentiation aimed at protecting or advancing persons disadvantaged by unfair discrimination is warranted provided the measures conform with the internal requirements of section 9(2).[103] Since restitutionary or remedial measures are not a deviation from or invasive of the right to equality,[104] these measures – whilst discriminatory – are not unfair and, consequently, in this sense, do not constitute 'reverse discrimination' or 'positive discrimination'.[105] Whilst restitutionary or affirmative measures are steps towards the attainment

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100 In the words of Moseneke, D.C.J. in *ibid.* at para. [37] "… because the Constitution says so".

101 *Van Heerden* 2004 (CC) at para. [32]. In the words of van der Westhuizen, J. in *Barnard* 2014 (CC) at para. [138] "[a]ffirmative measures are critical to realising the constitutional promise of substantive equality". In *Van Heerden* 2004 (CC) at para. [31] it was made clear that in the absence of:

> "… a positive commitment [to] progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised underprivilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow".

102 *Van Heerden* 2004 (CC) at para. [31].

103 *Ibid.* at para. [32].

104 *Ibid.* at para. [30].

105 I refer the reader, as Moseneke, J., as he was then, did in *Van Heerden* 2004 (CC) at para. [30], to the "debate" as to the nature of these measures Rycroft, A., *Obstacles to Employment Equity?: The Role of Judges and Arbitrators in the Interpretation and Implementation of Affirmative Action Policies,* Vol. 20, No. (1999), Industrial Law Journal, pp. 1411-1430; Pretorius, J.L., *Constitutional Standards for Affirmative Action in South Africa: A Comparative Overview,* Vol. 61, (2001), Heidelberg Journal of International Law, pp. 403-457; Van Reenen, T.P., *Equality, Discrimination and Affirmative Action: An analysis of Section 9 of the Constitution of the Republic of South Africa,* Vol. 12, No. 1, (1997), South African Public Law, pp. 151-165.

of substantive equality, they must be adopted within the limits that the Constitution imposes.[106] These measures have been eloquently explained by van der Westhuizen, J. as follow:

> "The measures provided for in s[ection] 9(2) are aimed neither at punishment of the previously advantaged, nor at retribution or revenge. They do not represent a settlement or compromise between races or other groups; and they are certainly not intended to foster discrimination and division. The aim is stated in s[ection] 9(2): to promote the achievement of equality, which includes the full and equal enjoyment of all rights and freedoms, in view of past unfair discrimination. Subsection (2) addresses the wrongs of the past. Subsections (3), (4) and (5) prohibit unfair discrimination to prevent the proverbial second wrong that would not make a right. This is the constitutional concept of equality on which we as a nation agreed. In view of our history, equality cannot merely be a formal requirement – it has to have substance."[107]

Second, section 9(2), or then remedial or restitutionary equality, is a composite part of equality and must promote the achievement of equality; otherwise put, remedial or restitutionary equality must draw content from, be directed by and, accordingly, be congruent with the *value* 'achievement of equality'. Third, remedial or restitutionary equality always concerns remedial measures or restitutionary measures that are implemented to protect, or advance persons or categories of persons disadvantaged by unfair discrimination and, if the measure is congruent with section 9(2), it is not unfair discrimination to *discriminate* on the basis of race, gender, and other grounds that has, objectively speaking, the potential to impair one's dignity. The following passage of Ackermann, J. is instructive:

> "Particularly in a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied. The need for such remedial or restitutionary measures has therefore been recognised in ss. 8(2) and 9(3) of the [I]nterim and 1996 Constitutions respectively. One could refer to such equality as remedial or restitutionary equality."[108]

Remedial or restitutionary equality is the transformative and substantive (in the positive sense)[109] element of equality jurisprudence giving effect to the transformative nature of the

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106 *Barnard* 2014 (CC) at para. [35].

107 *Ibid.* at para. [135].

108 *Sodomy* 1999 (CC) at paras. [60]-[61].

109 S. 9(2) explicitly envisions positive conduct – in the form of measures – to give effect to the value and ultimately achieve equality. Negative substantive equality, in turn, is when remedial equality *informs*, for example, the interpretation of s. 9(3) (as was the case in *Hugo*) or s. 9(1).

Constitution,[110] which, in the context of the achievement of equality and section 9(2), heralds "the start of a credible and abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of our constitutional framework".[111] The Constitution has "a transformative mission and permits government to take remedial measures to redress the lingering and pernicious effects of apartheid"[112] whilst being cognisant of the fact that the Constitution so permits "even though this commitment [to transform our society] means that individuals [will] be adversely affected by the process of transformation".[113] It is my opinion that one should apply the principles underlying restitutionary equality primarily when dealing with a case concerning restitutionary measures and section 9(2). However, I am not arguing that the principles of restitutionary equality should not inform equality jurisprudence in general. Thus, the principles of restitutionary equality must inform the interpretation and application of section 9(1) and 9(3) or 9(4), respectively.[114]

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110 See Langa, (2006, *Transformative Constitutionalism*), at p. 351 where the previous chief justice draws attention to *Makwanyane* 1995 (CC) at para. [262] where it was acknowledged that "the Constitution expressly aspires to … provide a transition from … grossly unacceptable features of the past to a conspicuously contrasting … future" and *Du Plessis* 1996 (CC) at para. [157], for yet another example where the CC accepted that "[the Constitution] is a document that seeks to transform the *status quo ante* into a new order".

111 *Van Heerden* 2004 (CC) at para. [25].

112 *Barnard* 2014 (CC) at para. [29].

113 *Ibid.* at para. [78]. In *Bato Star* 2004 (CC) at para. [76], Ngcobo, J., as he then was, described transformation as a process and that "profound difficulties … will be confronted in giving effect to the constitutional commitment of achieving equality. We must not underestimate them". Also, in *Bel Porto* 2002 (CC) at para. [7], Chaskalson, C.J. explained that:

> "[t]he difficulties confronting us as a nation in giving effect to these commitments are profound and must not be underestimated. The process of transformation must be carried out in accordance with … the Constitution and its Bill of Rights. Yet, in order to achieve the goals set in the Constitution, what has to be done in the process of transformation will at times inevitably weigh more heavily on some members of the community than others."

114 This approach seems to be followed by the CC, since Ackermann, J. opined in *Sodomy* 1999 (CC) at para. [62] that the wording of s. 9(2) (i.e. "measures") should not suggest that principles underlying remedial equality do not operate elsewhere, as was clearly articulated in *Harksen* 1998 (CC) at para. [51(b)] where, in dealing with the purpose of the provision or power as a factor to be considered in deciding whether the discriminatory provision has impacted unfairly on complainants, Goldstone, J. held:

> "If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above [impairment of dignity], but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question. In *Hugo*, for example, the purpose of the Presidential Act was to benefit three groups of prisoners, namely disabled prisoners, young people and mothers of young children, as an act of mercy. The fact that all these groups were regarded as being particularly vulnerable in our society, and that in the case of the disabled and the young mothers, they belonged to groups who had been victims of discrimination in the past, weighed with the Court in concluding that the discrimination was not unfair." [footnotes omitted]

6. QUALIFYING AS A SECTION 9(2) MEASURE: THE VAN HEERDEN-TEST

> "Schemes and conduct based on race, which arbitrarily benefit some and violate the rights of others, can never qualify as a legitimate measure under section 9(2) [of the Constitution]."[115]

If a measure properly qualifies as a section 9(2) measure it does not constitute unfair discrimination, but, conversely, if the measure does not so qualify and it constitutes discrimination on a prohibited ground, the measure must be assessed in the unfair discrimination paradigm of section 9(3) to ascertain if it offends the anti-discrimination prohibition in section 9(3).[116] Once a measure is challenged on the basis that it infringes the right to equality *in the wide sense*,[117] such claim can be met[118] by proving that the measure qualifies as a section 9(2) measure.[119] A measure will so qualify if the measure (*i*) targets persons or categories of persons who have been disadvantaged by unfair discrimination, (*ii*) is designed to protect or advance such persons or categories of persons, and (*iii*) promotes the achievement of equality.[120]

As to (*i*), does the measure *target* a "*disadvantaged class*" that is to be protected or advanced by the measure?[121] The measure must favour "a group or category designated in s[ection] 9(2)" and the "beneficiaries" of the measure must be "*shown* to be disadvantaged by unfair discrimination" [own emphasis].[122] Within each favoured *class* there may be exceptional, hard cases, or then windfall beneficiaries where, for example, a white male is benefited by a

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115 The thought-provoking words penned by van der Westhuizen, J. in *Barnard* 2014 (CC) at para. [140].

116 *Van Heerden* 2004 (CC) at para. [36].

117 In the wide sense means the right of equality includes the right to equality before the law, the right to equal protection and benefit of the law (s. 9(1)), and the right against unfair discrimination (ss. 9(3) & 9(4)). In other words, a claimant can assert infraction of either s. 9(1) or ss. 9(3) or 9(4) or both s. 9(1) and ss. 9(3) or s. 9(4).

118 S. 9(2) is, therefore, a *defence* to or against any claim of infringing s. 9(1) (equality before the law and equal protection and benefit of the law) or ss. 9(3) or 9(4) (the right against unfair discrimination, whether at the hands of the state or a private legal subject). See Thompson, D. & Van der Walt, A., *Affirmative Action: Only a Shield? Or Also a Sword?,* Vol. 28, No. 3, (Jan., 2007), Obiter, pp. 636-646; Coetzer, N., *Affirmative Action: The Sword Versus Shield Debate Continues,* Vol. 21, No. (2009), South African Mercantile Law Journal, pp. 92–101.

119 *Van Heerden* 2004 (CC) at para. [37].

120 *Ibid.* These requirements have not been without criticism – see Rautenbach, I.M., *Requirements for Affirmative Action and Requirements for the Limitation of Rights,* No. 2, (Jan., 2015), Journal of South African Law, pp. 431-443, at p. 433 where it is opined that before the CC delivered judgment in *Barnard*, *Van Heerden*-requirements were criticised for not providing for fairness or proportionality review and reference is made to Pretorius, J.L., *Accountability, Contextualisation and the Standard of Judicial Review of Affirmative Action: Solidarity obo Barnard v South African Police Services,* Vol. 130, No. 1, (2013), South African Law Journal, pp. 31-44; McGregor, M., *Affirmative Action on Trial – Determining the Legitimacy and Fair Application of Remedial Measures,* No. 4, (2013), Journal of South African Law, pp. 650-675; Pretorius, J.L., *Fairness in Transformation: A Critique of the Constitutional Court's Affirmative Action Jurisprudence,* Vol. 26, No. 3, (2010), South African Journal on Human Rights, pp. 536-570.

121 *Van Heerden* 2004 (CC) at para. [38].

122 *Ibid.*

measure.[123] The existence of an overwhelming *minority* of windfall beneficiaries or exceptional cases cannot undermine the legal efficacy of a remedial measures.[124] A measure must be assessed against the majority – not the exceptional and difficult minority – of people to which it applies.[125] The legal efficacy of a measure pivots on whether an "overwhelming majority of members of the favoured class" are indeed persons "disadvantaged by unfair discrimination"[126] as envisaged by section 9(2).[127]

I must pause to deal with an *obiter* position adopted by Mokgoro, J. in *Van Heerden* that is another example of the ossification of subjectivity that is exacerbated and occasioned by a grand narrative of our history and a polemical relationship with the world. In this regard I refer the reader to a, rather lengthy, passage of Mokgoro, J. where she sets out how a previously disadvantaged individual is to be defined or identified in terms of section 9(2):

> "… [Section] 9(2) … allows a person or categories of people to be advanced. This is important because of the nature of the unfair discrimination that was perpetrated by apartheid. The approach of apartheid was to categorise people and attach consequences to those categories. *No relevance was attached to the circumstances of individuals*. *Advantages or disadvantages* were meted out *according* to one's *membership of a group*. Recognising this, s[ection] 9(2) allows for measures to be enacted which target *whole categories* of persons. … It is *sufficient for a person to be a member of a group previously targeted by the apartheid state for unfair discrimination* in order to benefit from a provision enacted in terms of s[ection] 9(2) … The State need not show that any discrimination caused by the measure is fair, or that each individual member of the advanced group *actually suffered past disadvantages* as long as an individual was part of a group targeted."[128] [own emphasis]

This approach is echoed in section 1 of the EEA as it defines "designated groups" as "black people, women and people with disabilities". Section 15 of the EEA states that affirmative action measures are "measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities …". By only requiring a person to be a member of a group previously disadvantaged by past discrimination or a designated group means that a black South African – earning R570 000 after tax and falling within the richest one per cent of South Africans[129] – would be described as a previously disadvantaged individual qualifying for help by virtue of restitutionary measures *without more*. This approach to restitutionary equality, established by virtue of a questionable interpretation section 9(2), is

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123 *Ibid.* at para. [39].
124 *Ibid.* at para. [40].
125 *Ibid.* at para. [39].
126 This is the exact wording of s. 9(2).
127 *Van Heerden* 2004 (CC) at para. [40].
128 *Ibid.* at paras. [85]-[86].
129 Data from the years 2010 – 2012 found in Staff-Writer, *How Much the Richest 1% of South Africans Earn* (E-Pub. Date: 3 Jun. 2015) Electronic Newspaper Article: BusinessTech [Accessed on: 23 Mar. 2016].

antithetical to what Moseneke, J., as he was then, described as a "situation sensitive" approach in *Van Heerden*.[130] As far as Moseneke, J is concerned, substantive equality requires, whenever "assessing fairness or *otherwise*", "a flexible but situation sensitive approach[, which] is indispensable because of *shifting patterns* of hurtful discrimination and stereotypical response in our *evolving* democratic society" [own emphasis].[131] Not only should an approach to equality be flexible and situation sensitive, it must, in itself, be reliant on multidirectional progression. The definition of previously disadvantaged individual ought to be open to perpetual (re)definition. By multidirectional progression, I mean not *only* progressiveness that was at hand when positive measures to eradicate the *consequences* of the past were recognised and justifiably deemed fundamental for achieving equality. We ought to be progressive in realising that there are those that cannot be classified as previously disadvantaged and qualifying for help by virtue of restitutionary measures *simply because* of his or her membership within a particular group. For the first ten to fifteen years after apartheid such a 'formal approach' to restitutionary equality was justifiable, but now, more than twenty-four years after the fall of apartheid, we must be progressive in the sense that we seek to benefit those who are *currently* and in fact disadvantaged so as to bring about social transformation. I see no justifiable reason, whether constitutional, jurisprudential, ethical, or otherwise, why a person falling within the highest percentile of remunerated or income earning South Africans should be classified *without more and within every context*[132] as disadvantaged in the economic sense of the word and especially in the context of the EEA. The children of such a person ought also not be advantaged by restitutionary measures *without more*. For example, a bursary awarded to Andile Ramaphosa, the son of President Cyril Ramaphosa, cannot be justified on the fact that his son is black only, since, I submit, the actual privileged position of Andile ought to disentitle him to be advantaged *qua* a black male in this context. Mere group membership relies on a grand narrative of our history as *any* black person is *assumed* to be adversely affected in his or her current existential state. It displays a polemical relationship in that it is excessively critical of any other opinion and the interpretation disregards

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130 *Van Heerden* 2004 (CC) at para. [27].

131 *Ibid.*

132 For example, when disregarding the *actual* position of individuals concerned one is merely acting upon a definition of a human being as advantaged or disadvantaged. In other words, a person that is black, highly qualified, vested with fifteen years of experience, and whose earnings are excessively high should be *disqualified* from being benefited from affirmative action measures. The reason is quite simple, why should said black person not be *obliged* to have his or her merit be the deciding factor, since to *assume* that it would not be sufficient would be to *assume* that a person who has to either consider promoting or appointing this black individual will be white or otherwise and disregard merit and prefer the, for example, white candidate. Even if these assumptions were to realise, such preference is direct discrimination on the basis of race. Therefore, there *ought* to be a point where the advantaged and privileged position of a black person disallows him or her to qualify for affirmative action measures. This submission should not be confused or conflated with broad-based economic empowerment.

any self-criticism or realisation that progression has or can be made in empowering the previously disadvantaged. This interpretation is only effective at (re)defining being as being advantaged when white and being disadvantaged when black.

I am not alone in my submission, call, and advocacy for true substantive contextuality as regard restitutionary measures. The South African Human Rights Commission,[133] in its 2017/2018 Equality Report, is also of the opinion that restitutionary measures should be positioned to assist those members of the designated groups, to use the language of the EEA, or, more generally put, 'previously disadvantaged individuals' that are *de facto* disadvantaged.[134] The Commission is of the opinion that (*i*) it is impossible to measure the impact of special measures on the most vulnerable persons or groups when those persons or groups are not identified based on accurate data and (*ii*) enhanced and proactive steps are necessary to qualitatively assess both the need for and impact of remedial or restitutionary measures on vulnerable individuals and groups *based on current socio-economic need*.[135] Allied to this concern is quantitative proof that a so-called "creamy-layer"[136] is forming as regard to black men. Burger, Jafta, & von Fintel has quantitatively proved that the benefits of affirmative action have accrued to tertiary qualified black men.[137] They have shown that, among men, black wages "became as responsive to economic growth as white wages after the imposition of affirmative action legislation".[138] Transformation legislative reforms[139] removed the obstacles that prevented black men, as a whole, from enjoying the benefits of economic expansion.[140] Burger, Jafta, & von Fintel found that the manner in which "education was rewarded" played a dominant role in the evolution of the wage gap between races.[141] Although "returns to tertiary education have grown for all groups", it was especially so amongst black men.[142] They found that the "trend for black men intensified even more after employment equity laws were enacted" and, as such, transformation

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133 Hereinafter referred to as the "the Commission".

134 *Equality Report: Achieving Substantive Economic Equality Through Rights-based Radical Socio-economic Transformation in South Africa* (2016/2017) South African Human Rights Commission at p. 36.

135 *Ibid.* at pp. 36-37.

136 McGregor, M., *Judicial Notice: Discrimination and Disadvantage in the Context of Affirmative Action in South African Workplaces,* Vol. 44, No. 1, (2011), De Jure, pp. 111-125 at fn. 53:

> "India, for example, and on the other hand, makes provision for this. Individual people who do not share the group characteristics of social, economic or educational backwardness among certain backward classes, the so-called 'creamy layer', are not entitled to benefit under affirmative action measures."

137 Burger, R.*, et al. Affirmative Action Policies and The Evolution of Post-Apartheid South Africa's Racial Wage Gap* (2016) United Nations University (Uni-Wider) at p. 28.

138 *Ibid.*

139 Both the EEA and the Broad-Based Black Economic Empowerment Act, No. 53 of 2003 (hereinafter referred to as the "B-BBEE Act") was considered, hence my use of "transformation legislative reforms".

140 Burger*, et al. Affirmative Action Policies and The Evolution of Post-Apartheid South Africa's Racial Wage Gap* (2016) at p. 28.

141 *Ibid.*

142 *Ibid.*

legislation has been effective at "drawing highly qualified black men into well-remunerated positions, which is the driving factor of the average lessening of the wage difference that they have observed".[143] Being alive to this reality, the Commission recommended that "… the EEA be amended to target more nuanced groups on the basis of need, and taking into account social and economic indicators".[144] In addition, it recommended that "… government … collaborates [*sic*] with Stats SA to gather data disaggregated by ethnic origin, language, and disability, and that includes social and economic indicators".[145] It is, therefore, clear that the Commission is in concert with my critique of both the EEA and Mokgoro, J's fallacious interpretation of section 9(2). As such, a-contextual mere membership of a specific group ought not to afford an individual benefit of restitutionary or remedial measures *without more*.

As to (*ii*), the measure must be "*designed* to protect or advance categories of persons, disadvantaged by unfair discrimination" [own emphasis].[146] Any remedial measure is directed at an envisaged future outcome; namely, the achievement of equality[147] and, although the future is hard to predict, a measure must be "reasonably capable of attaining the desired outcome".[148] The desired outcome is the achievement of equality *by* advancing or benefiting the interests of those who have been disadvantaged by unfair discrimination.[149] Such a measure will be incapable of being designed to achieve the constitutionally authorised end *if* it is arbitrary, capricious, or displays naked preference.[150] A measure that is not "reasonably likely" to achieve the constitutionally authorised end cannot qualify as a section 9(2) measure.[151] Section 9(2) does not envisage a standard of necessity as regard to the relationship between the measure and the end (purpose). The text requires only that the measure be "designed to protect or advance".[152] The sponsor or proponent of a remedial measure need not show a *necessity* to disadvantage one class in order to advance another.[153] Section 9(2) does not require such a "necessity test", because a remedial measure "must be constructed to protect or advance a disadvantaged *group*" [own emphasis].[154] "The prejudice that … [will] arise is incidental to, but certainly not the target of

143 *Ibid.*
144 *Equality Report: Achieving Substantive Economic Equality Through Rights-based Radical Socio-economic Transformation in South Africa* (2016/2017) at p. 39.
145 *Ibid.*
146 *Van Heerden* 2004 (CC) at para. [41]. This is the exact wording of s. 9(2).
147 *Minister of Justice and Constitutional Development v South African Restrucuturing and Insolvency Practitioners Association* 2018 JOL 40085 (CC) at para. [44].
148 *Van Heerden* 2004 (CC) at para. [41].
149 *Ibid.*
150 *Ibid.*
151 *Ibid.*
152 *Ibid.* at para. [42].
153 *Ibid.* at para. [43].
154 *Ibid.*

remedial legislative choice".[155] The measure need only envisage a reasonable likelihood of meeting an envisioned end. To require a sponsor of a remedial measure to establish a precise prediction of a future outcome is a standard inimical to section 9(2).[156]

However, a measure that is haphazard, random, and overhasty is incapable being designed to achieve anything.[157] There must be a rational connection between the measure and the aim it is said to be designed to achieve[158] and mere "random", "haphazard", and lethargic discrimination would achieve very little, if anything, and is wholly counter-productive.[159] A measure taken for improper or corrupt motives would be arbitrary and not pass muster under section 9(2)[160], even if done under the guise of advancing the previously disadvantaged.[161] A measure that is so absent of thought and organisation so as to earnestly threaten the very functioning and survival of achieving equality, would lack rationality, and could not be said to advance or be fair to anybody, let alone the disadvantaged.[162] To honour constitutional ideals and values in our national endeavour of moving in the direction of achieving substantive equality, proper, thoroughly though through rational measures must be designed and put into place, lest the achievement of equality be but a shallow aspirational ideal shunned in favour of distorted notions of transformation, materialist equality, or mere 'representivity as equality'. This leads us to the third requirement.

As to (*iii*), the measure must "promote the achievement of equality".[163] Appreciation of the *effect* of the measure in the context of our broader society is determinative of whether it will promote the long term goal of achievement of equality.[164] It is indisputable that pursuing the achievement of equality through the use of a measure always comes at a price for those who were previously advantaged and who are currently being disadvantaged.[165]

> "The measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from the previously advantaged communities."[166]

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155 *Ibid.*
156 *Ibid.* at para. [42].
157 *Stoman v Minister of Safety & Security* 2002 JOL 9408 (T) at p. 21.
158 *Ibid.*
159 *Ibid.* at p. 22.
160 In terms of s. 9(3) the discrimination would equally be unfair – *Van Heerden* 2004 (CC) at para. [149].
161 *Ibid.*
162 *Ibid.*
163 *Ibid.* at para. [44]. This is the exact wording of s. 9(2).
164 *Ibid.*
165 *Ibid.*
166 *Bato Star* 2004 (CC) at para. [76]. Sachs, J., in *Van Heerden* 2004 (CC) at para. [145], placed the adverse effects of remedial measures on the pedestal of restoration of the society's dignity as a whole and to discriminate and mete out advantage on the basis of race and gender in a 'post'-apartheid South Africa is, thus, integral to restoring dignity to our country as a whole:

It ought never be forgotten or, more dangerously, ignored that the long term goal of our constitutional envisioned ideal society is a non-racial and non-sexist society in which each person is recognised and treated as a human being of equal worth and dignity.[167] When taking cognisance of both the dignity of those advantaged and those disadvantaged by a measure it becomes indisputable that a measure can never be allowed to constitute an abuse of power or impose such substantial and undue burden on those disadvantaged by it that the Constitution's long term goal is irreparably threatened and made a mockery of.[168] The assessment, therefore, becomes a question as to whether a measure was adopted with improper motives,[169] or it was "unduly punitive or manifestly and grossly disproportionate in its impact".[170] When so considering, it is mindful to keep the nature of requirement (*ii*) above in mind, which is the fact that a remedial measure cannot be invalidated because the same remedial purpose could have been achieved in other and possibly better ways; in other words, the question is one of rationality.[171] In *Barnard* van der Westhuizen, J. noted that, this requirement, because it entails that the measure must promote the achievement of equality, requires an appreciation of the effect and impact of the measure, which is more than what mere abstract rationality testing requires.[172] I agree with the aforementioned, but he continued and noted that the "impact of a measure is ascertained by looking at *how it is implemented*" [own emphasis].[173] Although I am not in agreement, the justice provides some valuable insight in his analysis, and, if I am incorrect, this serves as a documentation thereof and of the positive law. Before turning to his analysis, in my opinion, requirement number (*iii*) stops at the abstract analysis as to whether the measure, considered by itself, and not by considering the *application* thereof, has the potential to or retards the achievement of equality.

> "Yet, burdensome though the process is for some, it needs to be remembered that the system of State-sponsored racial domination not only imposed injustice and indignity on those oppressed by it, it tainted the whole of society and dishonoured those who benefited from it. Correcting the resultant injustices, though potentially disconcerting for those who might be dislodged from the established expectations and relative comfort of built-in advantage, is integral to restoring dignity to our country as a whole. For as long as the huge disparities created by past discrimination exist, the constitutional vision of a non-racial and a non-sexist society which reflects and celebrates our diversity in all ways, can never be achieved. Thus, though some members of the advantaged group may be called upon to bear a larger portion of the burden of transformation than others, they, like all other members of society, benefit from the stability, social harmony and restoration of national dignity that the achievement of equality brings."

167 *Van Heerden* 2004 (CC) at para. [44].

168 *Ibid.*

169 Which would constitute an abuse of power and be arbitrary (hitting at no. (*ii*) of the *Van Heerden*-requirements discussed above).

170 *Van Heerden* 2004 (CC) at para. [153].

171 *Ibid.*

172 *Ibid.* at para. [146].

173 *Ibid.* at para. [153].

As to (*iii*), van der Westhuizen, J. is of the opinion that the enquiry ought to transcend mere abuse of power and undue harm.[174] The third requirement requires a judgment – exercised within the ambit of the right to and value of equality – as to whether the measure "serves to advance or retard the equal enjoyment in practice of the rights and freedoms that are promised by the Constitution but have not already been achieved".[175] This assessment must take into account whether the measure undermines the goal of section 9 to promote the long-term vision of a society based on non-racialism and non-sexism and must be alive to shifting circumstances and the distribution of privilege and under-privilege in society.[176] He paused to mention that equality can certainly mean more than representivity, since by focusing on representivity only a measure's implementation may thwart other equality concerns.[177] The justice provided the following example:

> "... [I]f a population group makes up 2% or 3% of the national demographic, then, in an environment with few employees, the numerical target for the group would be very small or even non-existent. If a candidate from this group is not appointed because the small target has already been met, this may unjustly ignore the hardships and disadvantage faced by the candidate or category of persons, not to mention the candidate's possible qualifications, experience and ability."[178]

This is exactly what transpired in *Naidoo v Minister of Safety and Security*.[179] This case concerned an employment equity plan that prescribed race and gender representivity targets based on national demographics, which entailed that 2,5% of all posts nationally were allocated to Indians. *In casu* the complainant, although originating from KwaZulu-Natal, spent the majority

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174 *Ibid.* at para. [148].

175 *Ibid.*

176 *Ibid.*

177 *Ibid.* at para. [149].

178 *Ibid.*

179 *Naidoo v Minister of Safety and Security* 2013 (3) SA 486 (LC).

> "The applicant, an Indian woman, applied for a senior post in the South African Police Service (SAPS). The national selection panel refused to recommend her promotion on the ground that doing so would be in conflict with the targets for race representation set out in the SAPS equity plan … These targets were formulated on the basis of the national racial demographic and called for 79% African; 9,6% white; 8,9% coloured; and 2,5% Indian representation. A gender target of 70% male and 30% female was also set … The calculation used to determine the race and gender allocation was explained as follows: 19 positions on level 14 are multiplied by the national demographic figure for a specific race group, e.g. 19 positions x 79% Africans = 15 of the 19 posts to be filled by Africans; then 15 x 70% = 11 positions to be filled by African males, minus the current status of seven, meaning there is a shortage of four African males. For Indian females the calculation is 19 x 2,5% = 0,5 positions to be filled by Indians; then 0,5 x 30% = 0,1 Indian females, and that is rounded off to zero. Of the five available positions 0,125 could go to Indians, multiplied by the 30% gender allocation - meaning 0,037 could be allocated to Indian females, and that is rounded to zero. Indian females on level 14 were ideal because there were none and the ideal was zero. There was one Indian male on level 14, but there ought to be none, whether male or female, as the ideal for Gauteng was zero and no Indian could be appointed."

Quoted from Louw, A.M., *The Employment Equity Act, 1998 (and Other Myths About the Pursuit of 'Equality', 'Equity', and 'Dignity' in a Post-Apartheid South Africa) (Part I),* Vol. 18, No. 3, (2015), Potchefstroom Electronic Law Journal, pp. 593-667, at p. 593.

of her professional career in the police service in Gauteng. Not a single Indian woman was employed at the occupational level in Gauteng to which she applied at the time when she applied. The Labour Court held, whilst denouncing the exclusionary effect of the numerical targets, that the targets undermined the purpose of section 9(2) and section 6 of the EEA to promote substantive equality.[180] The consequence of the plan was a compromise of the ideal of a non-racial and non-sexist society because the targets denied a particular group access to employment opportunities and frustrated the groups' life chances and thereby caused race or gender-based contests and alienation.[181] The Labour Appeal Court held, on appeal, that the plan did not constitute an absolute barrier to the appointment of Indian women in Gauteng.[182] The Court – unfortunately so – found notwithstanding that in terms of these targets the "ideal" representation at the relevant occupational level was zero for Indian women. In total, there was nineteen positions and with the relevant post allocation of 0,475% for Indians it meant that, rounded off, even in the most unlikely event that all positions became vacant, there still would have been no post earmarked for Indians in terms of the plan.[183]

I do not to expand on the reasoning of the Labour Appeal Court. In my view such a conclusion is the epitome of reverse discrimination that section 9(2) measures are held up *not* to be. It is the epitome of the fundamental problem of inadequate social transformation, since one cannot conscientiously argue that the Labour Appeal Court saw the complainant *as* a living breathing human being that is willing to litigate to progress in a public office and in service of her community. One cannot sensibly argue that the complainant was conceived in terms of an understanding of the self as a way of being-in-the-world in terms of which being (existence *as*) human is an expression of the ways of being-with and being-there inspired and influenced by *Ubuntu*.[184] In terms of my ethical conception of equality the Labour Appeal Court would have had to conceive the complainant as being in an ethical relationship with the other and the community. The Labour Appeal Court would have had to conceive the complainant not as a mere Indian woman applicant entitled to 0,475% of a position based on personally held characteristics or attributed ontological characteristics. The complainant was not conceived as being human, but rather only as a means to an end, which is to act in *total*[185] disregard of her

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180 *Naaido* 2013 (LC) at paras. [190]-[191].
181 *Ibid.*
182 *Minister of Safety and Security and others v Naidoo* 2015 (11) BLLR 1129 (LAC) at para. [47].
183 Pretorius, J.L., *The Limitations of Definitional Reasoning Regarding "Quotas" and "Absolute Barriers" in Affirmative Action Jurisprudence as Illustrated by Solidarity v Department of Correctional Services,* Vol. 28, No. 2, (2017), Stellenbosch Law Review, pp. 269-286, at p. 282.
184 See Pt. III, Ch. 6.
185 My use of total disregard can be compared to the Kantian notion of being treated *only* as a means to and end and not at the same time also an end in itself.

existential being as a human and conceive her being in the same manner as a mere *res* (entity) that is only considered for the value (as opposed to worth) that she represents on an 'employment equity score-card'. In other words, the proposed ethical conception of equality will *always* first conceive humans in their being (existence *as*) human irrespective of race, sex, gender, or otherwise. An ethical conception of equality will *first* enjoin recognition of the being of a human *as* human before recognising the race, sex, gender, or otherwise of the human being. Thus, an ethical conception of equality does not disregard race, sex, gender, or otherwise, but does not allow race, sex, gender, or otherwise to be projected as the totality of the being (existence *as*) a human. Our being (existence as) human ought to transcend any socially constructed prejudice (ontological bias) and socially constructed bigotry (ontological intolerance).

6.1. ARBITRARINESS, RATIONALITY, & THE SECOND VAN-HEERDEN REQUIREMENT

In *Minister of Justice and Constitutional Development v South African Restrucuturing and Insolvency Practitioners Association* a policy was adopted by the Minister of Justice and Constitutional Development that regulated the Master's powers to appoint trustees under the Insolvency Act.[186] Clause 6 requires that insolvency practitioners who become eligible to be appointed as trustees must appear on a Master's list, which had to be divided into four categories.[187] Category A consisted of African, Coloured, Indian and Chinese females who became South African citizens before 27 April 1994. Category B's composition was the same as A, but for the fact that it was only included men as opposed to women. Category C consisted of white women who became citizens before 27 April 1994.[188] Category D comprised of white men – irrespective of when they became citizens – as well as African, Coloured, Indian, and Chinese men and women who became South African citizens after 27 April 1994.[189] In terms of the policy a list would be compiled and the names of practitioners would be listed alphabetically, but divided into the respective categories. In terms of the policy insolvency practitioners must be appointed "consecutively in the ratio A4: B3: C2: D1".[190] In other words, the Master must appoint four practitioners from Category A for every one practitioner from Category D. After discussing the second *Van Heerden*-requirement,[191] Jafta, J. held that the reasonable likelihood that the restitutionary measure concerned would achieve the purpose of equality is common to both the

186 Insolvency Act, No. 24 of 1936. *Restrucuturing & Insolvency* 2018 (CC) at para. [4].
187 *Restrucuturing & Insolvency* 2018 (CC) at para. [22].
188 *Ibid.*
189 *Ibid.*
190 *Ibid.*
191 *Ibid.* at paras. [39]-[40].

second and third of the *Van Heerden*-requirements.[192] Category D includes males and females who became citizens after 27 April 1994, whether white, black, Coloured, or Indian and, as such, perpetuates inequality or then the current *status quo*, since the majority of this category is white males. As such, it cannot be said that equality is likely to be achieved, since category D perpetuates the disadvantage which the policy seeks to eradicate. Jafta, J. also held that a "section 9(2) measure may not discriminate against persons belonging to the disadvantaged group whose interests it seeks to advance".[193] In keeping with the second *Van Heerden*-requirement, this requirement was articulated with reference to, among other things, arbitrariness and capriciousness[194] and Moseneke, J., as he was then, in *Van Heerden*, held that arbitrary or capricious measures, or measures that display naked preference are incapable of being designed to achieve a constitutionally authorised purpose.[195] Jafta, J. held that, whilst the latter is correct, "the statement must not however be read as incorporating into the second requirement the demand that a restitutionary measure should not be arbitrary or capricious".[196] Jafta, J. concluded that "[t]hese are separate requirements of the Constitution which are not restricted to restitutionary measures".[197] Jafta, J. missed the point in that, although these might be 'separate requirements of the Constitution', these requirements are not always relevant nor appropriate. What Moseneke, J., as he was then, held that *in the context of* the second requirement, measures that are arbitrary, capricious, or display naked preference is incapable of being designed to achieve a constitutionally authorised purpose. After concluding that the second and third requirements were not met, Jafta, J. proceeded to assess arbitrariness and rationality *in general.*

6.1.1. ARBITRARINESS

An action is arbitrary when taken for no reason or no justifiable reason[198] and arbitrary conduct is proscribed by the Constitution in that it requires that every action taken in the exercise of public power must be underpinned by plausible reasons, which reasons must justify the conduct in question.[199] Jafta, J. held that absent reasons justifying the policy, the "*unequal operation* of the policy is arbitrary and leads to *impermissible differentiation*" [own emphasis].[200] The reader must note that the justice referred to *mere differentiation*,[201] which follows sound

192 *Ibid.* at para. [46].
193 *Ibid.* at para. [42].
194 *Ibid.* at para. [47].
195 *Ibid. Van Heerden* 2004 (CC) at para. [149].
196 *Restrucuturing & Insolvency* 2018 (CC) at para. [47].
197 *Ibid.*
198 *Beckingham v Boksburg Licensing Court* 1931 TPD 280 at pp. 521-522; *Bernberg v De Aar Licensing Board* 1947 (2) SA 80 (C) at p. 92; *Kadiaka v Amalgamated Beverage Industries* 1999 (20) ILJ 373 (LC).
199 *Restrucuturing & Insolvency* 2018 (CC) at para. [49].
200 *Ibid.* at para. [52].
201 It shall be recalled that in *Prinsloo* 1997 (CC) at para. [25] it was held that:

constitutional doctrinal thought, since we are currently dealing with arbitrariness denoting the jurisprudence of section 9(1). What is quite interesting is that the unequal operation is held to be arbitrary absent justificatory reasons for the differentiation. Unequal operation of the policy refers to the differentiation occasioned by the policy that amounts to unequal treatment in the constitutional sense, which denotes the absence or insufficiency of reasons. Whilst the state may differentiate, it may not do so arbitrarily.[202] The justice then referred to the following informative paragraph contained in *Makwanyane*:

> "Arbitrariness must also inevitably, by its very nature, lead to the unequal treatment of persons. Arbitrary action, or decision making, is incapable of providing a *rational explanation* as to *why* similarly placed persons are treated in a substantially different way. Without such a rational justifying mechanism, unequal treatment must follow."[203]

Whilst the policy might have been adopted in pursuit of a laudable purpose of transforming the insolvency industry, the "*implementation* of the policy contains arbitrary terms" [own emphasis].[204] The policy differentiates between people who were disadvantaged by discrimination; that is, it differentiates between those who became citizens before 27 April 1994 and those who became citizens thereafter. The policy places all the latter group of (disadvantaged) people in the same category as white males and affords them the same benefits. No "reasons were advanced for treating previously disadvantaged people in the same manner as those who were advantaged, in a measure designed to eliminate consequences of unfair discrimination and achieve equality".[205] "The failure by the Minister to provide reasons justifying why disadvantaged people should be treated differently, on account of the date on which they became citizens, establishes the arbitrariness of the policy".[206]

> "In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation."

The above passage was quoted in *Restrucuturing & Insolvency* 2018 (CC) at para. [53].

202 *Restrucuturing & Insolvency* 2018 (CC) at para. [53].

203 *Makwanyane* 1995 (CC) at para. [156].

204 The use of the word 'implementation' is rather unfortunate, since it is a noun denoting the process of putting a decision or plan into effect. I cannot fathom how the implementation in and of itself contains arbitrary terms. Is the implementation of the policy not the implementation of the arbitrary terms of the policy as contained in the wording of the policy as opposed to the implementation containing the words contained in the policy being implemented? Be that as it may, implementation is discussed in *Barnard*.

205 *Restrucuturing & Insolvency* 2018 (CC) at para. [49].

206 *Ibid.* at para. [54].

6.1.2. RATIONALITY

In turning to rationality, Jafta, J. held that whilst the concepts of arbitrariness and irrationality do overlap these are separate concepts against which the exercise of public power is tested. The difference is explained thus:

> "Arbitrariness is established by the absence of reasons or reasons which do not justify the action taken. Rationality does not speak to justification of the action but to a different issue. Rationality seeks to determine the link between the purpose and the means chosen to achieve such purpose. It is a standard lower than arbitrariness. All that is required for rationality to be satisfied is the connection between the means and the purpose. Put differently, the means chosen to achieve a particular purpose must reasonably be capable of accomplishing that purpose. They need not be the best means or the only means through which the purpose may be attained."[207]

The consequence of the above is that a policy or decision that is arbitrary is irrational and a decision or policy, although not arbitrary may still be irrational.[208] *In casu*, the policy was held not to be rationally connected with the legitimate governmental purpose of achieving equality, *in casu*, the transformation of the industry concerned.[209]

7. APPLICATION OF SECTION 9(2) MEASURES: AFFIRMATIVE ACTION

In *Barnard* the Constitutional Court had to decide, for the first time, whether the *specific* application of a restitutionary or remedial measure can be challenged.[210] *Barnard* was the

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207 *Ibid.* at para. [55].

208 I am indebted to Prof. Brandt who was kind enough to entertain a telephone conversation on a Saturday evening to provide guidance and insight in this regard. Jafta., J also referred to the following passage of *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) at para. [51]:

> "The executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the ground of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if objectively speaking they are not, they fall short of the standard demanded by the Constitution."

209 *Restrucuturing & Insolvency* 2018 (CC) at paras. [57]-[58].

210 Much has been written on this case, see for example Albertyn, (2015, *Adjudicating Affirmative Action within a Normative Framework of Substantive Equality and the Employment Equity Act - An Opportunity Missed? South African Police Service v Solidarity obo Barnard*); Rautenbach, (2015, *Requirements for Affirmative Action and Requirements for the Limitation of Rights*); Louw, (2015, *Part I*); Louw, A.M., *The Employment Equity Act, 1998 (and Other Myths About the Pursuit of 'Equality', 'Equity', and 'Dignity' in a Post-Apartheid South Africa) (Part II),* Vol. 18, No. 3, (2015), Potchefstroom Electronic Law Journal, pp. 668-733. For commentary on the judgments before the CC decided on the matter see McGregor, (2013, *Affirmative Action on Trial - Determining the Legitimacy and Fair Application of Remedial Measures*); Malan, K., *Constitutional Perspectives on the Judgments of the Labour Appeal Court and the Supreme Court of Appeal in Solidarity (acting on behalf of Barnard) v South African Police Services,* Vol. 47, No. 1, (2014), De Jure, pp. 118-140. In *Barnard* 2014 (CC) at para. [141] Van der Westhuizen, J., accepted – without more – that a Court may be asked to evaluate a decision-maker's decision whether that might be a private or public employer. As such, I am of the opinion that what follows is equally applicable to any

instigator for my undergraduate research project in which I investigated the concept of equality and the right to equality in a 'post'-apartheid context. I principally sought to determine whether the outcome of the judgment was *just*, considered within a 'post'-apartheid transformative context. In short, in this case the Court had to decide whether the decision of the National Commissioner of the Police Service[211] amounted to unfair discrimination on the ground of race in breach of section 9(3) of the Constitution and section 6(1) of the EEA. The decision taken was not to promote Captain Renate M. Barnard[212] after the interview panel as well as the Divisional Commissioner recommended Ms. Barnard as the first choice candidate for the post.[213] The National Commissioner stated in a letter that the recommendation does not "address representivity and the posts are not critical and the *non-filling* of the posts will not affect service delivery" [own emphasis].[214]

In *Barnard* Moseneke, D.C.J. held that "the manner in which a properly adopted restitutionary measure was applied may be challenged", since Courts are not precluded from determining whether a constitutionally *valid* section 9(2) restitutionary or remedial measure (*in casu* an employment equity plan) has been put into practice (applied) lawfully.[215] Any section 9(2) measure has two distinct points of constitutional compliance that must be met. The first is constitutional validity, which requires compliance with the *Van Heerden*-requirements, as discussed above. The second is constitutionally compliant implementation of a constitutionally valid restitutionary or remedial measure. It is to the latter constitutionally compliant implementation to which I now turn to,[216] but within the context of employment or then

person formulating and implementing a s. 9(2) measure, whether the person is perceived as 'public' or 'governmental' or then 'the State' or a 'private' legal subject. It must be noted that the relevant and applicable legislation to this case was the EEA with the consequence that it might seem *unclear* whether the application of a measure is to be separated from the *Van Heerden*-requirements discussed above outside the context of the EEA and affirmative action measures provided for therein. My opinion is that it would be quite enigmatic if the specific application of restitutionary or remedial measures, outside the EEA context, cannot be challenged or, if it can be challenged, that the appropriate standard to be adhered to when implementing a measure is different from what is required in the EEA. In principle one cannot deny that the EEA, or then affirmative action measures, sources constitutional validity from s. 9(2). Consequently, the standard to be adhered to when applying of *any* restitutionary or remedial measure *must* be the same as and sourced from s. 9(2) jurisprudence, which may be particularised and contextualised by relevant legislation, such as the EEA.

211 Hereafter referred to as the "National Commissioner".

212 Hereafter referred to as "Ms. Barnard".

213 *Barnard* 2014 (CC) at paras. [13] & [15].

214 *Ibid.* at para. [15].

215 *Ibid.* at para. [38].

216 However, the discussion of implementation of remedial measures in the context of *Barnard* is with an employment context and in the public sphere. As such, it must be understood as applicable in such context.

affirmative action measures. In the context of employment, one cannot and ought not to forget or to, quite comfortably,[217] ignore the importance of one's work:

> "'One's work is part of one's identity and is constitutive of one's dignity. Every individual has a right to take up any activity, which he or she believes himself or herself prepared to undertake as a profession, and to make that activity the very basis of his or her life. And there is a relationship between work and the human personality as a whole. 'It is a relationship that shapes and completes the individual over a lifetime of devoted activity; it is the foundation of a person's existence.'"[218]

Moseneke, D.C.J. held that a validly adopted section 9(2) measure must be put to use lawfully and, consequently, a valid measure may not "be harnessed beyond its lawful limits[,] …applied capriciously[,] or for an ulterior or impermissible purpose".[219] As a minimum standard the principle of legality requires that the "implementation" of a legitimate restitutionary or remedial measure must be rationally related to the terms and objects of the measure. Accordingly, the measure "must be applied to advance its legitimate purpose *and nothing else*" [own emphasis].[220] Generally speaking, irrational conduct in implementing a lawful project (measure) attracts unlawfulness.[221] Moseneke, D.J.C., thus, made it emphatically clear that the implementation of any section 9(2) measures must be rational.[222] However, he did add a caveat in stating that aforementioned are the minimum requirements and he did not consider it necessary to define the implementation standard finally.[223]

In disagreeing with Moseneke, D.C.J., Cameron, J., Froneman, J., and Majiedt, A.J., in a minority judgment, held that the appropriate standard that should applied when a litigant challenges the implementation of a constitutionally compliant restitutionary measure in a particular case is fairness.[224] The justices formulated a standard specific to the EEA, one that is rigorous enough to ensure that the implementation of a remedial measure is "consistent with the purpose of the Act"; namely, to "avoid over-rigid implementation, to balance the interests of the

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[217] I refer the reader to the thoroughly thought through conscientious and insightful remarks of a justice of the CC in *Restrucuturing & Insolvency* 2018 (CC) at para. [83] where Madlanga, J. held in the most clearest and unambiguous passage that is not self-contradictory as follows:

> "If, for the practices of white insolvency practitioners to continue in existence, it is necessary that white people as a group must not only continue to disproportionately dominate insolvency practice at the final stage but must also derive more benefit than what the policy has given them, then tough luck. After all, *Van Heerden* has held that remedial measures will have casualties or result in "hard cases". Lest redress towards the attainment of substantive equality will move at such a snail pace that the dream for equality will be as good as not being realised, it just cannot be business as usual."

[218] *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at para. [59].

[219] *Barnard* 2014 (CC) at para. [38].

[220] *Ibid.* at para. [39].

[221] *Ibid.*

[222] *Ibid.*

[223] *Ibid.*

[224] *Ibid.* at paras. [76] & [93]-[124].

various designated groups, and to respect the dignity of rejected applicants".[225] They distinguished the assessment of the "fairness of the individual implementation of affirmative action measures" from the assessment as to "whether those measures amount to unfair discrimination".[226] In terms of the latter assessment a determination is made as to whether the "formulation and content of a restitutionary measure are constitutionally compliant" whereas an assessment of the implementation of a measure entails an examination as to whether a "*specific implementation* of a measure that is constitutionally compliant in its general form is *nevertheless in conflict* with the provisions of the [EEA]" [own emphasis].[227]

In formulating fairness, as derived from the EEA, reference was made to the EEA's purpose: to achieve workplace equity by "implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels".[228] However, this purpose, by itself, does not unveil when a restitutionary measure *or* its implementation is not consonant with the EEA. The justices relied on several sections of the EEA to ascertain when the measure itself will not be consonant with the EEA.[229] In this context the justices held that the EEA, in section 15(2)(*b*), insists on affirmative action measures that are "based on equal dignity and respect of all people" and, thus, restates dignity's fundamental constitutional importance, both as a right and underlying value.[230] Section 15(4) of the EEA provides as follows:

> "Subject to s[ection] 42, nothing in this section requires a designated employer to take any decision concerning an employment policy or practice *that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups*."[231] [original emphasis]

Clearly the EEA (*i*) addresses the requirements of affirmative action measures in general and (*ii*) proscribes any implementation a measures constituting an absolute barrier to non-designated groups.[232] The justices held that they were required to determine whether the *national commissioner's implementation of the plan* was indeed so rigid as to constitute the use of quotas instead of numerical goals.[233]

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225 *Ibid.* at para. [97].
226 *Ibid.* at para. [101].
227 *Ibid.*
228 *Ibid.* at para. [89].
229 *Ibid.* The various sections are discussed in the case, but not discussed herein.
230 *Ibid.*
231 *Ibid.* at para. [90].
232 *Ibid.*
233 *Ibid.* The question of quotas is of utmost importance and this question was again asked to be decides upon by the Court in *Solidarity*. What must be noted here is that the measure itself can be so rigid as to provide for quotas, which would, in my opinion, render the plan irrational or arbitrary. In addition, it will impose such substantial and undue harm on those disadvantaged by it that the Constitution's long-term goal is irreparably threatened thereby and made a mockery of. As Sachs, J. held in *Van Heerden*, one can ask

The justices continued and held that the higher standard of scrutiny found in fairness does not entitle Courts to second-guess the reasoned choices of other branches of government.[234] However, fairness demands that judges ensure a decision-maker has "carefully evaluated relevant constitutional and statutory imperatives before making a decision that relies predominantly on one of the criteria, such as race, that are normally barred from consideration by s[ection] 9(3) …".[235] In relying on fairness a judge must determine whether the decision to implement a measure constitutes a fair implementation of the measure. In doing so a judge must examine both (*i*) the objective facts of the case and (*ii*) the reasons the decision-maker gave for his or her decision.[236]

Van der Westhuizen, J. did not agree with either the majority or Cameron, J., Froneman, J., and Majiedt, A.J. He followed my approach set out above in terms of which any section 9(2) measure has two distinct points of constitutional compliance that must be met. The first is constitutional validity, which requires compliance with the *Van Heerden*-requirements, as discussed above. The second is constitutionally compliant implementation of a constitutionally valid restitutionary or remedial measure. Van der Westhuizen, J. held that the first two *Van Heerden*-requirements "test whether the measure itself, in its design, is rationally connected to the end it aims to achieve".[237] I am in full agreement with this approach. The justice proceeded to hold that the focus of the third requirement is different in that it (*i*) pertains to the constitutional validity of the measure itself and (*ii*) assesses the constitutional compliance of the implementation of the measure in question.[238] He opined that the word 'achievement' implies some effect or impact and the achievement of equality cannot be tested "without contemplating some action taken in terms of the measure".[239] The *Van Heerden*-requirements in terms of this understanding acknowledges a distinction between a measure and its implementation. He concluded that both (*i*) a decision or other action taken in terms of a measure and (*ii*) the measure itself must be constitutionally compliant.[240] I agree but for his incorporation of the third

whether a measure adopted was unduly punitive or manifestly and grossly disproportionate in its impact. Accordingly, quotas would affect the second and third *Van Heerden*-requirement.

234 *Ibid*. at para. [96].

235 *Ibid*.: If rationality were to be adopted it would be:

> "… difficult ever to hold that a decision-maker had impermissibly converted a set of numerical targets into quotas in that any decision that resembles and accords with the numerical target would bear at least some rational connection with the measure's legitimate representivity goals. But a decision-maker cannot simply apply the numerical targets by rote. Similarly, a rationality standard does not allow a court to interrogate properly a decision-maker's balancing of the multiple designated groups, or of their interests against those adversely affected by the restitutionary measures".

236 *Ibid*. at para. [102].

237 *Ibid*. at para. [143].

238 *Ibid*.

239 *Ibid*.

240 *Ibid*.

Van Heerden-requirement into the assessment of constitutionally compliant implementation. The justice proceeded to state that "something more is needed when a measure as well as its implementation are evaluated".[241] I am in concurrence with the justice in that a measure can be constitutionally valid in form whilst at the same time being applied unlawfully.[242] The majority is, thus, followed in that a validly adopted measure must be put to use lawfully.[243] The justice concluded to hold that the impact and effect of the implementation of a constitutionally valid measure must be evaluated.[244]

The justice noted that to determine whether a measure's implementation passes constitutional muster one must take into account how it may affect other constitutional rights and values.[245] He rejected fairness and rationality as an appropriate standard, respectively. He instead saw the implementation of a measure as a limitation of another constitutional right that ought to be considered within the paradigm of and factors contained in section 36(1) of the Constitution.[246] The test for impact for him is whether "the impact of the implementation of a s[ection] 9(2) measure on other rights is more severe than necessary to achieve their purpose".[247] This follows from the mention of the extent of the limitation and less restrictive means in section 36. No single consideration is determinative; rather, "the court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list".[248] In this case he considered whether the measure impacted on Ms. Barnard's dignity more severe than necessary to achieve their purpose. In order to answer this question, he had recourse to Kantian ethics and asked:

> "Was Ms[.] Barnard treated as a mere means to reach an end, on the basis of her race only? As an individual, a woman and a public servant, she is also a member of a society deeply scarred by past and present inequality. Did the implementation of the measure impermissibly undermine her autonomy, including her ability to pursue her career goals?"[249]

In terms of this approach a decision-maker's decision would be assessed in line with a proportionality analysis akin to section 36. I cannot endorse such an approach since it is internally inconsistent with the structure of the Constitution, more specifically the Bill of Rights.

241 *Ibid.* at para. [145].
242 *Ibid.*
243 *Ibid.* at para. [38].
244 *Ibid.* at para. [145].
245 *Ibid.* at para. [156].
246 *Ibid.* at paras. [161]-[167].
247 *Ibid.* at para. [164].
248 *Ibid.*
249 *Ibid.* at para. [171].

I reject both fairness[250] and mere rationality, since rationality is already tied up within the *Van Heerden*-requirements and fairness is tied up in section 9(3) jurisprudence.

I submit that the enquiry as to the constitutional compliance of the implementation of a measure entails an analysis of the impact of the measure on constitutional rights and values, which includes the wider foundational value of achievement of equality. First, does the implementation give effect to the value 'achievement of equality'. When asking this question, one will adapt the third requirement of the *Van Heerden*-requirements to ascertain whether the *specific implementation* of the measure promoted the achievement of equality. Appreciation of the *effect* of the implementation of the measure in the context of the specific complainant *and* the broader society is determinative of whether it will promote the long-term goal of aching equality. Although I reject rationality as the appropriate standard, I do not reject it as a minimum standard. In other words, my approach builds upon mere rationality, since rationality is inclusive of and gives effect to the achievement of equality. Instead of adopting fairness, as advocated for by Cameron, J. *et al*, I rather opt for inviting reasons into the enquiry under the auspices of arbitrariness as opposed to fairness. As regard to human dignity, I must align myself with van der Westhuizen, J. where in that regarding the implementation one must enquire whether those disadvantaged by a measure are treated as a mere means to an end, on the basis of race or sex, and whether the implementation of the measure impermissibly undermines the disadvantaged individuals' autonomy, including their ability to pursue their career goals.

7.1. THE BARNARD *DICTUM*

The *dictum* of the Constitutional Court, as developed in *Barnard*, that a white woman may be *refused* appointment because white women, as a category defined by race and sex, are already adequately or over-represented in the occupational level at which she sought appointment, has subsequently been reiterated and even expanded by the Constitutional Court, to include, within this *dictum*, any race as well as sex.[251] These *dictums* are unforgiving in individual consequence and express suspect graceful 'representative egalitarianism'. These *dictums* mean that where your identity, in *Barnard* it was white female, is adequately or over-represented[252] at the relevant occupational level of an employer, such over-representation constitutes a constitutionally justifiable *bar* towards your employment at that occupational level until such time as either (*i*) the

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250 Seems that the LAC has latched on to the fairness standard – see *South African Police Service v Public Service Association of South Africa* 2015 JOL 33218 (LAC) at para. [35].

251 *Solidarity* 2016 (CC) at paras. [38]-[40].

252 Para 5.3.9 of the GN 1358 of 4 August 2005: "Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices" defines "under-representation" as:

> "the statistical disparity between the representation of designated groups in the workplace compared to their representation in the labour market. This may indicate the likelihood of barriers in recruitment, promotion, training and development."

employer ignores the over-representation or (*ii*) your *identity* is no longer over-represented. But the question then becomes, what does transformation mean in 'post'-apartheid South Africa in light of these *dictums*?

An unforeseen result of the constitutional transformative project is a transformative tension flowing from the interplay between formal equality and a notion of substantive equality inclusive of remedial equality.[253] The tension lies between the equality entitlement of the individual in not being discriminated against based on race or otherwise, and the equality of society as a whole.[254] Although the Constitution "permits us to take past disadvantage into account to achieve substantive equality[,]"[255] this tension between people of races and sexes is exactly that which is not addressed by substantive equality. The law might, admittedly, not be able to demand real respectful and *bona fide* treatment of an employee who is not appointed because he or she is white. Real in the latter sense relates to real substantive, extra-legal, respect and conduct carried out in good faith. For example, in *Barnard* the police did not even attend the conciliation meeting, despite due notice. Their conduct cannot be seen as either respectful or *bona fide*. Even if, *in law and principle*, the decision in *Barnard* is *correct* the manner in which we relate to each other, whilst recognising that individuals will be adversely affected by transformation, will determine whether we will become a truly non-sexist and non-racial society or only a constructed fiction of one. However, the tenor of the judgement in equating representivity with equality merely exacerbated the transformative tension and the ossification of subjectivity.

Various arguments have been proffered for[256] and against[257] representivity as a fundamental principle or goal which would ultimately deliver an equal and transformed society.

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253 *Barnard* 2014 (CC) at paras. [77]-[81].

254 *Ibid.* at para. [79].

255 *Ibid.*

256 It goes without saying that the SA government has adopted the ideological and highly politicized position that representivity is the barometer for transformation and a broadly representative SA is a substantively equal SA, and with broadly representative SA one must understand that any sphere of SA must be reflective of the demographic profile of South Africa; in other words every business, organised society of individuals, collective bodies, organizations, corporations, juristic persons, or otherwise should, where appropriate and applicable, employ an overwhelming majority and/or be owned by an overwhelming majority of black Africans. S. 1 of the B-BBEE Act defines "broad-based black economic empowerment" as:

> "the viable economic empowerment of all black people, in particular women, workers, youth, people with disabilities and people living in rural areas, through diverse but integrated socio-economic strategies that include, but are not limited to –
>
> (*a*) *increasing* the *number of black people* that manage, own and control enterprises and productive assets;
>
> (*b*) facilitating ownership and management of enterprises and productive assets by communities, workers, co-operatives and other collective enterprises;
>
> (*c*) human resource and skills development;
>
> (*d*) achieving *equitable representation* in all occupational categories and levels in the workforce;
>
> (*e*) *preferential procurement* from enterprises that are owned or managed by black people; and
>
> (*f*) investment in enterprises that are *owned or managed by black people*." [own emphasis]

S. 2 of the EEA provides that the EEA's purpose is:

> "to achieve equity [as opposed to equality] in the workplace by –
>
> (*a*) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
>
> (*b*) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their *equitable representation* in all occupational levels in the workforce." [own emphasis]

See Fredman, S., *Reimagining Power Relations: Hierarchies of Disadvantage and Affirmative Action,* (2017), Acta Juridica, pp. 124-145, at pp. 140-141 where Fredman opines and seeks to justify representation *as* equality by holding that "affirmative action as representation can be legitimated as an effective means of redressing ongoing stereotyping and prejudice, bringing the second dimensions into play". However, in the same breath it is acknowledged that:

> "[T]his formulation reveals its *limited role in relation to redressing disadvantage*, facilitating voice, participation[,] and structural change. While preference policies based on representivity may change the racial composition of some higher paid occupations, *they do not challenge the underlying structural and institutional forces leading to the discrimination*. … [A]ffirmative action diagnoses the problem as one of maldistribution of privileged positions, with the result that its objective is limited to the redistribution of such positions among under-represented groups. … [I]n practice, affirmative action is … found to do no more than favour the relatively privileged of the disadvantaged group. While some 'make it to the top', the vast majority will remain in poorly paid, low status jobs. *For fundamental change to occur, the structural and institutional* ***causes*** *of exclusion need to be changed*." [own emphasis]

Fredman continues and states that "[a] different justification for a principle of representivity as the goal of affirmative action is that such an approach provides diversity in an educational institution or workplace. Diversity could be a string candidate for explaining a principle of strict representation, including floors and ceilings." However, as with the first formulation and on closer examination:

> "… diversity appears more problematic. As a start, it has a strongly instrumental flavour. Rather than redressing disadvantage, addressing stigma, and facilitating voice in the disadvantaged group, it is depicted as enhancing the educational experience of members of dominant groups. Outside of the educational context, where there is clearly a value in richer educational experience, diversity is even more instrumental, generally justified as creating a better experience for customers, or a more responsive public service. This does not … redress … disadvantage. It certainly falls into the trap of essentialising groups …." [own emphasis]

257 See Malan, K., *Observations on Representivity, Democracy, and Homogenisation,* No. 3, (2010), Journal of South African Law, pp. 427-449, at p. 446-447 where Malan opines that the principle of representivity entrenches systemic inequality opposed to being the lodestar of equality is it has been held out to be. Louw M, A., *Should the Playing Fields be Levelled? Revisiting Affirmative Action in Professional Sport (Part I),* Vol. 15, No. 1, (Jan., 2004), Stellenbosch Law Review, pp. 119-136. Louw M, A., *Should the Playing Fields be Levelled? Revisiting Affirmative Action in Professional Sport (Part II),* Vol. 15, No. 2, (Jan., 2004), Stellenbosch Law Review, pp. 225-246. Brassey, M., *The Employment Equity Act: Bad for Employment and Bad for Equity,* Vol. 19, No. (1998), Industrial Law Journal, pp. 1359-1367, at p. 1363:

> "The concern [of the EEA] is not with disadvantage, but with racial representativeness, which it uses as its organizing concept. Since demographic testing of this sort can find no justification in the Constitution, the Act can be rescued only if representativeness is considered to be a legitimate proxy for past disadvantage. To prove this, the court will need to be satisfied that no reasonable alternative exists by which past disadvantage might be tested directly."

Louw argues in Louw, (2015, *Part I*), at p. 626 that:

> "A 'numbers game approach' to redressing disadvantage caused by past unfair discrimination is just too artificial (and based on questionable hypotheses which may, themselves, be open to criticism as constituting stereotyping) to provide a satisfactory (and constitutionally compliant) model for demographic representivity-based affirmative action measures, without more (or without, at least, proper) explanation by our courts…."

Louw, (2015, *Part II*). Whilst Malan argues that representivity leads to homogenization, even if he is wrong, it is widely accepted that affirmative action is aimed at securing diversity, which is, in and of itself, not a wholly uncontested concept as Kekes in Kekes, J., *The Injustice of Affirmative Action Involving Preferential Treatment*, in Cahn, S. (Ed.) *The Affirmative Action Debate* (1995), at p. 200 indicated:

> "[A]rbitrariness pervades the attempt to justify preferential treatment by appeal to the benefits of diversity … No effort is made to contribute to diversity by according preferential treatment to religious fundamentalists, anti-feminists, political conservatives, defenders of the desirability of American primacy in international affairs, or to those who advocate research into genetic racial differences. As it now stands, diversity is a code word for individuals or views that find favo[u]r with left wing academics."

Louw, in Louw, (2015, *Part I*), at p. 628, n. 98, opines that as a justification for affirmative action 'diversity' and its operative (political) meaning is in the eye of the beholder. The concept or ideal of diversity, which involves an *exclusionary* value judgment is highly political and inspired by the 'accepted' majoritarian and

> "The notion of racial and gender representivity has mushroomed into one of the foremost principles in terms of which the public order in South Africa is organised. If transformation has developed into the master concept of our post-1994 public order, representivity is the principal instrument for achieving transformation ... [In South Africa] there is in all probability no other legal principle that is so virulently and unrelentingly pursued."[258]

My critique is against 'identity representivity', which phrase is used by myself to describe the Constitutional Court's *dictums* holding that job reservation – on the basis of identity – is constitutionally justifiable for in so far as it does not amount to an application of a quota. However, I submit that the Court's interpretation of the meaning of 'quota' is formalistically narrow to the extent that the Court can be said to have abdicated its constitutional duty of upholding the law in favour of political(ly motivated) deference. Representvity – as a concept and principal requirement – has been incorporated into at least forty-seven separate statutes incorporating the requirement of racial and gender representivity into the composition of the boards of public bodies (charged with overseeing fields ranging from libraries to quantity surveyors and property valuers, to weather services).[259] It is unequivocal then that representivity is the relevant standard *to measure* transformation *and* (the attainment of) equality. What Zondo, J. could not have made any clearer, in *Solidarity*, is that, most certainly in the context of the workplace, transformation *means* seeking to become broadly representivity of the people of South Africa. Otherwise put, a transform***ed*** workforce means to be broadly representative of the people of South Africa. Demographic representivity has become the "proxy for equality"[260] by attributing an essentialist essence to the notion of transformation. Representivity is a *condictio sine qua non* for the achievement of equality and, as such, representivity *is* equality. Once this *state* of being (existence) has been attained we would have *achieved* equality; in other words, equality (achieved) *is* being broadly representative of the demographic (which is nothing else than racial)[261] composition of the population of South Africa (representivity). Transformation has

populist public opinion at any given time. Politicized diversity as a yardstick for equity is, thus, highly suspect.

258 Malan, (2010, *Observations on Representivity, Democracy, and Homogenisation*), at p. 427.

259 Louw, (2015, *Part I*), at p. 620. Louw led me to Malan who has provided a non-exhaustive list of legislation that creates bodies that must be composed in compliance with the representivity principle. In his list, in respect of every piece of legislation, he mentions the name of the body or staff components required to be composed in consonance with the representivity principle together with the applicable representivity provision – Malan, (2010, *Observations on Representivity, Democracy, and Homogenisation*), at pp. 428-429, n. 6.

260 Louw, (2015, *Part I*), at p. 624.

261 Despite what Nugent, J. might have said in *Solidarity* 2016 (CC) at paras. [121]-[122] where a demographic profile is defined as "… a statistical analysis of the characteristics of a population constructed upon whatever characteristics one chooses to analyse" and who also held that if "… the demographic profile of a population is to be the measure of employment equity then all the characteristics of the population that are relevant must be brought to account and not only some". Ultimately it was held that if one characteristic, such as race, is selected and other *relevant* characteristics are ignored, such conduct would amount to irrationality, which is not countenanced by the law.

been equated with a statistical or arithmetical 'reality', but even more profoundly, our state of existence *as* a transformed and *substantively* equal society characterised by social justice has been reduced to mere ones and zeros on an Excel spreadsheet. We will only include the other and celebrate the radical alterity of the other for in so far as the representivity ratio allows such celebration of difference.

7.1.1. QUOTAS

Relevant to the *Barnard dictum* is the question of quotas. In the context of employment equity, the distinction between quotas and numerical targets is important. I submit that any section 9(2) measure cannot provide for quotas and the implementation of a measure cannot be so rigid so as to constitute any target a quota and, in that sense, become an absolute barrier to employment. In other words, a quota can invalidate a plan itself and, thus, strike at its constitutional validity – as *Van Heerden* sense (in other words, the formulation and content of a restitutionary measure are constitutionally compliant) – or it can negate the implementation of a measure and render it constitutionally non-compliant.

A designated employer is required to implement several measures in pursuit of affirmative action: they must identify and eliminate employment barriers, further diversify the workforce "based on equal dignity and respect of all people" and "retain and develop people" as well as "implement appropriate training measures".[262] Section 15(3) of the EEA contains a vital caveat in providing that affirmative action measures may include preferential treatment and numerical goals but must exclude any form of "quotas". However, the EEA does not define quotas. Although the majority in *Barnard* held that the case before the Court was not an appropriate one so as to enable the Court to give meaning to the term, the majority, nonetheless, observed that section 15(4) sets the tone for the "flexibility and inclusiveness" that is required to advance employment equity.[263] Any employment equity plan or practice establishing an absolute barrier to the future or continued employment or promotion of people who are disadvantaged by these measures is in conflict with section 15(3) and section 9(2).[264]

In *Solidarity* the Court referred to itself in *Barnard* and stated that it, although not defining a quota exhaustively, held that "one of the distinctions between a quota and a numerical target is that a quota is rigid whereas a numerical target is flexible".[265] The *onus* on the party averring that the numerical targets of a restitutionary or remedial measure (*in casu* an employment equity plan)

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262 Ss. 15(2)(*b*) & 15(2)(*d*)(ii).
263 *Barnard* 2014 (CC) at para. [42].
264 *Ibid.*
265 *Solidarity* 2016 (CC) at para. [51].

constitute quotas must show that the targets are rigid.[266] In *Solidarity* it was averred that the measure provided for rigid quotas *and* was applied rigidly.[267] The majority in *Solidarity* held that the employment equity plan made provision for deviation from the itself (deviations from the plan) and, as a consequence, the measure provided for deviation from the targets in certain circumstances.[268] Deviations were provided for in two limited circumstances; namely, a candidate (whose appointment would not advance the achievement of the 'numerical targets' of the employment equity plan) could, nevertheless, be appointed if he or she had scarce skills or on the basis of the operational requirements of the employer.[269] The majority held that the numerical targets cannot be rigid once a remedial measure contains a provision for deviations from the numerical targets of the measure.[270] This is particularly so where the deviations do occur in reality.[271] Thus, because the exceptional deviations did occur in reality the targets were not rigid. The minority, however, found:

> "In contrast to the thoughtful, empathetic, and textured plan one might expect if weight is given to what was expressed by this court, what we have before us is only cold and impersonal arithmetic. A person familiar with the arithmetic functions of an Excel spreadsheet might have produced it in a morning."[272]

As to the meaning of a quota, the minority is in agreement with the majority in relying on *Barnard* to hold that the primary distinction between a quota and a numerical target is flexibility.[273] The minority further relied on *Barnard* to hold that section 15(3) "endorses numerical goals in pursuit of work place representivity and equity",[274] and most importantly, numerical targets serve as a "*flexible employment guideline*" to a designated employer.[275] The minority held that, in assessing the flexibility of a remedial measure, the relevant question is whether the general application of the measure is flexible.[276] The enquiry is not whether the measure provides for certain special cases that are excluded from its ambit. The critical enquiry is rather whether there is scope for flexibility in the general application of a measure with regard to positions or circumstances not excluded from its general ambit.[277] In *Solidarity*, the relevant employment equity plan provided for exact instructions regarding the *identity* of who can be appointed at each

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266 *Ibid.*
267 *Ibid.*
268 *Ibid.*
269 *Ibid.*
270 *Ibid.* at para. [53].
271 *Ibid.*
272 *Ibid.* at para. [102].
273 *Ibid.* at para. [111].
274 *Ibid.*
275 *Ibid.*
276 *Ibid.* at paras. [113]-[114].
277 *Ibid.*

operational level. For example, in operational level 5, the employment equity plan provided that "… only African Females, whites[,] and Indians can be appointed".[278] In following the majority, the employment equity plan does not provide for quotas because an African male applicant may be appointed, if he has scarce skills and/or on the basis of the employer's operational requirements. However, in following the minority, the employment equity plan should have provided for numerical guidelines only. For example, the employment equity plan should have read as follows: 'at level 5, African Males are currently sufficiently represented and preference, on the basis of employment equity, may only be provided to African Females, whites, and Indians'. In other words, the employment equity plan must still allow an African male to be appointed – irrespective of the numerical targets of the employment equity plan – even if there is no provision or reason for deviation. Applying the majority's view, a designated employer need only provide for limited flexibility; that is, deviation or exclusion from its general application. However, applying the minority's view, a designated employer should provide for flexibility in the general application of the employment equity plan. By doing so, the employer can be concerned with the relationship between, but most importantly, the dignity of both the previously disadvantaged and those disadvantaged by transformation. It is up to designated employers to decide whether they will adopt the majority's or the minority's approach in their employment equity plans, neither of which is unconstitutional.[279]

Pretorius argues, quite conveniently, that the majority's *dictum* that mere exceptional exclusions from ambit of applicability renders a measure flexible is nothing else than definitional reasoning in the context of quotas and absolute barriers. Pretorius is of the opinion that standards such as fairness, reasonableness, or proportionality as opposed to normatively deprived definitions of quotas or barriers are required.[280] The majority of the Court did not consider the exclusionary effect of the employment equity plan's so-called numerical targets based on a contextual evaluation of the targets' impact on all concerned since. In his opinion the definitional approach lacks any substantive normative consideration.[281] The definitional analysis concerns itself only with a single definitional element; namely, the plan's flexibility. Pretorius is of the opinion that "in terms of the definitional approach, the flexibility standard itself was

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278 *Ibid.* at para. [103.1].

279 This paragraph is reliance on a short article authored by me: Van der Walt, J.J., *Targets and Quotas: The Cold and Impersonal Arithmetic of Transformation – Employers Be(a)ware* (E-Pub. Date: Feb. 26, 2018) Baker & McKenzie [Accessed on: Aug. 13, 2018]. See also Van der Walt, J.J., *Targets and Quotas: The Cold and Impersonal Arithmetic of Transformation – Employers Be(a)ware* (E-Pub. Date: March 5, 2018) Polity [Accessed on: Aug. 13, 2018].

280 Pretorius, (2017, *Limitations of Definitional Reasoning*), at p. 279.

281 *Ibid.*

understood and applied a-normatively".[282] Consequently, because *some* provision was made for exceptions from the so-called 'numerical targets' (through the so-called "deviation clause" in the plan), instrumental and formal 'exception-to-the-rule' logic (that is reminiscent of rule formalism) became decisive. Scant consideration was given to the nature and impact of the exceptions on the dignity of those affected, despite the clear caution and constitutional principle highlighted by Moseneke, A.C.J. in *Barnard*: transformation must take place "with due care not to invade unduly the dignity of all concerned".[283]

8. TRANSFORMATION AND RACE RELATIONS

For millions of South Africans, the 'South African experience' is a daily struggle to make a living within a materially unequal society in which certain factors of production are divided along sexual and racial lines. The reason for this division being the indisputable objective fact that South Africa has been bequeathed with the aftermath of calculated and institutionalised social, political and economic domination, subjugation, and suppression. It, therefore, follows that since the advent of the Interim Constitution and, subsequent thereto, the Constitution, a process of transformation found its inception and continuation within South Africa. This process of transformation is not a mere governmental policy or political rhetoric, but a constitutionally instigated demand "that our society be transformed from the closed, repressive, racist, oligarchy of the past, to an open and democratic society based on human dignity, equality and freedom".[284] That political negotiations gave rise to the Interim Constitution cannot be denied, but both the Interim Constitution and the Constitution is 'bigger' than mere politics – it is superior to and trumps any movement of partisan hegemony. It is, therefore, clear that both the Interim Constitution[285] and the Constitution[286] are transformative constitutions.

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282 *Ibid.*

283 Pretorius, (2017, *Limitations of Definitional Reasoning*), at p. 279 and quoted portion is that of the *Solidarity* 2016 (CC) at paras. [30].

284 Chaskalson, (2000, *The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of Our Constitutional Order*), at p. 204.

285 See *Makwanyane* 1995 (CC) at para. [262] where it was acknowledged that "the Constitution expressly aspires to … provide a transition from … grossly unacceptable features of the past to a conspicuously contrasting … future" and *Du Plessis* 1996 (CC) at para. [157], for yet another example where the CC accepted that "[the Constitution] is a document that seeks to transform the *status quo ante* into a new order".

286 See *Barnard* 2014 (CC) at para. [29], Moseneke, A.C.J., writing for the majority, observed that the Constitution has "a transformative mission"; *Bato Star* 2004 (CC) at para. [76]; *Van Heerden* 2004 (CC) at para. [25], Moseneke, J., as he then was, again writing for the majority, affirmed that "our Constitution heralds … the start of a credible and abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of our constitutional framework"; *Bel Porto* 2002 (CC) at para. [7], Chaskalson, C.J. explained that "[t]he process of transformation must be carried out in accordance with … the Constitution and its Bill of Rights".

In 1998, an article authored by Klare entitled *Legal culture and Transformative Constitutionalism* saw the light in which Klare coined the term "Transformative Constitutionalism".[287] Before its publication, the transformative nature of both the Interim Constitution and the Constitution had already been established by the Constitutional Court and subsequent thereto previous Chief Justice Arthur Chaskalson argued for transformation without any explicit reference to this notion of transformative constitutionalism.[288] However, both previous Chief Justice Pius Langa[289] and the previous Deputy Chief Justice Dikgang Moseneke[290] made explicit reference to the notion of transformative constitutionalism and even quoted Klare's definition thereof. The reason for indicating that transformation, as an idea or notion, can exist *outside* of or beyond transformative constitutionalism is three-fold. Firstly, transformative constitutionalism is the brainchild of an American; namely Klare.

Secondly, it is without question that transformative constitutionalism is embracive of substantive equality, which is not without more unacceptable. What is highly problematic, however, is substantive equality driven by transformative constitutionalism, which is, in the words of Klare:

> "a long-term project of *constitutional* enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of *inducing* large-scale social change through non[-]violent *political* processes *grounded in law*."[291] [own emphasis]

Transformative constitutionalism as expressed in the quoted paragraph is not 'wrong' nor 'right' *per se*. Transformative constitutionalism is an – incomplete – conception of transformation by limiting itself, almost in an absolutist fashion, as a *political* process *grounded* in law, which process ignores and pays no attention to the relationships between human beings, not to mention ignorance of the ethical relation. *Naaido* is the epitome of the consequences of politicising race.[292] When considering the real state of affairs and the lived experience of human beings race *per se* cannot be relevant, since race must be *relevant* to a person's lived experience. The only reason why the complainant's race in *Naaido* was taken into account is political;[293] that is, the manner in which race is taken into account is primarily determined by the manner in

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287 See Klare, (1998, *Legal Culture and Transformative Constitutionalism*).

288 See Chaskalson, (2000, *The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of Our Constitutional Order*).

289 Langa, (2006, *Transformative Constitutionalism*).

290 See Moseneke, (2002, *The Fourth Bram Fisher Memorial Lecture: Transformative Adjudication*).

291 Albertyn & Goldblatt, (1998, *Facing the Challenge of Transformation*), at p. 272.

292 *Naidoo* 2015 (LAC).

293 Political is not limited to part-politics as such, but rather incorporates insight into both the public and private spheres of life and the impact thereon and control thereover.

which such treatment will be perceived by the black public opinion and affect the manner in which such public can be *controlled*. In other words, race and its relevance within material transformation is pre-dominantly concerned with political power, which translates into economic power. In contrast herewith, the proposed ethical conception of equality will *always* first conceive humans in their being (existence *as*) human irrespective of race, sex, gender, or otherwise. An ethical conception of equality will *first* enjoin recognition of the being of a human *as* human before recognising the race, sex, gender, or otherwise of the human being. Thus, an ethical conception of equality does not disregard race, sex, gender, or otherwise, but does not allow race, sex, gender, or otherwise to be projected as the totality of the being (existence *as*) a human. Our being (existence *as*) human ought to transcend any socially constructed prejudice (ontological bias) and socially constructed bigotry (ontological intolerance).

Substantive equality is perceived as transformation of a materially unequal society – grounded in law. Structures of oppression and domination must be dismantled and power relations within our society must be reconstructed along egalitarian lines with the, hoped, consequence that '"human development is maximised and material imbalances [are] redressed"'.[294] The focus of substantive equality is not abstract from lived experience, but is directed at restructuring our society along egalitarian lines. The aforementioned elaboration on the content of substantive equality is not wrong *per se*, but I remind the reader that the law is merely normative as opposed to positive with respect to the human cognitive faculty. Simply put, a rule of law can only (normatively) prescribe to a human being how he or she *ought* to act so as to render his or her conduct objectively lawful (as opposed to just). A rule of law can only *state* or proclaim that the socio-economic circumstances of an individual *are* important. Whether a legal subject decides to act at all or in accordance with the said rule of law or *agree* with the importance ascribed to socio-economic circumstances is entirely in the discretion of the moral agent – the human being. Now let us unpack this from a perspective that is alive to the importance attached to the perception that we have of each other.

The law, by which I mean the Constitution,[295] is not the only problem, we are and, more accurately, our inability to act autonomously from social prejudice is complicit in the problem of inadequate social transformation. Once confronted with the other, one is vested with *a priori* understanding (in Heidegger's sense). We have pre-conceived conceptions of each other, which conceptions are, more often than not, replete with social and other bias. As if apartheid was not

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294 Moseneke, (2002, *The Fourth Bram Fisher Memorial Lecture: Transformative Adjudication*), at p. 318 quoting Albertyn & Goldblatt, (1998, *Facing the Challenge of Transformation*), at p. 272.

295 I specifically exclude the EEA and the B-BBEE Act.

enough to morally pollute our conception and understanding of (the meaning of) each other('s) (being) and destroy the ethical relations between each other, we chose to (*i*) (re)define, in law, the *difference* between each other predominantly along racial lines and (*ii*) to use the (re)defined difference (that is previous (and perpetually) disadvantaged as well as previous (and perpetually) advantage(d)) as the exclusive and, thus, a-contextual basis upon which to confer advantage and impute disadvantage upon each other. As already stated, this (re)definition of difference resulted in the ossification of subjectivity and the meaning of being. Transformative constitutionalism is complicit in this unacceptable and ethically questionable turn of events by virtue of its disregard of the being of human beings that are the actors within the process of transformation. It exacerbates our inability to act autonomously from social prejudice.

I have now critiqued transformative constitutionalism, the Constitutional Court, and the manner in which equality thought has (re)defined the being (existence as) of human beings. I turn to the public and how we still have racist conceptions of and are racist towards each other, whether the racist is white, black, Indian, Coloured, male, or female. It is the prevalence of racism that transformative constitutionalism has not transformed, but instead harboured. What is the state of South Africa's race relations and is such state of affairs a result of and threatened by substantive equality? In answering this question I must turn to the February 2017 report of the South African Institute of Race Relations.[296] Approximately a year after Penny Sparrow's infamous, hurtful, and insulting comments equating black beachgoers to "monkeys", in December 2016, similar remarks were made in another Facebook post. Ben Sasanof commented on Facebook, which comment is based on and informed by a photograph of a packed Durban beach, that the "crowded beach 'must have smelt like the inside of Zuma's asshole'".[297] "When critics accused him of racism for this incendiary analogy, Mr. Sasanof responded with yet more outrageous remarks. He also called one commentator 'a monkey'".[298] Numerous other racially sensitive comments also saw the light of day during 2016. Estate agent Vicki Momberg,[299] the victim of a smash-and-grab robbery, was caught on video using the word 'kaffir' and "reportedly saying that she would drive over black people and shoot them if she had a gun".[300] A young Cape Town resident, Matthew Theunissen, termed the government "a bunch of kaffirs" after the then sports minister Fikile Mbalula decided to ban four sporting bodies, including cricket and rugby,

296 *Race Relations in South Africa: Reasons for Hope* (2017) South African Institute of Race Relations. I refer hereinafter to the South African Institute of Race Relations as the "SAIRR".

297 *Ibid.* at p. 1.

298 *Ibid.*

299 She has subsequently been convicted and found guilty of committing the crime *crimen iniuria* and sentenced to three years' imprisonment, with one year suspended. She is taking the decision on appeal.

300 *Race Relations in South Africa: Reasons for Hope* (2017) at p. 1.

from bidding for international tournaments based on their failure to comply with racial quotas.[301] Vanessa Hartley, also a Cape Town resident, compared black people with "stupid animals" who "flocked to Hout Bay" and should be "tied to a rope...before there was nothing left" of the Hout Bay.[302] The year 2016 also harboured various threats of violence against white people, especially from political corners – including government. An employee of the Gauteng provincial administration tweeted that whites should be "hacked and killed like Jews" and their children "used as garden fertiliser".[303] Other comments also surfaced by black South Africans who called for white people to be "poisoned and killed", urged "the total destruction of white people", and, astonishingly, advocated in favour of a civil war in which "all white people would be killed".[304] In August 2016, Luvuyo Menziwa, a member of the students' representative council at the University of Pretoria, cited "white previllage (*sic*), white dominance, and white monopoly capital (*sic*)" as *some* of his reasons for "hating white people".[305] He eloquently concluded is post as follows: "Fuck white People, just get me a bazooka or AK47 so I can do the right thing and kill these demon possed (*sic*) humans".[306] Julius Malema, leader of the political party Economic Freedom Fighters, added fuel to the fire or then the threats of violence against white people. In November 2016, Julius Malema emerged from a court appearance in Newcastle and said "They (white people) found peaceful Africans here. They killed them. They slaughtered them, like animals! We are not calling for the slaughter of white people, at least for now!".[307]

The report contains an analysis of the question as to whether black people see white people as 'second-class':

> "Some of the comments made by Mr[.] Malema and other politicians suggest that black people hate white people and want to drive them out of the country or, at the very least, relegate them to the status of second-class citizens. The IRR survey[,] thus[,] asked people if this was how they really felt. As shown in Table 9, 60% of respondents rejected the view that 'South Africa is now a country for black Africans and whites must take second place'. Among black people, 58% disagreed with this perspective, *while 29% endorsed it*."[308] [own emphasis]

The SAIRR also investigated the role of politicians in racism:

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301 *Ibid.*

302 *Ibid.*

303 *Ibid.* To date Mr. Theunissen has neither been charged nor been prosecuted for *crimen iniuria*.

304 *Ibid.* To date none of the relevant individuals have either been charged or prosecuted for *crimen iniuria*. However, the (assumed racist) Afriforum chose to lay criminal charges against 100 people for hate speech and incitement to violence (*AfriForum Lays Criminal Charges Against 100 People for Hate Speech and Incitement to Violence*, (Date Accessed: 19 Aug. 2018), [Address: https://www.afriforum.co.za/afriforum-lays-criminal-charges-100-people-hate-speech-incitement-violence/]).

305 *Race Relations in South Africa: Reasons for Hope* (2017) at p. 1.

306 *Ibid.*

307 *Ibid.*

308 *Ibid.* at p. 7.

> "The ruling party and the EFF … often blame the country's current problems … on 'racism' and 'colonialism'. The IRR's 2016 survey … asked if people agreed that 'all this talk about racism and colonialism is by politicians trying to excuses for their own failures'. While 26% of respondents disagreed with this statement, roughly half (49%) endorsed it … Divergence across the colour line was marked, for 46% of black people supported this view, compared to 68% of whites. The proportion of respondents unsure about whether they agreed or disagreed with this perspective was also high, standing at 25%. Results here are strikingly different from those obtained in 2015, when the same question was posed. At that time, 62% of all respondents and 59% of blacks agreed that much of the talk about racism and colonialism in the country was by politicians trying to excuse their own failures. That the equivalent percentages have since dropped to 49% in general and to 46% among blacks (showing a decline of 13 percentage points) suggests that racial rhetoric in 2016 has had a large impact on public perceptions here."[309]

The most important question then, has race relations (social cohesion) improved? The SAIRR reported:

> "Significantly, more than half (55%) of respondents thought [race relations] had improved, while just over a quarter (27%) felt they had stayed the same. Overall, more than 80% of respondents thought race relations had either improved or stayed the same, while roughly 5% said they did not know. Some 13% thought race relations had become worse, with 11% of blacks expressing this view. *Most of the concern about worsening race relations came from coloured, Indian, and white people*."[310] [own emphasis]

In other words, the percentage of the minorities that felt that race relations have worsened is double to that of the same percentage of black individuals. Those disadvantaged by transformation and remedial measures is shown to be every identity group but for black people. Coloured and Indian people had to resort to litigation to prevent being disadvantaged by remedial measures, where the Indian people usually had to digest the sour taste of defeat and, thus, be disadvantaged in the name of identity (code word for black) dominated representivity numerical targets (code word for quotas).

Transformative constitutionalism need not only be signalled out as the reason for constrained social transformation. Several academics are to be saddled with these consequences for their essentialist overemphasis on disadvantage and difference – but primarily that of *material disadvantage*.[311] It is, therefore, argued that the process of transformation and our quest for achieving equality, by having recourse to substantive equality, did not bring about – social transformation – in a satisfactory manner. Our attempts at social transformation are rather

309 *Ibid.*

310 *Ibid.* at p. 3.

311 Albertyn & Goldblatt, (1998, *Facing the Challenge of Transformation*), at p. 272; Fredman, (2007, *Redistribution and Recognition: Reconciling Inequalities*), at p. 216; Fredman, (2017, *Reimagining Power Relations: Hierarchies of Disadvantage and Affirmative Action*), at pp. 140-141.

constrained and can only be enhanced if we were to release ourselves from grounding transformation in law as opposed to guiding transformation by the ideals at which the Constitution is directed. The focus must be on 'the subject' as opposed to merely the objective 'reality', which has been overrun and is being controlled by pseudo-revolutionism, within which the subject finds himself or herself. What should inform transformation are not theories of transformation itself, but rather what ought we, as individuals, have to be-come or to what realisation we have to come so as to live up to the transformative vision of the Constitution. Social transformation is what the Constitution is advocating for: a society based on "social justice",[312] but social transformation that is wholly different from that as conceived by the Constitutional Court. This conception of social transformation is developed and provided content to in Chapter 3, to which I now turn to.

9. CONCLUSION

In this chapter I provide content to and articulate the fundamental problem of inadequate social transformation in terms of a grand narrative of our history and the irresponsible polemical relationship with the world that is displayed by the Constitutional Court, academia, and the State. This grand narrative of our history and irresponsible polemical relationship is then showcased by the infamous 'essential context' of the Court that it religiously, and as shown above a-contextually, has recourse to when deciding cases involving race, racism, racially offensive conduct, or language, more specifically Afrikaans. I also provide content to my proffered argument that the Court's conception of substantive equality sets the scene for (*i*) systemic and materialist prominence, (*ii*) an uncritical approach towards 'identity representivity', (*iii*) an essentialist understanding of our history culminating in a grand narrative of our history, and (*iv*) the ossification of subjectivity.

This chapter indicates that the inadequacy of social transformation is an inadequacy of transforming subjectivity or then notions of the self. Transformation of the conceptions of the other has not taken place, but for the regressive (re)definition of being and difference, as articulated above. In short, a white person is perceived – not as a human being – but *as* (a representation of) or the epitome of advantage(d). The humanity is annexed from the white person's existential being and replaced with politically instigated and motivated notions of (assumed) advantage. The converse is also true, a black person is perceived – not as a human being – but *as* (a representation of) or the epitome of disadvantage(d). The humanity is annexed from the black person's existential being and replaced with politically instigated and motivated

[312] Preamble of the Constitution.

notions of (assumed) disadvantage. The dignity (worth) of and meaning of both black and white South Africans are disregarded and ignored. We are cast and relegated to the realm of ontological non-being (existence as a being (a *res*)).

I argue that the, unbeknownst, corruption of the right against unfair discrimination with the *purpose* of restitutionary equality provides for jurisprudential uncertainty and a notion of substantive equality that is excessively and perilously materialist as well as dissonant towards ontological (re)definition of being. South Africa is encumbered with materialist and a-social transformative jurisprudence parading under the guise of so-called substantive equality jurisprudence. The human being has been relegated to the periphery of constitutional obedience in the name of achieving a transform*ed* as opposed to an equal South Africa. To make this rather plain, transformation has been equated with equality, since, as shown above, racial representivity has been equated with equality. By adopting equality jurisprudence that is not first concerned with the ethical relation between human beings we are merely perpetuating the apartheid pedagogy. In terms of this pedagogy we have been taught and disciplined to conceive each other's being in terms of already *a-priori* defined ontological meanings. This pedagogy is informed by the need for and moral justification of defining human beings; that is, attributing ontological meaning to their existence by characteristics that are legally or politically *attributed* to them. This ontological definition of being (existence *as*) human is attained by attributing ontological meaning to human existence with socially constructed and attributed characteristics. These characteristics are metaphysical in nature; in other words, separated from and not present in the perceptive reality and, thus, hits squarely on an ontological meaning. I now turn to what transformation *ought* to represent.

Part II: The South African Substantive Constitutional Revolution and The Consequences Thereof

CHAPTER 4:
THE SOUTH AFRICAN SUBSTANTIVE CONSTITUTIONAL REVOLUTION

1. INTRODUCTION

The meaning of social transformation is given content to and expanded on in this chapter. Social transformation denotes (*i*) the element of radical change and (*ii*) the element of a process of perpetual be-coming of our-selves and society. To place this chapter in its proper context, it bears reminding that the fundamental problem of inadequate social transformation gives rise to three fundamental questions, the second of which is the subject matter of Part II of this thesis. The first research question, dealt with in Part I, asks what substantive equality is, as developed by the Constitutional Court, and why did it not bring about social transformation. The third fundamental question asks whether the fundamental problem of inadequate social transformation can be addressed, in a final sense. The second fundamental question, discussed in this chapter, provides content to the notion of social transformation and acts as a constitutional enabler for the ethical conception of equality that I aim to develop. This fundamental question, divisible into two prongs, serves as Chapter 4 and Chapter 5, respectively, and asks: (*i*) what is the South African substantive constitutional revolution and (*ii*) what are the consequences thereof?

The first part of the second fundamental question provides content to Cornell's two-pronged interpretation of the subject of transformation, which, in turn, provides inspiration to my understanding of social transformation. The first prong of her interpretation translates transformation as radical change causing a dramatic restructuring of the system – political, legal, or social – to such an extent that the 'identity' of the system itself is altered.[1] The second part turns on the question "what kind of individuals do we have to become in order to open ourselves to new worlds".[2] As will become clear in this chapter, Ackermann's notion of a substantive constitutional revolution is composed of three constituent elements. The first element denotes a *de jure* dispensational change, the second element denotes the displacement

1 Cornell, *Transformations: Recollective Imagination and Sexual Difference*, (1993), at p. 1.
2 *Ibid.*

and replacement of the substantive ideology underlying the legal order, and the third element denotes the perpetual nature of a substantive constitutional revolution. In this chapter the first two elements are married with and gives content to Cornell's first prong and the third element is connected to Cornell's second prong of her interpretation.

The divide between the legal order and social order becomes elevated in Chapter 4 and Chapter 5. Chapter 4 demonstrates the radical change undergone by South Africa's legal order through reliance on the South African substantive constitutional revolution. Chapter 5 emphasises the *possibility* of social transformation (transformation of the *social* (order)) through acting upon and embracing the possibility of a 'post'-apartheid modernity.

1.1. STRUCTURE OF THE CHAPTER

In this chapter the notion of a substantive constitutional revolution is used to show the (*i*) radical and (*ii*) substantive change undergone by the South Africa legal order. However, there was a history that preceded and led to the radical substantive *de jure* change. It has been made plain, in Chapter 2 and Chapter 3, that human dignity is of significant constitutional importance in a 'post'-apartheid South Africa - the Constitutional Court has, in fact, adopted a dignity based substantive approach to equality. The constitutional importance of human dignity *and* equality in 'post'-apartheid South Africa is ascribed to the past systemic practice of racially and sexually instigated unequal treatment that led to and is evidenced by indignity.[3] The first two sections of this chapter, relating to the past that preceded the revolution and the utmost importance of respect for the dignity of all human beings, place the South African substantive constitutional revolution in its proper context.

The abovementioned context is followed by an exposition of Ackermann's notion of a substantive constitutional revolution. Two of the three composite elements of Ackermann's notion of a substantive constitutional revolution are discussed under the heading "Substantive Constitutional Revolution" and these elements are used to give content to Cornell's first prong of her interpretation. Hereafter, the second element of a substantive constitutional revolution is further unpacked, under the heading "The Substance of The Revolution: *Grundnorm(s)*", through reliance on the notion of a *Grundnorm* and it is submitted that both constitutional values and *Ubuntu* are the *Grundnorms* of 'post'-apartheid South Africa. I then turn to the notion of a *Rechtsstaat* in a substantive sense to further add content to the substance of the new order that

[3] Compare and contrast the fundamental and *absolutist* importance of human dignity in Germany. There is a distinct difference between the importance of human dignity in South Africa and that of Germany. In South Africa human dignity was affronted by *unequal treatment* based – predominantly – on race and then also on other personally held characteristics. South African human dignity must be considered as a fundamental value alongside freedom and the achievement of equality.

replaced the old. I conclude this chapter with the third element of a substantive constitutional revolution, denoting the perpetual nature of a substantive constitutional revolution. This perpetual nature is then connected to the notion of be-coming that occupies an important place in the meaning of social transformation and my ethical conception of equality. This chapter, in its final instance, unveils to the reader that, once ethically perceived, the South African substantive constitutional revolution is occasioned by, as consequences, the possibilities of, (*i*) an ethical interpretation of the Constitution, (*ii*) an ethical conception of equality, and (*iii*) a 'post'-apartheid modernity, which modernity is elaborated upon and developed in Chapter 5.

2. THE PAST THAT PRECEDED THE REVOLUTION

The dispensational change, marked by the end of apartheid and the inception of the current democratic[4] and constitutional dispensation, is the product of a process of political negotiations, between the previous government and various political groups and parties, known as the Conference for a Democratic South Africa (CODESA) that culminated in the adoption of the Interim Constitution by the Tricameral Parliament on 22 December 1993.[5] Our history of segregation and domination at the hands of apartheid culminated in these negotiations.

Apartheid is a defining period[6] of our history characterising it as institutionalised legal denial of the humanity of the majority of South Africans. For such majority the word apartheid constituted a representation of the totality of our history.[7] The question is then: what influence

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4 Nelson Mandela was elected as South Africa's first democratic president in the first non-racial election held in April 1994. By reason of this election South Africa saw the formation of the Government of National Unity consisting of the African National Congress, the National Party, and the Inkatha Freedom Party.

5 The process of drafting the Interim Constitution was initiated with convening of CODESA on 20 Dec. 1991. A working group was established and tasked with drafting a constitution for a democratic non-racial South Africa. Because of violence CODESA subsequently broke down, but eventually resumed after the government and the ANC signed a Record of Understanding on 26 Sept. 1992. In Nov. 1993, the negotiators agreed upon the Interim Constitution providing for the new parliament to act as a constitutional assembly to draw up the Constitution - Saunders, C. & Davenport, T., *South Africa: A Modern History*, (2000), at pp. 560, 563-566 & 571; Currie & De Waal, *Introduction to the Constitution and the Bill of Rights* (2013), at pp 4-6.

6 In the year 1948, when the National Party formed the first government consisting of Afrikaners only, apartheid, as an era, commenced – Saunders & Davenport, *South Africa: A Modern History*, (2000), at p. 377.

7 *City of Tshwane* 2016 (CC) is the epitome of the exclusionary danger inherent in a conception of our past that affords absolutist relevance to the 'majoritarian view of history *as* apartheid'. In this case two white Justices refused to accept that *every* emblem, name, statute, or other signifier referring to or recalling the history of apartheid or colonialism, whether in part or otherwise, is subject to the right of the majority (black) to apply to a Court or request the executive to remove such signifier from public display. These Justices were labeled, by a black Justice, as racists and charged with the allegation of giving effect to cultural rights under the guise of racism. It is quite unfortunate that exclusionary partisan political rhetoric has infiltrated the consciousness of our CC, since such rhetoric is purported to be clothed with *bona fide* constitutionalism and transformationist intentions, but is informed and motivated by exclusionary and inherent racist and hegemonist senselessness aimed at 'post'-apartheid domination under the misguided and self-interested call for neo-liberationism. For a judicial interpretation of apartheid that is not replete

does apartheid have in defining our history? To answer this question, we must first articulate an understanding of apartheid. Apartheid, as a concept, is said to have originated in the mid-1930s among Afrikaner intellectuals who sought 'vertical' or hierarchical separation of races.[8] On 24 June 1944, D.F. Malan, the founder of the Purified National Party, first used the term in the South African parliament where he spoke of a policy "to ensure the safety of the white race and of Christian civilization by the honest maintenance of the principles of apartheid and guardianship".[9] Apartheid, an Afrikaans term, means 'apart-ness' or 'segregation' and denotes a system of racial discrimination created, maintained, and intended to be perpetuated by government (legal) design.[10] The Secretary-General of the International Commission of Jurists depicted the practice of apartheid, thus:

> "… [T]he application of … apartheid … is morally reprehensible. The evil of the policy of separation of races lies in the presumption of racial superiority translated into the deliberate infliction of an inferior way of life on 'all who are taunted by [black] skins'. Not permitted to choose their own way of life, the [black] population are reduced to permanent political, social, economic and cultural inferiority. The impact of apartheid extends to virtually all aspects of life[:] …[a]t church, at home, at school, or university, at the cinema, on the beach, in the courts; in fact, in

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with racist rhetoric see, for example, *Makwanyane* 1995 (CC) at paras. [262]-[264]; *Brink* 1996 (CC) at para. [40].

8 See Saunders & Davenport, *South Africa: A Modern History*, (2000), at p. 373. See also Thompson, L., *The History of South Africa*, (2001), at p. 190 where it is submitted that:

> "The government applied apartheid in a plethora of laws and executive actions with four ideas at heart of the system; first, the population comprised four racial groups – white, coloured, Indian and African – each with its own inherent culture; second, whites, as the civilised race, were entitled to have absolute control over the state; third, white interests should prevail over black interests and the state was not obliged to provide equal facilities for the subordinate races; fourth, the white racial group formed a single nation, with Afrikaans- and English-speaking components, while Africans belonged to several (eventually ten) distinct nations or potential nations – a formula that made the white nation the largest in the country."

Quoted from Huges, A., *Human Dignity and Fundamental Rights in South Africa and Ireland*, (2014), at p. 96, n. 1. See Walker, E.A., *A History of Southern Africa*, (1957), at pp. 769-771 where it is stated that when the 1948 National Party victor, D.F. Malan, campaigned he indicated that:

> "… [his] main aim was to succeed where [the opposition] had failed by achieving apartheid, that is, segregation writ large, the permanent physical, mental and, as far as might be, spiritual separation of the four great racial groups in the Union each from the other, partly to preserve the racial purity of each, partly to do away with the friction that arose from intermingling and partly to give each the chance of developing along its own lines in its own appointed place. The apartheid policy had been summarised for election purposes in a pamphlet, whose authors recommended the idea as a product of 'the experience of the established European population … based on the Christian principles of justice and reasonableness,' and proposed to prohibit mixed marriages, to set up a body of experts in non-European affairs, and to empower the authorities to supervise 'the moulding of the youth' and forbid 'destructive propaganda' carried on by outsiders against the Union's handling of its racial problems. They laid special stress on the position of the Cape Coloured Folk midway between the Europeans and the Bantu, urging that, on the one hand, they be protected against Bantu competition and encouraged to make Christianity 'the basis of their lives' and that, on the other, they be segregated in every possible way."

9 Potts, L.W., *Law as a Tool of Social Engineering: The Case of the Republic of South Africa,* Vol. 5, No. 1, (Winter, 1982), Boston College International and Comparative Law Review, pp. 1-50, at p. 1, n. 2.

10 Feimpong, J.K. & Tiewel, S.A., *Can Apartheid Successfully Defy the International Legal System,* Vol. 5, No. 2, (1977), Black Law Journal, pp. 287-312, at p. 287.

> all conceivable forms of human relations a ruthless discrimination against the [black] population has become the law."[11]

In extending beyond a highly sophisticated and nuanced hegemonic system of race-based domination, apartheid as a word and concept carries a veiled and much more sinister meaning disregarding and extending beyond mere semantics. The Afrikaans term *Apartheid*, as such, is defined as "*[t]oestand van afgeskei, afgesonder te wees*".[12] Translated to English it means 'state of being separate, to be separated'. *Apartheid* is morphologically dividable as *apart-heid*. *Apart*, the stem of *apartheid*, is an Afrikaans word and defined as "*[a]fsonderlik; weg van ander; afgeskei van die ander*".[13] To translate: 'separately; away from other; separated from the other'. I emphasise that *apart*, translated to English, includes 'separated from the other'. In other words, *apartheid* can be understood as 'the state of being separated from the other'. The suffix *heid* renders *apartheid* a noun denoting the idea or state of being separated, as already indicated. However, Derrida placed emphasis on *heid* and attributed another level of abstraction to the suffix, which he described as "confined separation".[14] *Heid* is important because through its concentration and emphasis on separation the word *apartheid* "sets separation itself *apart*" [original emphasis].[15] What Derrida meant was that by virtue of the suffix *heid*, 'separation' as such, is abstracted by the word *apartheid* to the extent that separation exceeds its own original and dominant meaning. *Apartheid* sets separation apart from its original and dominant meaning and, as such, the word *apartheid*, by virtue of the emphasis flowing from *heid*, attributes an ontological[16] meaning to 'separate' or 'separated' as characteristic of the essence of humans in their already existing state of existence.[17] *Apartheid* sets 'being separate(d)' ontologically and ideologically apart to such an extent that 'being separate(d)' was an ontological essence – an ontological fact.[18] Thus considered, *Apartheid* includes, semantically considered, the 'state of being separated from the other' as well as affords, ontologically considered, ontological character to the 'state of being separated'. Therefore, our history, as influenced by *apartheid*, can be understood as follows: The being (characteristic essence) of humans was equated with the state of being separated from the other.[19]

Once cognisant of Heidegger's ontological difference and his notion of the truth of being it becomes clear that there could not have been any meaningful experience by white South

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11 *Ibid.* at pp. 287-288.
12 *Ibid.*
13 *HAT: Verklarende Handwoordeboek van die Afrikaanse Taal,* (1994).
14 Derrida, J., *Racism's Last Word,* Vol. 12, No. 1, (1985), Critical Inquiry, pp. 290-299, at p. 292.
15 *Ibid.*
16 Derrida used the phrase "quasi-ontological" – *ibid.*
17 Derrida, (1985, *Racism's Last Word*), at p. 292.
18 Ontological as used here would be ontic within Heidegger's ontology.
19 From hereon I will, again, be using apartheid without italics as the use with italics was only necessitated by my morphological analysis.

Africans of all the ways in which black South Africans could have made a difference in their being-in-the-world as both being-there and – especially – being-with. From the ideological standpoint that the essence of humans is the state of being separated from the other there is a being-in-the-world devoid of being-with. Consequently, the truth of being (in Heidegger's sense) must have been diluted and in a sense polluted by the systemic and legal denial of meaningful experience of the ways in which both black and white South Africans could have made differences in or impacted each other's lives. Ontological meaning was attributed to the being of both humanity as well as white human beings and black (human) beings based on racist *a priori* theoretical knowledge (ontologically constructed bias) and in the *absolute* absence of any meaningful (*bona fide*) engagement with and experience of each other.

The 'architect of apartheid', H.F. Verwoerd, as a psychology and sociology professor, educated his students in a rather positivistic manner and encouraged his students to follow a methodological approach in terms of which one deals, in the first instance, with objective facts and, only thereafter, theory will follow.[20] In other words, the epistemological model providing for 'objective facts' (or then knowledge) must be assumed as a given and accepted as valid – without more, but such assumption and presumed validity is, in my opinion, detrimental to the idea of justice itself. Rule by cruel or unjust power[21] resulting from blind reliance on the 'real' or 'fact', and therewith "to present 'reality' [or 'factual truth'] as the basis of … Justice" leads to an *a priori* denial of any possible legal reform that is 'yet to be articulated'. *A priori* acceptance of certain 'realities' as 'fact' or the 'factual truth' is a nothing else than a theoretical, albeit positivistic, deduction. As such, positivism, as an "anti-ideological ideology[,]" is a belief that one must accept that which *is* as is because that which *is*, is presented as being underpinned by "objective knowledge" with its own overriding and intrinsic value, and as such, objective knowledge is "valuable for its own sake, regardless of [the] human values and interests" at stake.[22] Hence, separate treatment must logically follow, almost as common sense because being (existing as a) human *is* being separated from the other and that which *is*, is underpinned by 'objective knowledge' with its own overriding and intrinsic value regardless of the human values and interests at stake – in this context human worth itself.

Once black people were seen as inferior to white people, separate but inferior treatment of blacks must follow logically, almost as common sense. As such, the doctrine of 'separate but

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20 Allsobrook, *A Genealogy of South African Positivism*, (2014), at p. 108.

21 Cornell used the word tyranny in Cornell, D., *Philosophy of the Limit*, (1992), at p. 132, which came to my attention after reading Van Marle, (1996, *The Doubly Prized World*), at p. 330.

22 See Allsobrook, *A Genealogy of South African Positivism*, (2014), at p. 96.

equal treatment' was born.[23] This doctrine only condemned discrimination with substantial inequality. It can, thus, be renamed as 'separate but not substantially unequal treatment'. The doctrine was applied in a number of cases to the effect that only discrimination occasioned by or resulting in substantial inequality is seen as contrary to the rule of law or then 'unlawful'.[24] Under the guise provided for by this doctrine stark disparities in wealth and privilege saw the light and apartheid, therefore, left South Africa with a materially unequal society. Once black and white had been ontologically reconfigured, ontological reconfigurement of humanity followed 'naturally' or 'logically'. It then follows why ontological reconfigurement of white and black in 'post'-apartheid South Africa as advantage(d), privilege(d), and racist and disadvantage(d), not privilege(d), and not (or unable to be) racist followed 'naturally' or 'logically'.

3. RESPECT FOR THE DIGNITY OF ALL HUMAN BEINGS

> "It was against a background of the *loss of respect for human life and the inherent dignity* which attaches to every person that a spontaneous call has arisen among sections of the community for a return to *[U]buntu*."[25] [own emphasis and footnotes omitted]

The influence of apartheid on our history is central to the reason why the respect for the dignity of *all* human beings is important. In our, not so distant past, the point of departure was not recognising human beings as having inherent worth with the entitlement or right to demand equal respect and concern. It was rather decided to represent separation as the ontological essence of humanity. To be separated or segregated was passed off as natural[26] and the method of separation chosen by the previous government was discrimination (in the constitutional sense). Physical separation provided for by the discriminatory legislation was morally abhorrent. However, even more egregious is the basic premise upon which such legislation was founded; that is, the inferiority of black people.[27] Archbishop Emeritus Desmond Tutu said that "[a]partheid claimed that what imbued anyone with worth was … the colour of your skin[, which is] actually a biological irrelevance".[28] As such, from a methodological point of view, the South African government, by virtue of apartheid, did not discern, it discriminated.[29] Consequently,

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23 See Hahlo, H. & Kahn, E., *The South African Legal System and its Background*, (1968), at p. 56 and *Fourie* 2006 (CC) at paras. [150]-[153].

24 I am, in this specific context, using the term unlawful in its widest possible sense as signifying any conduct contrary to the rule of law. See *Minister of Posts and Telegraphs v Rasool* 1934 AD 167 in which case "separate but not substantially unequal" treatment was upheld.

25 *Makwanyane* 1995 (CC) at paras. [226]-[227].

26 Derrida, (1985, *Racism's Last Word*), at p. 292.

27 *The Citizen 1978 (Pty) Ltd v McBride (Johnstone, amici curiae)* 2011 (CC) at para. [145].

28 Quotation found in Ackermann, (2004, *The Legal Nature of the South African Constitutional Revolution*), at p. 644.

29 Derrida, (1985, *Racism's Last Word*), at p. 292.

apartheid signified the denial of common humanity,[30] or then the humanity common to all, by representing separation as the ontological essence of humanity as opposed to recognising human beings as having inherent worth. In this sense, white people did not only deny the humanity of black people, they denied their own humanity. Black human beings were treated as not having inherent worth and the government went to great lengths to deny Blacks "that which is definitional to being human".[31] Apartheid, understood as confined separation based on race, means that one is both spatially *confined* and ontologically *constrained* by racial separation. People were separated and confined to specific areas and locations based on race and ontologically defined (constrained in their being) based on race. Those in power arbitrarily defined the identity of a black person *as* inferior,[32] uneducated,[33] criminal[34] and so forth. In order to encapsulate Blackness with utmost scorn, ridicule, contempt and a sense of belittlement they were referred to as *kaffirs*.[35] Definitional to being human, for Ackermann, is the "ability to understand or at least define oneself through one's own powers and to act freely as a moral agent pursuant to such understanding or self-determination".[36] black people could not control the most basic aspects of human life, such as, among other things, with whom one may associate, whether social or sexual,

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30 *Makwanyane* 1995 (CC) at para. [329].

31 Ackermann, (2004, *The Legal Nature of the South African Constitutional Revolution*), at p. 645.

32 *Daniels v Campbell* 2004 (5) SA 331 (CC) at para. [48], Ngcobo, J., as he then was, in writing a minority concurring judgment stated that "[b]lack people were denied respect and dignity. They were regarded as inferior to other races". In *Moller* 1911 it was accepted "[a]s a matter of public history we know that the first civilized legislators in South Africa came from Holland and regarded the aboriginal natives of the country as belonging to an inferior race, whom the Dutch, as Europeans, were entitled to rule over, and whom they refused to admit to social or political equality".

33 In *S v Xhego* 83 Prentice Hall at para. H76, p. 197 the Court noted that there were other factors which "… militated strongly against the acceptance of the allegations of the accused, again resulting largely from the inherent foolishness of the Bantu character".

34 See Penny, T. & Lindeque, M., *High Court Judge Under Fire for Black Rape Culture Comments* (E-Pub. Date: May, 2016) Eye Witness News [Accessed on: 25 June 2016] where, as recently as May 2016, a High Court Judge, Mabel Jansen, stated that non-consensual sex (in other words rape) is "[i]n their [black people's] culture".

35 De Vos, in De Vos, P., *On 'Kaffirs', 'Queers', 'Moffies', and Other Hurtful Terms* (Pub. Feb., 2008: E-Pub Feb., 2008) Constitutionally Speaking [https://constitutionallyspeaking.co.za/on-kaffirs-queers-moffies-and-other-hurtful-terms/ Accessed on: Feb., 2008 Accessed] wrote on the meaning of *kaffir* thus:

> "This term has an ugly history in South Africa and was almost exclusively used by white racists as a gross generalisation to denigrate black South Africans. To be called a 'kaffir' is to be called a lazy and stupid person. But the assumption behind the word is that by being lazy and stupid one is merely behaving as all black people always behave – as white people expect black people and know all black people to behave. So even when a white person is called a 'kaffir', the recipient of the insult is being told that he or she is just as lazy and stupid as all black people are known to be by all racist white people."

In *Ryan v Petrus* 2010 (1) SACR 274 (ECG) it was held that "[w]hen a black man is called a 'kaffir' by somebody of another race, as a rule the term is one which is disparaging, derogatory and contemptuous and causes humiliation" and in *Prinsloo v S* 2014 (Unreported Judgement) ZASCA 96 (SCA) at para. [20] the SCA held:

> "In our racist past it was used to hurt, humiliate, denigrate and dehumanise Africans. This obnoxious word caused untold sorrow and pain to the feelings and dignity of the African people of this country. …[S]uch conduct seeks to negate the valiant efforts made to break from the past and has no place in a country like ours which is founded upon the democratic values of human dignity, and the advancement of human rights and freedoms."

36 Ackermann, (2004, *The Legal Nature of the South African Constitutional Revolution*), at p. 645.

where one may live or where one may go to school.[37] Where one lives, with whom you associate yourself with, and where you receive your education is developmental of your identity. black people did not define themselves according to their own powers. Their identity was arbitrarily attributed to or rather forced upon them by the government treating them as mere objects and not persons of infinite worth.

Consequently and succinctly put, the analysis of apartheid and its influence on our history leads me to conclude that apartheid was constitutive of a state devoid of respect for human dignity, equality, and freedom. Therefore we, the people of South Africa, adopted the Constitution that constituted "one, sovereign, democratic state founded on the value[s of] [h]uman dignity, the achievement of equality and the advancement of human rights and freedoms".[38] We value human dignity, the achievement of equality, and advancement of human rights and freedoms because of our past. I submit that, by virtue of the South African substantive constitutional revolution and the Constitution, we have substantively (re)constituted a legal order based upon and engendered a society directed by *Grundnorms* of both *Ubuntu* and constitutional values. It is submitted that the replacing ideological substance of 'post'-apartheid South Africa is the *Grundnorm* of both constitutional values and *Ubuntu*. As a result, the notion of a *Grundnorm* is explicated in the context of the South African substantive constitutional revolution. Relevant to said replacement with mentioned *Grundnorm* is the idea of and fact that South Africa is now a *Rechtsstaat* in a substantive sense.

4. SUBSTANTIVE CONSTITUTIONAL REVOLUTION

I now discuss and elaborate upon Ackermann's notion of a substantive constitutional revolution to provide content to Cornell's first prong; namely, transformation as radical change causing a dramatic restructuring of the system – political, legal, or social – to such an extent that the 'identity' of the system itself is altered.

Ackermann developed the notion of a substantive constitutional revolution to describe the radical change undergone by South Africa. For him the notion or phrase denotes a previous dispensation being "turned on its head" and replaced by a constitutional dispensation where the substantive content of the replacing dispensation differs *fundamentally* from that of the replaced

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37 In *Brink* 1996 (CC) at para. [40], O'Regan, J. held that:

> "Our history is of particular relevance to the concept of equality … apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in ['white'] areas …; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and *inferior* facilities were provided." [own emphasis]

38 S. 1(*a*) of the Constitution.

dispensation.[39] I have distilled two elements from Ackermann's aforementioned description of a substantive constitutional revolution. Firstly, the phrase is inclusive of a dispensational change. Secondly, the notion denotes, in addition to a mere dispensational change (procedural revolution), displacement and replacement of the old legal order's underlying ideological substance with fundamentally dissimilar substance of the new legal order. The final element is only discussed later on in this chapter and denotes the continuous nature of the revolution.

In the first sentence of this chapter I said that the meaning of social transformation is given content to and expanded upon in this chapter. Ackermann's notion of a substantive constitutional revolution is used to give content to such meaning. It shall also be recalled that I rely on Cornell's interpretation of the subject of transformation to inform the meaning of social transformation. For her the subject of transformation is two pronged and denotes (*i*) radical change causing a dramatic restructuring of the system – political, legal, or social – to such an extent that the 'identity' of the system itself is altered and (*ii*) "what kind of individuals do we have to become in order to open ourselves to new worlds".[40] Cornell's first prong is associated with and provided content to by relying on Ackermann's notion of a substantive constitutional revolution.

Ackermann developed an argument for his assertion that the (Interim) Constitution brought about the South African substantive constitutional revolution. I discuss the two prongs of his argument that correspond with my two distilled elements of a substantive constitutional revolution, since the two prongs are his explanation of the elements.

4.1. DISPENSATIONAL CHANGE: CONSTITUTIONAL REVOLUTION

The first prong of Ackermann's argument is indicative of the dispensational (structural) change caused by the (Interim) Constitution. South Africa is now[41] a constitutional state, founded upon the democratic values of human dignity, the achievement of equality, and freedom.[42] Ackermann correctly notes that the former omni-competence of the legislature saw

39 Ackermann, (2004, *The Legal Nature of the South African Constitutional Revolution*), at pp. 646.

40 Cornell, *Transformations: Recollective Imagination and Sexual Difference*, (1993) at p. 1.

41 The concept of fundamental rights contained in a Bill of Rights was initially rejected, see Potgieter, J.M., *The Role of Law in a Period of Transition: The Need for Objectivity,* Vol. 53, No. 5 (1991), Tydskrif vir Hedendaagse Romeins-Hollandse Reg pp. 800-807. After some time the inevitable reality of fundamental rights contained in a Bill of Rights lead private law scholars to seek to limit the ambit of such rights, see Visser, P.J., *A Successful Constitutional Invasion of the Private Law,* Vol. 57, No. 4 (1995b), Tydskrif vir Hedendaagse Romeins-Hollandse Reg pp. 745-750. I was made aware of this development in Le Roux, W., *The Aesthetic Turn in Post-Apartheid Constitutional Rights Discourse* Vol. 69, No. 1, (2006), South African Law Journal, pp. 101-120, at p. 104.

42 See ss. 7(1), 36(1) and 39(1) of the Constitution. See also *Mamabolo* 2001 (CC) at paras. [40]-[41] where the CC mentioned that freedom within the constitution of the U.S. is of utmost importance where, for example, freedom of speech is a pre-eminent freedom ranking above all others, but our Constitution provides for three foundational values – human dignity, equality, and freedom.

its sudden demise at the hands of the Interim Constitution that decisively ended parliamentary sovereignty.[43] The Interim Constitution, thus, precipitated a dispensational change[44] that dramatically transformed the legal system by replacing parliamentary sovereignty[45] with constitutional supremacy.[46] Formerly, the parliament held sovereignty and exercised authoritarian power legislating, in an oppressive and morally repressive manner, the social organisation of the society. Currently, the supremacy of the Constitution rejects such sovereignty and despotic abuse of power. South African history, thus, led to a change from an authoritarian state,[47] vested with parliamentary sovereignty, to a democratic South Africa.[48] Accordingly, to bring us back to Cornell's first prong of the subject of transformation, the identity of the political system was dramatically transformed from parliamentary supremacy and authoritarianism to constitutional democracy. The social system, however, is the subject that remains to be transformed.

Ackermann distinguishes the South African substantive constitutional revolution from Kelsen's definition of revolution on the basis that the South African revolution is (*i*) constitutional and (*ii*) radical in nature (substantive). Kelsen defined a revolution as occurring "whenever the *legal order* of a community is *nullified* and *replaced* by a *new* [legal] order in an *illegitimate way*[;] that is in a way *not prescribed* by the first order itself" [own emphasis].[49] For Kelsen the only juristic criterion for a revolution is the overthrowing of a legal order in force and replacement thereof by a new legal order in an unanticipated fashion from the perspective of the previous legal order.[50] It is of no consequence whether the revolution was occasioned by or facilitated through violence or was carried out by the masses or only a few governmental officials.[51]

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43 Ackermann, (2004, *The Legal Nature of the South African Constitutional Revolution*), at p. 643.

44 *Makwanyane* 1995 (CC) at para. [7].

45 The courts, at no point, had the power to block Parliamentary endorsed racial discrimination. In *Ndlwana v Hofmeyr N.O.* 1937 AD 229 at p. 238, the AD held that Parliament's will, as expressed in an Act, could not "be questioned by a Court of Law whose function it is to enforce that will not to question it". A unanimous judgment by the AD in *Harris v Minister of the Interior* 1952 (2) SA 428 (AD) overturned *Ndlwana*, but Parliament invalidated the decision with the South Africa Act Amendment Act, No. 9 of 1956. S. 2 of the Act stated: "No Court of Law shall be competent to enquire into or pronounce upon the validity of any law passed by Parliament...".

46 S. 4(1) of the Interim Constitution provides that "[t]his Constitution shall be the supreme law of the land and s. 4(2) subjects the parliament to its provisions and more specifically that of the Bill of Rights in that "[t]his Constitution shall bind all legislative organs at all levels of government".

47 *Zuma* 1995 (CC) at para. [262].

48 Chaskalson, in Chaskalson, A., *The Third Braam Fisher Lecture: Human Dignity as a Foundational of Our Constitutional Order,* Vol. 16, No. 2, (2000), South African Journal on Human Rights, pp. 193-205, at p. 200, opined, although extra-judicially, that "[c]onstitutionalism, rooted in respect for human rights, has taken the place of apartheid and racial domination".

49 Kelsen, H., *General Theory of Law and State*, in Wigmore, J. H., Hall, J., *et al.* (Eds.), *20th Century Legal Philosophy Series*, Vol. 1, (1949), at p. 117.

50 *Ibid.*

51 *Ibid.*

Ackermann submits that the 'constitutional nature' of the South African substantive constitutional revolution distinguishes it from Kelsen's definition.[52] 'Constitutional' means, firstly, there was no interruption in the legal order resulting from the replacement of the previous authoritarian dispensation with the new democratic dispensation; in other words, the change in the identity of the political system.[53] Secondly and relating to the first point, the revolution was initiated and controlled by an Act of parliament of the old order; that is the Interim Constitution.[54] Therefore, from the perspective of the old legal order, the dispensational change was legitimate, foreseen, and in fact controlled by an Act of parliament of that same legal order.

Kelsen argued, "that every state [is] a *Rechtsstaat*, as long as the authorities act within the ambit of legality, irrespective of the normative content of the law".[55] Central to this idea of a formal *Rechtsstaat* is the principle of legality, which principle has, as its core, the requirement that any conduct of the government must be carried out in accordance and compliance with (a) valid (rule of) law.[56] What is problematic, however, is that legality *per se* does *not* regulate the normative content of the law. Even more troublesome was the case of South Africa where the legal state of affairs was rule *by* law instead of governance in accordance with the rule *of* law. Parliament could have enacted legislation retroactively validating encroachment upon rights *ex post facto* rendering their conduct rule *by* (*ex post facto*) 'valid' law. This was the case, even though a formal *Rechtsstaat* includes a prohibition against retroactive legislation.[57] I make the following statement and apply Kelsen's definition of a formal *Rechtsstaat* quoted above: South Africa was a formal *Rechtsstaat* in that the authorities did act within the ambit of legality, notwithstanding the dubious normative content of the rule of law in terms of which they ruled *by* (enacting retroactive legislation).

Ackermann is of the opinion that that the 'radical nature' of the South African substantive constitutional revolution distinguishes it from a mere procedural revolution.[58] In

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52 Ackermann, (2004, *The Legal Nature of the South African Constitutional Revolution*), at p. 646; see Cornell & Fuller, *Introduction*, (2013), at p. 4.

53 Ackermann, (2004, *The Legal Nature of the South African Constitutional Revolution*), at p. 646; see s. 229 of the Interim Constitution where it provides that "[s]ubject to this Constitution, all laws which were immediately before the commencement of this Constitution in force … shall continue [to be] in force".

54 ACKERMANN, (2004, *The Legal Nature of the South African Constitutional Revolution*) at p. 646.

55 Blaau, L.C., *Rechtsstaat Idea Compared with the Rule of Law as a Paradigm for Protecting Rights,* Vol. 107, No. 1, (Feb., 1990), South African Law Journal, pp. 76-96, at p. 80.

56 See *ibid.* at p. 83 where it is stated that the content of a *Rechtsstaat* in the formal sense is not clear but can be said to have some or all or the following characteristics:

> "(*a*) The separation … of government power … (*b*) The principle of *legality* … (*c*) State action including that of the judiciary should be based upon a formal statute and state authority should be exercised according to its provisions … (*d*) State actions must be predictable … to facilitate legal certainty, consequently, *retroactive legislation is prohibited*" … (*e*) An independent judiciary to protect fundamental rights …" [own emphasis and footnotes omitted].

57 See n. 56 above.

58 Ackermann, *Human Dignity: Lodestar for Equality in South Africa*, (2012), at p. 15. See Cornell, D., *Law and Revolution in South Africa: Ubuntu, Dignity and the Struggle for Constitutional Transformation*, (2014), at p. 2 where

terms of a procedural revolution only certain criteria, for example free and universal suffrage and the establishment of civil rights, are to be met for the transition to be completed where after a country is dislodged from its authoritarian[59] past and placed in a position directed at a democratic future.[60] However, a procedural revolution stops before a radical displacement and replacement of substance. In accordance with Kelsen's understanding of a revolution a substantial part of the old legal order remains valid[61] (as in the case of South Africa) and the content of the norms remain the same (contrary to South Africa's revolution).[62] It is to the change in content, in other words, substance, to which I now turn to.

4.2. DISPLACEMENT OF THE IDEOLOGICAL SUBSTANCE OF THE OLD LEGAL ORDER: SUBSTANTIVE REVOLUTION

Let us start this second prong of Ackermann's argument by asking what ideological substance had to be replaced. Once the descendants of the original Dutch and French Hugenot had regained control of their country, after British rule that spanned a century-and-a-half, the message of the apartheid government for the white Afrikaner segment of society was clear: overcome British liberalism, which had interfered with the order of society.[63] "The white man intended to re-establish the *primacy* of his *traditional social values* and to reassume unequivocal *domination* over his racially and culturally inferior [black] countrymen" [own emphasis].[64] The law was turned into a tool to engineer society in pursuance of these goals. Thus, the law, as an

she argues, with reference to s. 39 of the Constitution, that the South African revolution is substantive and not a mere procedural revolution.

59 Britannica, E.o.E., *Authoritarianism*, (Date Accessed: Nov. 10, 2018), [Address: https://www.britannica.com/topic/authoritarianism]:

> "In government, authoritarianism denotes any political system that concentrates power in the hands of a leader or a small elite that is not constitutionally responsible to the body of the people. Authoritarian leaders often exercise power arbitrarily and without regard to existing bodies of law, and they usually cannot be replaced by citizens choosing freely among various competitors in elections. The freedom to create opposition political parties or other alternative political groupings with which to compete for power with the ruling group is either limited or non-existent in authoritarian regimes."

60 Cornell, *Law and Revolution in South Africa: Ubuntu, Dignity and the Struggle for Constitutional Transformation*, (2014), at p. 2.

61 Kelsen, *General Theory of Law and State*, (1949) at p. 117. *Cf.* s. 39(3) of the Constitution providing that "[t]he Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill[…]".

62 KELSEN, (1949) at p. 117.

63 See Potts, (1982, *Law as a Tool of Social Engineering: The Case of the Republic of South Africa*), at p. 1, n. 1: discovery of diamond and gold deposits on the Afrikaner republics in 1867 shattered their isolation from and recognition by the British. This discovery lead to increased interest of the British to control the Afrikaner republics, which resulted in a guerrilla war between the British by the Afrikaners; known as the Boer War. After two years of conflict the British defeated the Boers, or Afrikaners. After a humiliating and destructive skirmish, the British ridiculed the Afrikaners for their poverty, country ways, and language. The British denied them jobs and instead employed black Africans who were willing to work more cheaply. The National Party was then formed to restore Afrikaners to their former place in South African society.

64 *Ibid.* at p. 2.

instrument of social engineering, was central to apartheid.[65] The social engineering program of apartheid South Africa (*i*) did not aim to achieve the highest values of Western civilization, (*ii*) was not primarily concerned with changing customary behaviour,[66] and (*iii*) was not designed to demonstrate official regard for popular conceptions of justice.[67] The system was founded on the premise that society is a constellation of diverse (racial) communities and it used the law to shape the structure of social life[68] along the lines of different (racial) communities whilst, at the same time, *realising Afrikaner social ideals*, at the expense of all other ideals that 'belonged' to other (racial) communities, by nurturing segregationist behavioural norms that tightly structured interracial contacts aimed to separate and control on the basis of difference rather than integrate and unite in diversity, which ultimately led to the acquiescence of the black population to its own subjugation.[69] These behavioural norms caused perpetuation of a system of gross racial inequality, which, at the same time, also facilitated the effective management of the tension engendered by the inequality.[70]

Keeping this succinct ideological and historical insight in mind, it is without question that the initial changes brought about by the (Interim) Constitution that has been subsequently been confirmed by the Constitution are revolutionary.[71] In evaluating the radical nature (revolutionary aspect)[72] of the change brought by the South African substantive constitutional revolution, Ackermann notes that the Constitution is not merely a "formal constitutional document" only providing protection against arbitrary exercise of public power: the Constitution itself is a "monumental break from the past".[73] It is, thus, of utmost importance to understand South Africa's jurisprudential nexus with its past in order to distinguish the South African constitutional revolution from a mere procedural revolution and to emphasise its radical and substantive nature. In *Zuma* Mahomed, J., as he was then, provided an exceptional exposition of South Africa's jurisprudential nexus with its past:

> "[i]n some countries[] the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a *decisive break* from, and a ringing rejection of, that part of the

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65 *Ibid.*
66 *Ibid.* at p. 50.
67 *Ibid.*
68 *Ibid.*
69 *Ibid.* at p. 3.
70 *Ibid.*
71 Chaskalson, (2000, *The Third Braam Fisher Lecture: Human Dignity as a Foundational of Our Constitutional Order*), at p. 199.
72 Terminology used in Cornell & Fuller, *Introduction*, (2013), at p. 4 where the authors signals the "introduction of a set of values" as the revolutionary aspect of the change.
73 Ackermann, (2004, *The Legal Nature of the South African Constitutional Revolution*) at p. 645.

> past which is *disgracefully racist, authoritarian, insular, and repressive* and a vigorous identification of and *commitment* to a *democratic, universalistic, caring* and *aspirationally egalitarian ethos*, expressly articulated in the Constitution".[74] [own emphasis]

In a later judgment, he stated:

> "[w]hat is … clear from … the Constitution and the tenor and spirit of the Constitution viewed historically and teleologically, is that the Constitution is not simply some kind of statutory codification of an acceptable or legitimate past. It retains from the past only what is defensible and represents a *radical and decisive break* from that part of the past which is unacceptable. It constitutes a decisive break from a *culture of apartheid* and racism to a constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours. There is a *stark and dramatic contrast* between the past in which South Africans were trapped and the future on which the Constitution is premised" [own emphasis].[75]

The South African substantive constitutional revolution displaced the old authoritarian legal order and replaced it with an objective normative value system and democratic constitutionalism that rejects the ideological assumptions and worldviews of the old legal order. The Constitution rejects the state of being separated from the other as the ontological essence of humanity and ended the legally enforced and racially motivated spatial separation and ontological constrainment of the apartheid dispensation. The constrained and suppressed humanity of the previously oppressed, although never annihilated,[76] is now fully recognised and freed. The (Interim) Constitution displaced and replaced constrained separation with equal respect and concern across difference.

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74 *Zuma* 1995 (CC) at para. [262].

75 *Shabalala v Attorney-General of the Transvaal* 1996 (1) SA 725 (CC) at para. [26].

76 Dignity can never be lost or annihilated to the state of non-existence because s. 10 of the Constitution, whilst also containing a justicible human right, recognizes dignity as an inalienable, innate characteristic of each individual person and hence why it is a foundational value of our society in terms of s. 1(*a*) of the Constiitution. Botha's opinion, provided in Botha, H., *Human Dignity in Comparative Perspective,* Vol. 20, No. 2, (2009), Stellenbosch Law Review, pp. 171-370, at p. 197, is that the existence of human dignity of a particular person is not dependent on particular characteristics of said person and his or her dignity cannot be waived or lost through undignified behaviour. Ackermann in turn, in Ackermann, *Human Dignity: Lodestar for Equality in South Africa*, (2012), at p. 95, opined, also based on his interpretation of s. 10, that the dignity inherent in every human being "cannot be destroyed". Botha (Botha, (2009, *Human Dignity in Comparative Perspective*), at p. 197), Ackermann (Ackermann, *Human Dignity: Lodestar for Equality in South Africa*, (2012)), and Steinmann (Steinmann, R., *The Core Meaning of Human Dignity,* Vol. 19, No. 1, (Jun. 7, 2016), Potchefstroom Electronic Law Journal, pp. 1-32) compare South African dignity jurisprudence with that of Gernamy, especially the wording of s. 10, when referring to dignity as representing, at minimum, inalienable, inhereent, and intrinsic worth of every human being by virtue of being human being. Finally, Cornell, in Cornell, D., *A Call for a More Nuanced Constitutional Jurisprudence: Ubuntu, Dignity, and Reconciliation,* Vol. 19, No. 1, (Jan., 2004), South African Public Law, pp. 666-675, through reliance of Kantian ethics, opines that:

> "Dignity lies in our struggle to remain true to our moral vision, and even in our wavering from it. In the case of South Africa, those who broke under torture did not lose their dignity, precisely because they cannot lose their dignity, since it is a postulate of practical reason that never can be fatally undermined by our actual existential collapse before horrifying brutality."

The radical nature of the South African substantive revolution relates to the (Interim) Constitution that established "… an objective normative value system that, as an underlying constitutional value for all areas of the law, acts as a guiding principle and stimulus for the legislature, … the executive and the judiciary".[77] The doctrine of objective constitutional invalidity is one of the complexities of the South African substantive constitutional revolution because the revolutionary aspect of the change brought by said revolution is the imposition of an objective normative value system. The combination of constitutional supremacy and the objective normative value system provides for the doctrine of objective constitutional invalidity. We are, thus, left with a new legal order within which any law or conduct inconsistent with the Constitution and its objective normative value system *is* invalid.[78] Through its establishment of an objective normative value system the (Interim) Constitution constituted an objective normative legal order. As such, from the inception of the (Interim) Constitution, any law or conduct that was inconsistent or in conflict with the values contained in the (Interim) Constitution (the objective normative value system) ceased to exist within the new objective normative legal order. Thus, a Court *must* declare any law or conduct inconsistent with the Constitution invalid to the extent of its inconsistency[79] and the *declaration* of invalidity merely brings reality in line with "theoretical [notional] invalidity"[80] South Africa's objective approach to constitutional invalidity merely confirms that South Africa is a *Rechtsstaat* – in the substantive sense – rooted in the values of section 1. In such a *Rechtsstaat* the government is enjoined[81] to promote the values of the Constitution to materially realise the aspirations implicit in the objective normative legal order.

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77 *Ibid.* at p. 646.

78 See s. 2 of the Constitution.

79 See s. 172(1) of the Constitution.

80 Currie & De Waal, *Remedies*, (2013), at p. 179. See *Ferreira* 1996 (CC) at paras. [26]-[27] in which Ackermann, J. held that:

> "[a] statute is either valid or 'of no force and effect to the extent of the inconsistency'. The subjective positions in which parties to a dispute may find themselves cannot have a bearing on the status of the provisions of a statute under attack. [Any] competent Court … ought not to restrict its enquiry to the position of one of the parties to a dispute in order to determine the validity of a law. The consequence of such a (subjective) approach would be to recognise the validity of a statute in respect of one litigant, only to deny it to another. Besides resulting in a denial of equal protection of the law, considerations of legal certainty, being a central consideration in a constitutional state, militate against the adoption of the subjective approach. … [A] Court's order does not invalidate the law; it merely declares it to be invalid. It is very seldom patent, and in most cases is disputed, that pre-constitutional laws are inconsistent with the provisions of the Constitution. It is one of this Court's functions to determine and pronounce on the invalidity of laws, including Acts of Parliament. This does not detract from the reality that pre-existing laws either remained valid or became invalid upon the provisions of the Constitution coming into operation. In this sense laws are objectively valid or invalid depending on whether they are or are not inconsistent with the Constitution. The fact that a dispute concerning inconsistency may only be decided years afterwards, does not affect the objective nature of the invalidity. The issue of whether a law is invalid or not does not in theory therefore depend on whether, at the moment when the issue is being considered, a particular person's rights are threatened or infringed by the offending law or not".

81 S. 7 confirms the imposition of this obligation on the "state" in the South African context. – see s. 7 of the Constitution.

The Constitution, embodying an "objective, normative value system",[82] injects normative content into the legal order through its own normative character drawn from the reason for and the manner in which it came into existence. This reason is discussed under separate headings in this Chapter[83] and the manner referred to *is* the South African substantive constitutional revolution. Thus, the (Interim) Constitution brought about a *normative* change, since it is an "embod[iment of] certain fundamental legal norms [(values)] that are not merely hortatory but rather define the [C]onstitution in a substantive way".[84] Consequently, the law is both subject to and informed by the values that underlie our constitutional democracy.

At the risk of overstatement, the Constitution constituted a new "objective, normative legal order".[85] 'Objective' entails that the normative order stands objectively outside and independent from the subjective interests of legal subjects.[86] The legal order is then objectively rooted in something outside the interests of the existential being; that is, rooted in the values contained in section 1 of the Constitution. The Constitution seeks to break away from Afrikaner social ideals and the traditional social values of the former dispensation, as alluded to above, and, most importantly, provides for a constitutional paradigm to transform and creatively (re)imagine societal and behavioural norms. This act of (re)imagination ought to be guided by the ethical ideals sheltered by the Constitution, which ideals find elucidation in section 1(*a*) as founding (ethical) values. It is (re)imagination and (re)constitution of our-selves that is lacking in current transformative (equality) thought. Societal and behavioural norms reminiscent of our past still permeate our society today and until we (re)imagine the ontological being (essence) of each-other social transformation is negated and ended before ever having found meaningful inception.

Ackermann has opined that:

> "A transforming constitution such as ours will only succeed if everyone, in government as well as in civil society at all levels, embraces and lives out its values and its demands. It will only succeed if restitutional equality becomes a reality and basic material needs are met, because it borders on the obscene to preach human dignity to the homeless and the starving."[87]

However, whilst Ackermann is not incorrect in his assertion, it borders on the obscene to think that we have not deconstructed and (re)imagined our perception of the ontological meaning of each-other's being in terms of an ideology that is in contrast with the apartheid

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82 *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) at paras. [54]-[56]*; Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) at para. [48].

83 Under heading no. 2. and no. 3. of this chapter.

84 *Ibid.*

85 Cornell & Fuller, *Introduction*, (2013), at p. 4.

86 *Ibid.*

87 Ackermann, (2004, *The Legal Nature of the South African Constitutional Revolution*) at p. 679.

pedagogy. Our understanding of the being (essence) of human beings is still being taught to us and remains informed by the apartheid pedagogy. As indicated in Chapter 3, whilst transformation is blindly emphasising transformation of material needs, South Africans are ever-increasingly developing (politically instilled) racist conceptions of each other that is entirely divorced from the phenomenological being (the phenomena or the human being one perceives with one's eyes). Phrases such as white privilege, white monopoly capitalism, and so forth attribute exclusionary and a demeaning ontological meaning to the being (essence) of a white human being that is replete with and draping of racism at the hands of neo-liberationism. As soon as one radicalises *and* politicizes (in other words considered conjunctively), race (and this is equally true for other categories, such as sex, gender, and sexual orientation) one is removing the subject matter of any meaningful engagement with the issue of *social* transformation (that is inclusive of material transformation), which is aimed at aspiring towards the achievement of the ideal of equality between *human beings* of equal innate and inalienable worth. An engagement revolving around and controlled by radical politics abandons the centrality of the *human and its worth* in favour of a partisan and populist inspired exclusionary political discourse aimed at dismantling the 'agendas'[88] of the oppressors and the neo-racists.

5. THE SUBSTANCE OF THE REVOLUTION: *GRUNDNORM(S)*

The previous section ended with a discussion of how the South African substantive constitutional revolution displaced and replaced of the ideological content of the old legal order with an objective normative legal order. The content of this objective normative value system and legal order is translated and communicated by relying on the notion of a *Grundnorm*. Both the Interim Constitution and the Constitution are revolutionary constitutions and "… directed to the *future*: to the *ideal* of a new society which is to be built on the common values which made a political transition possible in our country and which are the *foundation* of its new Constitution [own emphasis]."[89]

These common values that made the *political* transition possible are *both* the constitutional values of human dignity, the achievement of equality, the advancement of human rights and

[88] See Madlingozi, (2017, *Social Justice in a Time of Neo-Apartheid Constitutionalism*), at pp. 140 & 145, where Madlingozi uses terminology such as "social justice agenda", "an overwhelmingly white epistemic community theorises social justice, calibrates its *agenda*, selects; test cases' and engages in 'strategic litigation' on behalf of 'poor communities'", and "[t]he contemporary realm of social justice is a realm dominated by professional NGOs made up of middleclass officials who accept the legitimacy of the post-1994 dispensation, are in a conflictual but civil relation with the state, and who mainly pursue a recognition-incorporation-distribution *agenda*" [own emphasis].

[89] *Makwanyane* 1995 (CC) at para. [323].

freedoms, *and Ubuntu*. In the context of this thesis, *Grundnorm* denotes the adoption of the achievement of equality as a, not the, standard which must inform all law and against which all law and conduct must be tested for constitutional consonance. Alongside equality, the other two core constitutional and democratic values are freedom and equality.[90] In addition, I submit that these three Western values *together with* the African philosophical concept of *Ubuntu* is South Africa's new ideological substance. These values together with *Ubuntu* is, therefore, constitutive of and constitutes the *Grundnorm(s)* of 'post'-apartheid South Africa.

Kelsen, the 'father of *Grundnorm*', described the legal process as a hierarchy of norms in which the validity of each norm (excluding the *Grundnorm*) rests upon a higher norm.[91] Each level within this hierarchy is representative of a movement from the generality to increased individuality[92] and a norm can only be derived from another norm.[93] This process of derivation is not perpetual, since a *Grundnorm* is the ultimate, basic, or fundamental norm that is determines the validity of all other norms. Since the validity of this fundamental norm does not rest upon the validity of another legal norm it must be *extra-legal*[94] and not a norm of the positive law that is created by a real act of will of a legal organ.[95] The *Grundnorm* is presupposed in juristic thinking and meta-legal because it is pointless to seek further legal justification for its validity.[96]

In dealing with the relationship between a constitution and the *Grundnorm*, Kelsen argued that "we must trace back the existing constitution to a historically first constitution, which cannot be traced back to a positive norm created by a legal authority".[97] The end result is then that we will reach a constitution (*Grundnorm*) that became valid in a *revolutionary way*.[98] The Constitution is the product of the South African substantive constitutional *revolution* and the underlying substance – *Grundnorm* – that replaced the apartheid regime became valid in a revolutionary way; hence the name South African substantive constitutional *revolution*. For Kelsen, the presupposed validity of the historically first constitution provides normative credence to the constitution as the *Grundnorm*.[99] The *Grundnorm* is the normative *content* of the presupposition of validity or then that which was presumptively valid. The *Grundnorm(s)* of both *Ubuntu* and constitutional values were presumed to be valid based on an unequivocal realisation

90 *Mamabolo* 2001 (CC) at para. [41].
91 Freedman, *Lloyd's Introduction to Jurisprudence*, (2008), at p. 310.
92 *Ibid.*
93 *Ibid.* at p. 309.
94 *Ibid.*
95 *Ibid.* at p. 314.
96 *Ibid.* at pp. 314-316.
97 *Ibid.* at p. 316.
98 *Ibid.*, Kelen distinguish between a constitution in a legal-logical sense (*Grundnorm*) and the constitution in the positive sense (constitution as we generally understand it).
99 *Ibid.*

and recognition of the inherent invalidity of (*i*) any representation of 'being separated from the other' as the essence of humanity and (*ii*) confined separation. The ideological starting point for social organisation and regulation by law was a misconceived discriminatory essence. Consequently, the latter was replaced by our current *Grundnorm(s)* in a revolutionary way and on a presumption of validity.

Cornell & Fuller interpreted Kelsen as follows: "… a *Grundnorm* is an external moral or ethical ideal that is the foundation for the entire legal system in question".[100] I understand the term *Grundnorm* as an external ethical value that is the foundation of an entire legal system. An ethical value, in turn, is a value that perpetually stands in relation to and acts as a momentary signifier of the ideal signified by such value. In other words, the constitutional values of freedom, dignity, and the achievement of equality are ethical values that are perpetually directed towards the ideal but only momentarily concretely signifies the ideals once the value is given content (meaning) to. The ethical nature of these values renders their meaning perpetually susceptible to and open towards difference. In other words, the meaning of a value always remains open towards different meanings, never to be understood as being finally determinate.

The inclusion of human dignity and the achievement of equality as foundational values in section 1(*a*) of the Constitution has been dealt with in Chapter 2 and Chapter 3. The importance of human dignity has also been addressed under the heading "Introduction" of this chapter. Thus, I have already indicated ***why*** the constitutional values of dignity and the achievement of equality ought to be South Africa's *Grundnorms*, but have not done so in respect of *Ubuntu*. I now turn to why *Ubuntu* ought to be a *Grundnorm* of 'post'-aparthied South Africa, which must be red together with Chapter 5.

The *causa causans* for the "spontaneous call … for a return to *Ubuntu*" is "the loss of respect for human life and the inherent dignity which attaches to every person".[101] I agree with Mokgoro, J. that "[a]lthough South Africans have a history of deep divisions characterised by strife and conflict, one shared value and ideal that runs like a golden thread across cultural lines is the value of *Ubuntu*". [102] Even without people neither knowing about the existence of *Ubuntu* nor accepting the notions flowing from *Ubuntu*, *Ubuntu* acts as an *ethical* conduit between individuals and, in this sense, it ought to be the golden thread crossing cultural lines.

> "We have all been affected … by the 'strife, conflict, untold suffering and injustice' of the recent past … Some of the violence has been perpetrated through the machinery of the State … to ensure

100 Cornell & Fuller, *Introduction*, (2013), at pp. 5-6.
101 *Makwanyane* 1995 (CC) at para. [227].
102 *Ibid.* at para. [307].

> the perpetuation of a *status quo* that was fast running out of time. But all this was violence on human beings by human beings. Life became cheap, almost worthless. It was against a background of the *loss of respect for human life and the inherent dignity* which attaches to every person that a spontaneous call has arisen among sections of the community for a return to *[U]buntu*. … *[Ubuntu]* has … always been mentioned in the context of it *being something to be desired*, a *commendable attribute* which the *nation should strive for*."[103] [own emphasis and footnotes omitted]

After the loss of respect for human life and dignity in South Africa it is not unexpected that South Africans would turn to an indigenous African "ethical value or ideal … reject[ing] any neat separation between law and ethics".[104] In terms of *Ubuntu* 'moral' suggests an ethical activity of justice directed toward the aspirational ideal of a free humanity harmonising competing interests through an appeal to ideals and values that attribute ethical meaning to human life.[105] The founding values of the Constitution set the tone for peaceful co-existence, since we are all too aware of the potential for disorder occasioned decades of oppression and repression.[106] *Ubuntu* abounds values[107] and ideals, which have the potential of shaping South African jurisprudence as a whole.[108] *Ubuntu* (and its shared values) and the values of the Constitution are likely to become central in shaping and formulating a new indigenous law and jurisprudence.[109] In addition, *Ubuntu* is an ethical directive as the 'law of law' (or, as I put it, a *Grundnorm*)[110] underlying the entirety of the Constitution.[111]

> "The spirit of *Ubuntu* … suffuses the whole constitutional order [by] combin[ing] individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights [and the Bill of Rights would be] … nothing if [it is] not a structured, institutionalised[,] and operational declaration in our … new society of the need for human interdependence, respect[,] and concern."[112]

It is through the philosophy of *Ubuntu* that an ethical meaning can be attributed to human life. However, I reject any notion of morality as "any attempt to spell out how one determines a right way to behave, behavioural norms which, once determined, can be translated

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103 *Makwanyane* 1995 (CC) at paras. [226]-[227].

104 Cornell, *Law and Revolution in South Africa: Ubuntu, Dignity and the Struggle for Constitutional Transformation*, (2014), at p. 14.

105 *Ibid.*

106 Mokgoro, Y., *Ubuntu and the Law in South Africa,* Vol. 1, No. 1, (Nov., 1998), Potchefstroom Electronic Law Journal, pp. 15-25, at p. 20.

107 The values of *Ubuntu* incudes human dignity, respect, inclusivity, compassion, concern for others, honesty and conformity Mokgoro, (1998, *Ubuntu and the Law in South Africa*), at p. 21.

108 Mokgoro, (1998, *Ubuntu and the Law in South Africa*), at p. 23.

109 *Ibid.*

110 See Metz, T., *The Motivation for "Toward an African Moral Theory",* Vol. 26, No. 4, (Dec., 2007), South African Journal of Philosophy, pp. 331-335. Also see Ramose, M.B., *But Hans Kelsen was not Born in Africa: A Reply to Thaddeus Metz,* Vol. 26, No. 4, (Dec., 2007), South African Journal of Philosophy, pp. 347-355 for some exclusionary thought on the subject.

111 Cornell & Van Marle, (2005, *Exploring Ubuntu: Tentative Reflections*), at p. 219.

112 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at para. [37].

into a system of rules".[113] I see such conception of morality as subjective morality susceptible to manipulation by and as a mechanism of domination at the behest of subjective interest of those in power. In contrast therewith, I emphasise and expressly incorporate the ethical relation into my work. The ethical relation places emphasis on and concerns (*i*) the kind or person each one of us must *become* to develop a non-violative relationship with the other[114] and (*ii*) a way of being-in-the-world.[115] In terms of an ethical interpretation of the Constitution and under an ethical conception of equality the relation in which one stands to the other must be an ethical relation. *Ubuntu* addresses both becoming a person to develop a non-violative relationship with the other and a way of being-in-the-world. Thus, *Ubuntu* can address the ethical relation in its totality. *Ubuntu* is discussed in further detail in Chapter 5.

The only remaining value to be discussed as a *Grundnorm* of South Africa is freedom, which is done under the next heading. Simply put, freedom in a substantive *Rechttstaat*, such as South Africa, is relative and so is its protection. Consequently, freedom, which includes negative protection of liberties, is conceived positively requiring enablement of enjoyment of liberties by legal subjects.

5.1. SOUTH AFRICA *AS* A SUBSTANTIVE *RECHTSSTAAT*

In progressing further into the replacement of the substantive ideology underpinning the old legal order with that of Grundnorms, I turn to the notion of a *Rechtsstaat* in a substantive sense. Blaau distinguishes between the formal aspect of the *Rechtsstaat* (*Rechtsstaat* in a formal sense) and the material or substantive aspect of the *Rechtsstaat* (*Rechtsstaat* in a material or substantive sense).[116] In a substantive *Rechtsstaat*, state authority is subject to higher juridical norms (*Grundsätze*)[117] and protection of rights is provided for within a normative structure of the constitution.[118] In a formal *Rechtsstaat* the guarantee and protection of liberties[119] are not seen in relative terms and "liberty is … protected merely for liberty's sake".[120] A substantive *Rechtsstaat* is not an extension of the formal *Rechtsstaat* through the addition of *mere* subjective morality because at the centre of a substantive *Rechtsstaat* is the object of preserving a balance between *lex* and *ius*.[121] Accordingly, the positive law as formally expressed (*lex*) must be reflective of "proper

113 Van Marle, (1996, *The Doubly Prized World*), at p. 332.
114 *Ibid.*
115 *Ibid.*
116 Blaau, (1990, *Rechtsstaat Idea Compared with the Rule of Law as a Paradigm for Protecting Rights*), at pp. 79-88.
117 *Ibid.* at p. 85.
118 *Ibid.*
119 The primary objective of a formal *Rechtsstaat*.
120 Blaau, (1990, *Rechtsstaat Idea Compared with the Rule of Law as a Paradigm for Protecting Rights*), at p. 85.
121 *Ibid.*

[objective] ethical norms" (*ius*).[122] Section 39(2) of the Constitution provides that "[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights". In other words, the spirit, purport, and the objects of the Bill of Rights play a determinative role in legal discourse in that the positive law as formally expressed (*lex*) must be reflective of proper objective ethical norms being the spirit, purport, and objects of the Bill of Rights. Section 39(2) renders South Africa a *Rechtsstaat* in a substantive sense:[123] the Constitution is not merely a formal document regulating public power, since it embodies, as the German Constitution, an objective, normative value system.[124] Basic right norms contain both defensive subjective rights and embody an objective value system.[125] This value system and its values acts as a guiding principle and stimulus for the entire legal system as well as the legislature, executive, and judiciary.[126] The common law forms part of the legal system and section 39(2) mandates the influence of the fundamental constitutional values thereon.[127]

The relationship between *lex* and *ius* explains why South Africa's 'moral standard' is objectively placed outside subjective interests of legal subjects. According to Cornell the Constitution, firstly, appeals to an ideal community and, secondly, legally (re)constituted a new South Africa.[128] She ascribes ethical meaning to the South African substantive constitutional revolution by assigning the Constitution both status of law (*lex*) and an ethical call (*ius*) upon South Africans to "live up to the aspirational ideals" of the Constitution.[129] Cornell thus perceives South Africa as a *Rechtsstaat* possessed of an objective normative legal order[130] denoting a legal system founded upon the Constitution (*lex*) that is put beyond the reach of coordinated subjective interests.[131] Hegemonic private interests cannot determine what is good (*ius*) but rather something outside the interests of the existential being is the determinant, that is the ethical (*ethikos*). It, therefore, follows quite eloquently that the moral appeals to: "a larger *ethical activity of justice*, toward the aspirational *ideal* of a free humanity that can harmonise competing interests not simply through balancing but through an *appeal* to *ideals and values that attribute ethical meaning to*

122 *Ibid.*
123 See Cornell & Fuller, *Introduction*, (2013), at pp. 5-6.
124 *Carmichele* 2001 (CC) at para. [54].
125 *Ibid.*
126 *Ibid.*
127 *Ibid.*
128 Cornell, D., *Bridging the Span Towards Justice: Laurie Ackermann and the Ongoing Architectonic of Dignity Jurisprudence*, (Jan., 2008), Acta Juridica, pp. 18-46, at p. 20.
129 *Ibid.* at p. 18.
130 See *ibid.* at p. 19 where Cornell used the phrase "objective realm of external freedom", but I will only limit myself to an objective normative legal order, thereby not including Kant's conception of the realm of external freedom in my ethical reading of the Constitution in its totality.
131 Cornell, (2008, *Bridging the Span Towards Justice*), at p. 18.

human life" [own emphasis].[132] Cornell, by her mentioning of an ethical activity of justice, sought to attribute ethical meaning to human life, which resonates with *Ubuntu*. Consequently, instead of the Constitution pointing at an ideal community as envisaged, for example, in Kant's Kingdom of Ends, we can draw content from African jurisprudence to ascertain the ideals and values that attribute ethical meaning to human life. Therefore, the Constitution is positioned at an ideal society[133] infused with the African philosophical concept of *Ubuntu* as opposed to one conceived in terms of Kant's idea of the community of the Kingdom of Ends.

The last foundational value to be discussed provides for the advancement of human rights and freedoms. I interpret human rights *and* freedoms conjunctively because South Africa is a substantive *Rechtsstaat* in which the guarantee and protection of liberties[134] are seen in relative terms and "liberty is not protected merely for liberty's sake".[135] Let me explain what protecting liberties for the sake of liberty means. The hallmark of Western philosophy – 'I think, therefore, I am' – is our starting point. I think, and as such I am – because I am free to think. To rephrase: I am because I am free to think. To mention one example of the importance of freedom: freedom, for Kant, was the "originary right of all human beings and, therefore, the basis of their dignity".[136] In this context, freedom is liberty and because one is free, one is afforded liberties such as the right to privacy, freedom of religion, freedom of speech, equality before the law, and the right to a fair trial. One must understand these liberties in a *negative* sense protecting the individual against the state. Freedom is understood, in general and in a negative sense, as the "right of individuals not to have 'obstacles to possible choices' placed in their way by the State"[137] or then the freedom to act without interference from anyone. Liberty is then to be free from interference, which includes freedom from interference in your private sphere – hence the right to privacy. Liberty means you are free to express your opinion without any interference – censorship, hence the right to freedom of speech. Liberty means you are free to pursue an honestly held religious belief or conviction without interference – hence the right to freedom of religion. I can carry on, but in this sense, liberties are protected merely for the sake of liberty. I now turn to explain what it means *not* to protect liberty merely for the sake of liberty.

In a substantive *Rechttstaat* freedom is protected and guaranteed *because* a person is a living breathing human being imbued with human dignity, demanding equal respect and concern, and

132 *Ibid.*
133 See Pt. II, Ch. 5.
134 The primary objective of a formal *Rechtsstaat.*
135 Blaau, (1990, *Rechtsstaat Idea Compared with the Rule of Law as a Paradigm for Protecting Rights*), at p. 85.
136 Cornell & Fuller, *Introduction*, (2013), at p. 14, but freedom for Kant meant something completely different from that of freedom in terms of the Anglo-American tradition.
137 *Ferreira* 1996 (CC) at para. [54].

to whom freedom is more than mere the absence of interference. Protection of liberty is or liberties are relative, and not linear, since a person cannot be free to exercise liberties without "full and equal enjoyment of all rights and freedoms [liberties]".[138] Freedom is understood as including development of "those capabilities necessary for each individual to achieve those ends that each one has reason to value".[139] Sen calls the latter 'capability freedom' and Cornell summarised this notion as follows:

> "… capability freedom is affirmative in that human beings must both have their fundamental human functioning protected – the right, for instance, to food, medical care and work – and be allowed the space to turn their dreams of capability into actual functionings. Simply put, it is not enough to protect the right of everyone to be a lawyer and enter law school if the education of the country is unequal and racially or sexually discriminatory."[140]

Woolman's interpretation of Sen is that the constitutional values of dignity, equality, and freedom require a "level of material support (e[.]g[.], food) and immaterial support (e[.]g[.], civil liberties) that enable individuals to pursue a meaningful and comprehensive vision of the good life – as they understand it".[141] That which is 'good' (*ius*) belongs to the ideal ethical society and the 'good' is placed outside the reach of hegemonic subjective interests. To contrast the latter, in our, not so distant past, to be separate was seen as 'good' and this separateness was objectively justified by the rationality of the white man. In contrast therewith, under the Constitution and ethical constitutionalism that which is 'right' (in this sense referring to subjective morality) is determined by each individual internally, but at the same time, such conviction is externally rejected, limited, or justified by the law (*lex*) as influenced and determined by the proper ethical norms (*ius*); which is ideals. To use the words of Kant:

> "Any action is right if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law."[142]

In the South African context, one would argue that any action is 'right' if it can coexist with the ethical ethos (normative objective value system) instilled by ethical and aspirational ideals informing the ethical values that underlie our 'post'-apartheid constitutional dispensation.

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138 S. 9(2) of the Constitution provides that "[e]quality includes the full and equal enjoyment of all rights and freedoms".

139 Woolman, S.C., *Chapter 36: Dignity*, in Woolman, S. C. & Bishop, M. (Eds.), *Constitutional Law of South Africa* (2014), at Ch. 36, p. 67.

140 Cornell, (2008, *Bridging the Span Towards Justice*), at p. 39.

141 Woolman, *Chapter 36: Dignity*, (2014), at Ch. 36, p. 76.

142 Quote found in Wood, A., *Human Dignity, Right and the Realm of Ends,* (2008), Acta Juridica, pp. 47-65, at p. 55, and the quote is that of Kant found in Kant, I., and & Wood, A.W., *Practical Philosophy*, "The Cambridge Edition of the Works of Immanuel Kant", (1996), at p. 230.

6. BE-COMING A 'POST'-APARTHEID SOUTH AFRICA

My focus is now on the third and final element of Ackermann's notion of a substantive constitutional revolution, which relates to the perpetual nature thereof. Drawing from the work of van Marle[143] and in the context of Ackermann's assertion that the South African substantive constitutional revolution might never be completed I interlace the notion of a substantive constitutional revolution with my understanding of be-coming. The notion of be-coming fulfils an important role within social transformation and, thus, my ethical conception of equality. Therefore, in bringing my discussion of Cornell's interpretation of the subject of transformation to an end, I place be-coming at the centre of my creatively adapted question of Cornell's second prong of her two-pronged interpretation asking what kind of persons do we have to become to open ourselves to a new world. My creative adaptation states: be-coming of our-selves opens us to (the possibility of) new worlds.[144]

Ackermann emphasised that the Constitution is "… transcendental in the sense that, given the imperfections … of human beings and human society, the vision it [the Constitution] incorporates may never be fully realised".[145] Our own imperfection should not preclude us from aspiring to this ideal vision with utmost assiduousness. The continuality of the South African substantive constitutional revolution is eloquently described by Cornell & Fuller where they discuss dignity as a *Grundnorm* of South Africa:

> "The Dignity jurisprudence of South Africa lies at the very heart of the substantive legal revolution; an on[-]going revolution that demands the transformation of South Africa from a horrifically unjust society to one that aspires to justice for all of its citizens."[146]

Cornell interprets the following passage of Ackermann as evidencing that "there can be no final Constitution because it will be up to the people of South Africa continually to transform this country as guided by the great idea[l]s of dignity, equality and justice":

> "[T]he ultimate fate of the Constitution, a bridge with a very long span,[147] will not be decided by the jurisprudence of its courts alone ... A transforming Constitution such as ours will only succeed if

143 Her notion of becoming is primarily found in Van Marle, (2010, *Reflections on Post-Apartheid Being and Becoming*) and Van Marle, K., *Lives of Action, Thinking and Revolt - A Feminist Call for Politics and Becoming in Post-Apartheid South Africa,* Vol. 19, No. 1, (Jan., 2004), South African Public Law, pp. 605-628. See also Van Marle*, et al.*, (2012, *Memory, Space and Gender*).

144 This term is used by Gaonkar – see Gaonkar, (2002, *Toward New Imaginaries*) and Pt. II, Ch. 5 at p. 178.

145 Ackermann, *Human Dignity: Lodestar for Equality in South Africa*, (2012), at p. 15.

146 Cornell & Fuller, *Introduction*, (2013), at p. 3.

147 The epilogue of the Interim Constitution set the scene for jurists to be captivated by a metaphoric conception of the Interim Constitution; see among others, Mureinik, (1994, *A Bridge to Where-Introducing the Interim Bill of Rights*), at pp. 31-33; De Vos, (2001, *A Bridge Too Far: History as Context in the Interpretation of the South African Constitution*); van der Walt, (2001, *Dancing with Codes: Protecting, Developing and Deconstructing Property Rights in a Constitutional State*); Le Roux, (2004, *Bridges, Clearings and Labyrinths: the Architectural*

> everyone, in government as well as in civil society at all levels, embraces and lives out its vales and its demands. It will only succeed if restitutional equality becomes a reality and basic material needs are met, because it borders on the obscene to preach human dignity to the homeless and the starving. This must, however, be achieved in a manner consonant with the human dignity of all. We are, after 10 years, only at the end of the beginning."[148]

Van Marle argues for "becoming" 'post'-apartheid because South Africa cannot be 'post'-apartheid when one is confronted with the bequeathed socio-economic aftermath of apartheid that remains to be addressed.[149] 'Post' signifies that South Africa is 'not yet' after or beyond the reach and consequences of the apartheid *social* order.[150] Apartheid has formally come to an end with the advent of the Interim Constitution, but the entirety of the racially inspired structure of advantaged and disadvantage, control of the black population (whether economic, psychological, or otherwise), and otherwise meticulous demeaning regulation and domination of the black population did not come to an instantaneous end. That is the reason for the need for transformation in the material sense. In addition to material inequality, one cannot forget the systemic denial of inherent equal worth that was thoroughly orchestrated in the most egregious *modus*, surpassed only by death itself; namely, large scale, state authorised, and legally justified ontological bias, intolerance, and ultimately racially inspired hatred towards and the need to control every aspect of any black person to the prejudice of such person and the advantage of the (white) other. As already submitted in Chapter 3, the being (essence) of the other had been overlooked as the *subject* of transformation, since the entirety of South Africa's transformative 'agenda' has been deliriously affording preference to material concerns and imprudently banished transformation of our-selves to the abyss of ideological irrelevance. Radical populist and partisan politics cannot concern itself with the ethical relation between human beings *inter se*, since such a concern would be delegitimising and destabilising the radical (political) element the liberationist agenda that is central to neo-liberationism. Although South Africa is 'not yet', socially considered, 'post'-apartheid and, I submit that, South Africa cannot ever fully and finally be 'post'-apartheid, since to *be* 'post'-apartheid is to have achieved equality; that is to have overcame *any and all* socially constructed ontological bias or intolerance. Apartheid signifies, among other things, racist domination of one group over another, racism, racist policies, systemic disadvantage, and discrimination. Thus, once one has experienced the ethical realisation it

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Framing of Post-Apartheid Constitutionalism), at pp. 629-645; Ackermann, (2004, *The Legal Nature of the South African Constitutional Revolution*), at pp. 651 & 678; Van Marle*, et al.*, (2012, *Memory, Space and Gender*).

148 Ackermann, (2004, *The Legal Nature of the South African Constitutional Revolution*), at pp. 678-679.

149 Van Marle, (2010, *Reflections on Post-Apartheid Being and Becoming*), at p. 351.

150 Compare Van Marle where she quoted *Justice and Reconciliation in Post-Apartheid South Africa*, (2009), at p. 2 in Van Marle, (2010, *Reflections on Post-Apartheid Being and Becoming*), at p. 350 and opined that 'post'-apartheid is that which '"hints at the intersection of the transitional and the apparently enduring"' or, otherwise put, a liminal space.

follows naturally that it is impossible for South Africa to have be-come 'post'-apartheid; that is, post or after that which is represented by apartheid, since the ethical realisation includes *realisation* of the inability of humans to act autonomously and, in consequence, the impossibility of achieving equality.

Van Marle proclaims that what is at stake in "becoming" 'post'-apartheid is both "becoming of individuals/subjects" and the "becoming of communities[/society]".[151] In addition, because dominant (liberal) discourse and the public at large conceived the Constitution as monumental[152] not much has changed, if at all, when considering 'post'-apartheid jurisprudence, material inequalities, and power relations.[153] She also asks whether South Africa has undergone transformation, as defined by Cornell; in other words, social transformation.[154] As already indicated in Chapter 3, there is a clear lack in social transformation in 'post'-apartheid South Africa. She also submits that, since the Constitution as monument do not provide a space for critical questioning, a conception of the Constitution a memorial is rather called for.[155] Regarding material inequalities still prevalent today, the Constitutional Court is aware that "[p]ast unfair discrimination frequently has on[-]going negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely".[156] However, the (re)imagination and (re)constitution of the self and society has not received sufficient attention or consideration, if at all, by either the Constitutional Court or the dominant discourse within 'post'-apartheid transformative jurisprudence; namely transformative constitutionalism.

"Becoming", in contemporary philosophy, is understood in the sense of Aristotelian substantial change; that is, a *change involving something coming into existence* rather than a change in the attributes of some existing thing.[157] Similarly, for Deleuze and Guattari "becoming" is a verb with its own consistency and does not "reduce to, or lead back to, 'appearing', 'being', 'equalling', or 'producing'".[158] Any "becoming" is already "molecular" because becoming does not entail either imitation or identification with something or someone, or proportioning of formal

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151 Van Marle, (2010, *Reflections on Post-Apartheid Being and Becoming*), at p. 350.

152 Van Marle, (2004, *Lives of Action, Thinking and Revolt - A Feminist Call for Politics and Becoming in Post-Apartheid South Africa*), at pp. 606-621.

153 Van Marle, (2010, *Reflections on Post-Apartheid Being and Becoming*), at pp. 348 & 351.

154 *Ibid.*

155 Van Marle, (2004, *Lives of Action, Thinking and Revolt - A Feminist Call for Politics and Becoming in Post-Apartheid South Africa*), at pp. 612, she succinctly set out her argument as the possibility of preventing total closure – (re)interpretation and (re)invention of meaning can be possible in the future if "an approach is adopted that regards the constitution and human rights as memorial… [, not monumental, in a space that is opened to a politics of action, thought and revolt, a politics of becoming".

156 *Sodomy* 1999 (CC) at para. [60].

157 Bunnin & Yu, *The Blackwell Dictionary of Western Philosophy*, (2004) at p. 75.

158 Deleuze, G. & Guattari, F., *A Thousand Plateaus: Capitalism and Schizophrenia* (1987), at p. 239.

relations.[159] "Neither of these two figures of analogy is applicable to becoming: neither the imitation of a subject nor the proportionality of a form".[160] Finally, becoming is not evolution, but rather involution, which is in no way regression, but rather creative creation.[161]

In developing a notion of "becoming" van Marle relies on Deleuze and Guattari[162] and their argument for "feminist politics as a double movement".[163] Van Marle indicates that they distinguished between 'molar' and 'molecular' politics. Molar politics is "concerned with female identity as such" and "designates a political movement with a firm 'ground, identity[,] or subject'".[164] Molar politics is "politics by which a female subjectivity is claimed".[165] Molecular politics is "a politics of questioning and activation through which 'those tiny events that make such foundations possible' are questioned";[166] it is a politics concerned with "the questioning of female identity" and "provides space for the 'mobile, active[,] and ceaseless challenge of becoming'".[167] Van Marle opines that this double movement is appropriate in describing the "future of South African law, one in which identity (stability) is asserted, but in the same move, one in which a becoming, a ceaseless challenge, is asserted".[168] Molar politics can be compared with the first element of Ackermann's notion of a substantive constitutional revolution; that is the displacement and replacement of the old legal order with the new legal order. Molecular politics can be compared with the last element of Ackermann's notion of the South African substantive constitutional revolution, which is that it can continue in perpetuity. In other words, the continuance of the South African substantive constitutional revolution can be compared with the ceaseless challenging of accepted norms or the *status quo*. Therefore, within our new constitutional democracy, the revolution is not completed, and will never be completed, because in becoming, not only post-apartheid but, a socially just society there must be a ceaseless questioning and challenging of the *status quo*.

Van Marle submits that Deleuze and Guattari identifies, considered *in tandem*, a politics that produces a double-movement, or then two dynamic senses of movement in terms of which the movement occasioned by molar politics acts as the organisation of a subjectivity and the

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159 *Ibid.* at p. 272.
160 *Ibid.*
161 *Ibid.* at p. 238.
162 *Ibid.* at pp. 272-287.
163 Van Marle, (2010, *Reflections on Post-Apartheid Being and Becoming*), at p. 351.
164 *Ibid.*
165 Van Marle, (2004, *Lives of Action, Thinking and Revolt - A Feminist Call for Politics and Becoming in Post-Apartheid South Africa*), at p. 623.
166 *Ibid.*
167 Van Marle, (2010, *Reflections on Post-Apartheid Being and Becoming*), at p. 351.
168 *Ibid.*

movement of molecular politics provides for the continuous challenge of becoming.[169] In this 'political' double-movement (the assertion or organisation of) subjectivity should work in harmony with the movement of molecular politics. The consequence of so moving in harmony would be that the double movement acts as a simultaneous *confrontation of subjectivity* in and by itself through its harmonious advancement together and in association with molecular movement *to affirm itself as an event in the process of becoming*. Thus, any assertion of meaning attached to subjectivity is but a single articulation (assertion) of meaning in the process of becoming human.[170] Any assertion of subjectivity must not simply be a mirroring of the dominant self, since such single movement would stop short of the second movement belonging to molecular politics.

For me *any* human being (*Da-sein*) by virtue of being-in-the-word is always be-coming in or by being-there (in the word, together with beings) and being-with (in the world, together with others). Humans (*Da-sein*) is being-in-the-world. Thus, *Da-sein* is being-with and *Da-sein* is being-there. Being-there means we are in a relationship with beings and without us they (beings) would not have a meaning and, in fact, would cease to exist for all intents and purposes. Humans do not just happen to be in a world, a 'there'. The 'there' of humans is essential to humans and would be nothing at all without it. Conversely, it ('there' or the world) would be nothing without humans: "Our world is the context in terms of which we understand ourselves, and *within which we be*[-]*come who we are*. … 'I am myself plus my circumstance'."[171] Being-with entails being in a relationship with others and not being an isolated atomic being divorced from the fact that you are actively engaged in your being-with others. "Being-in-the-world, the world is always the one that I share with [o]thers. The world of *Da-sein* is a with-world [*Mitwelt*]. being-in is being-with [o]thers."[172]

Consequently, it is within human capacity to (re)imagine and (re)constitute its 'there', with specific reference to the beings in our 'there' (world). History is unequivocal and unambiguous: one group (man, white, and/or heterosexual) can define the meaning of the being

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169 Van Marle, (2004, *Lives of Action, Thinking and Revolt - A Feminist Call for Politics and Becoming in Post-Apartheid South Africa*), at p. 623.

170 I must admit that I merely 'borrow' certain strands of thought from Deleuze and Guattari simply because of my disassociation from statements made in Deleuze & Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (1987), at pp. 274 & 275 such as:

> "A dog may exercise its jaw on iron, but when it does it is using its jaw as a molar organ. When Lolito eats iron, it is totally different: he makes his jaw enter into composition with the iron in such a way that he himself becomes the jaw of a molecular dog. … You become animal only molecularly. You do not become a barking molar dog, but by barking, if it is done with enough feeling, with enough necessity and composition, you emit a molecular dog."

They are also of the opinion that becoming is not imaginary with which I wholly disassociate myself with – *ibid.* at p. 238.

171 Polt, *Heidegger: An Introduction*, (1999), at p. 30.

172 Heidegger, *Being and Time*, (1927), at p. 155.

of another group (woman, black, and/or homosexual). Be-coming is then the perpetual exercise of the (innate human) capacity to develop (imagine) a meaning of being (existing *as* human). Every human being has the capacity and ought to be allowed to understand and define himself or herself through one's own powers and to act freely as a moral agent pursuant to such understanding and self-determination.[173] We all have the capacity and ought to be able to (re)imagine and (re)constitute the social or society; that is, the way in which we imagine (perceive) the society in which we are actively engaged with each other, inhibit, and sustain. Thus, closely related to the notion of be-coming is the notion of the 'social imaginary', which is more fully addressed in Chapter 5.

With the above in mind, I introduce my conception of be-coming. 'Be' (v.) is used to denote existence whereas 'come' (adj.), in turn, is used to denote occur, happen, and *take place*. The hyphen is used to separate existence from occurrence to indicate that any being (thing) does not merely exist, but its existence occurs, happens, or takes place.[174] Be-coming describes existence *as* not representing the state of mere presence in the present and denotes change that involves something coming into existence. Be-coming is suspect of any preferred or 'absolutist true' *a fortiori* knowledge and assumptions about the stability and 'givenness' of already existing and the objective, neutral, and certain meaning attributed to such state of already existing and being complete in your existence. Be-coming entails being conscious of how our being (existence) is a simultaneous 'reality' and a continuous process of discovering ourselves through and within our *experience* of being-in-the-world (Existing-in-the-world).

Be-coming can, therefore, *not* be *mere* imagination and constitution of the self and society, since be-coming, whilst suspect of *a fortiori* knowledge, does not deny that we emerge into existence with certain background understanding. Thus, we cannot escape a pre-imagined and pre-constituted self, but, instead of adopting a nihilist perspective or merely accepting the preordained and unquestionability of who and what you are, an ethical understanding is always open towards (re)imagination and (re)constitution of the self by perpetually calling into question the pre-imagined and pre-constituted self or then a former (re)imagined and a (re)constituted self to a previous pre-imagined and pre-constituted self. Be-coming is, therefore, the perpetual (re)imagination and (re)constitution of the self and perpetual (re)imagination and (re)constitution of society. By borrowing from the double movement of molar and molecular politics, I submit that an assertion of the meaning of any-thing is accompanied by deferred (re)imagination of the

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173 Ackermann, (2004, *The Legal Nature of the South African Constitutional Revolution*), at p. 645.

174 In other words, to sit at the table – to be simply there – does not mean one exists or one is then not exemplified in existence. Rather, the walking to the chair, sitting down, eating, and excusing oneself from the table is being present in the occurrence of one's existence.

same meaning in the same act of asserting. The assertion of meaning is an event *taking place* in the process of be-coming. It is deferred (re)imagination of the same meaning in the same act of assertion because any asserted meaning is always incomplete by excluding or lacking the hitherto never asserted meaning. No asserted meaning can be final and is always open towards (re)assertion, rather than reassurance, through imagining the hitherto never asserted meaning. Otherwise put, no meaning can ever be finally asserted because once (re)asserted the assertion hitherto never made ought to be imagined. In other words, you are perpetually remaining open towards the questioning (the meaning of) your-self whilst and in the same act of asserting (the meaning of) your-self. Be-coming entails simultaneous (re)imagination and (re)constitution in that we (re)constitute ourselves in the act of (re)imagining our-selves or imagining our-selves differently. Be-coming entails that any assertion of any-thing, which includes a conception of our-selves, be accompanied by the simultaneous but deferred questioning of the very same meaning in the very act of asserting. Thus understood, be-coming is perpetual and what is at stake in be-coming 'post'-apartheid is both be-coming of subjects and be-coming of society.[175]

My notion of be-coming specifically incorporates the ethical relation to integrate the second prong of Cornell's interpretation of the subject of transformation and, as such, social transformation. Based on the meaning that I attach to be-coming I creatively adapt Cornell's second prong to mean the following: be-coming of our-selves opens us to (the possibility of) new worlds. In understanding be-coming ourselves we can rely on the ethical relation that concerns the kind of person one must be-come to develop a non-violative relationship with the other. "The concern of the ethical relation … is a way of … [being-in-the-world] that spans divergent value systems and allows us to criticize [(question)] the repressive aspects of competing moral systems".[176] This aspect is further addressed in Chapter 5 with recourse to *Ubuntu*, but for now it is re-iterated that be-coming denotes that no 'answer' forthcoming from *Ubuntu* in respect of the ethical relation can be final, since any assertion – inspired by the philosophical concept of *Ubuntu* – cannot be final because the moment that the assertion is uttered it is devoid of the non-asserted; that is, the hitherto never asserted meaning.

Van Marle submits that Deleuze and Guattari identifies, considered *in tandem*, a politics that produces a double-movement, or then two dynamic senses of movement in terms of which the movement occasioned by molar politics acts as the organisation of a subjectivity and the movement of molecular politics provides for the continuous challenge of becoming. In this 'political' double-movement (the assertion or organisation of) subjectivity should work in

175 Van Marle, (2010, *Reflections on Post-Apartheid Being and Becoming*), at p. 350.
176 Cornell, *Philosophy of the Limit*, (1992), at p. 13.

harmony with the movement of molecular politics. If so moved in harmony the consequence would be that the double movement acts as a simultaneous confrontation of subjectivity in and by itself through its harmonious advancement together and in association with molecular movement to affirm itself as an *event* in the process of becoming. Thus, any assertion of meaning attached to subjectivity is but a single articulation (assertion) of meaning in the process of becoming human. Any assertion of subjectivity must not simply be a mirroring of the dominant self, since such single movement would stop short of the second movement belonging to molecular politics.

As I have stated above, the reason why I include an in-depth analysis and discussion of the term substantive constitutional revolution is precisely because the South African substantive constitutional revolution *provides* for the *possibility* of an ethical conception of equality. The ethical realisation is marked by the acceptance of the impossibility of achieving equality and Ackermann argues that the Constitution is "transcendental in the sense that, given the imperfections … of human beings and human society, the vision it [the Constitution] incorporates may never be fully realised".[177] What the Constitution envisions is the ideal of achieving equality[178] and when a revolution is at hand the thoughts and ideas on how to *challenge* and *change* the *status quo* (inequality) so as to move to a new future (equality) runs rampant. In our on-going revolution we must never be complacent, but always be-coming – asserting a ceaseless challenge against the *status quo*. An inclination to accept my ethical conception of equality is strengthened by the fact that there is already an overlap between my conception and that of the Constitutional Court's substantive equality. The overlap is evident from the fact that addressing or eliminating difference is antithetical to my conception and the Constitutional Court[179] being not only open to difference, because "[t]he desire for equality is not a hope for the elimination of all differences[,]"[180] but also calls for its recognition as well as its celebration.[181] If the South African substantive constitutional revolution is, as I have argued, inclusive of the ethical moment (accepting the impossibility of achieving equality), I can see no reason why one cannot accept the impossibility of ever fully understanding 'the other'. It is my opinion that the Constitutional Court implicitly recognised this latter impossibility in that "[t]o understand 'the other' one must *try*, *as far as humanly possible*, to place oneself in the position of 'the other'" [own emphasis].[182] If

177 Ackermann, *Human Dignity: Lodestar for Equality in South Africa*, (2012), at p. 15.
178 See s. 1(*a*) of the Constitution.
179 I make this statement whilst cognizant of the fact that the CC has defined difference.
180 *Sodomy* 1999 (CC) at para. [22].
181 See *Pillay* 2008 (CC) at para. [65] where the CC distinguishes between mere 'permitting' of difference from 'celebration' difference.
182 *Sodomy* 1999 (CC) at para. [22].

we must *try*, *as far as humanly possible*, to place oneself in the position of the other, it seems to me we are accepting that there is an extent to which you, as a human, cannot truly be positioned in *locus* of the other and, therefore, the extent to which you can truly understand the other is limited.

7. CONCLUSION

This chapter provides content to the meaning of social transformation through recourse to Ackermann's notion of a substantive constitutional revolution. The first two elements of a substantive constitutional revolution have, in turn, been related to Cornell's first prong of her interpretation of the subject of transformation. The final element has been linked with her second prong and I have, in addition, creatively adapted Cornell's second prong though recourse to my notion of be-coming. What this chapter, thus, conclude with is the succinct statement that social transformation denotes (*i*) the element of radical change and (*ii*) the element of a process of perpetual be-coming of our-selves and society.

In coming to this conclusion this chapter saw its inception with the first two elements of a substantive constitutional revolution which is representative of the meaning of the notion itself. The two elements denote the displacement and replacement of the old legal order with a new legal order (dispensational change) as well as a change in the substantive ideological content underlying the new legal order (substantive change). Recourse is then had to the notion of a *Grundnorm* to elaborate on the change in substance. It is said that the *Grundnorms* of both constitutional values and *Ubuntu* are the new substance of the 'post'-apartheid legal order. Additional depth is then provided in arguing that South Africa is a *Rechttstaat* in the substantive sense in terms of which liberty is not protected for the sake of liberty itself. Rather, freedom is protected since a person cannot be free to exercise liberties without "full and equal enjoyment of all rights and freedoms [(liberties)]".[183] This chapter is concluded with a discussion of the third element of Ackermann's substantive constitutional revolution; which is, the perpetual nature thereof that I have, as shown above, linked element with the perpetual be-coming of the social.

The notion of be-coming delineates the role of the law as opposed to the role of society and elevates the divide between the legal order and social order in the process of transformation. The be-coming of the individual human being (legal subject) is further particularised and expanded upon in Chapter 5 through the notion of the social imaginary. The (re)imagination and (re)constitution of the social order is also considered in Chapter 5. The South African

[183] S. 9(2) of the Constitution provides that "[e]quality includes the full and equal enjoyment of all rights and freedoms".

substantive constitutional revolution, therefore, leads to the possibility of a 'post'-apartheid modernity, which is the topic under discussion in Chapter 5.

The Interim Constitution is monumentally celebratory in its acknowledgement of a new objective normative legal order[184] and by professing equality between men, women, and people of all races in this legal order.[185] The South African substantive constitutional revolution turned the old legal order on its head as well as replaced the 'old' with a 'new'. This 'monumental narrative' is maintained in the Constitution.[186] The Constitution is aesthetically designated as a monument because it signifies what the newly constituted objective normative legal order *ought* to be. The (Interim) Constitution as memorial warns us that, even though a new legal order has been constituted, a materially equal society characterised by social justice is the ideal, yet to be achieved. As memorial, the (Interim) Constitution reminds us that it is up to the individual and collective agency of its citizenry to act pro-actively in aspiring toward achieving this ideal of a socially just society – because one cannot characterise a materially unequal society as socially just. Ethically considered, a socially equal society characterised by social justice is the ideal, never to be achieved. At the centre of the Constitution as memorial lies the acceptance of the inequalities permeating our society as well as the acknowledgement that the obligation rests on us, not the law, to bring about social transformation in striving for social justice. Embracing the Constitution as memorial is an acceptance of the limits of the law in that the law cannot, by itself, bring forth substantive equality even though the law provides for the *possibility* of substantive equality with phrases such as that "[e]quality includes the *full and equal enjoyment* of all rights and freedoms".[187]

The law cannot bring about transformation, let alone social transformation. In 'post'-apartheid South Africa the law already provides for the instrumental mechanisms to transform material reality by whatever a-contextual and dehumanising means, however cold and arithmetically unjust such transformation might be. The law or then jurisprudence, as currently interpreted and understood, negates the subject of jurisprudence to political irrelevance and legal worthlessness. The legal subject is defined as either disadvantaged or advantaged, with the consequence that we (or are forced to) perceive and treat each other as such – irrespective of context or the true state of affairs.

184 See *Makwanyane* 1995 (CC) at para. [7] where Chaskalson, P. made it clear that the Interim Constitution is a "transitional constitution[,] but one which itself *establishes* [or in my own words 'constitutes'] a new [legal] order in South Africa" [own emphasis].

185 Preamble of the Interim Constitution.

186 Preamble of the Constitution.

187 S. 9(2) of the Constitution.

The South African substantive constitutional revolution provides for transcendence of the above reification of disadvantage as the ontological essence of our being (existence *as*) human. By displacing the previous dispensation and replacing it with *ethical ideals*, I submit that the revolution is perpetual in nature, never to be completed. A 'post'-apartheid South Africa is to be particularised in perpetuity within an ever-developing, ever-constituting, and ever-transforming 'post'-apartheid modernity. The lack of social transformation is *not* ascribable to the Constitution as such, but rather our lack of reliance upon ethical values and the ethical philosophical concept *Ubuntu*. 'Post'-apartheid South Africa is ripe for *social* transformation by opening ourselves to the possibility of a *new* world – a *true* 'post'-apartheid modernity.

CHAPTER 5:
THE CONSEQUENCES OF THE SOUTH AFRICAN SUBSTANTIVE CONSTITUTIONAL REVOLUTION

1. INTRODUCTION

Part II of this thesis addresses the second fundamental question; namely what is South Africa's substantive constitutional revolution and its consequence? In Chapter 4, after introducing and discussing the South African substantive constitutional revolution, I concluded that social transformation denotes (*i*) the element of radical change and (*ii*) the element of a process of perpetual be-coming of our-selves and society. The submission is that, once ethically perceived, the South African substantive constitutional revolution is occasioned by, as consequences, the possibilities of, (*i*) an ethical interpretation of the Constitution, (*ii*) an ethical conception of equality, (*iii*) a 'post'-apartheid modernity, elaborated upon and developed in this chapter.

In Chapter 4, I submit that the South African substantive constitutional revolution constituted a new *legal* order. In contrast with Chapter 4 that concerns the newly constituted legal order, this chapter concerns the *possibility of* an ideal *social* order. I articulate this *possibility* by investigating what a 'post'-apartheid South African *modernity* ought to entail. What this chapter also unveils is that this *possibility* of an ideal social order is a consequence of the South African substantive constitutional revolution. In aligning this chapter to the fundamental problem of inadequate social transformation, it is reiterated that the concern of Chapter 4 is the first element of social transformation; in other words, radical change causing a dramatic restructuring of the system – political, legal, or social – to such an extent that the 'identity' of the system itself is altered. Chapter 4 ends with the be-coming of the self with the primary focus of the discussion being on how we *ought* to realise and be open towards the idea of perpetual (re)imagining and (re)constituting our-selves. In contrast with Chapter 4, this chapter concerns the be-coming of

society – the (re)imagination and (re)constitution of *society*. I have creatively adapted[1] the second element of social transformation into the following statement: perpetual be-coming of our-selves opens us to (the possibility of) new worlds. Worlds or (in Heidegger's term a 'there') are *different conceptions of society or the social order*. The integral relationship between the (re)imagination and (re)constitution of the self is with the (re)imagination and (re)constitution of society cannot be overstated.

1.1. STRUCTURE OF THE CHAPTER

I start this chapter by introducing the notion of the social imaginary to the reader. The notion is relied upon to enlighten society into realising that each one of us has the capacity to (re)imagine the self and to (re)constitute ourselves *and* the society. Building on the social imaginary, I place emphasis on (re)imagination and (re)constitution of the society by relying on the multiple modernities thesis. This thesis entails a perpetual (re)constitution of *cultural programmes* and *institutions*. In contrast with the social imaginary that focuses on the 'subjective, micro, or individual' aspect of the second element of social transformation, the multiple modernities thesis focuses on the 'macro element' of the second element of social transformation. The nature of the formation of modernities is explored through the analysis paradigm of Castoriadis, which consists of the ontology of determinacy and the ontology of creativity. Following hereon, the African philosophical and ethical concept of *Ubuntu* is explored and relied on to give content to *both* the meaning of being human within a 'post'-apartheid South Africa *and* the meaning of the *social* in 'post'-apartheid South Africa. In short, I incorporate *Ubuntu* in my ethical conception of equality to provide content to Cornell's second prong of her interpretation of the subject of transformation by occasioning the assertion of *a* meaning of being in *an* event during the process of be-coming 'post'-apartheid and emerging into a 'post'-apartheid modernity that is creatively adapted by *Ubuntu*.

2. SOCIAL IMAGINARY

I rely on the notion of the social imaginary to build upon and particularise the second aspect of Cornell's interpretation of the subject of transformation. The social imaginary, in fact, particularises the 'micro' aspect of the second element of social transformation, which is informed by Cornell's second prong of her interpretation of the subject of transformation. It is through reliance upon this notion of social imaginary that I attempt to enlighten society to realise that each one of us has the capacity to (re)imagine the self and to (re)constitute ourselves and the

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[1] This term is used by Gaonkar – see Gaonkar, (2002, *Toward New Imaginaries*) at p. 12.

society.[2] Each one of us is a role-player in the perpetual process of be-coming, which is be-coming 'post'-apartheid South Africa in pursuing our aspirational end of a socially just society. The social imaginary is relied upon to enlighten the members of society to realise that each one *ought* to participate in the process of be-coming, which means active participation in the continuous (re)imagination and (re)constitution of the self and society; that is to participate in the process of social transformation. Social transformation does not start with a theory and most definitely not in the mind of a politician, but also not in that of a philosopher, playwright, or some kind of public speaker. Social transformation starts and ends with the conception of the other and, based on such conception, the manner in which one treats the other. Taylor stated the 'obvious' quite eloquently: "Humans operated with a social imaginary well before they ever got into the business of theorising about themselves".[3]

The three pillars of the social imaginary are an understanding of the social imaginary as (*i*) "the way our contemporaries imagine the societies they inhibit and sustain",[4] (*ii*) that *common understanding* that enables common (social) practices of a society,[5] and (*iii*) an *inexplicable enabling symbolic matrix*.[6] I explain these pillars, in turn.

The first pillar tells us that the social imaginary is "the way our contemporaries imagine the societies they inhibit and sustain"[7] and includes the *means* by, or *methods* or *modes* through which individuals understand their identity and their place in the world.[8] 'Way' denotes (*i*) 'the manner in which' society is imagined and (*ii*) 'as what' society is imagined. Social imaginar*ies* represent (*i*) – the 'manner in which' or 'the means' – and are imaginary in a double sense. Firstly, social imaginar*ies* exist because of implicit (prior) understanding, "even when they acquire immense institutional force" through a constitution, for example.[9] As already stated above, the second pillar holds that the social imaginary is inclusive of that *common understanding* that enables common (social) practices of a society.[10] In other words, social imaginar*ies* exist because of the social imaginary. Secondly, social imaginar*ies* are "… the *means* [methods] by which individuals

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2 I rely on the work of Taylor consisting of a journal article and a book: the journal article Taylor, C., *Modern Social Imaginaries,* Vol. 14, No. 1, (2002), Public Culture, pp. 91-124 is a shortened version of the book Taylor, C., *Modern Social Imaginaries*, (2004).

3 Taylor, (2002, *Modern Social Imaginaries*), at p. 108; Taylor, *Modern Social Imaginaries*, (2004), at p. 26.

4 Taylor, *Modern Social Imaginaries*, (2004), at p. 6.

5 Taylor, (2002, *Modern Social Imaginaries*), at p. 91 read with p. 106; Taylor, *Modern Social Imaginaries*, (2004), at p. 2 read with p. 25.

6 Gaonkar, (2002, *Toward New Imaginaries*), at p. 1.

7 Taylor, *Modern Social Imaginaries*, (2004), at p. 6.

8 Gaonkar, (2002, *Toward New Imaginaries*), at p. 1.

9 *Ibid.* at p. 4.

10 Taylor, (2002, *Modern Social Imaginaries*), at p. 91 read with p. 106; Taylor, *Modern Social Imaginaries*, (2004), at p. 2 read with p. 25.

understand their identity and their place in the world".[11] The Constitution, as a social entity and a manifestation (*an* imaginary) of *the* social imaginary, can serve as a *means* by which individuals understand their identity and their place in the world. However, social imaginar*ies* are generally understood as more informal and less institutionalised *first-person subjectivities* that build upon implicit *common understanding* (social imaginary) that underlie and make possible common practices.[12]

The law, as a social institution, is a *mode* informing individuals' understanding of his or her identity or place in the world. The law, as a social institution, in turn, informs individuals' understanding of the social, or then society. To further advance the notion that the law informs a legal subject's understanding of his or her identity (understanding of self) or place in the world I submit that because of the law's performative possibilities, it, at minimum, informs and, arguably, is determinative of, even if only at an institutional level, an understanding of being (existence *as*) a human precisely because of human consciousness. The law is grounded upon and stems from human consciousness and, as such, does not have an autonomous existence. We enact and maintain the positive law to realise a conception of justice, which is located in human consciousness; that is a sense of justice that is the product of cognitive human capacity.[13] Thus considered, the legal subject is the one enacting law to realise *its* conception of justice. Irrefutably then, the conception of different subjects concerning, one, their own being, including its *value* or *worth*, and, two, the being of other subjects, including their *value* or *worth*, plays a determinant role in relation to the meaning and role of equality within justice and, as such, the positive law. Therefore, the nature of the subject is important, since the manner in which we perceive each other's being has a direct impact on how the law perceives legal subjects and the relationship between legal subjects. In Chapter 3 it is made patently clear that – irrespective of the true state of affairs – every black South African is *conceived* as disadvantaged, dominated and controlled by white power, excluded by and from the benefits of white privilege, accorded the false senses of reality in which the calls for neo-liberationism may be answered and pursued, and accorded the inability to be racist. In short, a black person is, ontologically considered, a Disadvantaged Victim. In other words, in 'post'-apartheid South Africa black South Africans have been (re)imagined and (re)constituted as the Disadvantaged Victim. Again, I qualify myself expressly and state unequivocally that there remain black South Africans disadvantaged by the consequences of apartheid, which I do not deny. However, my submission remains the same, ontological ossification based on an exclusionary grand narrative of our history attributing an

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11 Gaonkar, (2002, *Toward New Imaginaries*), at p. 4.

12 *Ibid.*

13 Murphy, C.F., *Modern Legal Philosophy: The Tension between Experiential and Abstract Thought*, (1978), at p. 124.

irrebuttable or irrefutable sense of culpability on the previously advantaged, as particularised in Chapter 3, is not congruent with the Constitution. More importantly, neo-liberationism is an absolute barrier to social transformation, since it caused the ossification of subjectivity, which is nothing else as a stagnant (re)definition of being along the lines of racist populist politics. The converse is also true; which is, the refusal by white South Africans to partake in the process of transformation and the lingering racist ideologies perpetuates *both* past conceptions of black human beings *and* current ossified conceptions of black and white South Africans.

As regard the second pillar, the social imaginary – as common understanding – transcends immediate background understanding that makes sense of our *particular* practices.[14] Understanding (as in Heidegger's sense) transcends the immediate background and assumes a broader comprehension of our whole predicament (*milieu*), which *milieu* includes how we stand in relation to one another, how we relate to other groups, and how we got where we are.[15] Understanding is cognisant of and informed by the past. This broader comprehension is a limitless "… unstructured and inarticulate understanding of our whole situation [*milieu*], within which particular features of our world become evident". [16] This broader comprehension is incapable of being adequately expressed because of its unlimited and infinite nature.[17] The *ethical dimension of the social imaginary* lies in the impossibility of ever adequately expressing a complete understanding of the whole situation (*milieu*).

Building on the second and turning to the third and final pillar, a conception of the social imaginary as understanding of the entire situation (*milieu*) (within which particular features of our world become evident) reinforces Gaonkar who opines that the social imaginary is an *inexplicable enabling symbolic matrix*.[18] Within this symbolic matrix people both act and imagine as world-making collective agents.[19] Thus understood, social imaginar*ies*[20] cannot be divorced from the social, political, or cultural environment because the social imaginary *is* the symbolic matrix (environment) within which the social itself develops. The social imaginary is both the

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14 Taylor, (2002, *Modern Social Imaginaries*), at p. 107; Taylor, *Modern Social Imaginaries*, (2004), at p. 25.

15 Taylor, (2002, *Modern Social Imaginaries*), at p. 107; Taylor, *Modern Social Imaginaries*, (2004), at p. 25.

16 Taylor, (2002, *Modern Social Imaginaries*), at p. 107; Taylor, *Modern Social Imaginaries*, (2004), at p. 25. This is yet another reason for Taylor to speak of imagination and not theory.

17 Taylor, (2002, *Modern Social Imaginaries*), at p. 107; Taylor, *Modern Social Imaginaries*, (2004), at p. 25. This is yet another reason for Taylor to speak of imagination and not theory.

18 Gaonkar, (2002, *Toward New Imaginaries*), at p. 1.

19 *Ibid.*

20 Being the ways in which the social is understood, which ultimately becomes social entities that mediate collective life.

environment within which the social develops and the "ways of understanding the social that become social entities[21] [(for example, the law or church)] themselves, mediating collective life".[22]

Humans' capacity to imagine their social reality is always conducted within[23] and constrained[24] by the social imaginary and, once the capacity to imagine is exercised, the product is a manifestation of the social imaginary; in other words, social imaginar*ies* (that is the 'as what' society is imagined 'as'). The social imaginary includes our understanding of what the social is (the positive) and what it ought to be (the normative). The conception of society or the social, how we relate to each other, and how we *ought* to relate to each other are imaginary human constructs. Before one relates or act in relation to another, you contemplate and consider how to act and only after such due consideration one acts. Experience of acting in relation to others leads to an expectation of what might happen and, thus, informs an understanding of how one *ought* to act in relation to others. Thus considered, the social imaginary is informed by human beings, more specifically human interaction and, in turn, the social imaginary informs human beings, or then more specifically, human interaction. By contemplating how one ought to act and then acting in accordance with the conclusion of your contemplation one is already partaking or being an actor in the social imaginary. The contemplation ultimately acted upon (imaginary contemplation) results in actual conduct (imaginary realisation). Those partaking in and observing the imaginary realisation is consequently informed thereby (imaginary experience). The imaginary experience then informs imaginary contemplation which in turn results in imaginary realisation, which imaginary realisation, by necessary implication, will inform those acting or observing thereby constituting an imaginary experience. It is the continuance and repetition of imaginary contemplation, imaginary realisation, and imaginary experience that result in social practice.

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21 Social entities are, minimally, a group of individuals formed for social reasons, but more broadly an entity perceived to exist independently by the public as well as its members; that is something that exists independently from its members as well as the public, but exists by virtue of recognition for a reason rationally related to the needs of either its members or the society. One must contrast social reasons and political reasons for the establishment of an organisation, but one cannot deny the fact that the social imaginary influences politics and *vice versa*. A prime example of a social institution is, in my view, the law.

22 Gaonkar, (2002, *Toward New Imaginaries*), at p. 4.

23 In other words, one cannot think without any prior understanding. I am not because I think, rather because I am I can think (imagine). One is, therefore, already thinking within a specific context.

24 In other words, one cannot think without any prior understanding. I am not because I think, rather because I am I can think (imagine). One is, therefore, constrained by prior understanding, since to transcend such understanding and to *interpret* requires active engagement in an act of questioning or (ethical) calling understanding or meaning itself into question.

Social imaginar*ies*[25] cannot be divorced from the social, political, or cultural environment, since the social imaginary is the symbolic matrix (environment) within which the social itself develops. In other words, what the notion of social imaginary and social imaginaries have shown is the following: the manner in which we relate to each other is informed by the manner in which our understanding and conceptualisation of each other is developed and understood. The understanding of the self regarding the other informs the manner in which the self will interact with the other. The conception one holds of the being of another, including the value and worth of the other, has a direct and causative influence on the manner in which one interacts with and relates to the other. If one human being perceives the other as a worthless animal (non-human being) he or she will treat the other as a worthless animal (non-human being). If one perceives the other as an instance or manifestation of an omnipotence that evokes an understanding of the other as the root of all tribulations, hatred, bigotries, and, most contemporaneously, disadvantage (whether systemic or otherwise) then one will treat the other as the cause of any and all tribulations, hatred, bigotries, and, most contemporaneously, disadvantage (whether systemic or otherwise).

2.1. SOCIAL IMAGINAR*IES*, SOCIAL THEORY, REIFICATION OF THE SOCIAL

Returning to the second pillar of the social imaginary, I note that, in contrast with theories and philosophies (formulated by social scientists, historians, and philosophers, providing for third-person or objective points of view regarding social entities) social imaginar*ies* are "*first-person subjectivities* that build on *implicit understandings* that underlie and make possible common practices" [own emphasis].[26] Social imaginar*ies* are either "embedded in the habitus of a population" or "carried in modes of address, stories, symbols, and the like".[27] The social imaginary, for Taylor, refers to something far-reaching, something richer than academic theories that people have recourse to when contemplating social reality in a disengaged manner.[28] He has the following in mind:

> "… the *ways* in which people *imagine their social existence*, how they fit together with others, … the *expectations* that are normally met, and the deeper *normative notions* that underlie these expectations [own emphasis]".[29]

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25 Being the ways in which the social is understood, which ultimately becomes social entities that mediate collective life.

26 Gaonkar, (2002, *Toward New Imaginaries*), at p. 4.

27 *Ibid.*

28 Taylor, (2002, *Modern Social Imaginaries*), at p. 106.

29 *Ibid.*

He contrasted social imaginary with social theory on three grounds. Firstly, social imaginary refers to the way in which ('as what') "ordinary people imagine their social surroundings" and is often not expressed in theoretical jargon, but rather carried in social expressions such as legends, stories, and images.[30] Secondly, the social imaginary is shared by a multiplicity of people and sometimes even the society at large whereas theory is more often than not in the possession of a minority.[31] Finally and related to the second ground, the social imaginary "is that common understanding that makes possible common practices and a widely shared sense of legitimacy".[32] What was once only a theory – held by only a few – can infiltrate the social imaginary;[33] a theory, once only held and followed by the elite, can be passed unto the masses to infiltrate the social imaginary.

Upon adoption of the notion of the social imaginary it only follows that there can be a multiplicity of imaginar*ies* of the social. Different people will have different opinions concerning the same subject matter – they will imagine their social surrounding differently because of different reasons. When passing a theory unto the masses, this understanding is, in the first instance, dogmatised and, thereafter, popularised under the people thereby penetrating the social imaginary to the effect that, for example, adultery is unacceptable. In consequence, a few people can determine how people *ought* to fit together and what they *ought* to expect from others.

The social imaginary is intertwined with both perceived knowledge of how events usually unfold, from inception up to conclusion, obtained by sensory observation and experience as well as an expectation of how events *ought* to unfold.[34] Given the nature of the social imaginary, it can "confer legitimacy on common practices" as well as "embed them in a normative scheme" (moral order).[35] Thus, social theory advocating for and dogmatising a specific understanding of the social can cause reification of such understanding and the modern and Western moral order has penetrated our social imaginary to such an extent to render it indisputable. It has become so 'obvious' to us that we struggle to conceive that it is but one imaginary amongst many possibilities of the social. With this reification of the social, human beings have desisted from (re)imagining and (re)constitution of themselves as well as society. I would even say that our capacity to imagine has been forgotten and we merely accept the 'givenness' or normality of the dominant social imaginary (social theory/moral order). There is a lack of critically calling this imaginary into question – there is a lack of ethical discourse on the site of an existential crisis. In

30 *Ibid.*
31 *Ibid.*
32 *Ibid.*
33 *Ibid.*
34 *Ibid.*
35 Gaonkar, (2002, *Toward New Imaginaries*), at p. 10.

bringing this back to the fundamental problem, subjectivity is still haunted by racist conceptions of the self. In addition, the self has been (re)defined in law. The legal subject's race or sex, for example, reigns supreme in being the constituting ontological essence of being (existence *as*) human in 'post'-apartheid South Africa.

The 'post'-apartheid social imaginary has been reified by the absolute insistence on the relevance of, for example, race, gender, and sex in understanding one's identity and place in the world ('post'-apartheid South Africa) to such an extent that the insistence has become exclusionary and ossified the meaning of being. The dominant social imaginary holds that a person is, before conceived in his or her being-in-a-relationship-with the other, which is an expression of his or her humanity, first (re)defined in his or her being (existing *as*) a personification of advantage(d), disadvantage(d), racist, sexist, or any other representation of bigotry. Power has been redistributed along, for example, racial, sex, and gender lines without keeping in mind that it is *not* the race, sex, or gender of the recipient that justified the redistribution, but the disadvantage suffered and being suffered *based on* past discrimination *on the grounds* of race, sex, and gender. The 'power and political issue' is that of personally held characteristics as opposed to the lived experience of the state of being systemically disadvantaged. Personally held characteristics have been politicised as they are the *locus* of political power in 'post'-apartheid South Africa. Ontological bias (a preconceived opinion of the ontological meaning of the other's being (existence *as*) a human that is not based on prior experience that is not *ab initio* polluted by social prejudice, such as racism or sexism) is as prevalent in 'post'-apartheid South Africa as had been the case in apartheid South Africa simply because we continue to ascribe to *de jure* definitions of the legal subject that is divorced from social reality or the lived experience of the legal subject. Current transformative jurisprudence is akin to rule formalism in terms of which any *case* that is regulated by a *valid* rule of law is to be regulated in accordance with that rule.[36] Thus, where the rule itself does not provide for equal treatment, equality, as such, is divorced from the rule itself. The rule is an abstraction, divorced from the legal subjects in respect of whom it finds application. I qualify myself: I do not deny the need for material transformation, but submit that we are simply not acting in pursuance of the aspirational ideal of the achievement of quality through recourse to substantive equality. We are, instead, failing to transform society socially and disregarding any realisation of social cohesion.

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[36] Michelman, (1986, *The Meanings of Legal Equality*), at p. 25.

3. MULTIPLE MODERNITIES THESIS

Whilst keeping the notion of social imaginary in mind, I incorporate the multiple modernities thesis into my thinking as a composite element of my ethical conception of equality. In contrast with the social imaginary that focuses on the 'subjective, micro, or individual' aspect of the second element of social transformation, the multiple modernities thesis focuses on the 'macro element' of the second element of social transformation. Whereas the micro focuses on the individual, the macro focuses on the society.[37] The multiple modernities thesis provides content to the macro element of the second element of social transformation. In other words, I rely on the thesis in arguing for the perpetual be-coming of society or, otherwise put, the perpetual (re)imagination and (re)constitution of society. The *possibility* of an ideal society is, thus, pursued through reliance on this thesis, whilst the thesis, at its core, is ethical by being radically indeterminate and open towards continuous (re)imagination and (re)definition; that is, akin to the be-coming of society.

The multiple modernities thesis enjoins an understanding of the contemporary world – the history of modernity is best explained – as a story of perpetual constitution and (re)constitution of a multiplicity of cultural[38] programs.[39] Otherwise put, a story of continuous constitution and (re)constitution of a multiplicity of social imaginar*ies*. In this story social actors realise the perpetual constitution and (re)constitution of multiple institutional and ideological patterns in association with both social, political, and intellectual activists as well as social movements.[40] The activists and movements pursue different objectives as they hold divergent views of what renders a society 'modern'. In other words, the society is constituted by human

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37 Whilst I am cognisant of the theoretical possibility of the social imaginary incorporating macro elements, I specifically chose to divide the micro and the macro through the use of and reliance upon the multiple modernities thesis.

38 See *Pillay* 2008 (CC) at paras. [47] & [53]-[54] where Langa, C.J. described (not defined) culture as including traditions and beliefs developed by a community. The Justice continued and held that:

> "… 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. … [W]hile cultures are associative, they are not monolithic. The practices and beliefs that make up an individual's cultural identity will differ from person to person within a culture: one may express their culture through participation in initiation rites, another through traditional dress or song and another through keeping a traditional home. While people find their cultural identity in different places, the importance of that identity to their being[-]in[-]the[-]world remains the same. There is a danger of falling into an antiquated mode of understanding culture as a single unified entity that can be studied and defined from outside. … Cultures are living and contested formations. The protection of the Constitution extends to all those for whom culture gives meaning, not only to those who happen to speak with the most powerful voice in the present cultural conversation."

39 Eisenstadt, S.N., *Multiple Modernities,* Vol. 129, No. 1, (Winter, 2000), Daedalus, pp. 1-29, at p. 2.

40 *Ibid.*

beings and human beings are not constituted by an already existing and pre-ordained order; hence the fact that we are dealing with modern*ities* or then modern moral orders.

It cannot be disputed that colonialism and imperialism displaced and influenced the way in which people live and see themselves within the world as the coloniser's conception of modernity (the particular constituted cultural program) included the colonised only in so far as the colonised fulfilled the role of a slave, servant, or the dominated. The imposition of Western modernity on the colonised people infiltrated and altered their social imaginary which led to a distinct lived experience of modernity for such people – a reification of the social and being human. Although it cannot be disputed that multiple modernities do exist, for as far as any imaginary diverges from Western modernity, whether as a moral order[41] or social imaginary, such imaginary or imagined social surrounding is *not* a corruption of, or less worthy, admirable, or acceptable than Western modernity. The divergence is rather a reconfiguration – a "creative adaptation".[42] Thus, whilst enjoying historical precedence, Western conceptions of modernity are not the only authentic modernities.

Modernities, in all their varieties, are responses to an existential problematic.[43] This problematic has two elements; namely, (*i*) the decline in the unquestioned legitimacy of a preordained social order and (*ii*) the former decline mark any conception of a modernity.[44] The existential problematic also includes, paradoxically, a reluctance or refusal to question the 'givenness' of the social order. The 'givenness' or 'objective justifiability' of a social order as 'natural', 'correct', or 'right', on the basis of 'objective and neutral facts', is inherent to the ontology of determinacy and metaphysical ethics, discussed below. The rise of reason is accompanied by the clarity of meaning and unquestionable truths. The existential problematic, thus, includes a reluctance or refusal by human beings to question and (re)imagine their relation with others, their understanding of their place in the world and, most fundamentally, to question and (re)imagine their subjectivity. From the perspective of those in an advantaged position or

41 As indicated in Ch. 1, Taylor in Taylor, (2002, *Modern Social Imaginaries*), at p. 91. argues that Western modernity is both "inseparable from a certain kind of social imaginary" as well as "a new conception of the moral order of society". He argues that this conception of a moral order mutated into a social imaginary through the development of "social forms that characterise Western modernity" and these forms are the "economy, the public sphere and the self-governing people". The concern of this thesis is not a pre-occupation with and (rather mundane and banal) analysis of Western modernity; I shall leave that to post-colonial theorists.

42 Gaonkar, (2002, *Toward New Imaginaries*), at p. 12.

43 Eisenstadt explained in Eisenstadt, (2000) at p. 4 that Faubion in Faubion, J.D., *Modern Greek Lessons: A Primer in Historical Constructivism* (1993), at pp. 113-115, with reference to Weber, noted that "the threshold of modernity may be marked precisely at the moment when the unquestionable legitimacy of a divinely preordained social order began its decline" and that Weber finds the existential threshold of [a] modernity as an ethical postulate that the world is a God-ordained, and hence somehow meaningfully and ethically oriented cosmos".

44 Eisenstadt, (2000, *Multiple Modernities*), at p. 4.

position of power, any questioning of social existence would be seen as an existential problematic. However, reluctance on the side of the disadvantaged or dominated to call into question their social existence ought to be described as an existential crisis.

A modernity, for me, ought to be marked by a critical calling into question of grand narratives, absolute truths, and the purported dogmatic objective and neutral principles of a conception of social existence; such as, for example, co-existence of atomic individuals in mutual benefit.[45] Accordingly, any modernity ought always be relative to an epoch and, most importantly, indicative of a movement from the old to the new by first questioning and then (re)imagining and (re)constituting.[46] Thus, modernity is marked by a movement away from the old into the new (future) unfolding within and constituting a given epoch – thus, relating to the notion of be-coming.[47] Our existence in and experience of the world are influenced, and can even be determined, by the modernity (social imaginary *as* an inexplicable enabling social matrix) within which we emerge into and exist. Each of our emergence into existence (being) is signified by human birth whereas the temporality of our existence is signified by the inevitability of death. When born, one is born and emerge into existence of an already existing social-historical world occupied by a social imaginary exemplified by a modernity.

Reliance on the Castoriadis's analysis paradigm indicates how modernities are formed. These ontologies show that the 'manner in which' we perceive our social existence is determined by nature of the modernity with which society (or a given social order) is imbued with. In other words, social imaginar*ies* are determined by the modernity; that is, the social imaginary of a specific epoch. Castoriadis' paradigm is encapsulated in two ontologies; namely, the ontology of determinacy and the ontology of creativity.[48] These ontologies relate to and can be further particularised by two conceptions of ethics, as discussed by Boshoff.[49]

The Western intellectual tradition – dominated by the ontology of determinacy – holds that 'to be', or 'to exist', is 'to be determined'.[50] In terms of this ontology (*i*) the imaginary dimension is derivative and only reflects or reprints that which already is – the 'real'[51] and (*ii*) an

45 By describing modernity as such I do not hold that modernity is described in its final sense. I merely attempted to describe modernity relative to a fundamental feature of any modernity, which is the decline in the unquestioned legitimacy of, or otherwise put, the rise of questioning a preordained social order.

46 Such movement is only true in so far as the ontology of creativity, as discussed herein below, is that which informs the relevant modernity.

47 The second aspect of social transformation has been indicated as entailing perpetual be-coming of ourselves opening us to (the possibility of) new worlds.

48 Gaonkar, (2002, *Toward New Imaginaries*), at p. 6.

49 Boshoff, A., *Ethics and the Problem of Evil: S v Makwanyane,* Vol. 11, No. 2, (2007), Law, Democracy & Development, pp. 47-56.

50 Gaonkar, (2002, *Toward New Imaginaries*), at p. 6.

51 *Ibid.*

immanent logic or law governs the universe and human endeavours within it. Consequently, the genesis and development of social-historical worlds are understood as an unfolding of said logic or law.[52] In terms of this logic or law new and emergent forms of social life are explained away or exposed as mere superficial adaptations or variations of an underlying *essential order* deciphered by reason. Western philosophical thinking has been critiqued as a thought process that "invariably and predominantly prioritises the stable presence of the existence (being) of all things (beings)".[53] Priority is given to 'stability in existence' in disregard for the "way existence concerns the primordial and temporal emergence of things from 'origins' or an 'origin' that cannot be described in terms of presence or present existence".[54] For Heidegger "being 'is' the non-present (which is not the same as absent) origin of all things (beings) that eventually become present".[55]

Boshoff distinguished between modernist or metaphysical ethics and the ethics of difference. Ethics of difference is derived from the work of Levinas and can be related to ontology of creativity.[56] Modernist or metaphysical ethics falls within and is an instance of the ontology of determinacy. Modernist ethics prefers fixed points of reference and a steady set of principles.[57] These principles are fixed and determinable because metaphysics is "based on pure interest-free rationality and objective knowledge".[58] In distinguishing modernity from artistic modernism, one can state that modernity is centred on the foundational concept of reason, hence primacy of reason, which is identified by the spirit of Enlightenment.[59] A characteristic of modernism is the belief of epistemological foundations; in other words, the justifiability of knowledge is absolutely dependent on indubitable foundations.[60] In terms of modernist ethics our collective wisdom would increase in proportion to which our collective knowledge grows. Thus, as our knowledge grow we will begin to learn more about the other and consequently begin to understand the other – become to know the other. The other becomes an object of consciousness and, just as the law is a product of human consciousness, the other to the self is something that can be, and has been, arbitrarily shaped and defined.

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52 *Ibid.*

53 Derrida adopted Heidegger's critique in this regard – Veitch*, et al.*, *Jurisprudence: Themes and Concepts* (2012), at p. 175.

54 *Ibid.*

55 *Ibid.*

56 Boshoff, (2007, *Ethics and the Problem of Evil: S v Makwanyane*), at p. 48.

57 *Ibid.* at p. 49. Unfortunately, Boshoff relates the latter sentence to what she referred to "that very fashionable word" values. Values are the antithesis of fixed points of reference and steady sets of principles and Boshoff's reference in this context is misplaced and contrary to a more conceptually astute understanding of the relationship between values and ideals.

58 *Ibid.*

59 Minda, G., *Postmodern Legal Movements: Law and Jurisprudence At Century's End*, (1996), at p. 224. This spirit found expression within romantic confidence that inhered in the theories of, for example, Kant and Hegel, proffering that human emancipation is achievable through reason – *ibid.*

60 *Ibid.*

In the context of law, modernity entails the shared common belief of traditional jurisprudential scholars in the possibility of systematising legal knowledge using coherent and verifiable propositions about the nature of law and adjudication. True to the essentialist modernist perception of the law as an autonomous, self-generating activity, modernity sought secularisation of the law. The legal subject is abstracted from and disregarded in the process of systematising legal knowledge through the use of coherent and verifiable propositions about the nature of law and adjudication. The 'study of law' in legal modernism does not concern itself with the continuous development of the nature of the legal subject, because to do so would have required, first, recognition of different (conceptions of) legal subjects and, two, analysis thereof to accommodate regulation of such different subjects. Put another way, why would the concept of a 'legal subject' be inclusive rather than exclusionary; beneficial to the dominant rather than detrimental to the dominant; comfortable or convenient to those included in the definition of the legal subject as opposed to their discomfort. It, therefore, follows why there is a:

> "… need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting".[61]

In Chapter 1 I endorsed the belief that we must "transform the subject of jurisprudence into the jurisprudence of the subject".[62] Questions of subjectivity, therefore, become legal questions, as such. Questions of subjectivity[63] is of utmost importance within modernist ethics since it, including modernity itself, is characterised by, among other things, the topic of subjectivity; that is, understanding of the self. [64] Most importantly, the modern concept of the subject can be expressed as the "logic of identity".[65] Minda submits that one can understand *legal modernism* by understanding postmodernism as a "subject-formation type of criticism in that postmodernism criticise and react against the liberal definition of the legal subject".[66] The logic of identity can only express one construction of meaning and operations of reason because this logic is beguiled by an insatiable urge to "think things together, to reduce them to unity".[67] Heterogeneity (difference) is reduced to homogeneity (the same). Rational thought is equated with finding the universal single principle or law (essence) that relates to, accounts for and, ultimately, is determinative of the phenomena to be accounted for. being is essence and

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61 *Fourie* 2006 (CC) at para. [60].

62 Balkin, (1993, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*), at p. 107.

63 Such as, "what does it mean to be a woman?", "what does it mean to be black?", "what does it mean to be homosexual?", "what does it mean to be a man?", "what does it mean to be white?", "what does it mean to be heterosexual?", "what does it mean to be?", and "what does it mean to be a human being?".

64 Boshoff, (2007, *Ethics and the Problem of Evil: S v Makwanyane*), at p. 48.

65 *Ibid.*

66 Minda, *Postmodern Legal Movements: Law and Jurisprudence At Century's End*, (1996), at pp. 240-241.

67 Boshoff, (2007, *Ethics and the Problem of Evil: S v Makwanyane*), at p. 48.

epistemology holds that there must be a single truth to the meaning of being. Within legal modernism reason seeks an essence that classifies, in terms of a single formula, concrete particulars as *inside* or *outside* a category.[68] Such essence identifies a commonality (the corollary of which is an abnormality) between all things belonging to and is classified in terms thereof as falling within the defined category. The logic of identity, exemplified by the project of reducing heterogeneity, implies that the self must be reduced to unity (same). In terms of this logic, the legal subject has no basis outside itself and is conceived as being self-generating, autonomous and, at the same time, it is assumed, without more, that the legal subject's (the dominant self's) representation of reality will be unambiguous and true.

Western modernity, through its understanding of self, provides for a single conception of being that is totalising in nature and aimed at reducing all other, defined as outside the category, to the same and is, therefore, inherent exclusionary. In terms of this understanding there can be only one self with other *alter egos*,[69] always defined as the other to the self, although to be regarded the same as the self but never recognised as another self, because there can only be one correct conception of being human.

The second ontology is the ontology of creativity in terms of which society is a "self-creating, self-instituting enterprise".[70] The constitution of a new society – by the society – is a rupture because that which is provided for by history "'is not the determined sequence of the determined[,] but the *emergence of radical otherness*, immanent creation, non-trivial novelty'" [own emphasis].[71] The ontology of creativity holds that a new social-historical world is constituted *ex nihilo* in and through creative imagination and such world is constituted, not by conscious individuals, but by "anonymous masses who constitute themselves as a people in the very act of founding".[72] The ontology of creativity is a *revolutionary constitutive instantiation of the social imaginary* and marks the occasion(s) when the environment within which the social develops, the social imaginary itself, is *transformed* and the example under discussion is the South African substantive constitutional revolution.

The social imaginary, as signifying a distinctive human capacity finds elucidation in the form of the ontology of creativity, means that the society as a whole, and every person within it,

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68 *Ibid.*

69 I attach no special meaning to *alter ego*, other than as referring to the other of the ego. Ego is a conscious thinking subject and *the* consciously-thought-of-subject (that is the subject being thought of by the ego) is the self or then I. The self is persons' essential being that distinguishes themselves from each other, but the self is I, which is the object or subject of self-consciousness. Being the object of self-consciousness, that is the object of the consciousness of ego, means that the self is metaphysical in nature, it is a noumenal being.

70 Gaonkar, (2002, *Toward New Imaginaries*), at p. 6.

71 *Ibid.* Gaonkar quoted Castoriadis from Castoriadis *The Imaginary Institution of Society* (1987) 184.

72 *Ibid.*

must realise that imagining the social – the environment within, manner in which we relate to each other, and the relation(s) between individuals *within a community* – is not only the proverbial work of philosophers or sociologists, but is an innate human capacity inhering within each one of us. This capacity to imagine does not inhere unburdensomely; it encumbrances each individual with a responsibility. No person should shy away from the undeniable – his or her capacity to imagine; denial is antithetical to responsibility. Selfless imagination is not responsible, so is selfishness. Responsibility demands agents *as* acting *within* a self-creating and self-instituting enterprise. Society – as a self-creating and self-instituting enterprise – is marked by the perpetual (re)constitution of the self bound up in – causing and caused by – the re-constitution of the society. Responsibility is recognition on the part of the subject that its being (existence *as*) a human *can* be an irreciprocal and inseparable relationship with itself in and through a reciprocal and inseparable relationship with others. In terms of the current conception of being, the ego cannot negotiate its individual wellbeing with itself.[73] The ego is engulfed by an absolutist preference for its own interests. However, I submit that the ego, being the subject, stands in relation to others. I submit that the ego's being is not exclusively introspective, but rather found in a reciprocal, but inseparable, relationship with others. Whilst the subject might be preoccupied with self-interest, its being only acquires meaning through being in a relationship with others. Whether one agrees with the responsibility occasioned by imagination understood in terms of the notion social imaginary or not, I can only hope that agreement is without question when stating that every human being can perceive what his or her place in the world *ought* to be, what he or she *wants or longs* to be, whether alone or in relation to others. I can only hope that there is a universal recognition that human beings can think for themselves, about themselves, and their relationship with others; that is, (re)imagine and (re)constitute their social surroundings.

In turning to ethics of difference, Levinas named ethics as the "calling into question of my spontaneity by the presence of the Other".[74] Critchley interpreted the aforementioned quote as "[e]thics, for Levinas, is critique; it is the critical *mise en questin* [calling into question] of the liberty, spontaneity, and cognitive emprise of the ego that seeks to reduce all otherness to itself".[75] If ethics is the calling into question of the self (which includes the *res cogitans* (thinking

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73 That is, we cannot negotiate with the constructed notion of the self. Societal norms dictate that self-interest or your own well-being is to be given preference above that of any other's. The interests of the individual are conceptualised as being in competition with that of other individuals. The self is conceptualised as a disassociated and abstracted human being with interests that are *ab initio* in competition with that of others.

74 Levinas, E., *Levinas Totality and Infinity: An Essay on Exteriority*, "Martinus Nijhoff Philosophy Text", (1979), at p. 43.

75 Critchley, S., *The Ethics of Deconstruction*, (1992), at p. 5.

thing) and its *cogitata* (thoughts; subjects of thought or objects of consideration)),[76] then I would pause to determine what is that which is to be called into question.

Ramose submits that the definition of 'man', formulated by Aristotle, as a rational animal "constituted the philosophical basis for racism in the West".[77] To be human, to be included within the definition of man, one must be rational. Thus, *ab initio*, the coloniser, in the face of "striking similarities in some physiological features", used physical differences between itself and the colonised as a basis of justification for excluding the colonised from the definition of man, or then human being.[78] Derrida noted that "'there was a time, not long ago and not yet over, in which 'we, men' meant 'we adult white male Europeans'".[79] The cognitive emprise of the ego[80] called into question includes the topic of subjectivity. Thus understood, ethics is the critical calling into question of subjectivity itself. Otherwise put, that which is called into question is, among other things, subjectivity.

Ethics of difference also embraces the recognition of the *radical alterity of the other*. Radical alterity is a central tenet of my ethical conception of equality, which is similar to van Marle's thought. For her an ethical interpretation of equality 'radically' acknowledges the inescapable fact of difference.[81] The ethical dimension of an ethical interpretation of equality lies precisely in the understanding that accommodation of difference is impossible.[82] As such, equality does not seek to accommodate difference[83] and the 'ethical' includes openness towards difference and acceptance of the impossibility of ever fully understanding one another's differences.[84] In the context of equality, the ethical demands rejection of exclusionary binary categorisation and the preference of one category (of persons) above another flowing forth from the divergent, often privileged and underprivileged, conceptions of different categories of people based on (irrelevant, demeaning, and domineering) difference(s). Binary categorisation is oppressive in that more often than not one binary is preferred above and privileged in relation to the other.

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76 *Ibid.* at p. 4.

77 Ramose, M.B., *An African Perspective on Justice and Race* (E-Pub. Date: 2001) Polylog: Forum for Intercultural Philosophy [Accessed on: 4 Feb. 2018] at p. 11.

78 *Ibid.*

79 Douzinas, C. & Warrington, R., *A Well-Founded Fear of Justice: Law and Ethics in Postmodernity*, in Leonard, J. (Ed.) *Legal Studies as Cultural Studies: A Reader in (Post)modern Critical Theory* (1995), at p. 209*)* quoting Derrida in Derrida, J., *Force De Loi: Le Fondement Mystique De L'Autorite: Deconstruction and the Possibility of Justice* Vol. 11, No. 5, (Jul./Aug., 1990), Cardozo Law Review, pp. 920-1045, at p. 949.

80 Ego in this context is the conscious thinking subject, or then agent.

81 Van Marle, *Towards an "Ethical" Interpretation of Equality* LLD Thesis (1999) at p. 161; Van Marle, (2000, *An Ethical Interpretation*), at p. 595.

82 Van Marle, *Towards an "Ethical" Interpretation of Equality* LLD Thesis (1999) at p. 161; Van Marle, (2000, *An Ethical Interpretation*), at p. 595.

83 Van Marle, *Towards an "Ethical" Interpretation of Equality* LLD Thesis (1999) at p. 161; Van Marle, (2000, *An Ethical Interpretation*), at p. 595.

84 Van Marle, *Towards an "Ethical" Interpretation of Equality* LLD Thesis (1999) at p. 161; Van Marle, (2000, *An Ethical Interpretation*), at pp. 595-596.

Ascribing meaning results in the creation of dichotomies. Meaning is binary, which can be related to Nietzsche.[85] For Nietzsche, meaning is not representative of reality and meaning itself is "constructed in an endless series of hermeneutics".[86] Meaning is not conferred by reason as a result of sensory observations and acquired by thematising obtained data. Meaning is rather conferred by retrospective causal projection.[87] The meaning of the unfamiliar is established through recourse to the familiar. Recourse is had to that which meaning has already been attributed to in the past (been interpreted), after which one invokes the outside world (reality) retrospectively as a basis "to give causal foundation to what the mind has already experienced".[88] The unfamiliar is defined by the familiar by relating the familiar to the unfamiliar rendering the unfamiliar also familiar and when a new unfamiliarity arise such unfamiliarity will also be defined by relating the unfamiliar to the familiar and this process carries on *ad infinitum*. This is the construction of meaning in an endless series of hermeneutics (interpretation). Van der Walt advanced that the "fundamental strategy on which this endless series of hermeneutics relies is the identity principle".[89] Forging of identities (meanings) renders interpretation possible and interpretation made possible by forged identities (meanings) is achieved through the construction of "similarities and dissimilarities that do not exist in themselves".[90] I submit that this identity principle is an expression of the logic of identity.

Based on my analysis of the logic of identity and the identity principle, I conclude that meaning of and within subjectivity is (socially) constructed. The white coloniser (familiar), being confronted by black human beings (the unfamiliar), ascribed meaning to the being of the black human being (unfamiliar) by relating it to a (conception) of a white human being. Even though a black human being is a human being, the familiar was white, not black. On that basis a difference was observed in that if white is a rational animal; black must then be an irrational animal and hence not a human being. Thus, what it meant to be black was an irrational animal and, accordingly, not human. The ontology of creativity and ethics of difference informs a 'post'-apartheid modernity that seeks (re)constitution of society by members of society who constitute themselves as a people in the very act of founding. The ontology of creativity holds that society is a self-creating, self-instituting enterprise and that the constitution of a new society – by the

85 A nominalist. In terms of nominalism abstract concepts, general terms, or universals exist only as names with no independent existence. Objects labelled by the same term have nothing in common but their name. Only actual physical particulars are real. Universals, only being verbal abstractions, exist only subsequent to particular things.

86 Van der Walt, J., *The Language of Jurisprudence From Hobbes to Derrida (the Latter's Quest for an Impossible Poem)*, (1998), Acta Juridica, pp. 61-96, at p. 72.

87 *Ibid.*

88 *Ibid.*

89 *Ibid.* at p. 74.

90 *Ibid.*

society – is a rupture. History, in terms of this ontology, provides for the *emergence of radical otherness*. The latter, thus, brings one to the conclusion that there must be an ethics of difference operative within this ontology, since such an ethic embraces the recognition of the *radical alterity of the other*. Radical alterity is a central tenet of my ethical conception of equality. My submission is that *Ubuntu* can provide for an ethical and African ontology of creativity and ethics of difference. Based on the fact that *Ubuntu* is not mere rules or principles and that it is a *way of life*, it can influence the way of life of each and every South African and, as such, the (re)definition and (re)constitution of the society along ethical lines as opposed to the pre- and post-apartheid ideological tendencies to define (the ontological meaning of) and constitute (the ontological 'reality' of) our society along racial lines.

4. 'POST'-APARTHEID MODERNITY & *UBUNTU*

The remaining aspect discussed in this chapter is the African ethical lodestar that is to inform 'post'-apartheid conceptions of our being-in-the-world. Such an ontological and ethical lodestar, in turn, ought to inform a 'post'-apartheid modernity. The ethical lodestar can assist in asserting the meaning of being in 'post'-apartheid South Africa as an event in the process of be-coming. In the introduction of this chapter I alluded to the fact that, whilst Chapter 4 concerned the newly constituted legal order, this chapter concerns the *possibility of* an ideal *social* order; that of a 'post'-apartheid South Africa *modernity*. To this point I have discussed the (re)imagination of the self by using the notion of the social imaginary. Whilst the social imaginary includes the (re)imagination and (re)constitution of the self, it also includes the (re)imagination and (re)constitution of society; in other words, it relates to the process of be-coming. I have addressed the (re)imagination and (re)constitution of society under the heading of multiple modernities thesis.

Ubuntu is, however, evaluated in the context of multiple modernities thesis by indicating how *Ubuntu* can influence and transform 'post'-apartheid modernity and, as such, the prevailing social imaginary; that is, the *environment* in which the social develops. In addition, the conception of being (existence *as*) human is of fundamental importance to both *Ubuntu* and the notion of social transformation. Consequently, the (re)definition and (re)constitution of the self and society ought to be influenced and directed by *Ubuntu*, including the African conception of the individual.

The philosophical concept of *Ubuntu* provides for a unique African conception of being (existence *as*) human and can influence the dominant conception of the noumenal legal subject. *Ubuntu* can influence the society's own opinions and convictions concerning the meaning of

being (existence *as*) human and how we *ought* to relate to each other.[91] However, to show the lack of considering such *a* different and African conception of being *within the context of equality*, *Ubuntu* has, to my knowledge, only been referred to in two Constitutional Court judgments since the dawn of constitutional democracy.[92] Also, *Ubuntu* is not 'the' other conception of self or the legal subject and informs my thinking in the context of an African[93] philosophical concept, or even philosophy, that can provide content and guidance in (re)imagining conception**s** of being human. The converse is, therefore, also true, in the sense that Western philosophy is not rejected in its totality and is incorporated in this thesis as well. Similar to my argument that the South African *Rechtsstaat* is possessed of a *Grundnorm* of *both Ubuntu* and constitutional values, I argue that conception(s) of being ought to be influenced by not only Western and not only African philosophy. Without privileging the one above the other, different philosophies *must* be open for consultation to arrive at a (re)imagined conception of being. Subscribing to 'only African ideas or knowledge is relevant' condescension will lead to an impoverished conception of being produced by exclusionary thought or ideologies and such conception of being will then also be totalising in nature. Even if such conception is not aimed at reducing all other (in this context, Western) to the same it will have such consequence and, therefore, be inherently exclusionary.

I now turn to explain *why* an *African* philosophical concept is not only justified but needed. By not stumbling over and making a problem of the geographical location of South *Africa* I can proceed to note that our existence in and experience of the world is influenced and can even be determined by the modernity within which we emerge into and exist. The modernity within which we currently exist is a product of our past. Although the legal order has been (re)constituted, society remains inadequately transformed. I submit that a South *African* 'post'-apartheid modernity remains ripe for *us* to continuously (re)imagine and (re)constitute and

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91 I refer the reader to the following passage of Ramose in Ramose, (2001) at para. [3]:

> "*Ubuntu* is actually two words in one. It consists of the prefix *ubu* and the stem *ntu*. *Ubu* evokes the idea of being in general. It is enfolded being before it manifests itself in the concrete form or mode of exstence [(*sic*)] of a particular entity. In this sense *ubu* is always oriented towards *ntu*. At the ontological level there is no strict separation between *ubu* and *ntu*. *Ubu* and *ntu* are mutually founding in the sense that they are two aspects of being as a oneness and an indivisible whole-ness. *Ubu* as the generalized understanding of being may be said to be distinctly ontological; *ntu* as the nodal point at which being assumes concrete form or a mode of being in the process of continual unfoldment may be said to be distinctly epistemological. Accordingly, [*U*]*buntu* is the fundamental ontological and epistemological category in the African thought of the Bantu-speaking people. The word *umu* shares the same ontological feature with the word *ubu*. Joined together with *ntu* then it becomes *umuntu*. *Umuntu* means the emergence of *homo loquens* who is simultaneously a homo sapiens. *Umuntu* is the maker of knowledge and truth in the concrete areas, for example, of politics, religion and law."

92 See *Hoffmann* 2001 (CC) at para. [38] where Ngcobo, J., as he was then, opined, in the context of *Ubuntu* and equality, that "[p]eople who are living with HIV must be treated with compassion and understanding. We must show [*U*]*buntu* towards them" and see also *Barnard* 2014 (CC) at paras. [174]-[176] where van der Westhuizen, J., in a minority decision, referred the collective attributes of dignity found in *Ubuntu* that informs equality because "[d]ignity is connected to equality".

93 African, for me, is not delineated by race (being black) and ethnic origin *per se* (being from African descent). I disassociate myself with Pan-Africanism.

content must be drawn from *Ubuntu* in order to transform the meaning of being and society. The social imaginary entails our capacity to *think* about, conceptualise, and ultimately act upon and realise a conception of society or then the social. It entails our capacity to imagine our social surroundings: how we relate to one another, where we stand in relation to one another, the nature and value of the relationships between each other, and ultimately our place in 'there' (world). *Ubuntu* can be relied upon so as to guide and inform our imaginary contemplation, since *Ubuntu* denotes a moral quality of a human being and, in addition, holds that members of society is interconnected and interdependent.

In terms of the multiple modernity thesis modernity is conceived as the global proliferation of an Idea of a distinct (Western (Europe)) way of being (existing *as* a) human[94] with distinctive institutional and cultural characteristics.[95] Modernity, at its core, is the development and crystallization of mode or modes of interpretation of the world: a distinct social *imaginaire* of the ontological vision of a distinct cultural program.[96] This way of being (existing *as*) a human – the distinct cultural program with its institutional implications – first crystallized in Western Europe hereafter it expanded throughout the world giving rise to continually changing cultural and institutional patterns.[97] Apartheid produced a distinct lived experience of a Western European inspired, motivated, and cultivated way of being *as* confined separation; that is separated from the other, not only spatially but also ontologically, which led to a constrained ontological existence of the majority of South Africans. *Ubuntu* is neither European nor, in terms of my understanding, conductive of ideological racist separatism. In the *status quo* of 'post'-apartheid South Africa we have an ontologically corrupted perception of the other and being-with the other in 'there' (world) in terms of which we have (re)defined subjectivity predominantly along the lines of race under the misguided guise of disadvantage as opposed to contextually identifying those who truly suffer from disadvantage. The latter is but an institutionalised example of ossification of subjectivity, since pejorative conceptions of the other still exist.[98]

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94 The word 'civilization' was used in Eisenstadt, S.N., *Some Observations on Multiple Modernities*, in Sachsenmaier, D., Riedel, J*., et al.* (Eds.), *Reflections on Multiple Modernities: European, Chinese and Other Interpretations* (2002), at p. 27.

95 *Ibid.*

96 *Ibid.* Under the previous heading "Multiple Modernities Thesis" it was said that the multiple modernities thesis enjoins an understanding of the contemporary world – the history of modernity is best explained – as a story of perpetual constitution and (re)constitution of a multiplicity of cultural programs. This must be seen as one side of the thesis, where the other is the critique of modernity in that modernity saw the crystallization and development of mode or modes of interpretation of the world: a distinct social *imaginaire* of the ontological vision of a distinct cultural program. In other words, the reification of *an* imaginary.

97 *Ibid.*

98 In this regard I refer the reader to Pt. I, Ch. 3 to evidence the fact that I know of and agree that racist conceptions of the other still abounds.

As indicated above, in terms of the ontology of creativity, a new social-historical world can be constituted *ex nihilo* in and through creative imagination. Such new world is constituted, not by conscious individuals, but by anonymous masses who constitute themselves as a people in the very act of founding. The Interim Constitution, understood as being instrumental in the South African substantive constitutional revolution, is exactly that – the normative rupture caused and experienced by South Africans. In and through creative imagination the people of South Africa constituted themselves as "[w]e, the people of South Africa" and emphatically acknowledged the "need to create a new order".[99] Non-racialism and non-sexism are, among others, the ontological consequences of the South African substantive constitutional revolution. The revolution radically changed the ontological meaning of being (existing *as*) a human by emphatically declaring that which is excluded from such meaning; that is, the Interim Constitution excluded separateness, being separated, being lesser than, or being possessed with a primordial right to rule over and dominate the other from the meaning of being. It remains up to us, the people of South Africa, to ascribe meaning to being (existing *as*) human in and through the process of social transformation by recourse to the social imaginary, the ontology of creativity, and reliance on the notion of be-coming. Imagining the social and our social existence is not the work of the law (the Constitution), but the work of each one of us as a collective self-constituting enterprise, since without us, the actors within society, society, as a self-constituting enterprise, would not exist.

The (Interim) Constitution is a solemn pact and an expression of an envisioned future and ideal society agreed upon in the act of self-constitution. The (Interim) Constitution shelters the repertory of collective actions; that is the common actions members of society know-how to undertake. However, as a repertory of collective actions it recollects what we, the people of South Africa, forbade and represents that which is idealised. The world ideal denotes two meanings. First, it refers to the general conception of ideals as qualities of perfection, desirability, and excellence. Secondly, it refers to the epistemological use of the word idealism, which pertains to internal mental representations of 'reality'(Ideal). The Constitution then shelters ethical Ideals; that is, mental impressions of what 'reality' *ought* to be (look like) thereby having the potential to shape the environment within which the social develops and the manner in which the social is understood. It, therefore, has the potential to affect the social imaginary in its totality. In other words, recalling the meaning of social imaginar*ies*, the Constitution represents the 'as what' we have imagined our society as. The 'post'-apartheid modernity, therefore, lends towards being characterised by the ontology of creativity and the new order, in the normative sense at least, was

[99] See the Preamble of the Interim Constitution.

constituted by the (Interim) Constitution. Hence, the 'post'-apartheid imaginary and South African modernity is positioned towards both:

> "… a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex. The pursuit of national unity, the well-being of all South African citizens and … reconciliation between the people of South Africa and the reconstruction of society. … [A recognition that there is a] need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *[U]buntu* but not for victimisation."[100]

and

> "… one, sovereign, democratic state founded on the … values of human dignity, the achievement of equality and the advancement of human rights and freedoms[;] … [n]on-racialism and non-sexism[; the s]upremacy of the constitution and the rule of law[; and] … [u]niversal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."[101]

The meaning and content of this South African modernity is not already determined but determinable. What exactly a future within which recognition of human rights, democracy, and peaceful co-existence *could* be is not already determined, but rather a future to be lived for, whatever that might be, because what we, as South Africans, realised is that we do not want a present in which there is no recognition of human rights, democracy, and peaceful co-existence. I submit that *Ubuntu* can guide and provide tentative content to a 'post'-apartheid modernity.

4.1. *UBUNTU*: ETHICAL INROADS TOWARDS A 'POST'-APARTHEID MODERNITY

> "We reject the power-based society of the Westerner that seems to be ever concerned with perfecting their technological know-how while losing out on their spiritual dimension. We believe that in the long run the special contribution to the world by Africa will be in the field of human relationships. The great powers of the world may have done wonders in giving the world an industrial and military look, but the great gift still has to come from Africa – giving the world a more human face."[102]

I submit that a human face can be provided to a 'post'-apartheid South African modernity through recourse to the ethical[103] and philosophical[104] concept of *Ubuntu*, which is

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100 National Unity and Reconciliation statement of the Interim Constitution.

101 S. 1 of the Constitution.

102 Biko, S., *Some African Cultural Concepts*, in Coetzee, P. H. & Roux, A. P. J. (Eds.), *The African Philosophy Reader* (1998).

103 *Ubuntu*, as an ethical concept, seeks to attribute ethical meaning to human life. Cornell, *Law and Revolution in South Africa: Ubuntu, Dignity and the Struggle for Constitutional Transformation*, (2014), at p. 14 opines that *Ubuntu* is an indigenous African "ethical value or ideal … reject[ing] any neat separation between law and ethics" and that moral, understood within the context of *Ubuntu*, is suggestive of an ethical activity of justice directed toward the aspirational ideal of a free humanity harmonising competing interests through an

integral to the process of be-coming and, as such, social transformation. *Ubuntu* is incorporated in my ethical conception of equality to provide content to Cornell's second prong of her interpretation of the subject of transformation by occasioning the assertion of *a* meaning of being in *an* event during the process of be-coming 'post'-apartheid and emerging into a 'post'-apartheid modernity that is creatively adapted by *Ubuntu*.

However, *Ubuntu* is neither easily defined[105] nor clear of critique based on its purported unambiguity,[106] alleged redundancy,[107] and professed emptiness.[108] *Ubuntu* is quite controversial

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appeal to ideals and values that attribute ethical meaning to human life. It has been opined in Cornell & Van Marle, (2005, *Exploring Ubuntu: Tentative Reflections*), at p. 219 that *Ubuntu* has been understood to be an important ethical directive in the sense of the 'law of law', or as I put it a *Grundnorm* (see Metz, (2007, *The Motivation for "Toward an African Moral Theory"*) regarding *Ubuntu* as a *Grundnorm*. Also see Ramose, (2007, *But Hans Kelsen was not Born in Africa: A Reply to Thaddeus Metz*) for some exclusionary thought on the subject), underlying the entirety of the Constitution. See also Radebe, S.B. & Phooko, M.R., *Ubuntu and the Law in South Africa: Exploring and Understanding the Substantive Content of Ubuntu,* Vol. 36, No. 2, (2017), South African Journal of Philosophy, pp. 239-251, at p. 244 where it is submitted that:

> "[*U*]*buntu* is the solid form of *ukama*, in that 'human interrelationship within society is a microcosm of the relationality within the universe'. Seen in this light, "*ukama* provides the ethical anchorage for human social, spiritual and ecological togetherness"' [Quotations of original source Murove, M.F., *An African Environmental Ethic Based on the Concepts of Ukama and Ubuntu*, in Murove, M. F. (Ed.) *African Ethics: An Anthology of Comparative and Applied Ethics,* (2009), at pp. 216-217].

See Cornell, D., *uBuntu, Pluralism and the Responsibility of Legal Academics to the New South Africa,* Vol. 20, No. 1, (2008), Law and Critique, pp. 43-58, at p. 47:

> "Each one of us has the *potential* to embody humanity, or humanness, understood from an *ethical perspective*. Further, *Ubuntu* requires us to come out of ourselves so as to realise the *ethical* quality of humanness. We are required to take that first ethical action without waiting for the other person to reciprocate. *Ubuntu* then is not a contractual ethic. It is up to me. And, in a certain profound sense, humanity is at stake in my ethical action. Thus, if I relate to another person in a manner that lives up to *Ubuntu*, then there is at least an *ethical relationship* that exists between us. Of course, if the two of us relate to others around us in a manner that lives up to an *ethical* understanding of humanness then we will have created an ethical community."

104 *Ubuntu* can be described as a philosophy of life – Mokgoro, (1998, *Ubuntu and the Law in South Africa*), at p. 16; Radebe & Phooko, (2017, *Ubuntu and the Law in South Africa: Exploring and Understanding the Substantive Content of Ubuntu*), at pp. 239-240. A similar version of this journal article also appeared in Mokgoro, Y., *Ubuntu and the Law in South Africa,* Vol. 4, No. 1, (2004), Buffalo Human Rights Law Review, pp. 15-24. See Cornell & Van Marle, (2005, *Exploring Ubuntu: Tentative Reflections*), at p. 201; Mnyongani, F., *De-Linking Ubuntu: Towards a Unique South African Jurisprudence,* Vol. 31, No. 1, (Jan., 2010), Obiter, pp. 134-145. See also Ramose, in Ramose, M.B., *African Philosophy Through Ubuntu*, (1999), at p. 50, where he submits that *Ubuntu* is the fundamental ontological and epistemological category in the African thought of the Bantu-speaking people. In addition, *Ubuntu* is representative of the crux of African philosophy – Pieterse, M., *Traditional African Jurisprudence*, in Roederer, C. & Moellendorf, D. (Eds.), *Jurisprudence* (2007), at p. 136. Lastly, Ngubane, in Ngubane, J.K., *Conflicts of Minds*, (1979), at p. 113 defines *Ubuntu* as "the philosophy which the African experience translates into action".

105 Bekker, T., *The Re-emergence of Ubuntu: A Critical Analysis,* Vol. 22, No. 2, (Jan., 2006), South African Public Law, pp. 333-344, at p. 334. Mokgoro, in Mokgoro, (1998, *Ubuntu and the Law in South Africa*), at p. 16, stated that:

> "The concept [*U*]*buntu*, like many African concepts, is not easily definable. To define an African notion in a foreign language and from an abstract as opposed to a concrete approach to defy the very essence of the African world-view and can also be particularly elusive. I will therefore not in the least attempt to define the concept with precision. That would in any case be unattainable."

106 Himonga, C*., et al.*, *Reflections on Judicial Views of Ubuntu,* Vol. 16, No. 5, (2014), Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad, pp. 369, at pp. 384-485. Kroeze, I.J., *Doing Things with Values II: The Case of Ubuntu,* Vol. 13, No. 2, (2002), Stellenbosch Law Review, pp. 252-264, at pp. 260-261. English, R., *Ubuntu: The Quest for an Indigenous Jurisprudence,* Vol. 12, No. 4, (1996), South African Journal on Human Rights, pp. 641, at p. 645.

107 Himonga*, et al.*, (2014, *Reflections on Judicial Views of Ubuntu*), at pp. 387-489. Kroeze, (2002, *Doing Things with Values II: The Case of Ubuntu*), at pp. 253-254.

and, thus, led to academic debate as to its substantive content and meaning, which is evident from the sources that I have already referred to.[109] The Constitutional Court has, from as early as the year 1995, in the seminal *Makwanyane* case, relied upon and, thereafter, incrementally developed *Ubuntu*.[110] Because of the express refusal by the Constitutional Court in *Makwanyane* to definitively and clearly define content and delineate the ambit of *Ubuntu* one can understand *why* it has been opined that *Ubuntu* – as a bloated concept – tries to achieve too much and collapses under its own weight of expectations.[111] This statement seemingly follows logically when considering the fact that *Ubuntu* "envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality".[112] Whilst disagreeing with the notion that *Ubuntu* collapses under its own weight of expectations, I am mindful of the substantive depth and intricacies associated with *Ubuntu*. Consequently, I have limited myself to *strands* of *Ubuntu* that stand to aid South Africa in be-coming 'post'-apartheid; in other words, those strands to be relied upon to inform an understanding of being human in a 'post'-apartheid South African modernity.

I rely on *Ubuntu* for guidance to an alternative conception of human beings; that is other than atomic and independent agents vested with certain liberties (our jargon would be rights) demanding recognition from and placing a duty upon others to respect such liberties. I accept that the law can conceive the nature of the constitutive members of the normative order underlying the political society as human beings who are rational social agents who are meant to collaborate in peace to their mutual benefit. At the same time, I submit that this rational social agent is, primarily, an autonomous individual vested with an excessive desire for self-preservation.

In identifying relevant strands of *Ubuntu* it is conceptually prudent to note Gade's answer to the question 'what is *Ubuntu*', which is two-pronged. On the one hand, *Ubuntu* concerns "a moral quality of a person" whilst, on the other hand, *Ubuntu* is a "phenomenon (for instance a philosophy, an ethic, African humanism, or, a worldview) according to which persons are interconnected".[113] In other words, *Ubuntu* touches on (*i*) the self – conceived as vested with

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108 Himonga, *et al.*, (2014, *Reflections on Judicial Views of Ubuntu*), at pp. 384-485. Kroeze, (2002, *Doing Things with Values II: The Case of Ubuntu*), at pp. 260-261.

109 See nn. 105-108.

110 See, for example, *Makwanyane* 1995 (CC) at paras. [223]-[229], [237]-[260], [306]-[312] & [374]; *AZAPO* 1996 (CC) at para. [19]; *Hoffmann* 2001 (CC) at para. [38]; *Port Elizabeth Municipality* 2005 (CC) at para. [37]; *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) at paras. [68]-[69], [86], [112]-[121]; *Barnard* 2014 (CC) at para. [174].

111 Kroeze, (2002, *Doing Things with Values II: The Case of Ubuntu*), at pp. 260.

112 *Makwanyane* 1995 (CC) at para. [307].

113 Gade, C.B., *What is Ubuntu? Different Interpretations among South Africans of African Descent,* Vol. 31, No. 3, (Oct., 2012), South African Journal of Philosophy, pp. 484-503, at pp. 488-489 & 492.

subjective *moral* human agency – and (*ii*) the relationship with others. However, *Ubuntu* has certain 'essential components' or values that need not be neatly categorised as either a moral human quality or relating to interconnectedness of human beings. These components are expressed thus: *Ubuntu* is an African philosophy that is intimately concerned with notions of humanness, respect for humanity, moral virtue, interconnectedness, compassion, group solidarity, and group-centred individualism with the consequence that *Ubuntu* prioritises the interests of the most vulnerable.[114] The meaning of *Ubuntu* can also be expressed in terms of popular African maxims such as *umuntu ngumuntu ngabantu* ('a person is a person because of other people' and translated in Sesotho: *motho ke motho ka batho ba bangwe*).[115] The Constitutional Court interpreted *Ubuntu* as representing a *South African culture* and the *philosophy of the African people*, which expresses "compassion, justice, reciprocity, dignity, harmony and humanity in the interests of building, maintaining and strengthening the community, and combines individuality with communitarianism".[116]

These broad strokes of colourful and heart-warming notions, values, and Ideas do provide a rather vague meaning of *Ubuntu*. In navigating through the dense nuances of *Ubuntu* I align myself with Radebe & Phooko where they submit that:

> "[*U*]*buntu* is a *way of life of the African people*, which is underpinned by certain components that make up its substantive content, and *permeates every aspect of their everyday existence* and interactions with each other and the world at large."[117] [own emphasis]

In terms of *Ubuntu* human beings in their everyday existence are *social beings* whose *humanity* is *expressed* through being in a *relationships with* others.[118] *Ubuntu* is the opposite of apartheid ideology in terms of which the being (essence) of humans was equated with the state of being separated from the other. The ideology was cantered on the meaning of being, since the entirety of the apartheid order revolved around the difference between black and white and the domination and subjugation of the former at the hands of the latter. Consequently, keeping with such emphasis on the ontological difference (not in Heidegger's sense) between white (self) and the other (black), the approach adopted in Chapter 1 is recalled; that is perceiving jurisprudence as jurisprudence of the subject and thus:

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114 See Radebe & Phooko, (2017, *Ubuntu and the Law in South Africa: Exploring and Understanding the Substantive Content of Ubuntu*), at pp. 240-241 who relied on Mokgoro, (1998, *Ubuntu and the Law in South Africa*), at p. 15.

115 See Radebe & Phooko, (2017, *Ubuntu and the Law in South Africa: Exploring and Understanding the Substantive Content of Ubuntu*), at p. 241 who relied on Mokgoro, (1998, *Ubuntu and the Law in South Africa*), at p. 15.

116 *Port Elizabeth Municipality* 2005 (CC) at paras. [37] & [43].

117 Radebe & Phooko, (2017, *Ubuntu and the Law in South Africa: Exploring and Understanding the Substantive Content of Ubuntu*), at p. 240.

118 *Barnard* 2014 (CC) at para. [174] quoting *Makwanyane* 1995 (CC) at para. [224].

> "Each path of jurisprudence represents an attempt by human beings to tell a story about being human. Unless one discounts the humanity of others, one must admit that one has something in common with all other human beings … what African jurisprudence calls for is an *ongoing dialogue* among Africans [which for me is inclusive of white people] *on being human*, a dialogue that of necessity leads to dialogue with other human beings. This dialogue is not an end in itself. It is *a dialogue with an existential implication* …"[119] [own emphasis]

Ubuntu's existential implications concern the way of life *as* a human being and strikes the core what the meaning of being (existence *as*) human[120] *ought* to be in a 'post'-apartheid South Africa. *Ubuntu* informs an African way of life (being human) in terms of which being-with (leaning on Heidegger's terminology) does not entail nor require assimilation to otherness, since *Ubuntu* – in the context of being-with – signifies a new kind of community (an ideal society), which can be described as follows:

> "The other as a singular, unique finite being puts me in touch with infinite otherness. In this ontology [subject area or domain], community is not the common belonging of communitarianism,[121] a common essence given by history, tradition, the spirit of the nation. Cosmos is being together with one another, ourselves as others, being selves through otherness."[122]

I replace "cosmos" with *Ubuntu* in that *Ubuntu* is a worldview (ideology) that (*i*) stresses the importance of community, solidarity, caring, and sharing and (*ii*) advocates profoundly for a sense of interdependence by emphasizing that true human potential can only be realised in partnership with others.[123] This leads to Gade's submission that *Ubuntu* is a "phenomenon according to which persons are interconnected".[124] In this context of interconnectedness *Ubuntu* is best translated as "humanism" that fundamentally relates to human beings' interconnectedness

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119 Murungi, J., *The Question of African Jurisrpudence: Some Hermeneutical Reflections*, in Wiredu, K. (Ed.) *A Companion to African Philosophy* (2004), at p. 525. Quote found in Bohler-Muller, N., *Some Thoughts on the Ubuntu Jurisprudence of the Constitutional Court,* Vol. 28, No. 3, (Jan., 2007), Obiter, pp. 590-599, at p. 592.

120 The meaning of being human, in Heidegger's sense, means, for me at least, experiencing all the ways in which the other (other human beings than I) makes a difference in one's being-in-the-world as both being-there and being-with the other.

121 See Etzioni, A., *Communitarianism*, (Date Accessed: Jul. 29, 2018), [Address: https://www.britannica.com/topic/communitarianism] where communitarianism is said to refer to a:

> "… social and political philosophy that emphasizes the importance of community in the functioning of political life, in the analysis and evaluation of political institutions, and in understanding human identity and well-being. It arose in the 1980s as a critique of two prominent philosophical schools: contemporary liberalism, which seeks to protect and enhance personal autonomy and individual rights in part through the activity of government, and libertarianism, a form of liberalism (sometimes called "classical liberalism") that aims to protect individual rights – especially the rights to liberty and property – through strict limits on governmental power."

122 Douzinas, C., *Human Rights and Empire: The Political Philosophy of Cosmopolitanism*, (2007), at p. 294. Quote found in Bohler-Muller, (2007, *Some Thoughts on the Ubuntu Jurisprudence of the Constitutional Court*), at p. 593.

123 Gade, (2012, *What is Ubuntu? Different Interpretations among South Africans of African Descent*), at p. 492 quoting Ngcoya, M., *Ubuntu: Globalization, accommodation, and contestation in South Africa* (2009) at p. 1.

124 Gade, (2012, *What is Ubuntu? Different Interpretations among South Africans of African Descent*), at p. 492.

in terms of which persons are what they are because of other persons.[125] The maxim *umuntu ngumuntu ngabantu* or *motho ke motho ka batho ba bangwe* literally means that 'I am because we are', and unites with the obligations of individuals in African societies to help each other.[126] Such obligations are afforded more importance as moral obligation as in the case of Western societies, since in the latter societies individual rights determine one's possessions and relationship with others. This maxim is an embodiment of the African view that it is the "community which defines the person as a person, not some isolated static quality of rationality, will[,] or memory…".[127] There is, therefore, no doubt that in African societies a communitarian orientation is preferred over individualism. *Ubuntu*, understood as the *potential* of being human, in that it is *Ubuntu* which both "'guarantees … a separation between men, woman and the beast[,]'" has as a consequence that *only* that which has *humanity* can have the potential of being a human. Every one of us has the potential to be a human being if we live up to that which *Ubuntu* requires from us.

Langa, J., as he was then, opined that *Ubuntu* can identify and give content to the relevant values that must be upheld and described *Ubuntu* as a culture that emphasises communality and the "interdependence of the members of the community".[128] For him, *Ubuntu* recognises every person's "status" as a human being and because of this "status" as a human being every human being is entitled to "unconditional respect, dignity and acceptance from the [other] members of the community".[129] Mokgoro argues that *Ubuntu* ought to influence the entire jurisprudence of South Africa in that, among other things, "law, experienced by an individual within a [community], [ought to be] bound to individual duty as opposed to individual rights or entitlements".[130] What Mokgoro means is that *Ubuntu* imputes upon every person a corresponding duty to give the same respect, dignity, value and acceptance and, more importantly, *Ubuntu* regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.[131]

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125 *Ibid.* at pp. 492-493 – this is a quote from an interview between Gade and Bongani Finca, a former commissioner of the South African Truth and Reconciliation Commission:

> "You are what you are because of other people. We do … [not] live in isolation, we live in a community. That sense of community is what makes you who you are, and if that community becomes broken, then you yourselves also become broken. And the restoration of that community, the healing of that community, cannot happen unless you contribute to the healing of it in a broader sense. Basically that is it. Ubuntu is that I am because of others, in relationships with others. I am not an island of myself, I am part of the community, I am part of the greater group."

126 Radebe & Phooko, (2017, *Ubuntu and the Law in South Africa: Exploring and Understanding the Substantive Content of Ubuntu*), at p. 242.

127 *Ibid.*

128 *Makwanyane* 1995 (CC) at para. [224].

129 *Ibid.*

130 Mokgoro, (1998, *Ubuntu and the Law in South Africa*), at p. 29.

131 *Makwanyane* 1995 (CC) at para. [224].

Returning to the *cultural* nature of *Ubuntu* I refer to Langa, C.J. who held that cultural convictions or practices may be so strongly held that meaning is found in a community of people, which flows from the notion that "we are not islands unto ourselves"[132] that is *central* to the *understanding* of the *individual* in African thought.[133] This notion, central to understanding the individual in African thought, is often expressed in the maxim *umuntu ngumuntu ngabantu* that denotes and emphasises "communality and the interdependence of the members of a community"[134] as well as the understanding that "every individual is an extension of others".[135] The link between *Ubuntu*, culture, and being (existence as a human) with modernity indicates that "[c]ultures, unlike religions, are not necessarily based on tenets of faith but on a collection of practices, ideas or *ways of being*" [own emphasis].[136] According to Gyekye, "an individual human person cannot develop and achieve the fullness of his/her potential without the concrete act of relating to other individual persons".[137] This African understanding of the individual emphasises the "*importance of community to individual identity* and hence to human dignity" [own emphasis].[138] In addition, under the Constitution, dignity and identity are inseparably linked, since one's sense of self-worth is defined by one's identity and, as such, one's relationship with others.[139]

> "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 only and exclusively from personal choice or achievement".[140]

The nature of belonging grounded in *Ubuntu* involves more than mere association by including participation in and expression of the community's practices and traditions.[141] In other words, a sense of belonging is grounded in and identity is formed by living within, forming part of, and experiencing a certain *culture*; that is, a particular constituted cultural program or then a modernity.

From the above identified link between *Ubuntu*, culture, and being makes it is clear that *Ubuntu* is not only an African worldview, but also a factor that influences *perceptions* of the other

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132 *Port Elizabeth Municipality* 2005 (CC) at para. [37].

133 *Pillay* 2008 (CC) at para. [53].

134 *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC) at para. [163].

135 *Pillay* 2008 (CC) at para. [53].

136 *Ibid.* at para. [66].

137 Gyekye, K., *Person and Community in African Thought*, in Coetzee, P. H. & Roux, A. P. J. (Eds.), *Philosophy from Africa: A Text with Readings* (1998), at p. 351.

138 *Pillay* 2008 (CC) at para. [53].

139 *Ibid.* See also *Affordable Medicines Trust v Minister of Health* (3) SA 247 2006 (CC) at para. [59] and *Sodomy* 1999 (CC) at para. [26].

140 *Pillay* 2008 (CC) at para. [53]. See Ackermann, *Human Dignity: Lodestar for Equality in South Africa*, (2012), at pp. 114-115 where Ackermann critiques the notion that one's identity cannot *only* flow from and be derived from the community. Ackermann opines that *Ubuntu* cannot and ought not to deny *individual* morality, responsibility, or accountability.

141 *Pillay* 2008 (CC) at para. [53].

and, thereby, influencing social conduct.[142] Perceptions formed with the influence of *Ubuntu* would result in humane orientation between human beings *inter se*, since *Ubuntu* is a "humanistic orientation towards fellow beings".[143] In cautioning us against a superficial perception of *Ubuntu* Mokgoro refers to Kunene for whom *Ubuntu* refers to as the "'potential of being human"' in that it is *Ubuntu* that which both "'guarantees … a separation between men, woman[,] and the beast"' as well as "'the very fluctuating gradations that determine the relative quality of that essence"'.[144] The *potential* of being human denotes a process of be-coming in terms of which one can fluctuate from the lowest point to the highest during one's lifetime and at the highest level where there is harmony between "the physicality and spirituality of life".[145] The physicality and spirituality of life denotes an understanding that:

> "… our *ethical relationship* to others is inseparable from how we are both embedded and supported by a community that is not outside each one of us, but is inscribed in us. This inscription of the other also calls the individual out of himself or herself back towards the ancestors, forwards towards the community, and further towards relations of mutual support for the potential of each one of us".[146]

The ethical relation informed by the notion of interconnectedness because the relation is "inseparable from how we are both embedded [in] and supported by a community".[147] The *spirituality of life* relates to the notional Idea of a community being inscribed within each member of that community, hence the characteristic of interconnectedness. If the community is inscribed in me by virtue of being a member of said community I, by necessary implication, must be inscribed in the community and every other member of said community. The other is then inscribed in each individual and each individual is inscribed in the other. *Spirituality of life* has another level of abstraction in that the notional Idea of "[t]his inscription of the other … calls the individual out of himself or herself back towards the ancestors, forwards towards the community, and further towards relations of mutual support for the potential of each one of us*"*.[148] The spirituality of life 'literally' pulls an individual towards the *physicality of life* – towards relations of mutual support for the potential of each one of us. The ethical relation, in terms of *Ubuntu*, is one of mutual support between individuals and the community and, corollary hereto,

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142 Mokgoro, (1998, *Ubuntu and the Law in South Africa*), at p. 17.

143 *Ibid.* at p. 19.

144 *Ibid.* quoting Kunene, M., *The Essence of Being Human: an African Perspective*, (1996) Inaugural Lecture, University of Natal.

145 Mokgoro, (1998, *Ubuntu and the Law in South Africa*), at p. 21.

146 The physicality and spirituality of life is best described by the following quote in Cornell, D. & Muvangua, N., *Introduction*, in Cornell, D. & Muvangua, N. (Eds.), *Ubuntu and the Law: African Ideals and Post-apartheid Jurisprudence* (2012), at p. 5.

147 *Ibid.*

148 *Ibid.*

between individuals within a community to realise the potential of each member within the community. In this sense, through a relationship of mutual support a person is a human being with inherent worth:

> "Simply existing is not what gives a human being inherent worth. Each of us … has our own placenta, and therefore a unique biological life. But what develops this biological singularity is the respect and support that is given to all human beings so that they can achieve a unique personal life".[149]

Furthermore, the *ethical relation,* under *Ubuntu,* is inseparable from how we members of a community are inscribed in each other – how the community is inscribed in each member – and concomitant interconnectivity.

Regarding the manner in which the law affects being-in-the-world, Mokgoro's submission becomes relevant and entails an argument that *Ubuntu* should "shape South African jurisprudence as a whole":

> "The original conception of law perceived not as a tool for personal defence, but as an opportunity given to all to survive under the protection of the order of the communal entity; communalism which emphasises group solidarity and interests generally, and all rules which sustain it, as opposed to individual interests, with its likely utility in building a sense of national unity among South Africans; the conciliatory character of the adjudication process which aims to restore peace and harmony between members rather than the adversarial approach which emphasises retribution and seems repressive. The lawsuit is viewed as a quarrel between community members and not as a conflict; … the idea that law, experienced by an individual within the group, is bound to individual duty as opposed to individual rights or entitlement. Closely related is the notion of sacrifice for group interests and group solidarity so central to [*U*]*buntu*(*ism*); the importance of sacrifice for every advantage or benefit, which has significant implications for reciprocity and caring within the communal entity."[150]

The extent to which *Ubuntu* must inform South African jurisprudence in its entirety falls outside the scope of this dissertation. What is certain, however, is that *Ubuntu* must inform South African equality jurisprudence, and to this extent, I agree with Mokgoro that, in the context of restitutionary equality – "law, experienced by an individual within the [community], is bound to individual duty as opposed to individual rights or entitlement".[151] A jurisprudence influenced by *Ubuntu* is a jurisprudence cognisant of and seeking to maintain social harmony to a grander extent than that of the Roman-Dutch Law, for example. *Ubuntu* is more concerned with the relationships between human beings; that is being-in-the-world, which includes *both* being-there

149 *Ibid.* at p. 9.

150 Mokgoro, (1998, *Ubuntu and the Law in South Africa*), at pp. 28-29.

151 *Ibid.*

as well as being-with. *Ubuntu* is an onto-ethical concept since the concept has two complimentary constituent segments. First, the ontological, in terms of which meaning attributed to being human *as* the state of being in a relationship with the other. Second and simultaneously, *Ubuntu* builds upon and expands from its ontological statement – being human entails being in a relationship with the other – by insisting upon an ethical relationship with the other. *Ubuntu* entails be-coming human by experiencing humanity with others and existing within an ethical relationship with the other:

> "Each one of us has the potential to embody humanity, or humanness, understood from an ethical perspective. Further, *Ubuntu* requires us to come out of ourselves … to realise the ethical quality of humanness. We are required to take that first ethical action without waiting for the other person to reciprocate. *Ubuntu* then is not a contractual ethic. It is up to me. And, in a certain profound sense, humanity is at stake in my ethical action. Thus, if I relate to another person in a manner that lives up to *Ubuntu*, then there is at least an ethical relationship that exists between us. Of course, if the two of us relate to others around us in a manner that lives up to an ethical understanding of humanness then we will have created an ethical community."[152]

Social harmony is sought "through close and sympathetic social relations within a group".[153] Therefore, implicit within the notion of *Ubuntu ngumuntu ngabuntu, motho ke motho lo batho ba bangwe*[154] is a constant challenge by others, during one's lifetime, to "achieve self-fulfilment through a set of collective social ideals".[155] Social values such as "group solidarity, conformity, compassion, respect, human dignity, humanistic orientation and collective unity"[156] are forthcoming as key social values of *Ubuntu* because of the constant challenge by *others* to achieve self-fulfilment through *social ideals*.

Since *Ubuntu* places emphasis upon the ethical relation between human beings and it being harmonious, it follows that when such relationship has been adversely affected, whether by a single act or by a system such as apartheid, it must be ethically reconfigured (repaired). Motivated by the concept of *Ubuntu* it should be a goal of our law to emphasise, *in principle*, the (re)establishment of harmony in the relationship between human beings (legal subjects) rather than pushing them apart. A remedy based on the idea of *Ubuntu* has the potential to go much further in restoring human dignity. There should be, as far as possible, a concerted effort amongst the judiciary, and society at large, to (re)establish a dignified and respectful relationship between the parties or persons whose relationships has been adversely affected. In extracting

152 Cornell, (2008, *uBuntu, Pluralism and the Responsibility of Legal Academics to the New South Africa*), at p. 47.
153 Mokgoro, (1998, *Ubuntu and the Law in South Africa*), at p. 21.
154 Meaning a human being is a human being because of other human beings, see *ibid.* at p. 19.
155 Mokgoro, (1998, *Ubuntu and the Law in South Africa*), at p. 21.
156 *Ibid.*

ethical content from *Ubuntu* when confronted with morally shattered relations, the goal should be to knit together shattered relationships in the community and encourage across-the-board respect for the basic norms of human and social interdependence.[157] Mokgoro, J. held, *obiter* and in the minority, as follows:

> "In our constitutional democracy the basic constitutional value of human dignity relates closely to [U]*buntu* or *botho*, an idea based on deep respect for the humanity of another. Traditional law and culture have long considered one of the principal objectives of the law to be the *restoration of harmonious human and social relationships* where they have been *ruptured* by an infraction of community norms. It should be a goal of our law to emphasise … the *re-establishment of harmony in the relationship between* [human beings], rather than … push[ing persons] apart … A remedy based on the idea of [U]*buntu* or *botho* could go much further in restoring human dignity than an imposed monetary award in which the size of the victory is measured by the *quantum* ordered and the parties are further estranged rather than brought together by the legal process[, for example]. It could indeed give better appreciation and sensitise a defendant as to the hurtful impact of his or her unlawful actions …
>
> [C]ourts should attempt, wherever feasible, to re-establish a dignified and respectful relationship between the parties. Because an apology serves to recognise the human dignity of the plaintiff, thus acknowledging, in the true sense of *Ubuntu*, his or her inner humanity, the resultant harmony would serve the good of both the plaintiff and the defendant. Whether the *amende honorable* is part of our law or not, our law in this area should be developed in the light of the values of [U]*buntu* emphasising restorative rather than retributive justice. The goal should be to knit together shattered relationships in the community and encourage across-the-board respect for the basic norms of human and social interdependence."[158]

My submission is thus: in (re)imagining a 'post'-apartheid South African modernity, the ontological meaning of being human *ought* to be influenced by *Ubuntu* and, among other things, its notions of interconnectedness, group solidarity, conformity, compassion, respect, human dignity, humanistic orientation, and collective unity. As made clear above, *Ubuntu* addresses the "ethical relation",[159] which relation places emphasis on the kind of person each one of us ought to become to develop a non-violative relationship with the other and concerns itself with a way of being (existing) in the world.[160] *Ubuntu* addresses both be-coming a person to develop a non-violative relationship with the other and a way of being-in-the-world – in other words, *Ubuntu* can address the ethical relation in its totality.

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157 Malan, K., *The Suitability and Unsuitability of Ubuntu in constitutional law: Inter-communal Relations Versus Public Office-bearing,* Vol. 47, No. 2, (2014), De Jure, pp. 231-257, at pp. 236-237.

158 *Dikoko* 2006 (CC) at paras. [68]-[69].

159 Van Marle, (1996, *The Doubly Prized World*), at p. 332.

160 *Ibid.*

Under the following sub-heading an alternative to racialized post-colonial conception of justice is considered. I now turn to the subjective component of justice and what the latter may entail in the 'post'-apartheid South African modernity.

4.1.1. THE SUBJECTIVE ELEMENT OF JUSTICE: LAW AS A SOCIO-ETHICAL REGIME WITH RELATIVE MORAL SIGNIFICANCE

I conceive the law as a socio-ethical regime with relative moral significance. Relative moral significance is indicative of the subjective element of justice. A legal order bears an "ethical relationship to the society in which it functions" because the law is related to and intersects with morality.[161] The law, or then legal order, is a "socio-ethical regime with only relative moral significance".[162]

The law is a social regime because it regulates the social existence of more than one human being, in this case the South African society. Turing to ethical in 'socio-ethical', ethics, in Greek, is *êthikos*, which literally means something concerned with *êthos*. *Êthos* is Greek for character, which, in turn, is connected to *ethos*. *Ethos*, in Greek, means social custom or habit.[163] *Morales*, on the other hand, is that which is concerned with *mores*. *Mores* is Latin for character, manner, custom, and habit.[164] Epistemologically considered, ethics and morals tend to describe or signify character, custom, and habit.[165] Pragmatically considered, ethics and morals tend to describe or signify character, custom, and habit of human beings and human beings *inter se*. Without essentialising, the overriding purpose of all moralities, or then ethics, is to provide social harmony and if the objective normative legal order of South Africa is not dedicated to, at the very least, social harmony how can it be directed at social justice? The ethical relationship alluded to above is a connection to a single – historically conditioned – value system.[166] In the South African context this value system – as an objective normative value system – is established by the Constitution.

The socio-ethical regime is of relative moral significance because the call for 'equality between men and women and people of all races' will not resonate on the same frequency for people other than South Africans. Apartheid is specific and relative to our particular history. As such, its existence influenced and shaped the substantive content of the (Interim) Constitution rendering the objective normative legal order a socio-ethical regime of relative moral worth emanating *exclusively* from the fissure caused by the end of apartheid. The moral implication of

161 Murphy, *Modern Legal Philosophy: The Tension between Experiential and Abstract Thought*, (1978), at p. 121.
162 *Ibid.*
163 Bunnin & Yu, *The Blackwell Dictionary of Western Philosophy*, (2004) at p. 28.
164 *Ibid.*
165 *Ibid.*
166 Murphy, *Modern Legal Philosophy: The Tension between Experiential and Abstract Thought*, (1978), at p. 121.

the 'post'-apartheid call for equality is, therefore, unique to South Africa and is in this sense already subjective. The importance placed, by the Constitution, on equality and dignity by reason of the past endorses the assertion that a legal system is of relative moral worth.

This conclusion of the law as a socio-ethical regime with relative moral significance is the subjective element of justice. When justice is determined 'objectively' the criterion of that objective totality is in actual fact an enforced specific (political) conception of what the society *ought* to be, but expressed as the present 'reality'. As such, the law cannot ever be equated with justice. The law does not have an autonomous existence; it is rather grounded in human consciousness because we enact and maintain positive law to realise justice.[167] The culmination of the struggle against apartheid – political negotiations – produced the Interim Constitution correlating the genesis of its contents to that of human consciousness. Legal systems emanating from human consciousness is not an anomaly, but South Africa's legal system is unique because it came about in and through a revolutionary process of finding a new South Africa. Within this revolutionary act of self-constitution, a new world was imagined and we, the people of South Africa, must only remember to embrace our inherent capacity to imagine new worlds. Thus, in any attempt at social transformation must be occasioned by the necessity to be *open* to the possibility of a new word. However, openness to change – the unknown – is alien to the dominant self that is possessed with an insatiable desire for certainty, individual self-interest, and the reduction of the other to the self. The revolutionary act of self-constitution was the product of a prolonged struggle against apartheid forming a highly important part of South Africa's history. As such, the *normative* content of the 'post'-apartheid objective legal order is a subjective response to the past in formulating the (Interim) Constitution as aesthetic documents representing a monumental declaration of 'never again'.[168]

The unfortunate consequence of transformative constitutionalism – as well as the thought influenced by notions thereof – and substantive equality driven by transformative constitutionalism is a disproportionate concern for transforming the structure and material realities of the phenomenal or 'real' world to correspond with the normative legal order established by the Constitution. My argument is that for social transformation to follow, transformative jurisprudence must not only be concerned with an a-contextual need to transform material 'reality' – that is the irrefutable or irrebuttable assumed reality of disadvantage – but must, in addition, transform the subject, which subject is one that is conceived through emphasis on the lived experiences of human beings. At the very least, transformation must provide for

167 *Ibid.* at p. 124.
168 Du Plessis, (2000, *The S.A. Constitution as Memory and Promise*), at pp. 386-388.

subjective positive realisation within individuals about the *other* conceptions of their being and their inherent capacity to *self-imagine* their social existence. As such, current South African transformative jurisprudence only encapsulates one half of Cornell's two-pronged definition of the subject of transformation.

The subjective element of justice is, in principle, open towards transformation, since it is subjective and derives its content from society and its member's own conception of justice. I submit that the subjective element of justice renders it perpetually open towards (re)definition of meaning. Furthermore, I submit that *Ubuntu* ought to underlie and inform (the subjective element of) justice. *Ubuntu* is fundamentally concerned with an ethical way of being (existing *as*) human and it deals with the ethical relation in its totality. I submit that *Ubuntu* can (re)define the meaning of being to (re)constitute the self as a human being whose humanity is expressed by being in a relationship with the other. In incorporating the philosophical concept of *Ubuntu*, being (existing *as*) a human would entail being in a humane relationship with the other and establishing a humane orientation in terms of which we relate to each other. In the final instance, *Ubuntu* can provide for a jurisprudence of the subject that transforms such jurisprudence from the 'ground up' by (re)imagining the meaning that we hold of each other that is grounded in conceiving the relationship between each other fundamentally differently as being ethical in nature and intimately interconnected with and interdepended on the other.

Any inherited, bigoted, and prejudicial conception of the other would not be congruent with *Ubuntu*, since one's orientation cannot be humane when the one does not recognise the humanity (dignity or worth) inherent in the other with whom you are interconnected. The moral or ethical quality of a person signified by *Ubuntu* would most definitely be absent when adhering to, advocating for, or acting upon any conception of the other as 'lesser than' or 'other than' a human being entitled to equal respect and concern. Refusal to (re)conceive and (re)constitute the self and the other in accordance with contemporaneous developments in circumstances affecting human subjectivity not only causes and perpetuates ossification of being. Such refusal is not open towards any possible new worlds or modernities in which one the ontological meaning of being (existing as) a human has *transformed* together with the (re)constitution of the social. In short, *Ubuntu* is incorporated in my ethical conception of equality to provide content to Cornell's second prong of her interpretation of the subject of transformation by occasioning the assertion of *a* meaning of being in *an* event during the process of be-coming 'post'-apartheid South Africa and emerging into a 'post'-apartheid modernity creatively adapted by *Ubuntu*.

5. CONCLUSION

The conclusion of this chapter, which concerns perpetual (re)imagination and (re)constitution of society, marks the end of Part II of this thesis. At the inception of this chapter it is made clear that the social imaginary is relied upon to enlighten the members of society to realise that each one *must* participate in the process of be-coming, which means active participation in the continuous (re)imagination and (re)constitution of the self and society; that is to participate in the process of social transformation. The social imaginary, as a notion, informs us that social transformation does not start with a theory and most definitely not in the mind of a politician, but also not in that of a philosopher, playwright, or some kind of public speaker. Accordingly, social transformation starts and ends with the conception of the other and, based on such conception, the manner in which one treats the other. The multiple modernities thesis, which is relates to the social imaginary, is incorporated into my thinking as a composite element of my ethical conception of equality.

I argue that, in contrast with the social imaginary that focuses on the 'micro element', the multiple modernities thesis focuses on the 'macro element' of the second element of social transformation, which element denotes a process of perpetual be-coming of our-selves and society. Whereas the micro focuses on the individual, the macro focuses on the society. The multiple modernities thesis provides content to the macro element; in other words, I rely on the thesis in arguing for the perpetual be-coming of society or, otherwise put, the perpetual (re)imagination and (re)constitution of society. The *possibility* of an ideal society is, thus, pursued through reliance on this thesis, whilst the thesis, at its core, is ethical by being radically indeterminate and open towards continuous (re)imagination and (re)definition; that is, akin to the be-coming of society.

I then proceed to incorporate *Ubuntu* in my ethical conception of equality and thereby provide content to Cornell's second prong of her interpretation of the subject of transformation by occasioning the assertion of *a* meaning of being in *an* event during the process of be-coming 'post'-apartheid and emerging into a 'post'-apartheid modernity that is creatively adapted by *Ubuntu*. In (re)imagining a 'post'-apartheid South African modernity, the ontological meaning of being human *ought* to be influenced by *Ubuntu* and, among other things, its notions of interconnectedness, group solidarity, conformity, compassion, respect, human dignity, humanistic orientation, and collective unity. As made clear above, *Ubuntu* addresses the "ethical relation",[169] which relation places emphasis on the kind of person each one of us ought to

[169] Van Marle, (1996, *The Doubly Prized World*), at p. 332.

become to develop a non-violative relationship with the other and concerns itself with a way of being (existing) in the world.[170] *Ubuntu* addresses both be-coming a person to develop a non-violative relationship with the other and a way of being-in-the-world – in other words, *Ubuntu* can address the ethical relation in its totality.

170 *Ibid.*

PART III: AN ETHICAL CONCEPTION OF EQUALITY

CHAPTER 6: AN ETHICAL CONCEPTION OF EQUALITY

There is no such thing as a socially transformed society.

1. INTRODUCTION

With this chapter the third and final fundamental question is addressed; which is, whether an ethical conception of equality can bring about social transformation. This chapter is dedicated to 'taking stock' and expressly tying the different strands of thought together into a concise and coherent reflection on my ethical conception of equality. The third fundamental question asks whether the fundamental problem of inadequate social transformation can be addressed, in a final sense. Thus, can the ideal of the achievement of equality be guided and influenced by ethical considerations to bring about a socially transfor*med* society? The answer is no, since equality cannot be achieved and society cannot be socially transformed. However, irrespective thereof, the ideal of the achievement of equality *ought* to be guided and influenced by ethical considerations to enable participation in the perpetual process of social transformation.

My ethical conception of equality, at its core, concerns (*i*) what it means to be human[1] and, flowing from such meaning, (*ii*) how humans ought to live together ethically; that is, in ethical relations *vis-à-vis* one another.[2] Both such meaning and relations are fundamentally concerned with the *lived experiences* of human beings.[3] The ethical, in this context, entails the

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1 Otherwise put, the meaning of being (existence *as*) human. In Ch. 1 at n. 56 it is submitted that the law provides further particularisation and context to this study. Accordingly, in the most broadest sense this study concerns the meaning of being (existence *as*) human, which relates to the interrogation of the self. However, the self is, based on the legal context, interrogated by focusing on the legal subject. In other words, the self is the *genus* and the legal subject a *de jure specie* of the self. The argument submitted in this thesis is that conceptions of the self influence conceptions of the legal subject.

2 Otherwise put, ethical relations between human beings.

3 As regard lived experiences see the Appendix where I allude to the fact that, for Heidegger, true self-reflection, that is reflection upon *Da-sein,* comes through living out a life; that is experience of living *as* a human. This is similar to the submission of van Marle where she argues in Van Marle, *Towards an "Ethical" Interpretation of Equality* LLD Thesis (1999) at p. 168 that judges, as poets, ought to focus on concrete life circumstances of people and should not only rely on abstract principles. *Ubuntu* is, thus, relevant because as Radebe & Phooko in Radebe & Phooko, (2017, *Ubuntu and the Law in South Africa: Exploring and Understanding the Substantive Content of* Ubuntu), at p. 240 submit:

"[U]*buntu* is a *way of life of the African people*, which is underpinned by certain components that make

indeterminate nature of the meaning of being, but in the sense of being open towards (re)imagination and (re)constitution of such meaning. Such indeterminate nature ties into my understanding of be-coming of the self and society. The ethical also entails that there is no single meaning or way of being (existing *as*) a human and, consequently, *difference* is central to my ethical conception of equality. Difference is, in the same manner as the meaning of being, accompanied by indeterminacy and openness. Neither the meaning of being a human nor the differences between humans can and ought to be defined, in a final sense.

Since what it means to be human is of fundamental importance it follows that, in terms of my ethical conception of equality, the meaning of being (existence *as* human) is investigated and questioned, disadvantage occasioned by ontological intolerance and bias is exposed, and ontological claims are made. Investigation, critiquing, and transformation of subjectivity and (ontological) identity lies at the centre of this thesis, which is evident from the fundamental problem. The meaning of self and, thus, the meaning of being a human without question concern the nature and give rise to an investigation of human subjectivity. The context of this thesis is inherently legal and, as such, the critique of subjectivity or the self is particularised by critique of the legal subject. Jurisprudentially considered, the ethical conception of equality that I propose is posited upon rendering jurisprudence, jurisprudence *of* the subject. Thus, equality jurisprudence ought to be equality jurisprudence *of* the subject. This jurisprudential element brings us back to the *lived experience* of a legal subject (human being), which is vital, but more so the meaning attached to the being (existence) of humans, since such meaning carries *attributed* value and worth, and has a direct impact on the *experience of humanity*, which takes us back to human dignity, as discussed in Chapter 2. As regard to human dignity, it should be recalled that, in Chapter 2, I linked section 9 of the Constitution with the right to life, more specifically a dignified life, and said that section 9 prevents life, in the context of the right to life from being undermined by various commissions and omissions that endanger the right to live the life of a human being. The right to life and, thereby, dignity influence the right to equality precisely because of the devastatingly harmful consequences of unequal treatment in the constitutional sense on a person's *experience* of humanity.

Answering the ethical call of social transformation would cause a rupture within and disillusionment of society's ontologically biased and intolerant consciousness whereby the shackles of pejorative, discriminatory, hegemonic, and other morally abhorrent ontological conceptions of the other are removed. Social transformation can disillusion society and, thereby,

up its substantive content, and *permeates every aspect of their everyday existence* and interactions with each other and the world at large."

facilitate transformation of the subject (self) by proclaiming that every human being is possessed with the capacity to imagine his or her being-in-the-world, which includes existing *as* a human being entitled to equal respect and concern, irrespective of being different or the other to the self. I submit that the current notion of substantive equality is complicit in requiring a rupture within and disillusionment of society's ontologically biased and intolerant consciousness.

In this thesis I critically call substantive equality into question by asking questions such as ought a conception of equality not rely on multidirectional progression as opposed to linear progression (that of substantive equality)?[4] Ought a conception of equality not be open to a perpetual (re)definition of concepts? Ought the *Harksen*-test[5] not be open to progressive (re)definition?[6] In the context of transformation, ought the definition of previously disadvantaged individual not be open to progressive contemporaneous (contextual) (re)definition?[7] Ought we not move beyond the shackles of a grand narrative of our history and an irresponsible polemical relationship with the world?[8] The aforementioned questions is indicative of the fact that the fundamental problem is occasioned by a fundamental fallacy that is tied up in (*i*) the legal conception of the legal subject and (*ii*) the manner in which the law perceives the relationship between legal subjects. The fundamental fallacy ultimately leads to a-contextual and ineffective legal remedies, which, if an ethical conception of equality is adopted, can be counteracted by transformation of the manner in which the law perceives the legal subject as well as the manner in which the law perceives the relationship between legal subjects.

1.1. STRUCTURE OF THE CHAPTER

This chapter starts with a discussion of van Marle's ethical interpretation of equality where after which I reiterate the fundamental problem and the meaning and importance of the notion of social transformation. After discussing social transformation, I turn to the two elements of my ethical conception of equality. The first sentence on the first page of this thesis reads: "There is no such thing as equality achieved.", which statement must be read together with the first sentence of this last chapter: "There is no such thing as a socially transformed society." The first sentence shelters the first element of my ethical conception of equality and the

4 As discussed in Pt. I, Ch. 3 at pp. 99-100.

5 In *Harksen* 1998 (CC) at para. [53] the CC formulated the so-called *Harksen*-test; see Van Marle, (2001, *Reflections on Teaching Critical Race Theory at South African Universities/Law Faculties*), at para. [24]. For critique of this approach see Van Marle, (2000, *An Ethical Interpretation*); Van Marle, (2001, *Reflections on Teaching Critical Race Theory at South African Universities/Law Faculties*), at p. 91 where she argues that the "*Harksen* test is a step towards *reification* of substantive equality and avoidance of its indeterminate meaning" [original emphasis].

6 As discussed in Pt. I, Ch. 3 at pp. 99-100.

7 As discussed in Pt. I, Ch. 3 at pp. 99-100.

8 As discussed in Pt. I, Ch. 3 at pp. 77-82.

second ("There is no such thing as a socially transformed society.") shelters the second element of my ethical conception of equality.

I explain the first element of my ethical conception of equality in terms of an ethical realisation that we reach once we *realise* the inability of humans to act autonomously from social prejudice and, in consequence, the impossibility of achieving equality. I discuss the first element under the heading "The Meaning of Being (existing *as*) a Human Being". The first element of my ethical conception of equality leads to the core of my ethical conception of equality, which, as alluded to above, concerns (*i*) the meaning of being (existence *as*) human and, flowing from such meaning, (*ii*) ethical relations between human beings. The second element holds that the ideal of equality achiev*ed* involves participation in and being continuously (re)constituted in the process of perpetual social transformation. In other words, perpetual participation of humanity in the perpetual be-coming of humanity. I discuss the second element under the heading "Be-coming of the 'Social'".[9] After discussing the two elements of my ethical conception of equality I turn to one final discussion of equality to crystalize the meaning of and interaction between 'equality' and an 'ethical conception' thereof.

2. AN ETHICAL INTERPRETATION OF EQUALITY

Van Marle argues for an ethical interpretation of equality.[10] The intersection between public space, equality, and justice is essential to this ethical interpretation of equality.[11] The reconstruction and transformation of public spaces are to provide room for the "telling of stories and acceptance", even celebration of, "human plurality, difference[,] and heterogeneity".[12] An ethical interpretation of equality is an interpretation that (*i*) 'radically' acknowledges the inescapable fact of difference, (*ii*) does not seek to 'accommodate' difference, and (*iii*) is aware of the limits of any present system, including and especially a legal system, to "encompass equality

9 I acknowledge the similarity between my notion of be-coming and the reconstruction and transformation of public spaces (proposed by van Marle), but I must insist that be-coming entails be-coming of the self *and* society, which is particularized by the notion of social imaginary and the multiple modernities thesis, where be-coming, considered together with the social imaginary and the multiple modernities thesis, in turn, relates back to the second prong of Cornell's interpretation of the subject of transformation, which I have creatively adapted. Finally, be-coming of society is particularized with reliance on the multiple modernities thesis, which I have, in turn, linked to *Ubuntu* in order to argue for a 'post'-apartheid modernity.

10 See van Marle, (1996, *The Doubly Prized World*); Van Marle, *Towards an "Ethical" Interpretation of Equality* LLD Thesis (1999); Van Marle, (2000, *An Ethical Interpretation*); Van Marle, (2002, *In Support of a Revival of Utopian Thinking, the Imaginary Domain and Ethical Interpretation*).

11 Van Marle, *Towards an "Ethical" Interpretation of Equality* LLD Thesis (1999) at p. 8; Van Marle, (2000, *An Ethical Interpretation*) at p. 595.

12 Van Marle, *Towards an "Ethical" Interpretation of Equality* LLD Thesis (1999) at p. 161 Van Marle, (2000, *An Ethical Interpretation*) at p. 595.

and justice completely".[13] As regard to 'ethical' van Marle notes: "The ethical imperative in deconstructive thought as formulated by … Derrida, based on the ethical theory of … Levinas, is my source for the understanding of 'ethical'."[14] "The ethical relation to the other means to be open to the otherness of the other without appropriation, without making her the other of myself."[15] She relies on Cornell to distinguish between morality and the ethical relation.[16] In addition, she also adopted an ethical feminist approach by, again, relying on Cornell. As regard to interpretation, "the process of interpretation, inspired by *differance*, does not refer to the finding of meaning and she accepts that we continuously create and recreate meaning". She turned to Derrida's notion of justice as aporia which "demands that a judge, when making a decision, must take note of given meanings, but must simultaneously create new meanings for the particular case before her".[17] Deconstruction is also central to interpretation:

> "… deconstruction seeks to expose the impossibility of a clear and final meaning… [as well as] … aims to show the ruptures and impossibilities, the tragedies and violence in our current systems. Ethical interpretation seeks to be true to deconstruction's rupture, impossibilities and tragedies. … [A]n ethical interpretation follows the view that life is hard".[18]

As regard to 'equality' she does not subscribe to a specific meaning of equality, but rather supports a certain way in which equality must be interpreted. In terms of her understanding "[e]quality will mean different things for different people at different times and places" and equality can, therefore, not be a static concept.[19] She ultimately submits that "an ethical interpretation of equality will provide the best (not perfect) way of approaching the issue of equality and recognising difference".[20] I now turn to some distinguishing features between my thought and that of van Marle.

First, I limit myself to the fundamentality of equality by accepting the right to equality seeks to (*i*) address legally prohibited differentiation and (*ii*) remedy its consequences. Whilst not being essentialist, one must understand *what* we are talking about when we are speaking the

13 Van Marle, *Towards an "Ethical" Interpretation of Equality* LLD Thesis (1999) under the heading "Summary" & at p. 161; Van Marle, (2000, *An Ethical Interpretation*) at pp. 595-596.
14 Van Marle, *Towards an "Ethical" Interpretation of Equality* LLD Thesis (1999) at pp. 24-25.
15 *Ibid.* at p. 25.
16 *Ibid.* at p. 25; Cornell, *Philosophy of the Limit*, (1992) at p. 13.
17 Van Marle, *Towards an "Ethical" Interpretation of Equality* LLD Thesis (1999) at p. 26.
18 *Ibid.* at p. 27.
19 *Ibid.* at p. 29.
20 *Ibid.*

language of equality. I, therefore, only subscribe to the indeterminacy and openness of the meaning of legally prohibited differentiation.[21]

Second, I have not interrogated the meaning of justice, as such, nor do I seek to do so. I merely submit that we enact and maintain positive law in an attempt to realise a conception of justice.[22] Thus considered, the legal subject is the one enacting law to realise *its* conception of justice. Irrefutably then, the conception of different legal subjects concerning (*i*) their own being, including its *value* or *worth*, and (*ii*) the being of other subjects, including their *value* or *worth*, has a determinative impact on the meaning and the role of equality within justice and, as such, positive law. Therefore, without question, the nature of the legal subject (subjectivity and identity) is important, since the manner in which we perceive each other's being has a direct impact on how the law perceives legal subjects and the relationship between legal subjects.

Third, although I incorporate deconstruction within my ethical conception of equality, I do not rely on Levinas to understand the 'ethical' as such. For me the 'ethical' relates to, among other things, ethical realisation,[23] ethical understanding,[24] ethical appreciation,[25] openness (towards (the radical) difference (of the other)), and indeterminacy (of meaning). The notions of be-coming, the social imaginary, and the multiple modernities thesis inform my ethical conception of equality and are ethical in the sense that they are interlaced with openness and indeterminacy.

Thus, to distinguish myself from van Marle I would argue that my ethical conception of equality – in the first instance – insists on an ethical regard to and the perpetual questioning of different meanings of being (existing *as*) a human. My ethical conception of equality will always *first* enjoin recognition of the being of a human *as* human before recognising the race, sex, gender, or otherwise of the human being. Thus, an ethical conception of equality does not disregard race, sex, gender, or otherwise, but does not allow race, sex, gender, or otherwise to be projected as the totality of the being (existence *as*) a human. My ethical conception of equality then incorporates be-coming of the social, which includes both the self and society.[26]

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21 My concern is differentiation within a legal context and prohibited differentiation at that. I also submit that without the presence of differentiation between people or categories one cannot consider the notion and meaning of equality, whether within a specific context or in the abstract.

22 Murphy, *Modern Legal Philosophy: The Tension between Experiential and Abstract Thought*, (1978), at p. 124.

23 See pp. 6, 13, 23, 158-159, 164, 210, 212, & 219-220.

24 See pp. 13, 43, 162, 199, 212, 219, 226, 301, 314, 317.

25 See pp. 14 & 219.

26 I am, however, not submitting that van Marle's ethical interpretation of equality allows race, sex, gender, or otherwise to be projected as the totality of the being (existence *as*) a human. My focus is *ab initio* on the self or the legal subject and I do not expressly consider aspects such as the public space and justice as constitutive elements of my ethical conception of equality. Rather, my ethical conception of equality is informed by notions of justice as opposed to incorporating a specific understanding or description thereof

Whilst I cannot deny that her thought principally gave rise to the basic tenets of my own ethical conception of equality, I distinguish myself from her on the basis that my ethical conception of equality, at its core, concerns (*i*) the meaning of being (existence *as*) human and, flowing from such meaning, (*ii*) ethical relations between human beings.[27] Both such meaning and relations are fundamentally concerned with the *lived experiences* of human beings.[28] In addition, I propose an ethical interpretation of the Constitution, which would, in turn, provide for an ethical conception of equality.[29]

3. SOCIAL TRANSFORMATION

The fundamental problem is placed at the centre of this thesis and, as such, a thorough exposition and nuanced understanding of social transformation is of utmost importance. My understanding of social transformation denotes (*i*) the element of radical change and (*ii*) the element of a process of perpetual be-coming of our-selves and society. My understanding finds inspiration from Cornell's two-pronged interpretation of the subject of transformation, since it encapsulates more than mere material transformation. Accordingly, social transformation not only encapsulates material or structural transformation – it transcends material transformation.

The first element of social transformation refers to Cornell's first prong of her interpretation and translates transformation as radical change causing a dramatic restructuring of the system – political, legal, or social – to such an extent that the 'identity' of the system itself is altered.[30] The second element of social transformation refers to Cornell's second prong, which turns on the question "what kind of individuals do we have to become in order to open ourselves to new worlds".[31]

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into it. In addition, I do not reject van Marle's understanding of justice, with which I am in agreement, but I place emphasis on different ethical concepts, since my concern is the meaning of being (existence *as*) human, self, and the legal subject, which van Marle did not consider in her earlier work pertaining specifically to her ethical interpretation of equality.

27 The meaning of being and ethical relations are, in turn, influenced by the concepts of be-coming, social imaginary, the multiple modernities thesis, and *Ubuntu*.

28 The lived experiences of individuals are also of utmost importance to van Marle's ethical interpretation of equality and she merely refers to the "concrete situation" – see Van Marle, *Towards an "Ethical" Interpretation of Equality* LLD Thesis (1999) at p. 168.

29 See the Appendix. I note that an ethical interpretation is not a necessity of my ethical conception of equality. My proposed ethical interpretation seeks to find a legal justification for an ethical conception of equality in the text of the Constitution, which justification is, however, not necessary. The proposed legal justification of an ethical conception of equality in term of an ethical interpretation of the Constitution is another distinguishing factor between me and van Marle.

30 Cornell, *Transformations: Recollective Imagination and Sexual Difference*, (1993), at p. 1.

31 *Ibid.*

In giving content to the notion of social transformation Cornell's first prong is broadened and expanded upon by the first two elements of the South African substantive constitutional revolution.[32] The third element, in turn, provides content to the second prong of Cornell's interpretation of the subject of transformation.[33] The third element leads to the introduction of the notion of be-coming. The impact of my understanding of be-coming on the meaning of social transformation is the creative adaptation of Cornell's second prong as well as incorporation of the social imaginary, the multiple modernities thesis, and *Ubuntu* into my ethical conception of equality. Social transformation and be-coming is, therefore, inextricably linked. Principally considered, the second element of social transformation entails the perpetual (re)imagination and (re)constitution of the self, which is, simply put, the perpetual transformation of the self. Perpetual (re)imagination and (re)constitution is inextricably linked with the notion of be-coming, and, as van Marle said, what is at stake in be-coming 'post'-apartheid is both "becoming of individuals/subjects" and the "becoming of communities[/society]".[34]

The place that social transformation inheres within my conception of equality is an aspirational ideal entailing the perpetual be-coming of both the society, which denotes the material or structural element within transformation, *as well as* the social, in the objective sense. Transformation of the self (subjectivity or (ontological) identity) entails transformation of the social, in the subjective sense, which ultimately translates into transformation of the social, in the objective sense. By having regard to the *social* within social transformation one is committing oneself to a process of transformation that (*i*) is ethically cognisant of and compassionate for the ethical relations towards others, (*ii*) emphasises and prioritises (perpetual be-coming of) the being(*s*) of human beings, (*iii*) harbours respect for (the difference of) the other, and (*iv*) instils nuance and sophistication to transcend our past with and within the process of social transformation. Although social transformation is alive to the consequences of transformation on segments of our society, it cannot countenance transformation that is tainted by a lack of respect and concern for the other, a-contextual programs, principles and rules, and a general sense of malice that parade under the guise of material or substantive transformation. On the flip-side, social transformation enjoins South Africans to understand and appreciate that advocating for and insistence upon mere and absolutist formal equality is *per se* insulting to but, in addition, seeks to make a mockery of our constitutional ideal of the achievement of equality.

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32 See Pt. II, Ch. 4 at pp. 141-149.

33 See Pt. II, Ch. 4 at pp. 157-165.

34 Van Marle, (2010, *Reflections on Post-Apartheid Being and Becoming*), at p. 350.

3.1. DECONSTRUCTION

Ignoring our historicity has been the tendency, since "it can be difficult and disturbing to face our own temporality and to experience the mystery of being":

> "It is easier to slip back into an everyday state of complacency and routine. Rather than wrestling with who we are and what it means [']to be['], we would prefer to concentrate on manipulating and measuring present beings. In philosophy, this self-deceptive absorption in the present leads to a metaphysics of presence, which only encourages the self-deception."[35]

Western philosophical thinking has been critiqued as a thought process that "invariably and predominantly prioritises the stable presence of the existence (being) of all things (beings)".[36] This critique holds that priority is given in disregard for the "way existence concerns the primordial and temporal emergence of things from 'origins' or an 'origin' that cannot be described in terms of presence or present existence".[37] For Heidegger "being 'is' the non-present (which is not the same as absent) origin of all things (beings) that eventually become present".[38] Traditional Western philosophical thinking is, for Heidegger, defined by a philosophical disregard for the "temporal emergence of all things" and the entirety of this thinking turned on the disregard for the "way things are never simply infinitely present[,] but the outcome of a finite event of disclosure".[39] His philosophical endeavour was a destruction of this metaphysics of infinite presence for the sake of "recovering the regard for temporal and finite emergence or disclosure of things".[40] The use of 'destruction' (for purposes of recovering the sense for the way things are not simply present and do not simply exist but come to presence and emerge into existence) is crucial in Derrida's thoughts on deconstruction.[41]

Derrida stated that the prevailing forms of consciousness and understanding of an era are structured by dominant and fundamental (foundational) texts.[42] These fundamental or foundational texts (for instance religious and philosophical works or political documents like constitutions, international treaties, human rights declarations, classic literary works, etc.) are said to constrain "the variety of present possibilities of human existence and hold them in place".[43] These foundational text maintain the presence (the 'there' or world) in and into which an era of human existence unfolds and proceeds; hence his provocative statement that there is nothing

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35 Polt, *Heidegger: An Introduction*, (1999), at p. 5.

36 Derrida adopted Heidegger's critique in this regard – Veitch*, et al.*, *Jurisprudence: Themes and Concepts* (2012), at p. 175.

37 *Ibid.*

38 *Ibid.*

39 *Ibid.*

40 *Ibid.*

41 *Ibid.*

42 *Ibid.*

43 *Ibid.*

outside text.[44] I submit that the meaning of one's being (existing *as*) a human is determined by fundamental or foundational text before one can exercise any meaningful self-engagement, self-identification, and self-determination and, such ontological meaning is attributed *before* one even exercise any sense of conscious engagement with oneself. In other words, even before one thinks one already is and the meaning of such existence is situated in a textual *event*. In an African context such consequence can be militated, since *Ubuntu* situates dignity within being (existing *as*) a human that is *ab initio* in a relationship with and whose being is always inextricably linked with that of the other. Human dignity is conferred worth, although indirectly inherent. Thus, human worth is not contingent on text, but rather recognition of and respect for one's human dignity by the community, which recognition is enjoined based on the 'status' of existing *as* a human being.

> "Derrida's concern with deconstruction must be grasped as a concern with the de-construction of the world or worlds constructed by language. Deconstruction is the textual event under the sway of which new worlds, new possibilities of observation and new modes of assertion become possible. Deconstruction, broadly definable as the picking at the seams of dominant texts that hold existing worlds in place, seeks to solicit the textual event through which new worlds may emerge. It is a picking at the textual seams that sustains present realities in the hope that they may unravel, come apart, and begin to release new ways and new forms of understanding."[45]

Derrida's claim that deconstruction '*takes place*' means that deconstruction cannot be defined.[46] Deconstruction 'takes place' during the reading of a text and as a textual practice it is 'double reading'.[47] Critchley argues that deconstruction is distinguishable from normal textual practice by the element of double reading.[48] Deconstructive reading can be described as a double-layered reading, which "interlaces … two motifs or layers of reading".[49] The first layer consists in the repeating of the "dominant interpretation" of the text itself "in the guise of a commentary".[50] Within and through this repetition lies the second layer consisting of the opening of "blind spots within the dominant interpretation".[51] A deconstructive reading of text occupies the space between the author's intention and the text, "between that which the writer commands and fails to command in a language".[52] Derrida calls the space between "intention and text the 'signifying structure' of the reading".[53] For Derrida commentary "'has always only

44 *Ibid.* at pp. 175-176.
45 Van Marle, *Towards an "Ethical" Interpretation of Equality* LLD Thesis (1999) at p. 181.
46 *Ibid.*
47 *Ibid.*
48 Critchley, *The Ethics of Deconstruction*, (1992), at p. 23.
49 *Ibid.*
50 *Ibid.*
51 *Ibid.*
52 *Ibid.*
53 *Ibid.*

protected, it has never opened, a reading'".[54] He claims, therefore, that the "signifying structure of a deconstructive reading" cannot be produced through the mere "'respectful doubling of commentary'".[55] Derrida writes that the goal or aim of deconstruction is:

> "… [T]o attain the point of a certain exteriority with respect to the totality of the logocentric epoch. From this point of exteriority a certain deconstruction of this totality … could be broached."[56]

The opening of space between the text and the writer's intention, such space must be one that is *other* to 'commentary', that is a space of *alterity*.[57] The opening of space leads to the creating of distance between "deconstructive reading and logocentric conceptuality".[58] I cannot state it better than Critchley where he concluded that: "The signifying structure of deconstructive reading traverses a space that is other to logocentrism and tends to exceed the orbit of its conceptual totality."[59] From this point of exteriority, deconstruction can displace the totality. Critchley rephrased the goal of deconstruction as the identification of a point of alterity *within* "the logocentric conceptuality and then to deconstruct this conceptuality from that position of alterity".[60]

Seeing that deconstruction consists of two layers of reading and taking into account that within the goal of deconstruction is the identification of a point of alterity, the second reading can be seen as a "destabilisation of the dominant interpretation … and the movement of traversing the text which enables the reading to obtain a position of alterity or exteriority, from which the text can be deconstructed".[61] The second layer consists of contradicting the text with itself, it opens the *meaning* of the text to an *otherness* "which goes against what the text want to say or mean".[62] Cornell explains:

> "Thus[,] the deconstructive emphasis on the opening of the ethical self-transcendence of any system that exposes the threshold of the 'beyond' of the not yet is crucial to a conception of legal interpretation that argues that the "is" of law can never be completely separated from the elaboration of the 'should be' dependent on an appeal to the Good. Ethical alternity is not just the command of the Other, it is also the Other within the nomos that invites us to new worlds and reminds us that transformation is not only possible, it is inevitable."[63]

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54 *Ibid.*
55 *Ibid.*
56 *Ibid.* at p. 26.
57 *Ibid.*
58 *Ibid.*
59 *Ibid.*
60 *Ibid.*
61 *Ibid.* at pp. 26-27.
62 *Ibid.* at p. 27.
63 Cornell, *Philosophy of the Limit*, (1992), at p. 111. See van Marle, (1996, *The Doubly Prized World*), at p. 332.

To be open to any new world, we must, first, realise that we are not *ab initio* free and autonomous individuals and, thereafter, be willing to deconstruct the current 'reality' so as to open our world ('appearances') to the possibility of new worlds (another 'reality'). As van Marle puts it "[d]econstruction seeks to disrupt the present or the given without at the same time seeking to replace the 'old' with the 'new', ensur[ing] the possibility of transformation and justice".[64]

New worlds, new possibilities of observation, and new modes of assertion become possible through deconstructive readings of the dominant interpretation of the meaning of being (existence *as*) human, the meaning of (the right to) equality, and (the right to) human dignity. Deconstruction can pick at the textual seams that sustains present realities; that is, the grand narrative of our history and equality *as* (racial) representivity. Deconstructive thought traverses the dominant 'reality' structured by the dominant interpretation to the unravel such 'reality' and, thereby, release new ways and new forms of understanding. My ethical conception of equality is, therefore, cognisant of deconstructive thought in that it also seeks to deconstruct morally abhorrent and bigoted meanings of being (existence *as*) human.

4. THE MEANING OF BEING (EXISTING *AS*) A HUMAN

The meaning of being (existing *as*) a human is the starting point of my ethical conception of equality, since, I submit, the perception[65] we have and hold of each other together with the value that we attribute to the other, based on such perception, results in an ontological conception[66] and, ultimately, ontological definition[67] of the (meaning of the being of the) other. The way[68] in which we regard, understand, and ultimately interpret the meaning of *each other's being* is determinative of *any* conception of equality, since *any* understanding and interpretation of each other *necessarily* includes attribution of ontological value based on ideological stimuli. This understanding and interpretation ultimately translate into an abstract idea or concept of the other and, with the passage of time, such abstract ideas or concepts have reified into exact statements or descriptions of the nature and meaning of the other.

The first sentence on the first page of this thesis reads: "There is no such thing as equality achieved.", which statement must be read together with the first sentence of this last chapter: "There is no such thing as a socially transformed society." The first sentence shelters the

64 Van Marle, (1996, *The Doubly Prized World*), at pp. 336-337.
65 Denoting the way in which something is regarded, understood, or interpreted.
66 Denoting an abstract idea; a concept.
67 Denoting an exact statement or description of the nature, scope, or meaning of something.
68 Way does not denote a method, but rather refers to an 'as what' and the value attached thereto.

first element of my ethical conception of equality, which I explain in terms of an ethical realisation that we reach once we *realise* the inability of humans to act autonomously from social prejudice and, in consequence, the impossibility of achieving equality. This ethical realisation also entails ethical understanding; that is, the *understanding* that it is impossible for human beings to act autonomously from (without the influence of) socially constructed prejudice (ontological bias). To be free from social prejudice – such as, racism, sexism, and homophobia – would be to act autonomously from socially constructed bigotries (ontological intolerance). Social prejudice or socially constructed prejudice is representative of ontological bias; that is, a preconceived opinion of the ontological meaning of the other's being (existing *as*) a human that is not based on prior experience that is not *ab initio* polluted by social prejudice, such as racism or sexism. Socially constructed bigotries are, in turn, representative of ontological intolerance; that is intolerance of the *ontological differences attributed* to the other's being (existence *as*) human. For any of us to be an individual that is open to new worlds we must first become disillusioned by the ethical realisation; which is, the *realisation* that nobody is capable of not thinking (whether consciously or subconsciously), at some point in time, that he or she is superior to or more deserving than the other based on personally held characteristics and appreciating (understanding the entire situation by grasping implications translating into acceptance) that he or she *ought* not to do so. We *ought* to be and are disillusioned because we are disappointingly accepting the 'discovery' that we are less good than we had previously thought. To become disillusioned by the ethical realisation is to attain ethical appreciation of our own imperfections. To be open to any new world, we must, first, realise that we are not *ab initio* free and autonomous individuals and, thereafter, be willing to deconstruct the current 'reality' so as to open our world ('appearances') to the possibility of new worlds (another 'reality'). As van Marle puts it "[d]econstruction seeks to disrupt the present or the given without at the same time seeking to replace the 'old' with the 'new', ensur[ing] the possibility of transformation and justice".[69]

Central to the meaning of being is the social imaginary[70] that denotes (*i*) 'the way' (as what *and* the method in terms of which) we imagine the society we inhibit and sustain[71] and (*ii*) the *means* by, or *methods* or *modes* through, which we understand our identity and place in the world.[72] The social imaginary informs my ethical conception of equality that the law – as a social *institution*[73] – is a mode informing our understanding of the social. Because of the law's

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69 Van Marle, (1996, *The Doubly Prized World*), at pp. 336-337.
70 Which is discussed, at length, in Pt. II, Ch. 5.
71 Taylor, *Modern Social Imaginaries*, (2004), at p. 6.
72 Gaonkar, (2002, *Toward New Imaginaries*).
73 Denoting an established law or practice and not only an established official organization having an important role in a society, such as the Church or parliament.

performative possibilities, the law, at minimum, informs and, arguably, is determinative of, even if only at an institutional level, an understanding of the meaning of being precisely because of human consciousness. The law, grounded upon and stemming from human consciousness, does not have an autonomous existence, since we enact and maintain positive law in an attempt to realise a conception of justice.[74] Thus considered, the legal subject is the one enacting law to realise *its* conception of justice. Irrefutably then, the conception of different subjects concerning (*i*) their own being, including its *value* or *worth*, and (*ii*) the being of other subjects, including their *value* or *worth*, has a determinative impact on the meaning and the role of equality within justice and, as such, positive law. Therefore, without question, the nature of the subject (subjectivity and identity) is important, since the manner in which we perceive each other's being has a direct impact on how the law perceives legal subjects and the relationship between legal subjects.

Whilst the aim might be to deconstruct and transform the dominant meaning of being (existence *as*) human, I firmly reject any possible 'science of being human'. It is impossible to understand human nature or, in my words, the being of humans, to the extent that "the improvisations of living [as a human] will be totally pre-empted [(thus, understood)] by the execution of scientific plans, like programs for a computer".[75] The contingencies and variables intrinsic to being human that ultimately present itself as the concrete 'here and now' can never be fully fathomed by human reason even when the mighty consciousness of the self (the I)[76] is equipped with past experience and the innate capacity to imagine a new adaptation through creative agency. Human beings are far too sophisticated in our being-in-the-word as ultimately phased by our being-with to the 'reality' of 'non-cognition' of an always and ever self-constituting being of humanity.[77] The reality of non-cognition denotes an ethical acceptance of the impossibility of fully understanding being (existence *as*) human. In addition, any and every thought of attributing final designation or understanding to the being (existence *as*) human is simultaneously self-limiting and an act of self-denial; that is, denial of the other self. Every enunciation on the being of humans pronounced to be complete, final, settled, or certain defies the reality of non-cognition of being human. The ethical trace uncovered by the aforementioned revelation marks an ethical realisation that – whatever the being of human beings might be – any final pronunciation thereon or definition thereof designates an understanding and attributes

74 Murphy, *Modern Legal Philosophy: The Tension between Experiential and Abstract Thought*, (1978), at p. 124.

75 Shevrin, (1971, *Essay: Is There a Science of Being Human*), at p. 201.

76 That is "[t]he object or subject of self-consciousness; the ego" – *Oxford Dictionary of English (British English)*: *Apple Dictionary* (2016), Ver. 2.2.1 (194).

77 See Parasidis, (2012, *Defining the Essence of Being Human*), at pp. 834-841 & 841-845 for an extensive exposition of the well documented inability of 'sciences' to *definitively* distinguish human beings as a unique species, whether through anthropology or comparative genomics.

meaning to being human equivalent to that of a mere being (an object or *res*). To do so would defy and amount to the rejection of humanity's reality of non-cognition with the consequence that to finally pronounce on the being of human is to relegate the self to the being of a mere being (an object or *res*).

An ethical conception of equality involves an understanding of the self as a way of being-in-the-world in terms of which being (existence *as*) human is an expression of the ways of being-with and being-there inspired and influenced by *Ubuntu*. In terms of this understanding being (existence *as*) human is an expression of a way of being in a relationship with the other *and* the community. An expression of a way of being-in-the-world[78] in terms of which the self is constituted through being in a relationship with the other *and* the community. This understanding of self, being (existence *as*) human, or subjectivity, raises two important points. First, it is a specific understanding of our ontological existence in terms of which the meaning of 'what' we are is determined by the state of existing in a relationship with and being constituted by the other and the community. Second, this understanding *ab initio* emphasises the relationships between human beings in their being-with the other and being-together-with each other in a community as opposed to *a-priori* knowledge and, as such, any form of legal relationship. There is, thus, an emphasis shift from the subject of jurisprudence being, among other things, the legal subject to the jurisprudence of the subject in its being-with the other and being-together-with each other in a community.

The being of humans is different from that of a mere being (object or res). Any human being is of incalculable worth by virtue of being a human. Thus, every human being is vested with human dignity. However, attributing the ideal of human dignity to humans does not distinguish the being of humans from that of mere beings nor our relationship with such beings. The *way* of being that distinguishes humans from other beings is 'being-there'. A book is (also) 'there', in the presence-at-hand sense of having an objective presence as its being; it has a spatial location. However, humans are 'there' in a deeper sense: "we inhabit a world, we are capably engaged in a meaningful *context*" [own emphasis].[79] Humans have a 'there' in a sense no other entity does and the reason is that for humans the world is understandable.[80] Humans are 'being-there' in the sense that *Da-sein* "is in such a way as to be its 'there'".[81] Humans do not merely

78 I adopt being-in-the-world to acknowledge the being of human beings as Bing-in-the-world entailing that we (humans) are essentially involved in a context, humans' relation to the world is conceived as active engagement, and rejection of the isolation of the individual in the world. See Ch. 1 at p. 23.

79 Polt, *Heidegger: An Introduction*, (1999), at p. 30.

80 *Ibid.*

81 *Ibid.*

happen to be in a world, a 'there'. The 'there' of humans is essential to humans and would be nothing at all without it. Conversely, it ('there' or the world) would be nothing without humans.

> "Our world is the *context* in terms of which we understand ourselves, and *within which we be[-]come who we are*. … 'I am myself plus my circumstance'."[82] [own emphasis]

Humans are the 'there' of or for being (in Heidegger's sense).[83] Humans are the site that being requires in order to (literally) take place.[84] Without *Da-sein*, other entities could continue to be, but there would be no one to relate to them *as* entities and, consequently, their being (objective presence) would have no meaning at all.[85]

Da-sein influences the understanding of the self referred to above in terms of which the being of humans is fluid and refers to an expression of the ways of being-with and being-there inspired and influenced by *Ubuntu*. An expression of the ways of being human refers, in turn, to habits, customs, behaviour, and systems of humans, which is informed by both the past and the possibilities of the future.[86] True self-reflection, that is reflection upon *Da-sein,* comes through living out a life; that is experience of living *as* a human.[87] A human being always lives and inhibits the world with a certain *understanding* which also includes a projection of certain possibilities. A central feature of *Da-sein* is 'being-with', which signifies that humans are not isolated from other humans.[88] Rather, human beings are "so constituted that our being is, in principle, available to one another, even prior to our experience" of each other.[89] being-with seeks to reject individual isolation in the *social world* through the constitution of *Da-sein* in the same way that the being-in-the-world rejects individual isolation in the world *per se*. Therefore, being-with aims to overcome the traditional Cartesian account of the isolated self.[90] This leads me to *Ubuntu*.

In incorporating *Ubuntu* in my understanding of self and thereby navigating through the dense nuances of *Ubuntu* I have aligned myself with Radebe & Phooko where they submit that:

> "[*U*]*buntu* is a *way of life of the African people*, which is *underpinned* by certain components that make up its substantive content, and permeates every aspect of their everyday existence and interactions with each other [being-with] and the *world at large* [being-there]."[91] [own emphasis]

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82 *Ibid.*
83 *Ibid.*
84 *Ibid.*
85 *Ibid.*
86 Such reference coincides with and supports reliance on the notion of the social imaginary, as discussed in Pt. II, Ch. 5.
87 Moran, *Introduction to Phenomenology*, (2000), at p. 238.
88 Bunnin & Yu, *The Blackwell Dictionary of Western Philosophy*, (2004) at p. 79.
89 *Ibid.*
90 *Ibid.*
91 Radebe & Phooko, (2017, *Ubuntu and the Law in South Africa: Exploring and Understanding the Substantive Content of* Ubuntu), at p. 240.

In terms of *Ubuntu* human beings are, in their everyday existence, social beings whose humanity is expressed through being in a relationship with others.[92] *Ubuntu* is the opposite of apartheid ideology in terms of which the being (essence) of humans was equated with the state of being separated from the other. The ideology was cantered on the meaning of being, since the entirety of the apartheid order revolved around the ontological difference between black and white and the domination and subjugation of the former at the hands of the latter. Consequently, keeping with such emphasis on the ontological difference between white (self) and the black (other) the approach adopted in Chapter 1 is recalled; that is perceiving jurisprudence as jurisprudence of the subject and thus:

> "Each path of jurisprudence represents an attempt by human beings to tell a story about being human. Unless one discounts the humanity of others, one must admit that one has something in common with all other human beings … what African jurisprudence calls for is an *ongoing dialogue* among Africans [which, for me, is inclusive of white people] *on being human*, a dialogue that of necessity leads to dialogue with other human beings. This dialogue is not an end in itself. It is *a dialogue with an existential implication* …"[93] [own emphasis]

4.1. ETHICAL RELATIONS BETWEEN HUMAN BEINGS

My notion of be-coming specifically incorporates the ethical relation to integrate the second prong of Cornell's interpretation of the subject of transformation and, as such, social transformation. The ethical relation concerns the kind of person one must be-come to develop a non-violative relationship with the other. "The concern of the ethical relation … is a way of … [being-in-the-world] that spans divergent value systems and allows us to criticize the repressive aspects of competing moral systems".[94]

Past relationships inform one's current relationship, which, in turn, will inform future relations. An ethical conception of equality interrogates the relationship between human beings and seeks to infuse such relation with notions of ethics. The African philosophical concept of *Ubuntu* is relied upon in this regard. *Ubuntu* is incorporated in my ethical conception of equality to provide content to Cornell's second prong of her interpretation of the subject of transformation by occasioning the assertion of *a* meaning of being in *an* event during the process of be-coming 'post'-apartheid and emerging into a 'post'-apartheid modernity that is creatively adapted by *Ubuntu*. The link between *Ubuntu*, culture, and being with modernity indicates that "[c]ultures, unlike religions, are not necessarily based on tenets of faith but on a collection of

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92 *Barnard* 2014 (CC) at para. [174] quoting *Makwanyane* 1995 (CC) at para. [224].

93 Murungi, *The Question of African Jurisrpudence: Some Hermeneutical Reflections*, (2004), at p. 525. Quote found in Bohler-Muller, (2007, *Some Thoughts on the Ubuntu Jurisprudence of the Constitutional Court*), at p. 592.

94 Cornell, *Philosophy of the Limit*, (1992), at p. 13.

practices, ideas or *ways of being*" [own emphasis].[95] According to Gyekye, "an individual human person cannot develop and achieve the fullness of his/her potential without the concrete act of relating to other individual persons".[96] This African understanding of the individual emphasises the "*importance of community to individual identity* and hence to human dignity" [own emphasis].[97] In addition, under the Constitution, dignity and identity are inseparably linked, since one's sense of self-worth is defined by one's identity and, as such, one's relationship with others.[98] "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 only and exclusively from personal choice or achievement".[99] The nature of belonging grounded in *Ubuntu* involves more than mere association by including participation in and expression of the community's practices and traditions.[100] In other words, a sense of belonging is grounded in and identity is formed by living within, forming part of, and experiencing a certain *culture*; that is, a particular constituted cultural program or then a modernity.

Ubuntu is not only an African worldview, but also a factor that influences *perceptions* of the other and, thereby, influencing social conduct.[101] Perceptions formed with the influence of *Ubuntu* would result in *humane orientation* between human beings *inter se*, since *Ubuntu* is a "humanistic orientation towards fellow beings".[102] In cautioning us against a superficial perception of *Ubuntu* Mokgoro refers to Kunene for whom *Ubuntu* refers to as the "'potential of being human'" in that it is *Ubuntu* that which both "'guarantees … a separation between men, woman[,] and the beast'" as well as "'the very fluctuating gradations that determine the relative quality of that essence'".[103] The *potential* of being human denotes a process of be-coming in terms of which one can fluctuate from the lowest point to the highest during one's lifetime and at the highest level where there is harmony between "the physicality and spirituality of life".[104] The physicality and spirituality of life denotes an understanding that:

> "… our *ethical relationship* to others is inseparable from how we are both embedded and supported by a community that is not outside each one of us, but is inscribed in us. This inscription of the

95 *Ibid.* at para. [66].
96 Gyekye, *Person and Community in African Thought*, (1998), at p. 351.
97 *Pillay* 2008 (CC) at para. [53].
98 *Ibid.* See also *Affordable Medicines Trust v Minister of Health* 2006 (CC) at para. [59] and *Sodomy* 1999 (CC) at para. [26].
99 *Pillay* 2008 (CC) at para. [53]. See Ackermann, *Human Dignity: Lodestar for Equality in South Africa*, (2012), at pp. 114-115 where Ackermann critiques the notion that one's identity cannot *only* flow from and be derived from the community. Ackermann opines that *Ubuntu* cannot and ought not to deny *individual* morality, responsibility or accountability.
100 *Pillay* 2008 (CC) at para. [53].
101 Mokgoro, (1998, *Ubuntu and the Law in South Africa*), at p. 17.
102 *Ibid.* at p. 19.
103 *Ibid.*
104 Mokgoro, (1998, *Ubuntu and the Law in South Africa*), at p. 21.

> other also calls the individual out of himself or herself back towards the ancestors, forwards towards the community, and further towards relations of mutual support for the potential of each one of us".[105]

The ethical relation is informed by the notion of interconnectedness because the relation is "inseparable from how we are both embedded [in] and supported by a community".[106] The *spirituality of life* relates to the notional Idea of a community being inscribed within each member of that community, hence the characteristic of interconnectedness. If the community is inscribed in me by virtue of being a member of said community I must, by necessary implication, be inscribed in the community and every other member of said community. The other is then inscribed in each individual and each individual is inscribed in the other. *Spirituality of life* has another level of abstraction in that the notional Idea of "[t]his inscription of the other … calls the individual out of himself or herself back towards the ancestors, forwards towards the community, and further towards relations of mutual support for the potential of each one of us".[107] The spirituality of life 'literally' pulls an individual towards the *physicality of life* – towards relations of mutual support for the potential of each one of us. The ethical relation, in terms of *Ubuntu*, is one of mutual support between individuals and the community and, corollary hereto, between individuals within a community to realise the potential of each member within the community. In this sense, through a relationship of mutual support a person is a human being with inherent worth:

> "Simply existing is not what gives a human being inherent worth. Each of us … has our own placenta, and therefore a unique biological life. But what develops this biological singularity is the respect and support that is given to all human beings so that they can achieve a unique personal life".[108]

Furthermore, the *ethical relation,* under *Ubuntu,* is inseparable from how we members of a community are inscribed in each other – how the community is inscribed in each member – and concomitant interconnectivity.

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105 The physicality and spirituality of life is best described by the following quote in Cornell & Muvangua, *Introduction*, (2012), at p. 5.

106 *Ibid.*

107 *Ibid.*

108 *Ibid.* at p. 9.

5. BE-COMING OF THE 'SOCIAL'

The second statement ("There is no such thing as a socially transformed society.") shelters the second element of my ethical conception of equality. The second element holds that the ideal of equality achieved involves participation in and being continuously (re)constituted in the process of perpetual social transformation. In other words, perpetual participation of humanity in the perpetual be-coming of humanity. In terms of my conception of be-coming 'be' (v.) denotes 'existence' whereas 'come' (adj.), in turn, denotes 'occur, happen, and take place'. The hyphen is used to separate existence from occurrence to indicate that humans do not merely exist, since our existence *as* human (being) occurs, happens, or takes place as an event in the process of be-coming.[109] Be-coming describes existence *as* not representing the state of mere presence in the present. Be-coming is suspect of any preferred or 'absolutist true' *a priori* knowledge and assumptions about the stability and 'givenness' of already existing and the objective, neutral, and certain meaning attributed to such state of already existing and being complete in your existence. Be-coming entails being conscious of how our being (existence) is a simultaneous (ontological) 'reality' and a continuous process of discovering ourselves through and within our *experience* of being-in-the-world (existing-in-the-world).

Be-coming cannot be *mere* imagination and constitution of the self and society, since be-coming, whilst suspect of *a fortiori* knowledge, does not deny that we emerge into existence with certain background understanding. Thus, we cannot escape a pre-imagined and pre-constituted self, but, instead of adopting a nihilist perspective or merely accepting the preordained and unquestionability of who and what you are, an ethical understanding is always open towards (re)imagination and (re)constitution of the self by perpetually calling into question the pre-imagined and pre-constituted self or then a former (re)imagined and a (re)constituted self to a previous pre-imagined and pre-constituted self. Be-coming is, therefore, the perpetual (re)imagination and (re)constitution of the self and perpetual (re)imagination and (re)constitution of society. By borrowing from the double movement of molar and molecular politics, I submit that an assertion of the meaning is accompanied by deferred (re)imagination of the same meaning in the same act of asserting. The assertion of meaning is an event *taking place* in the process of be-coming. It is deferred (re)imagination of the same meaning in the same act of assertion because any asserted meaning is always incomplete by excluding or lacking the hitherto never asserted meaning. No asserted meaning can be final and is always open towards

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[109] In other words, to sit at the table – to be simply there – does not mean one exists or one is then not exemplified in existence. Rather, the walking to the chair, sitting down, eating, and excusing oneself from the table is being present in the occurrence of one's existence.

(re)assertion, rather than reassurance, through imagining the hitherto never asserted meaning. Otherwise put, no meaning can ever be finally asserted because once (re)asserted the assertion hitherto never made is imagined. In other words, you are perpetually remaining open towards questioning (the meaning of) your-self whilst and in the same act of asserting (the meaning of) your-self. Be-coming entails simultaneous (re)imagination and (re)constitution in that we (re)constitute ourselves in the act of (re)imagining our-selves or imagining our-selves differently. Be-coming entails that any assertion of meaning, which includes a conception of our-selves, be accompanied by the simultaneous but deferred questioning of the very same meaning in the very act of asserting. Thus understood, be-coming is perpetual and what is at stake in be-coming 'post'-apartheid is both "becoming of individuals/subjects" and the "becoming of communities[/society]".[110]

Consequently, it is within human capacity to (re)imagine and (re)constitute its 'there', with specific reference to the beings in our 'there' (world). History is unequivocal and unambiguous: one group (man, white, and/or heterosexual) can define the meaning of the being of another group (woman, black, and/or homosexual). Be-coming is then the perpetual exercise of the (innate human) capacity to develop (imagine) a meaning of being (existing *as* human). Every human being has the capacity and ought to be allowed to understand and define himself or herself through one's own powers and to act freely as a moral agent pursuant to such understanding and self-determination.[111] We all have the capacity and ought to be able to (re)imagine and (re)constitute the social or society; that is, the way in which we imagine (perceive) the society in which we are actively engaged with each other, inhibit, and sustain. Thus, closely related to the notion of be-coming is the notion of the 'social imaginary', which is more fully addressed in Chapter 5.

To give content to be-coming of the self I rely on the notion of the social imaginary, which concept simultaneously builds upon and particularises the second aspect of Cornell's interpretation of the subject of transformation. It is through reliance upon this notion that I attempt to enlighten society to realise that each one of us has the capacity to (re)imagine the self and to (re)constitute ourselves and the society. Each one of us is a role-player in the perpetual process of be-coming, which is, now, be-coming 'post'-apartheid South Africa in pursuing our aspirational end of a socially just society. The social imaginary is relied upon to enlighten the members of society to realise that each one must participate in the process of be-coming, which

110 Van Marle, (2010, *Reflections on Post-Apartheid Being and Becoming*), at p. 350.
111 Ackermann, (2004, *The Legal Nature of the South African Constitutional Revolution*), at p. 645.

means active participation in the continuous (re)imagination and (re)constitution of the self and society; that is to participate in the process of social transformation.

Whilst keeping the notion of social imaginary in mind, I incorporate the multiple modernities thesis into my thinking as a composite element of my ethical conception of equality. In contrast with the social imaginary that focuses on the 'subjective, micro, or individual' aspect of the second leg of social transformation, the multiple modernities thesis focuses on the 'macro element' of the second leg of social transformation. Whereas the micro focuses on the individual, the macro focuses on the society.[112] The multiple modernities thesis provides content to the 'macro element' of the second leg of social transformation. In other words, I rely on the thesis in arguing for the perpetual be-coming of society or, otherwise put, the perpetual (re)imagination and (re)constitution of society. The *possibility* of an ideal society is, thus, pursued through reliance on this thesis, whilst the thesis, at its core, is ethical by being radically indeterminate and open towards continuous (re)imagination and (re)definition; that is, akin to the be-coming of society.

The multiple modernities thesis enjoins an understanding of the contemporary world – the history of modernity is best explained – as a story of perpetual constitution and (re)constitution of a multiplicity of cultural[113] programs.[114] Otherwise put, a story of continuous constitution and (re)constitution of a multiplicity of social imaginar*ies*. In this story social actors realise the perpetual constitution and (re)constitution of multiple institutional and ideological patterns in association with both social, political, and intellectual activists as well as social movements.[115] The activists and movements pursue different objectives as they hold divergent views of what renders a society 'modern'. In other words, the society is constituted by human beings and human beings are not constituted by an already existing and pre-ordained order; hence the fact that we are dealing with modern*ities* or then modern moral orders.

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112 Whilst I am cognisant of the theoretical possibility of the social imaginary incorporating macro elements, I specifically chose to divide the micro and the macro through the use of and reliance upon the multiple modernities thesis.

113 See *Pillay* 2008 (CC) at paras. [47] & [53]-[54] where Langa, C.J. described (not defined) culture as including traditions and beliefs developed by a community. The Justice continued and held that:

> "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. … [W]hile cultures are associative, they are not monolithic. The practices and beliefs that make up an individual's cultural identity will differ from person to person within a culture: one may express their culture through participation in initiation rites, another through traditional dress or song and another through keeping a traditional home. While people find their cultural identity in different places, the importance of that identity to their being[-]in[-]the[-]world remains the same. There is a danger of falling into an antiquated mode of understanding culture as a single unified entity that can be studied and defined from outside. … Cultures are living and contested formations. The protection of the Constitution extends to all those for whom culture gives meaning, not only to those who happen to speak with the most powerful voice in the present cultural conversation."

114 Eisenstadt, (2000, *Multiple Modernities*), at p. 2.

115 *Ibid.*

A modernity, for me, ought to be marked by a critical calling into question of grand narratives, absolute truths, and the purported dogmatic objective and neutral principles of a conception of social existence; such as, for example, co-existence of atomic individuals in mutual benefit.[116] Accordingly, any modernity ought always be relative to an epoch and, most importantly, indicative of a movement from the old to the new by first questioning and then (re)imagining and (re)constituting.[117] Thus, modernity is marked by a movement away from the old into the new (future) unfolding within and constituting a given epoch – thus, relating to the notion of be-coming.[118] Our existence in and experience of the world are influenced, and can even be determined, by the modernity (social imaginary *as* an inexplicable enabling social matrix) within which we emerge into and exist. Each of our emergence into existence (being) is signified by human birth whereas the temporality of our existence is signified by the inevitability of death. When born, one is born and emerge into existence of an already existing social-historical world occupied by a social imaginary exemplified by a modernity.

Reliance on the Castoriadis's analysis paradigm indicates how modernities are formed. These ontologies show that the 'manner in which' we perceive our social existence is determined by nature of the modernity with which society (or a given social order) is imbued with. Castoriadis' paradigm is encapsulated in two ontologies; namely, the ontology of determinacy and the ontology of creativity.[119] These ontologies relate to and can be further particularised by two conceptions of ethics; namely ethics of difference and metaphysical ethics.[120] The ontology of creativity and ethics of difference ethics of difference are congruent with my ethical conception of equality.

In terms of the ontology of creativity society is a "self-creating, self-instituting enterprise".[121] The ontology of creativity is a *revolutionary constitutive instantiation of the social imaginary* and marks the occasion(s) when the environment within which the social develops, the social imaginary itself, is *transformed* and the example under discussion in this is the South African substantive constitutional revolution. In turning to ethics of difference, Levinas named ethics as the "calling into question of my spontaneity by the presence of the Other".[122] Critchley

116 By describing modernity as such I do not hold that modernity is described in its final sense. I merely attempted to describe modernity relative to a fundamental feature of any modernity, which is the decline in the unquestioned legitimacy of, or otherwise put, the rise of questioning a preordained social order.

117 Such movement is only true in so far as the ontology of creativity, as discussed herein below, is that which informs the relevant modernity.

118 The second aspect of social transformation has been indicated as entailing perpetual be-coming of our-selves opening us to (the possibility of) new worlds.

119 Gaonkar, (2002, *Toward New Imaginaries*), at p. 6.

120 Boshoff, (2007, *Ethics and the Problem of Evil: S v Makwanyane*).

121 Gaonkar, (2002, *Toward New Imaginaries*), at p. 6.

122 Levinas, *Levinas Totality and Infinity: An Essay on Exteriority*, (1979), at p. 43.

interpreted the aforementioned quote as "[e]thics, for Levinas, is critique; it is the critical *mise en questin* [calling into question] of the liberty, spontaneity, and cognitive emprise of the ego that seeks to reduce all otherness to itself".[123] Ethics of difference also embraces the recognition of the *radical alterity of the other*. Radical alterity is a central tenet of my ethical conception of equality, which is similar to van Marle's thought. For her an ethical interpretation of equality 'radically' acknowledges the inescapable fact of difference.[124] The ethical dimension of an ethical interpretation of equality lies precisely in the understanding that accommodation of difference is impossible.[125] As such, equality does not seek to accommodate difference[126] and the 'ethical' includes openness towards difference and acceptance of the impossibility of ever fully understanding one another's differences.[127]

Attached to and forming part of every social imaginary and, thus, modernity is the ontological consequences of an event of coming into or emerging into existence (being). Birth is a prime example of such an event. Once born, your existence (being) is ontologically determined by something outside of your existential being. Your being is attributed to you and, thus, you are afforded a self without ever having exercised volition. By being born into this world with certain genital organs one is attributed a sex and, simultaneously, by being born into this world with certain pigmentation of your skin one is attributed a race. Both sex and race, without more, has a determinative impact on the remainder of your being (existing *as*) a human. Another event in life possessed with similar ontological consequences as birth is death. However, birth and death are not the only events carrying ontological consequences. The South African substantive constitutional revolution is also such an event of coming into or emerging into existence (being); that is an event with ontological consequences. The South African substantive constitutional revolution provided South Africa with the ability to transcend the ontology of determinacy and to act within the ontology of creativity and adopt an ethics of difference. The ontology of determinacy is reminiscent of our past and, as such, stands rejected by the Constitution. The South African substantive constitutional revolution, through the instrumentality of the (Interim) Constitution, constituted a new legal order, which order acts as the ethical referent and is directed at an ideal society. The *moral* order is already determined by the Constitution, which is

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123 Critchley, *The Ethics of Deconstruction*, (1992), at p. 5.

124 Van Marle, *Towards an "Ethical" Interpretation of Equality* LLD Thesis (1999) at p. 161; Van Marle, (2000, *An Ethical Interpretation*), at p. 595.

125 Van Marle, *Towards an "Ethical" Interpretation of Equality* LLD Thesis (1999) at p. 161; Van Marle, (2000, *An Ethical Interpretation*), at p. 595.

126 Van Marle, *Towards an "Ethical" Interpretation of Equality* LLD Thesis (1999) at p. 161; Van Marle, (2000, *An Ethical Interpretation*), at p. 595.

127 Van Marle, *Towards an "Ethical" Interpretation of Equality* LLD Thesis (1999) at p. 161; Van Marle, (2000, *An Ethical Interpretation*), at pp. 595-596.

what we, the people of South Africa, agreed upon in the (Interim) Constitution. The Constitution is aspirational by signifying an ideal society towards which we ought to aspire and attempt to live up to. As a transformative legal instrument, the Constitution is also an *ethical referent* acting as the means to engender social transformation. Through the ontology of creativity and an ethics of difference a 'post'-apartheid modernity can be conceived and (re)constituted that is conducive to and open towards social transformation.

Ubuntu is, however, evaluated in this context by indicating how *Ubuntu* can influence and transform 'post'-apartheid modernity and, as such, the prevailing social imaginary; that is, the environment in which the social develops. In addition, the conception of being (existence *as*) human is of fundamental importance to both *Ubuntu* and the notion of social transformation. Consequently, the (re)definition and (re)constitution of the self and society ought to be influenced and directed by *Ubuntu*, including the African conception of the individual. The philosophical concept of *Ubuntu* provides for a unique African conception of being (existence *as*) human and can influence the dominant conception of the noumenal legal subject. *Ubuntu* can influence the society's own opinions and convictions concerning the meaning of being (existence *as*) human and how we *ought* to relate to each other. However, to show the lack of considering such *a* different and African conception of being *within the context of equality*, *Ubuntu* has, to my knowledge, only been referred to in two Constitutional Court judgments since the dawn of constitutional democracy.[128] Also, *Ubuntu* is not 'the' other conception of self or the noumenal legal subject and informs my thinking in the context of an African[129] philosophical concept, or even philosophy, that can provide content and guidance in (re)imagining conception**s** of being human. The converse is, therefore, also true, in the sense that Western philosophy is not rejected in its totality and is incorporated in this thesis as well.

128 See *Hoffmann* 2001 (CC) at para. [38] where Ngcobo, J., as he was then, opined, in the context of *Ubuntu* and equality, that "[p]eople who are living with HIV must be treated with compassion and understanding. We must show [*U*]*buntu* towards them" and see also *Barnard* 2014 (CC) at paras. [174]-[176] where van der Westhuizen, J., in a minority decision, referred the collective attributes of dignity found in *Ubuntu* that informs equality because "[d]ignity is connected to equality".

129 African, for me, is not delineated by race (being black) and ethnic origin *per se* (being from African descent). I disassociate myself with Pan-Africanism.

6. EQUALITY

In Chapter 2 I identify the mischief[130] that the right to equality seeks to address as (*i*) legally prohibited differentiation and (*ii*) remedying its consequences. Only once this fundamentality of equality is understood *and* appreciated can we speak the language of equality. I then proceed from this mischief to the positive law and state that the purposes of the right to equality is located, firstly, in a concern with and a prohibition of any rule or conduct differentiating between people or categories of people that constitutes unequal treatment and/or unfair discrimination "in the constitutional sense".[131] Secondly, equality, in the context of the Constitution as memorial, is concerned with and influenced by a recognition that the unjust consequences of prolonged unfair discrimination, in the constitutional sense, requires rectification – through the auspices of *fair* discrimination – lest consequences of unjust hegemonic and bigoted treatment of people reign supreme, since equality delayed is equality denied.[132] Ethically considered, the right to equality ***ought*** to be constituted by and within a constitutional concern for and idealisation of attributed, innate, and incalculable worth (dignity) of human beings whose humanity is expressed in being in a relationship with the other *and* the community.

In this thesis I have shown that inequality is the product of the manner in which human beings are *treated* by other human beings, whether on a single occasion or over a prolonged period. It has also been submitted that the basis of such treatment is ontologically bias and bigoted conceptions of the other. The law prohibits unequal *treatment* and unfair *discrimination* in the constitutional sense[133] as well as provides for transformation of material inequality through restitutionary equality.[134] However, current equality thought caused the ossification of subjectivity and defined difference.[135] In addition, history has been essentialised by a grand narrative in terms of which culpability is attributed and disadvantage is meted out in total disregard for actual disadvantage, especially a state of being disadvantaged.[136]

Accordingly, irrespective of formal or substantive equality, the meaning of the self or subjectivity is determinative of instances where the other ought to have been treated the same as the dominant self or where the other ought to have been treated differently than the dominant

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130 See Pt. I, Ch. 2 at n. 7.

131 In *Ntuli* 1996 (CC) at para. [19] Didcott, J. held, *obiter*, that "[i]t is trite … that differentiation does not amount *per se* to unequal treatment in the constitutional sense". Didcott, J.'s *obiter* statement had subsequently been accepted by the majority in *Prinsloo* 1997 (CC) at para. [17].

132 *Sodomy* 1999 (CC) at para. [60].

133 See Pt. I, Ch. 2 and Pt. II, Ch. 4.

134 See Pt. I, Ch. 2 & Ch. 3. & Pt. II, Ch. 4.

135 See Pt. I, Ch. 2 & Ch. 3.

136 See Pt. I, Ch. 3.

self. In other words, ontological bias led to unequal treatment and unfair discrimination, since differential treatment would be based on preconceived opinion of the ontological meaning of the other's being (existing *as* a human) that is not based on prior experience that is not *ab initio* polluted by ontological prejudice, such as racism or sexism. Similarly, ontological intolerance, being intolerance of the *ontological differences attributed* to the other's being (existence *as* human), also lead to unequal treatment and unfair discrimination.

The right to equality[137] and the prohibition against unfair discrimination are *not* tools for social transformation. In addition, I have submitted in Chapter 3 that restitutionary equality, as currently defined and implemented, merely perpetuates the apartheid pedagogy in terms of which we are ontologically defined to the detriment of one group and the benefit of the other. The law cannot, on its own, bring about social transformation and any attempt at legal conceptualisation of a socially transformed society is antithetical to an ethical conception of equality. The reader is reminded of the elevated divide between the legal order and the social order that is central to Part II in that Chapter 4 demonstrates the radical change undergone by South Africa's legal order through reliance on the South African substantive constitutional revolution. Chapter 5, in turn, emphases the *possibility* of transforming the social (order) through reliance on the social imaginary and the multiple modernities thesis.

The law can inform and *enforce* (as was the case in apartheid and has become to be the case in 'post'-apartheid South Africa) conceptions of the being of humans. The law is but yet another product of the human cognitive enterprise or then consciousness, since human beings delineate justifiable (lawful) conduct with legal rules to enact a specific idea of justice. Simply put, the law is a reflection and concretisation of the ontological conceptions of the other that are subjectively held by a minority (apartheid/oligarchy) or a majority ('post'-apartheid/democracy). Whatever the ideological stimuli are that inform and ultimately constitute any derogatory, pejorative, or demeaning conception of the other, an ethical conception of equality always remains suspect of any rule of law, legal principle, or doctrine. This suspicion means that equality ought to be cognisant of the way in which the law makes a difference in the lives of human beings. The lived experience of a legal subject becomes the concern of equality jurisprudence. If the law treats a human being as a mere object whose identity can be determined and who can be controlled to his or her detriment (apartheid) or as mere object in the process of material transformation ('post'-apartheid South Africa), the law is *merely* giving effect to an underlying conception of the other to a *dominant* self.

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137 I am aware of the fact that the right to equality (the title of s. 9 of the Constitution) includes the right against unfair discrimination (ss. 9(3) – 9(5)).

The apartheid pedagogy is perpetuated with the adoption of equality jurisprudence that is not first concerned with the meaning of being (existence *as*) human and the ethical relation between human beings. In terms of this pedagogy we have been taught and disciplined to conceive each other's being in terms of already *a-priori* defined ontological meanings. This pedagogy is informed by the need for and moral justification of defining human beings; that is, attributing ontological meaning to their existence by characteristics that are legally or politically *attributed* to them. This ontological definition of being (existence *as*) human is attained by attributing ontological meaning to human existence with socially constructed and attributed characteristics. Importantly, this pedagogy holds that the meaning of being (existence *as*) a human being is defined to the benefit of one and the detriment of the other. It is a pedagogy not only because we are taught to understand the other in terms of *a priori* ontological definitions, but we are taught and made to accept these definitions as 'fact' and 'truth', since they are aimed at controlling (political) and regulating (legal) the existence of humans; in other words, their being-in-the-world. Restitutionary equality *per se* does not perpetuate the apartheid pedagogy, nor does substantive equality. However, once restitutionary equality – the transformative element within substantive equality – blindly fixates on benefiting one race above the other on the apparent and politically instigated purpose of benefiting a previously disadvantaged individual *notwithstanding* the fact that such individual is no longer or has never been disadvantaged *because of* previous or past discrimination, then substantive equality has regressed into the apartheid pedagogy in terms of which one race is defined to the detriment of another. Transformation is justified in a 'post'-apartheid South Africa, if such transformation is *in fact* influences, empowers, and advances those individuals who remain in a disadvantaged position *because of* past discrimination. Transformation cannot be justified if it is a-contextual and disregards the true state of affairs, lest transformation become a guise behind which the ideology of the apartheid pedagogy remains operative.

These characteristics are metaphysical in nature; in other words, separated from and not present in the perceptive reality and, thus, hits squarely on an ontological meaning. These ontological definitions of being (existence *as*) human are based on and informed by socially constructed prejudice and bigotry, that in turn, translate into ontological bias and intolerance. I must qualify myself and state that it is not the *act* of ontologically defining the other that is unethical, but rather the *a-proiri* 'knowledge' informing such definition and the consequence of such ontological definition of the being of the other. Such definition (representing a conception of the other) is constitutive of the other in the sense of determining *as what* he or she is 'existing as'. The act and/or consequence of defining being (existence *as* human) cannot be ethical once

such definition is 'correct', 'the only' and, thus, 'final' definition, since such definition simultaneously defines the self, the other, and difference, which definition is, therefore, inherently exclusionary.

It borders on the obscene to think that we have not deconstructed and (re)imagined our perception of the ontological meaning of each-other's being in terms of an ideology that contrasts the apartheid pedagogy. Our understanding (perception) of the being (essence) of human beings is still being taught to us and remains informed by this pedagogy. As indicated in Chapter 3, whilst transformation is blindly emphasising transformation of material needs, South Africans are ever-increasingly developing (politically instilled) racist conceptions of each other that is entirely divorced from the phenomenological being (the phenomena or the human being one perceives with one's eyes). An ethical conception of equality calls for a progressive[138] realisation of equality and not a regressive manipulation of 'reality'. An ethical conception of equality demands responsibility in and when striving for the ideal of equality by recognising the dignity of each human being as an ideal attribution. Under such a conception subjectivity or identity cannot be (re)imagined to the exclusion of or in *ill-founded* opposition towards the other, or then everything not black (especially Coloured, Afrikaner, or Western, more specifically speaking).

An alternative modernity of and for 'post'-apartheid South Africa is on the horizon, ripe for us to (re)imagine and (re)constitute our-selves as well as our perceptions and conceptions of each other's being (existence *as*) human. In the process of be-coming, both as (re)imagined and (re)constituted Selves and as a society, we can emerge into a new world, a truly 'post'-apartheid modernity signified by a culture of true recognition, respect for, and empathy towards the other, which includes the other's beliefs, culture, customs, opinions, and the rest. What stands at the doorstep of the current modernity (characterised and being overrun by racially and politically instigated and inspired neo-liberationism) is (re)imagination and (re)constitution of the totality of our being-in-the-world and I submit that an ethical conception of equality is a *step* in the right direction towards a truly (re)constituted 'post'-apartheid modernity and being-in-the-world. The possibility of such an alternative 'post'-apartheid modernity saw the light of day with the advent of the Interim Constitution, but is subject to banishment by neo-liberationism in the name of raw – racially drenched – political power founded on the partisan and populist narrative of an absolutist and exclusionary construction of post-democracy 'liberation'.

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138 Progressive in this context does not relate to gradual realization *per se*, but rather to conduct engaged in or constituting forward looking objectives.

6.1. HUMAN DIGNITY

To guide 'post'-apartheid South Africa human dignity is acutely drawn on by the Constitution by adopting it as the *Grundnorm* of the 'post'-apartheid South African legal order so as to constitute the *inversion of apartheid itself* and consequently providing for a transformative element of human dignity. The inversion by human dignity as a *Grundnorm* is not limited to respect for the intrinsic worth of all human beings but encompasses, in addition, recognition of dignity *as* righting of a violation.[139] Consequently, dignity, as distinct phenomena,[140] forms part of our understanding by reason of the experience of our undignified past and, as such, provides for an interpretation[141] of equality. In other words, aesthetically considered human dignity represents *more* than mere memory, since 'post'-apartheid South Africa has adopted an *understanding* of human dignity as both a monumental 'never again' as well as a memorial remembrance.[142] Dignity, as a monumental 'never again', serves to inform us of our past and in recollection of our past we emphatically proclaim that everyone is equal before the law and has the right to equal protection and benefit of the law as well as that unfair discrimination against anyone either by the state or any other person is prohibited. Not necessarily in contrast herewith, but rather in addition to 'dignity as a monumental never again', 'dignity as remembrance' requires us to live in remembrance of the past by recognising that equality includes the full and equal enjoyment of the all rights and freedoms, thereby appreciating that respect for dignity ought to be recognised *as* a righting of a violation. Dignity *as* remembrance or righting of a violation urges us to transform our gross materially unequal society to aspire to social justice in an attempt to live up to what the ideal of dignity requires from us, which is, at this point in time articulated by the value of human dignity as *both* respect for the inherent dignity of all human beings *and* the righting of the violation of the dignity of the entire South Africa.[143] Human dignity informs my ethical conception of equality to advocate for material transformation, as is the case with substantive equality. I, therefore, acknowledge the existence and consequences of apartheid as

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139 See Cornell & Fuller, *Introduction*, (2013), at pp. 6-7.

140 I rely on Moran, *Introduction to Phenomenology*, (2000), at pp. 4 & 34 to state that Phenomena has a distinctive and specific meaning and is found in the philosophical thought of phenomenology, which is, it shall be remembered from Ch. 1, a radical, anti-traditional style of philosophizing. Phenomenology emphasises "the attempt to get to the truth of matters, to describe phenomena, in the broadest sense as whatever appears in the manner in which it appears, that is as it manifests itself to consciousness, to the experiencer". Phenomenology firstly seeks to avoid all misconstructions and impositions placed on experience in advance, "whether these are drawn from religious or cultural traditions, from everyday common sense, or, indeed, from science itself". Explanations are not to be imposed before the phenomena have been understood from within and phenomena are not mere objects of perception, since mental phenomena are the things (beings) that are most our own.

141 In Heidegger's sense, see the Appendix regarding an ethical interpretation of equality.

142 Dignity as remembrance postulates something kept in commemoration of our past.

143 See *Makwanyane* 1995 (CC) at para. [329] where O'Regan, J. opined that "[b]lack people were refused respect and dignity and thereby the dignity of all South Africans was diminished".

well as the moral duty to transform our society that inherited such consequences. My ethical conception of equality is, however, more nuanced in that it is *ab initio* cognisant of the relationships between human beings, the actual circumstances in which human beings find themselves, and the consequences of treatment based on ontological meanings of being (existence *as*) a human.

The question that must be addressed before I can progress is: 'Where is the line drawn between justified and unjustified treatment based on ontological meanings of being (existing *as*) a human?'. For example, a person's religion or sex influences the conceptions others have of his or her being. In other words, once observed by the other, the Islamic female, for example, is representative of a human being that bears children and believes in a higher being. As regard to her sex, women are still regarded as being primarily responsible for child rearing. The fact that women become pregnant does not mean that women must be primarily responsible for child rearing, especially not where such responsibility is to the detriment of women. As regard to religion, the fact that she is Islamic does not mean that she is a or associated with a terrorist or terrorism. Thus considered, any treatment based on a pejorative or demeaning conception of another's being would necessarily be to his or her detriment or disadvantage. In other words, where persons are subjected to disadvantageous treatment based on such conceptions. However, disadvantage alone cannot draw such a line, since affirmative action is fair discrimination. In other words, it is a justified infraction of human dignity in furtherance of the ideal of achievement of equality. I submit that the notion of deconstruction can assist in drawing the line between justified and unjustified treatment based on ontological meanings of being (existing *as*) a human. I submit that deconstruction can disrupt the dominant meaning(s) of being and expose such meanings for what they really are. In Chapter 1 I indicate that I subscribe to an approach which traces the ways in which the system itself constructs meaning, as opposed to ascertaining the meaning only from the intention of the author or the intended meaning of the text.[144]

> "The semiotician traces the way the system produces meaning … and tries to see gaps or uncertainties within the structure, the many different levels at which rhetorical tropes can occur [that is representable arguments], and the many possible ways of re[-]describing them".[145]

The remaining consideration at this point, which lies at the centre of my ethical conception of equality, is the relationship between human beings. The treatment by human beings of other human beings ought to be non-violative in nature. In other words, the treatment should not be in disregard of or in disrespect of the other who is equal in dignity. However, as

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144 See Freedman, (2008) at p. 1418.

145 *Ibid.*

stated here under, the being of humans is an expression of ways of being-in-the-world in terms of which one's humanity is expressed by and one is constituted by being in a relationship with the other and the community. Past relationships inform one's current relationship, which, in turn, will inform future relations. An ethical conception of equality interrogates the relationship between human beings and seeks to infuse such relation with notions of ethics. The African philosophical concept of *Ubuntu* is relied upon in this regard.

Ubuntu's existential implications concern the way of life *as* a human being and strikes the core what the meaning of being (existence *as*) human[146] is in a 'post'-apartheid South Africa. *Ubuntu* informs an African way of life (being human) in terms of which being-with (leaning on Heidegger's terminology) does not entail nor require assimilation to otherness, since *Ubuntu* – in the context of being-with – signifies a new kind of community (an ideal society), which can be described as follows:

> "The other as a singular, unique finite being puts me in touch with infinite otherness. In this ontology [subject area or domain], community is not the common belonging of communitarianism,[147] a common essence given by history, tradition, the spirit of the nation. Cosmos is being together with one another, ourselves as others, being selves through otherness."[148]

I replace "cosmos" with *Ubuntu* in that *Ubuntu* is a worldview (ideology) that (*i*) stresses the importance of community, solidarity, caring, and sharing and (*ii*) advocates profoundly for a sense of interdependence by emphasizing that *true human potential* can only be *realised in partnership with* others [149] This leads to Gade's submission that *Ubuntu* is a "phenomenon according to which persons are interconnected".[150] In this context of interconnectedness *Ubuntu* is best translated as "humanism" that fundamentally relates to human beings' interconnectedness in terms of which persons are what they are because of other persons.[151] The maxim *umuntu ngumuntu ngabantu* or

146 The meaning of being human, in Heidegger's sense, means, for me at least, experiencing all the ways in which the other (other human beings than I) makes a difference in one's being-in-the-world as both being-there and being-with the other.

147 See Etzioni, A., *Communitarianism*, Encyclopedia Britannica where communitarianism is said to refer to a:

> "… social and political philosophy that emphasizes the importance of community in the functioning of political life, in the analysis and evaluation of political institutions, and in understanding human identity and well-being. It arose in the 1980s as a critique of two prominent philosophical schools: contemporary liberalism, which seeks to protect and enhance personal autonomy and individual rights in part through the activity of government, and libertarianism, a form of liberalism (sometimes called "classical liberalism") that aims to protect individual rights – especially the rights to liberty and property – through strict limits on governmental power."

148 Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism*, (2007), at p. 294. Quote found in Bohler-Muller, (2007, *Some Thoughts on the Ubuntu Jurisprudence of the Constitutional Court*), at p. 593.

149 Gade, (2012, *What is Ubuntu? Different Interpretations among South Africans of African Descent*), at p. 492 492 quoting Ngcoya, *Ubuntu: Globalization, accommodation, and contestation in South Africa* (2009) at p. 1.

150 Gade, (2012, *What is Ubuntu? Different Interpretations among South Africans of African Descent*), at p. 492.

151 *Ibid.* at pp. 492-493 – this is a quote from an interview between Gade and Bongani Finca, a former commissioner of the South African Truth and Reconciliation Commission:

> "You are what you are because of other people. We do … [not] live in isolation, we live in a community. That sense of community is what makes you who you are, and if that community

motho ke motho ka batho ba bangwe literally means that 'I am because we are', and unites with the obligations of individuals in African societies to help each other.[152] Such obligations are afforded more importance as moral obligation as in the case of Western societies, since in the latter societies individual rights determine one's possessions and relationship with others. In developing a conception of the self transcending the liberal self the Constitutional Court has relied upon to the African understanding of the individual[153] and specifically incorporated the African concept of *Ubuntu* into its equality jurisprudence within the context of culture and belief. Most importantly, dignity – under the Constitution and in the light of *Ubuntu* as a *Grundnorm* – contains individualistic as well as collective impulses.

7. CONCLUSION

It is submitted that for a socially transformed society to be a lived for aspiration the relationships between South African subjects must be (re)imagined to transform morally shattered relations into ethical relations resonating from alternative, creatively adapted, ontological meanings of being human in 'post'-apartheid South Africa. In concise terms, this thesis aims to enlighten society – as a whole – so that it comes to the realisation that every human being within it has the capacity to re-imagine its own being as well as the prevailing notion of equality. Transformation of the self and mending of moral relationships between South Africans cannot be neglected or ignored, lest any attempt at achieving equality transcending substantive equality be met with utter failure ascribable to the sacrifice of social transformation on the altar of radical material transformation. The meaning of being (existence as) human and ethical relations as between human beings ought to become central to jurisprudence, in general, and equality jurisprudence, in specific.

In the end I reiterate that social transformation does not start with a theory and most definitely not in the mind of a politician, but also not in that of a philosopher, playwright, or some kind of public speaker. Social transformation starts and ends with the conception of the other and, based on such conception, the manner in which one treats the other.

becomes broken, then you yourselves also become broken. And the restoration of that community, the healing of that community, cannot happen unless you contribute to the healing of it in a broader sense. Basically that is it. Ubuntu is that I am because of others, in relationships with others. I am not an island of myself, I am part of the community, I am part of the greater group".

152 Radebe & Phooko, (2017, *Ubuntu and the Law in South Africa: Exploring and Understanding the Substantive Content of Ubuntu*), at p. 242.

153 *Pillay* 2008 (CC) at para. [53].

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APPENDIX

1. FUNDAMENTAL CONCEPTS, TERMINOLOGY, & PHILOSOPHICAL THOUGHT INFORMING THE APPROACH

1.1. 'BEING' AND 'BEING'

> "Celebration ... is self-restraint, is attentiveness, is questioning, is meditating, is awaiting, is the step over into the more wakeful glimpse of the wonder – the wonder that a world is worlding around us at all, that *there are beings rather than nothing*, that things are and we ourselves are in their midst, that we ourselves are and yet barely know who *we* are, and barely know *that we do not know all this*."[1] [own emphasis]

Heidegger sought to indicate, in the above quoted passage, that the question 'what is the meaning of being' resonates from the acceptance and celebration of the fact that beings *are*. The question arises from the acceptance that there is something rather than nothing. Since there *are* beings one must ask what does this 'are' mean or what is it 'to be'? What makes a being count *as* a being, instead of *as* nothing? That is, on what basis do we understand beings *as* beings?[2] When so asking we are asking about Being, not about beings. For Heidegger, Being *is* that which determines entities *as* entities and *that* on the basis of which entities are already understood.[3] The difference between Being and entities (being) is the "ontological difference".[4] Capitalisation of the word 'Being' (*Sein*) marks the ontological difference, which is the crucial distinction between Being and beings (entities). Asking what the meaning of Being is concerns that what makes beings intelligible *as* beings. Whatever that factor (Being) might be, it is not itself simply another being among beings. There is, therefore, a difference between the nature of something (its essence) and its Being (its existence).[5]

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1 Heidegger, M., *GA 52 Hölderlins Hymne 'Andenken'*,(1941-42), Ochwadt, C. (Ed.), pp. 210. Quote found in Polt, *Heidegger: An Introduction*, (1999), at p. 1.

2 Polt, *Heidegger: An Introduction*, (1999), at p. 1.

3 *Ibid.* at p. 28.

4 *Ibid.*

5 For example, a dragon can be defined in its essence as a large, fire-breathing reptile, however, its existence is another matter altogether. Heidegger treats both of these issues as issues about being. Whilst being aware of the usual distinction he differentiated between 'what-being' (what something is) and 'that-being' (the fact that something is) – POLT, (1999) at p. 29.

Although being cognisant of Heidegger's ontological difference between Being and being, I *rely* on Heidegger's thinking, although not to investigate nor seek to determine the meaning of Being in the sense that he sought to in his work. I am cognisant of the ontological difference to justify my own reliance on *other* aspects of Heidegger's thinking, such as *Da-sein*, being-in-the-world, being-there, being-together, and so forth. In this work I investigate alternative meanings of Being (existence *as*) human whilst cognisant of the ontological difference. Being is also understood in the traditional ontological sense as representing the essence***s*** (as opposed to a single essence) of the being of humans. I am, therefore, cognisant of both classical or ordinary ontological questions (that is ontical for Heidegger) and Heidegger's ontological difference, as alluded to above. Whilst cognisant of and in the context of the current discussion, 'being' refers to 'essence(s) of the existence of a being' and a way of being (existing *as*) a human whereas 'being' can also refer to an 'entity' or the being of an entity as opposed to the being of humans. As is clear, I limit myself to investigating being of humans; that is, subjectivity or the self.

1.2. BEING (OF A) HUMAN AND *DA-SEIN*

> "Thus, to work out the question of Being adequately, we must make an entity – the inquirer – transparent in his own Being. The very asking of this question is an entity's mode of Being; and as such it gets its essential character from what is inquired about – namely, Being. This entity which each of us is himself [or herself] and which includes inquiring as one of the possibilities of its Being, we shall denote by the term *Da*[-]*sein*."[6]

Da-sein is the designation for human beings insofar as it (*Da-sein*) is individualised as myself or someone else and only insofar as *questioning* is its (*Da-sein's*) essential mode of relating to Being (in Heidegger's sense). *Da-sein*, in everyday German, parallels 'existence', but etymologically it means 'being-there'.[7] Heidegger used *Da-sein* to refer to humans; we are *the* entity that has an understanding of Being (in Heidegger's sense). *Da-sein* is "purely an expression of [our (humans') *way* of] being".[8] "*Da-sein* refers to the specific mode of Being of humans, emphasising its individuality and its role in the disclosure of Being".[9] Also, *Da-sein* does not merely occur factually, as is the case of rocks and trees, since *Da-sein's* being is an issue for it.[10] Phenomenology is central to Heidegger, which is confirmed by his insistence that "our deepest

6 Heidegger, *Being and Time*, (1927), at p. 27.

7 Polt, *Heidegger: An Introduction*, (1999), at p. 29; Moran, *Introduction to Phenomenology*, (2000) – Stambaugh, following Heidegger's instructions for future translations, hyphenates the word. The spelling '*Da-sein*' emphasizes the root meaning.

8 Polt, *Heidegger: An Introduction*, (1999), at p. 30.

9 Moran, *Introduction to Phenomenology*, (2000), at p. 238.

10 *Ibid.*

grasp of ourselves [does not come] … in some kind of self-reflection of a Cartesian kind".[11] Heidegger opined that "concentration on this kind of self-giving can lead existential analysis astray",[12] since, for him true self-reflection, that is reflection upon *Da-sein,* comes through living out a life; that is experience of living *as* a human.[13] Heidegger, in analysing human existence, enquired into the kind of Being of *Da-sein*, which is his fundamental analysis of *Da-sein*.[14] A human Being always lives and inhibits the world with a certain *understanding* which also includes a projection of certain possibilities:

> "*Da-sein* always understands itself in terms of its existence – in terms of a possibility of itself: to be itself or not itself. *Da-sein* has either chosen these possibilities itself or got itself into them, or grown up in them already."[15]

Also, human beings always and already carry a certain understanding of themselves, whether or not this understanding is 'thematised', made conscious, or is explicit.[16] Sciences regard *Da-sein* as a thing, in a similar fashion as they may attempt to distinguish *Da-sein* from all other things (beings).[17] However, *Da-sein* is not a thing (being) at all. Things (beings) are 'whats', "their being is 'presence-at-hand' (*Stambaugh*: 'objective presence'), and their ontological characteristics are 'categories'".[18] *Da-sein*, on the other hand, "is a 'who' whose being is 'existence' and whose ontological characteristics", as dubbed by Heidegger, are "existentialia (*Stambaugh*: 'existentials')".[19]

The *way* of Being that distinguishes humans from other beings is 'being-there'. A book is (also) 'there', in the presence-at-hand sense of having an objective presence as its being; it has a spatial location. However, humans are 'there' in a deeper sense: "we inhabit a world, we are capably engaged in a meaningful *context*" [own emphasis].[20] Humans have a 'there' in a sense no other entity does and the reason is that for humans the world is understandable.[21] Humans are 'being-there' in the sense that *Da-sein* "is in such a way as to be its 'there'".[22] Humans do not merely happen to be in a world, a 'there'. The 'there' of humans is essential to humans and would be nothing at all without it. Conversely, it ('there' or the world) would be nothing without humans.

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11 *Ibid.*
12 *Ibid.*
13 *Ibid.*
14 *Ibid.*
15 *Ibid.* at p. 239.
16 *Ibid.*
17 *Ibid.*
18 *Ibid.*
19 *Ibid.*
20 Polt, *Heidegger: An Introduction*, (1999), at p. 30.
21 *Ibid.*
22 *Ibid.*

> "Our world is the *context* in terms of which we understand ourselves, and *within which we be[-]come who we are*. … 'I am myself plus my circumstance'."[23] [own emphasis]

Humans are the 'there' of or for Being (in Heidegger's sense).[24] Humans are the site that Being requires in order to (literally) take place.[25] Without *Da-sein*, other entities could continue to be, but there would be no one to relate to them *as* entities and, consequently, their being (objective presence) would have no meaning at all.[26]

1.3. BEING-IN-THE-WORLD

Da-sein's fundamental nature is to always be-in-a-world (a 'there') and human being (*Da-sein*) is, therefore, 'being-in-the-world'.[27] 'World' means "a context, an environment, a set of references and assignments within which any *meaning* is located". Being-in-the-world holds that we (humans) are essentially involved in a context – "we have a place in a meaningful whole where we deal with other things and people".[28] The content of the relevant context depends on and varies from person to person, from culture to culture,[29] and, thus, from modernity to modernity. However, it the context of *Da-sein*, in general, it is submitted that our relation to the world is not disinterested, but rather an active engagement.[30] Saying *Da-sein* is being-in-the-world does not spatially contain *Da-sein* in the world, since, in this context, it is an existential[31] -ontological concept.[32] 'World' refers to the "historical and cultural contexts in which *Da-sein* exists or is formed".[33] "This world belongs to *Da-sein's* own structure and is not external to *Da-sein*. *Da-sein*, as being-there, must have a place and being-in-the-world is the basic state or the fundamental existential constitution of *Das-ein*."[34] Heidegger, by using being-in-the-world, indicated the inseparability of human beings from the world.[35] He was, thus, "opposed to the traditional approach to a human being" as an isolated self.[36]

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23 *Ibid.*
24 *Ibid.*
25 *Ibid.*
26 *Ibid.*
27 Moran, *Introduction to Phenomenology*, (2000), at p. 233.
28 Polt, *Heidegger: An Introduction*, (1999), at p. 46.
29 *Ibid.*
30 Polt, *Heidegger: An Introduction*, (1999), at p. 46.
31 Refers to experience as opposed to *a-priory* assumptions or theoretical essence. Also, existential for Heidegger is distinguished from the being of things denoting being as presence-at-hand (objective presence).
32 Bunnin & Yu, *The Blackwell Dictionary of Western Philosophy*, (2004) at p. 79.
33 *Ibid.*
34 *Ibid.*
35 *Ibid.*
36 *Ibid.*

1.4. Existence and Presence

For Heidegger presence is a rich and complex phenomenon, but presence, or at least by any traditional understanding of presence, is not exhaustive of the meaning of being.[37] Ancient and medieval philosophy, in general, professed that to be is "to be an enduringly present substance, or one of the attributes of such a substance".[38] The most real being is an eternal substance; such as, for example, a number[39] or God.[40] "Modern philosophy holds that to be is to be either [(*i*)] an object present in space and time as measured by quantitative natural science, or [(*ii*)] a subject, a mind, that is capable of self-consciousness, or self-presence".[41] Heidegger opined that these traditional approaches fail to describe the being of humans, since humans are not present substances, present objects, or present subjects: humans are beings whose past and future collaborate to let them deal with all the other beings that they encounter around them.[42] being *as* presence is the metaphysics of presence, which is critiqued by Heidegger.

If Being (in Heidegger's sense) is not presence, what is it? Whilst the meaning of being (in Heidegger's sense) itself is not investigated in this thesis as such, it is important to note that the meaning of Being (in Heidegger's sense) evolves (develops) in the course of history. The metaphysics of presence must be called into question, since this tradition *restricts humans to impoverished ways of thinking and acting*.[43] Humans, when identifying being with presence, can become obsessed with enabling beings to present themselves to them perfectly – in a definitive (final) way.[44] As actors within the metaphysics of presence, humans attempt[45] to achieve complete insight into things, which includes understanding and finally defining the self and the other (to the self). Through this all-embracing insight complete control over that which insight has been obtained is gained. This ideal attainment of knowledge is incompatible with the nature of understanding, since for Heidegger understanding is a "finite, historically situated interpretation".[46] The existence of truth is recognised by Heidegger and he does accept that some interpretations are better than others, but no interpretation is final.[47] As Heidegger, I am a

37 Polt, *Heidegger: An Introduction*, (1999), at p. 4, "It makes a difference to me that I am climbing this mountain, in this country, in this year – but to the mountain it makes no difference at all where or when it exists, because it is oblivious to all beings."
38 *Ibid.*
39 Solomon & Higgins, *The Big Questions: A Short Introduction to Philosophy*, (2010), at pp. 117-118.
40 *Ibid.*
41 Polt, *Heidegger: An Introduction*, (1999), at p. 4.
42 *Ibid.*
43 *Ibid.* at p. 5.
44 *Ibid.*
45 Through the auspices of philosophy, science, or technology.
46 Polt, *Heidegger: An Introduction*, (1999), at p. 5.
47 *Ibid.*

relentless enemy of a-historical, absolutist concepts of truth, of which examples are the "essential context" of the Constitutional Court and the grand narrative referred to in Chapter 3.

It is humans' own temporality that makes us sensitive to Being (in Heidegger's sense) whilst temporal neither denotes 'temporary' nor our impermanence, but rather is rooted in the fact that we are historical. In other words, humans are rooted in a past and thrust into a future.[48] We, as humans, inherit a past tradition – that is shared with others – and we, as opposed to I, pursue future possibilities that define us as individuals.[49] When we pursue future possibilities, the world opens up to us, and we understand beings – as opposed to the being of other human beings. The world opens up to us in pursuance of (future) possibilities and it, thus, makes a difference to us that there is something as opposed to nothing. Importantly, our historicity does not cut us off from reality; the contrary is true, our historicity opens us up to the meaning of being (in Heidegger's sense).[50] Ignoring our historicity has been the tendency, since "it can be difficult and disturbing to face our own temporality and to experience the mystery of Being":

> "It is easier to slip back into an everyday state of complacency and routine. Rather than wrestling with who we are and what it means [']to be['], we would prefer to concentrate on manipulating and measuring present beings. In philosophy, this self-deceptive absorption in the present leads to a metaphysics of presence, which only encourages the self-deception."[51]

Western philosophical thinking has been critiqued as a thought process that "invariably and predominantly prioritises the stable presence of the existence (Being) of all things (beings)".[52] This critique holds that priority is given in disregard for the "way existence concerns the primordial and temporal emergence of things from 'origins' or an 'origin' that cannot be described in terms of presence or present existence".[53] For Heidegger "Being 'is' the non-present (which is not the same as absent) origin of all things (beings) that eventually become present".[54] Traditional Western philosophical thinking is, for Heidegger, defined by a philosophical disregard for the "temporal emergence of all things" and the entirety of this thinking turned on the disregard for the "way things are never simply infinitely present[,] but the outcome of a finite event of disclosure".[55] His philosophical endeavour was a destruction of this metaphysics of infinite presence for the sake of "recovering the regard for temporal and finite emergence or

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48 Polt, *Heidegger: An Introduction*, (1999), at p. 79.
49 *Ibid.* at p. 5.
50 *Ibid.* at p. 66.
51 *Ibid.* at p. 5.
52 Derrida adopted Heidegger's critique in this regard – Veitch*, et al.*, *Jurisprudence: Themes and Concepts* (2012), at p. 175.
53 *Ibid.*
54 *Ibid.*
55 *Ibid.*

disclosure of things".[56] The use of 'destruction' (for purposes of recovering the sense for the way things are not simply present and do not simply exist but come to presence and emerge into existence) is crucial in Derrida's thoughts on deconstruction.

1.5. Emergence of Existence As a Textual Event

Derrida stated that the prevailing forms of consciousness and understanding of an era are structured by dominant and fundamental (foundational) texts.[57] These fundamental or foundational texts (for instance religious and philosophical works or political documents like constitutions, international treaties, human rights declarations, classic literary works, etc.) are said to constrain "the variety of present possibilities of human existence and hold them in place".[58] These foundational text maintain the presence (the 'there' or world) in and into which an era of human existence unfolds and proceeds; hence his provocative statement that there is nothing outside text.[59] I submit that the meaning of one's being (existing *as*) a human is determined by fundamental or foundational text before one can exercise any meaningful self-engagement, self-identification, and self-determination and, such ontological meaning is attributed *before* one even exercise any sense of conscious engagement with oneself. In other words, even before one thinks one already is and the meaning of such existence is situated in a textual *event*. In an African context such consequence can be militated, since *Ubuntu* situates dignity within being (existing *as*) a human that is *ab initio* in a relationship with and whose being is always inextricably linked with that of the other. Human dignity is conferred worth, although indirectly inherent. Thus, human worth is not contingent on text, but rather recognition of and respect for one's human dignity by the community, which recognition is enjoined based on the 'status' of existing *as* a human being.

2. **Section 9(1): Equality as Rationality**

Ntuli is the Constitutional Court's first judgment on 'equality before the law' and held that the guarantee of equality before the law "entitles everybody, at the very least, to equal treatment by our courts of law".[60] Following hereon the Court, in *Prinsloo*, confirmed this entitlement and added that the right to equality before the law makes it clear that "no-one is above or beneath the law and that all persons are subject to the *law impartially applied and administered*" [own emphasis].[61] In *Prinsloo* the Court specifically distinguished "[t]his right, or this

56 *Ibid.*
57 *Ibid.*
58 *Ibid.*
59 *Ibid.* at pp. 175-176.
60 *Ntuli* 1996 (CC) at para. [18], this case was decided on s. 8(1) of the Interim Constitution.
61 *Prinsloo* 1997 (CC) at para. [22].

aspect of the right guaranteed"[62] (equality before the law) from 'equal protection of the law' and held that mere differentiation – in the context of equal protection of the law – is subject to a rationality requirement.[63] However, the Court, in both *Ntuli*[64] and *Prinsloo* neglected to decide whether the right to equality before the law is also subject to the rationality requirement. In *Walker* Langa D.P., writing for the majority, opined that "[t]he rationality criterion adopted in *Prinsloo* should … be equally applicable whether we are dealing with 'equality before the law' or 'equal protection of the law'".[65] I am in accord with this position. Accordingly, whether one is dealing with equality before the law or equal protection and benefit of the law, the rationality criterion will be applicable. Section 9(1) relates to the first enquiry as set out above when the *Harksen*-test was discussed. I now turn to this enquiry.

As stated above, differentiation lies at the heart of section 9[66] and a law or conduct must differentiate between people or categories of people to infringe section 9.[67] The enquiry under section 9(1) necessarily encompasses both direct and indirect differentiation based on the reference to "direct and indirect discrimination" in section 9(3).[68] Section 9 distinguishes between two forms of differentiation: mere differentiation that does not involve discrimination and differentiation involving discrimination.[69] Section 9(1) relates to this notion of mere differentiation. The Courts would be called upon to review the justifiability or fairness of nearly the entire legislative programme and almost all executive conduct if every differentiation made amounted to either unequal treatment, that need be justified in terms of section 36, or discrimination, that must be shown to be fair.[70] One can, therefore, conclude that differentiation *per se* does not amount to unequal treatment in the "constitutional sense".[71] The question that need be answered is then, what is (*i*) unequal (*ii*) treatment (*iii*) in the constitutional sense?

As to (*i*), unequal relates to the notion of equality and not mere sameness in treatment. It envisions the idea of being treated *as equals* and not merely *equally* (the same).[72] The right to equality includes the right to be treated as equals, which does not necessarily include the right to equal treatment. A modern State, if it were to be governed effectively, and to harmonise the

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62 *Ibid.*

63 That is the first enquiry of the approach as set out above.

64 *Ntuli* was decided before *Prinsloo* and it was only in the latter case where the CC developed the rationality criterion.

65 *Walker* 1998 (CC) at para. [27].

66 *Prinsloo* 1997 (CC) at para. [23], the majority of the Court held that "[t]he idea of differentiation … lie at the heart of equality jurisprudence in general and of the s. 8 [now s. 9] right or rights in particular".

67 *Harksen* 1998 (CC) at para. [54].

68 See *Sodomy* 1999 (CC) at para. [63].

69 *Prinsloo* 1997 (CC) at para. [23].

70 *Ibid.*

71 *Ntuli* 1996 (CC) at para. [19].

72 *Prinsloo* 1997 (CC) at para. [32]; *Walker* 1998 (CC) at para. [128].

interests of all its inhabitants for the common good, must extensively regulate the lives of its inhabitants.[73] Such extensive regulation is impossible without some differentiation between people and classification of people, which treats people differently and which impacts people differently. To reiterate, mere differentiation *per se*, cannot constitute unequal treatment or unfair discrimination in the constitutional sense.[74] The guarantee of equality does not mean that the law must treat everyone equally (the same) and laws rarely provide for the same treatment for everyone.[75]

As to (*ii*), *treatment* relates to the wording of section 9(1) by denoting people or categories of people not being treated *as* equals before the law or people or categories of people being treated in such a manner that such people or categories of people are not afforded equal protection or benefit of the law.

As to (*iii*), unequal treatment in a constitutional sense means that the constitutional State, in (merely) differentiating between people or categories of people, "is expected to act in a rational manner".[76] Thus, the State cannot "manifest naked preferences that *serve no legitimate governmental purpose* for that would be inconsistent with the *rule of law* and the fundamental premises of the constitutional State" [own emphasis and footnotes omitted].[77] I pause to elaborate on the value rule of law and our focus within the rule of law is on the principle legality,[78] but in specific, the requirement of rationality. Any exercise of public power, whether that is in the form of conduct (executive) or law (legislative), must be rational.[79] Flowing from the rule of law, rationality entails that the exercise of public power should not be arbitrary.[80]

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73 *Prinsloo* 1997 (CC) at para. [24].

74 See *Prinsloo* 1997 (CC) at para. [52]:

> "The law differentiates between categories of people on innumerable scores which sound unobjectionable and may often be unavoidable. A few examples[:] … [the] levels of income at which the rate of the tax assessed on that is fixed, … ages when or the length of … employment before pensions become payable … and the criteria for … entitlement to the benefits of social welfare."

For other examples see Currie & De Waal, *Equality*, (2013), at p. 218; Albertyn & Goldblatt, *Chapter 35: Equality*, (2014) Ch. 35, p. 17.

75 See *Van der Merwe v Road Accident Fund* 2006 (4) SA 230 (CC) at para. [149] where Moseneke, J., as he then was, accepted that "… laws rarely prescribe the same treatment for everyone".

76 *Prinsloo* 1997 (CC) at para. [25].

77 *Ibid.*

78 See Hoexter *The Rule of Law and the Principle of Legality in South African Administrative Law Today* in Carnelley & Hoctor (Eds.) *Law, Order and Liberty: Essays in Honour of Tony Mathews* (2011) 55 where the author gives an exposition of the other components of legality which are lawfulness, procedural fairness and, possibly, the giving of reasons.

79 *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at para. [85].

80 *Ibid.* This has now been debunked in *Restrucuturing & Insolvency* 2018 (CC) at para. [55] where Jafta, J. held that:

> "While there may be an overlap between arbitrariness and rationality these are separate concepts against which the exercise of public power is tested. Arbitrariness is established by the absence of reasons or reasons which do not justify the action taken. Rationality does not speak to justification of the action but to a different issue. Rationality seeks to determine the link between the purpose

Decisions taken by public officials, must, as a minimum requirement, be rationally related to the purpose for which the power was given.[81] If the decision taken is not so rationally connected it will carry the label of irrationality and be inconsistent with this minimum requirement.[82] It has been held, although *obiter*, that the rule of law is a fundamental assumed truth or fact of our constitutional structure.[83] It is a foundational value[84] and "… permeates the entire Constitution".[85] Madala, J. went on to hold that the rule of law has as some of its basic tenets, which are the absence of arbitrary power, equality before the law, and the legal protection of certain basic human rights.[86] The rule of law and the achievement of equality are closely linked based on the direct connection between section 9(1) and the rule of law. The rule of law provides for the *minimum* protection with regard to differentiation. The rule of law it regulates *mere* differentiation by prohibiting irrational or arbitrary (mere) differentiation. This *part* or *aspect* of the rule of law makes out a specific *aspect* of equality, which aspect is found in section 9(1). The purpose(s) of the equality clause is (*i*) prohibiting patterns of disadvantage and discrimination and (*ii*) remedying its results. This dual-purpose is in addition to equality as rationality and flows forth from the achievement of equality. The remainder of equality jurisprudence consequently flows from the achievement of equality, as a foundational value, which is, in turn influenced by human dignity. The achievement of equality and the purpose of the equality clause stands in addition to that which is provided for by the rule of law. In this sense, the value *achievement* of equality transcends and expands from the rule of law.

The *purpose* of this *aspect* of equality is ensuring that the government, when exercising public power or performing a public function, functions in a rational manner.[87] This purpose of this aspect of equality (*i*) promotes governmental that relates to a justificatory vision of the public good and (*ii*) serves as an enhancement of logical consistency and integrity of legislation.[88] In the words of Murneinik, the constitutional order constitutes "a bridge away from a culture of authority … to a culture of justification".[89] Accordingly, when the law differentiates between people or categories of people it will fall foul of the constitutional standard of equality if it is

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and the means chosen to achieve such purpose. It is a standard lower than arbitrariness. All that is required for rationality to be satisfied is the connection between the means and the purpose. Put differently, the means chosen to achieve a particular purpose must reasonably be capable of accomplishing that purpose. They need not be the best means or the only means through which the purpose may be attained."

81 *Ibid.*

82 *Ibid.*

83 Minority judgment of Madala, J. in *Van der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC) at para. [65].

84 See s. 1(*a*) of the Constitution.

85 *Ibid.*

86 *Ibid.*

87 *Ibid.*

88 *Ibid.*

89 Mureinik, (1994, *A Bridge to Where-Introducing the Interim Bill of Rights*), at p. 32.

shown that the differentiation does not have both (*i*) a legitimate governmental purpose *and* (*ii*) a rational relationship to the purpose advanced to validate it.[90] If the pre-condition of a rationality is not complied with the impugned law infringes, *ab initio*, the right to equal protection and benefit of the law under section 9(1).[91] The rationality criterion applies equally whether we are dealing with 'equal protection of the law' or 'equality before the law'.[92] In conclusion, section 9(1) is not infringed because benefits are conferred or burdens are imposed *unevenly*, but because such benefits are conferred or such burdens are imposed without a *rational* basis.[93]

Albertyn & Goldblatt is of the opinion that the Constitutional Court accorded section 9(1) a meaning that stands separated from the rest of the equality clause.[94] I disagree. Section 9(1) deals with mere differentiation and the manner in which it regulates mere differentiation is by prohibiting irrational or arbitrary (mere) differentiation. The mischief[95] is unequal treatment falling short of discrimination (which must be shown to be *fair*) that must *rational* and, if it is not, must be *reasonable* and justifiable in terms of section 36. The authors did not heed the warning of Moseneke, J., as he then was, in *Van Heerden* where he said that "[a] comprehensive understanding of the Constitution's conception of equality requires a harmonious reading of the provisions of s[ection] 9".[96] The interrelated connection between the rule of law and the achievement of equality forms part of such comprehensive understanding. As such, one cannot deny that the meaning afforded to section 9(1) provides for a harmonious reading of the *entire* section 9 and, in addition, it is reconcilable with the structure of the Constitution, specifically the Bill of Rights.

LEGITIMATE GOVERNMENTAL PURPOSE

To ascertain the legitimacy of the purpose of the specific rule of law one must enquire as to what are the *reasons* given for the specific purpose of the rule of law. The *reasons* must render the purpose a *legitimate governmental purpose* and it is this purpose that would be proffered to validate the differentiation.[97]

In the *Van der Merwe* the Constitutional Court had to decide whether section 18(*b*) of the Matrimonial Property Act, No. 88 of 1984 infringed section 9(1). The question was whether the distinction between patrimonial and non-patrimonial damages and between marriages in and out

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90 Van der Merwe 2006 (CC) at para. [49].
91 *Ibid.*
92 *Walker* 1998 (CC) at para. [27].
93 *Van der Merwe* 2006 (CC) at para. [49].
94 Albertyn & Goldblatt, *Chapter 35: Equality*, (2014) at Ch. 35, p. 17.
95 See Pt. I, Ch. 2 at n. 7.
96 *Van Heerden* 2004 (CC) at para. [28].
97 *Prinsloo* 1997 (CC) at para. [26]; *Walker* 1998 (CC) at para. [27]; see Albertyn & Goldblatt, *Chapter 35: Equality*, (2014) at Ch. 35, p. 20.

of community of property is rationally related to a legitimate governmental purpose.[98] The facts that brought the case before the Constitutional Court was that of a man who drove over his wife and thereafter reversed over her. The wife instituted a claim against the Road Accident Fund ("**Fund**"), but the Fund raised a special plea whereby it denied any liability to compensate her for any patrimonial damages. The Fund based its special plea[99] on section 18*(a)* and *(b)*, read with section 19*(a)* of the Act, which prohibited claims for patrimonial damages between spouses married in community of property.[100]

The principle relating to a legitimate governmental purpose is that a Court must identify and examine "the specific government[al] … [purpose] sought to be achieved by the impugned rule of law or provision".[101] A Court cannot merely identify a generic governmental purpose relating to the impugned provision, but must identify and examine the purpose of the specific provision. The Court had to determine what legitimate governmental purpose is advanced by the differentiation in section 18(*b*) between claims for patrimonial and non-patrimonial damages as well as between spouses married in community of property and those married out of community of property. The purpose of section 18(*b*) placed before the Court was the avoidance of futility of spousal claims.[102]

Moseneke, D.C.J. held that the purpose proffered to validate section 18(*b*) was a "relic of the common law … which is simply not useful" and the distinction drawn by section 18(*b*) exhibits a theoretical obsession with the conceptual cohesion of a joint estate.[103] There is no *rational* reason why the Act should not grant a right of recourse for patrimonial damages arising from spousal violence[104] because such patrimonial damages would not accrue to the joint estate but would become the separate property of the battered spouse and, as such, the guilty spouse will not benefit from his or her own wrongdoing.[105] Because section 18(*b*) lacked a legitimate

98 *Van der Merwe* 2006 (CC) at para. [32].

99 It, in effect, pleaded that the summons of the wife was 'bad in law'.

100 *Ibid.* para. [14].

101 *Ibid.* para. [33].

102 In other words, seeing that when people are married in community of property they will both be possessed of one joint estate. But for property falling in category of "separate property" (See ss. 1, 17(1)(*a*) and (*b*), 19 and 20 of the Matrimonial Property Act, No. 88 of 1984) of one of the spouses, which is the exception to the general rule, their rights and liabilities will fall within this joint estate. Each spouse has a half but indivisible share in the estate that is inclusive of both rights and liabilities. Thus, the effect is that if a spouse would claim patrimonial damages from the other, the wrongdoer spouse would benefit from his or her own wrongdoing because once the damages are awarded to the claiming spouse such damages will fall into the joint estate, or that is how the argument goes.

103 *Van der Merwe* 2006 (CC) at para. [51].

104 *Ibid.* at para. [54].

105 *Ibid.*

governmental purpose to validate its differentiation the subsection was found to infringe the right to equal protection of the law under section 9(1).[106]

I must attend to the claim that 'legitimacy', contained in 'legitimate governmental purpose', "is equated with a weak form of rationality [in that]the government does not have to justify its purpose *against substantive constitutional values* or any conception of '*the general good*'" [own emphasis].[107] I vehemently disagree with this proposition. The authors are highly selective in their choice of sources for justification of their claim with the consequence of portraying a limited an erroneous understanding of what a legitimate governmental purpose entail. I have already indicated that section 9(1) forms a specific aspect or part of the Court's equality jurisprudence. The purpose of this aspect or part of equality is then to ensure that the government is enjoined to function in a rational manner. In *Prinsloo* it was held that the rationality requirement promotes the "need for governmental action to relate to a *defensible vision of the public good*" [own emphasis].[108] Furthermore, where a legislative scheme confers benefits or imposes burdens unequally *without* any rational basis it will constitute an "arbitrary differentiation which neither *promotes public good* nor advances a *legitimate public object*" [own emphasis].[109]

To illustrate where my difference from the authors is situated I will use *Walker*[110] as an illustrative example. The governmental purpose proffered to validate the differentiation was "dealing with the period of transition by phasing in the required changes in order to *achieve* equality between the residents of the different areas" [own emphasis].[111] The governmental purpose is, when considering the question in its broadest possible sense, the *achievement* of equality. *In casu* black residents were, in the interim, required to pay less than white residents for water and electricity because of previous legalised discrimination and disadvantage. The consequence of such discrimination and disadvantage was that black residents did not have meters installed at their property and, as such, a consumption-based tariff to be levied for consumption by black residents was objectively and physically impossible. Furthermore, in line with the constitutional value achievement of equality, it would have been irrational to levy charges on any basis other than a flat rate. To make my point rather clear, for the residents to be treated equally in the future, white residents had to pay *more* than black residents *in the interim*, so as to enable Pretoria City Council ("**Council**") to provide for uninterrupted service delivery *for all* and once the meters has been installed charges can be levied on a consumption-based system,

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106 *Ibid.* at para. [58].
107 Albertyn & Goldblatt, *Chapter 35: Equality*, (2014) at Ch. 35, p. 20.
108 *Prinsloo* 1997 (CC) at para. [25].
109 Van der Merwe 2006 (CC) at para. [49].
110 See below under the heading "The right to equality before the law" for a discussion of the case.
111 *Walker* 1998 (CC) at para. [27].

irrespective of race.[112] Thus, even if the case is not one where it is argued that the measure is a restitutionary measure[113] the governmental object of the differentiation could be rendered legitimate by the reason that the object of the differentiation is, broadly speaking, the achievement of equality. I am arguing that it is rational to have regard to the social and economic circumstances of people *in tandem* with the history of formal legalised discrimination leading to patterns of disadvantage and, as such, the social and economic circumstances. However, *prima facie,* the argument of the authors seems to be buttressed by the following passage of Sachs, J. in *Walker*:

> "… [P]atterns of advantage and disadvantage … lie at the heart of unfair discrimination as prohibited by s[ection] 8(2) [now section 9(3) & (4)], … the element of impartiality … underlies the rule of law … [and is] protected by s[ection] 8(1) [now section 9(1)]."

I agree that patterns of discrimination and disadvantage are at the centre of the right against unfair discrimination.[114] In the same vein I submit that being partial *because* of patterns of discrimination and disadvantage does not only form part of the constitutional commitment to the achievement of equality. Being partial because of patterns of discrimination and disadvantage might be rational. My argument is then quite simple, the value achievement of equality does influence the rationality criterion found in section 9(1) by determining the content or meaning of legitimacy contained in the requirement 'a legitimate governmental purpose'.

The fallacy within any claim that the interpretation of section 9(1) is devoid of any substantive content is indicated by connecting section 9(1) with section 9(2) as it is neither desirable nor feasible to divide the various subsections into watertight compartments.[115] In *Van Heerden* Moseneke, J., as he was then, formulated three requirements of a restitutionary measure in terms of section 9(2): the measure must (*i*) *target* and (*ii*) be *designed* to protect or advance persons or categories of persons who have been disadvantaged by unfair discrimination, and (*iii*) *promote* the achievement of equality.[116] The first two requirements are a transformative exposition of rationality in that the measure must be designed (rationally connected) to (the purpose of) protect(ing) or advance(ing) previously disadvantaged people.[117] Designed means that the measure should not be "arbitrary, capricious, or display naked preference".[118] Therefore, where a

112 In other words, as held in *Bel Porto* 2002 (CC) at para. [7], in striving towards the achievement of equality "what has to be done in the process of transformation will at times inevitably weigh more heavily on some members of the community than others".
113 As contemplated within s. 9(2).
114 Because of the fact that differentiation lies at the heart of equality – see *Prinsloo* 1997 (CC) at para. [23].
115 *Ibid.* at para. [22].
116 *Van Heerden* 2004 (CC) at para. [37].
117 *Barnard* 2014 (CC) at para. [143].
118 *Van Heerden* 2004 (CC) at para. [41].

policy or practice is haphazard, random, and overhasty it cannot be *designed* to achieve equality and a rational connection between the measure and its aim would be lacking.[119] In *Walker* the decision to levy charges differently was thoroughly thought through with a specific purpose in mind whereas the selective debt enforcement by officials of the Council was everything but a thoroughly thought through decision with a specific purpose in mind. Firstly, the policy of selective debt enforcement was not one initiated by the Council, but rather one adopted and implemented by its officials without its authority and in conflict with its express resolution to take action against all defaulters.[120] Secondly, the policy was adopted without public notice, in secrecy and "after untrue and misleading statements had been made by such officials with regard to that policy".[121] It is not merely the fact that the officials acted without the authority that rendered their actions constitutionally suspect but because of the fact that the officials did not act "in accordance with a *rational and coherent plan* adopted openly by the council or *its members*" [own emphasis].[122] The members' conduct was haphazard, random, and overhasty, but, in addition, they acted capriciously in applying their 'policy' in secrecy and after untrue and misleading statements had been made by such officials with regard to that 'policy'. Their conduct is the epitome of racist conduct. As such, we cannot have members of the Executive rant around on their own so-called benevolent crusades so as to bring about substantive equality under the guise of an apparent object coinciding with the achievement of equality. Once the Executive differentiates it *must* justify its decision in the light of a legitimate governmental purpose that is compliant with the substantive value of achievement of equality. The value achievement of equality is composed of two sides of the same sword. The government can use the value to legitimise their governmental purpose, but the value can also be used to de-legitimise an apparent legitimate governmental purpose. In *Walker* the Court did recognise that selective debt enforcement along racial lines can be justifiable, but in the same vein the Court denied to entertain the use of the value achievement of equality to clothe irrational differentiation.[123]

RATIONAL CONNECTION

This requirement that there must be a rational connection between differentiation and legitimate governmental purpose sought to validate it is a factual question which must be objectively determined. The question is then whether the means, and in the case of section 9(1) the means is differentiation, is *rationally* connected to the legitimate governmental purpose sought

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119 *Stoman v Minister of Safety and Security* 2002 (3) SA 468 (T) at p. 480, paras. A-C
120 *Walker* 1998 (CC) at para. [76].
121 *Ibid.*
122 *Idem* para. [79].
123 I take note of the fact that the Court found that the selective debt enforcement amounted to unfair discrimination, but as I have already said, I am using the facts of the case as a basis for my argument.

to validate such differentiation. The purpose of this rationality review is not to determine whether there is a more effective or less onerous way in which to give effect to the legitimate governmental purpose. The purpose is only to establish whether the differentiating in question is rational. The CC could not have been any clearer:

> "a person seeking to impugn the constitutionality of a legislative classification cannot simply rely on the fact that the State objective could have been achieved in a better way. As long as there is a rational relationship between the method and object it is irrelevant that the object could have been achieved in a different way."[124]

Thus, one does not enquire as to whether the government could have achieved its purpose more effectively in a different manner or whether the chosen manner of regulation (in other words differentiation) could have been more closely connected to its purpose.[125] One may only enquire whether the reason for the differentiation is rationally connected to the legitimate governmental purpose.

2.1. THE RIGHT TO EQUALITY BEFORE THE LAW

'Equality before the law' relates to the *administration and application* of the law by the Executive and Judicial branches of government. As discussed hereunder, *Ntuli* shows that the law itself can provide for unequal treatment by our Courts. Circumstances can exist where if a Court were to apply the letter of the law it would result in unequal treatment in the constitutional sense. Even though Courts are responsible for the administration of justice, the judiciary is not above the law and must administer and *apply the* law *impartially*. Where the law itself provides for unequal treatment by Courts, such Courts are enjoined by section 9(1), to declare such law unconstitutional. *Walker* shows that the executive is responsible for *administration* (or then enforcement) of the law and the executive in administering the law must act in a rational manner.

In *Ntuli* the Court had to decide whether section 309(1)*(a)* read with section 305 of the Criminal Procedure Act, No. 51 of 1977[126] infringed section 25(3)*(h)*[127] and section 8(1) of the Interim Constitution.[128] The CPA required persons convicted *and* imprisoned who noted an appeal *without* legal representation to first obtain a certificate from a judge certifying that there is a reasonable prospect of success. The relevant question was whether the differentiation between persons convicted and imprisoned without legal representation, on the one hand, and persons

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124 *Prinsloo* 1997 (CC) at para. [36].

125 *East Zulu Motors (Proprietary) Limited v Empangeni/Ngwelezane Transitional Local Council* 1998 (2) SA 61 at para. [24].

126 The Criminal Procedure Act, No. 51 of 1977 (hereinafter referred to as the "CPA").

127 The subsection reads as follow: "[e]very accused person shall have the right to a fair trial, which shall include the right … to have recourse by way of appeal or review [t]o a higher court than the court of first instance".

128 *Ntuli* 1996 (CC) at paras. [6] & [17], which is the first case decided by the CC on 'equality before the law'.

who are convicted and imprisoned but represented or persons convicted but not imprisoned (whether represented or not), on the other, amounted to an infringement of the former group's right to equality before the law? Does this differentiation between the aforementioned two groups amount to unequal treatment in "the constitutional sense"?[129] The Constitutional Court limited itself to the 'equality before the law' guarantee or aspect of the constitutional right to equality.[130] Without establishing the exact scope of 'equality before the law' Didcott, J. merely held that the "guarantee surely entitles everybody, at the very least, to equal treatment by our courts of law"[131] and the equal treatment by Courts must be administered "within the area controlled by section 25(3)(*h*)".[132] Didcott, J. did *not* apply the rationality criterion (this criterion was only developed later in *Prinsloo*) and held that even though the CPA does differentiate, "differentiation does not amount *per se* to unequal treatment in the constitutional sense".[133] Without applying such criterion, it was held that the differential treatment constituted unequal treatment in the constitutional sense and infringed section 8(1).[134]

That which follows is my own interpretation of *how* the Court (ought to have) come to its conclusion. The connection between the differentiation and the fact that the process provided for one of the groups is insufficient to give effect to and in fact amounted to an infringement of the right to a fair trial is important. The CPA provides for differential treatment by the Courts of these two groups and in this context such differential treatment amounts to *unequal* treatment. It is *unequal* because the one group is *burdened* with an additional requirement, whereas the other is *not* burdened with the requirement of obtaining the relevant certificate. It is unequal in a *constitutional sense* because the differential treatment of, and resultant process provided for, those persons who are convicted imprisoned and unrepresented amounted to an infringement of their right to a fair trial. As regard the right to a fair trial the question was whether a prisoner seeking a certificate exercise his or her constitutional right to "have recourse by way of appeal or review"[135] and the Court held that the application for such certificate does not amount to an exercise of the right to have recourse by way of appeal and, as such, constituted an infringement of the right to

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129 *Ibid.* at para. [19].

130 Didcott, J., writing for the Court, found it unnecessary to look at the right against unfair discrimination "irrespective of its rating either as an independent provision or as a corollary to" the right to equality before the law - *ibid.* at para. [18].

131 *Ibid.*

132 *Ibid.*

133 *Ibid.* at para. [19].

134 *Ibid.* at para. [20]: in actual fact, "Counsel agreed that, in its circumstances and consequences, the particular differentiation … did [infringe s. 8(1)]".

135 Does this process of obtaining a certificate give effect to that prisoner's right to such "recourse by way of appeal or review"? The Court held that the phrase "recourse by way of appeal or review" implies, at minimum, the opportunity, of any convicted person, for an adequate reappraisal of his or her case and an informed decision on it – *ibid.* para. [17].

a fair trial.[136] The process in fact provided for the inherent possibility of some worthy appeals being stifled.[137] In other words, where differential treatment, which amounts to unequal treatment, infringes *an other* constitutional right, it is highly likely that such treatment will constitute unequal treatment in a constitutional sense.[138] One can also apply the rationality criterion and ask is there a rational basis for burdening "people who labour under the greatest disadvantage in managing their appeals" with an additional requirement? At the time of writing I could not think of any justifiable governmental purpose for such an additional burden.

In *Rens* the Constitutional Court had to decide whether section 316 of the CPA infringed section 8.[139] The question was whether section 309 of the CPA infringed the right to equality before the law in that it affords an accused convicted in a lower court a right of appeal to the High Court, but does not afford such right to an accused person convicted in a High Court.[140] The latter is a legitimate governmental purpose and it was held that, one, the purpose itself is "rational" and, two, the "fact that appeals from the [High Court are] treated differently from appeals from the magistrates' courts is due to differences in the standing and functioning of the courts".[141]

In *Walker* the Constitutional Court was confronted with differentiation between black and white, previously disadvantaged and previously advantaged. In this case electricity and water charges in the area of the Council were levied on a differential basis. With the advent of our constitutional democracy two black townships (Mamelodi and Atteridgeville) were amalgamated with a formerly white municipality ("**old Pretoria**") to form the Council.[142] The Respondent was a resident of Constantia Park, a suburb in old Pretoria. The Court assumed – took judicial notice of the fact – that it is "… the population of Mamelodi and Atteridgeville is black and that of old

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136 *Ibid.*

137 No petition ('application' for the certificate) is prepared by counsel, but rather by the convicted person himself or herself. The prisoner is the author of the petition either alone or with the help of some imprisoned sea lawyer. *Ibid.* at para. [15]:

> "The typical product of such efforts, a product familiar to all with experience of it and hardly surprising in view of its source, is a rambling and incoherent commentary on the trial which misses points that matter, takes ones that do not, and scarcely enlightens the Judge about any".

138 See Fagan, A., *Dignity and Unfair Discrimination: A Value Misplaced and a Right Misunderstood,* Vol. 14, No. 1, (1998), South African Journal on Human Rights, pp. 220-247, at p. 226 where he opines that 'unfair', in the context of unfair discrimination, ought to entail an infringement of independent rights or egalitarian principles.

139 *S v Rens* 1996 (1) SA 1218 (CC).

140 The argument continued down the line that the leave to appeal procedure was such a disconcerting departure from that which is acceptable "elsewhere in our law" – the *right* to appeal from a court *a quo* – that this departure demanded an explanation to justify its survival – *ibid* at para. [28]. Firstly, the South African criminal procedure never recognised an automatic right to appeal *at all the levels* of the court structure. There is a rational governmental purpose for not affording this *automatic* right, which is to protect the appeal Court against the burden of having to deal with appeals which do not comply with the requirement "reasonable prospect of success" – *ibid.* at para. [7].

141 *Ibid.* para. [28].

142 *Walker* 1998 (CC) at para. [4].

Pretoria overwhelmingly white".[143] The residents of old Pretoria were levied on a consumption-based system and the consumption was measured by means of meters installed on each property.[144] The residents of Mamelodi and Atteridgeville – absent of meters – were levied on a uniform rate for every household.[145] The effect of these differing systems was that white residents had to pay more than black residents. The Court had to decide, *inter alia*, whether the differential treatment as to the levying of electricity and water charges infringed section 8(1) of the Interim Constitution. It is my interpretation of the case that Langa, D.P., writing for the majority, approached the facts *in casu* as falling within the guarantee 'equality before the law'.[146] Langa, D.P. referred to both *Ntuli* and *Prinsloo* as authority for holding that equality before the law is concerned with "entitling everybody, at the very least, to equal treatment by our courts of law" and, in addition, "no-one is above or beneath the law and that all persons are subject to law *impartially* applied and administered" [own emphasis].[147] The reasoning of my interpretation follows herewith. The law requires that, in general,[148] all the residents of the Council must pay for water and electricity. If the law states that every resident of the Council, but for black residents, must pay for water and electricity, it is substantially similar to the law requiring black residents to pay less than white residents. If the law does not require black residents to pay at all an impression is created that black persons are 'above' the law and the same perception is created when the law requires black residents to pay less than white residents. *In casu*, however, both black and white residents were required, by law, to pay for water and electricity. In other words, the law equally obliged both black and white residents to pay for water and electricity. If this was not the case, the law would have accorded benefits unequally. However, as far as I can discern from the judgment, the law itself was silent as to the *quantum* of the liability to pay for water and electricity. Accordingly, the Council had to decide upon the *quantum* of the liability, in other words, the tariff or rate at which water and electricity is to be levied. In its decision the Council chose, in *administering* the law as such, "as a temporary measure, not to apply the consumption-based tariff in Mamelodi and Atteridgeville but to operate on the basis of a flat rate".[149] Thus, this case relates to the *application and administration* of the law by the Executive branch of government and it was held that in its decision the Council:

> "treated the Respondent[,] together with the other residents of old Pretoria[,] in a manner which was different to the treatment accorded to the residents of Mamelodi and Atteridgeville by

143 *Ibid.*
144 *Ibid.*
145 *Ibid.*
146 See *ibid.* at para. [27].
147 *Ibid.*
148 I am not aware of any exclusions, but I would rather not make an absolute statement without qualification.
149 *Ibid.* at para. [21].

> operating a flat rate in Mamelodi and Atteridgeville while a consumption-based tariff, which was higher, was used in old Pretoria."[150]

The question was, thus, whether there is a rational basis for the differentiation between white and black residents falling in the different geographical locations respectively? Sachs, J., in his minority judgment, held that a possible violation of the element of *impartiality* that underlies the rule of law – as protected by section 8(1) – is the relevant subject matter under consideration.[151] In deciding whether section 8(1) has been infringed (*in casu*, equality before the law) Langa, D.P. held that: "The rationality criterion adopted in *Prinsloo* should … be equally applicable whether we are dealing with 'equality before the law' or 'equal protection of the law'."[152] He concluded[153] that the differentiation was rationally connected to a legitimate governmental propose. The legitimate purpose was that of "dealing with the period of transition by phasing in the required changes in order to achieve equality between the residents of the different areas".[154] The reason why *changes* had to be phased in was because of the disadvantage experienced by the black area premised on apartheid and its lingering consequences, which consequences included a lack of meters. The policy was to initially charge fixed or uniform rates against black because only after meters had been installed could consumption based levying follow. Accordingly, not only were the measures temporary, they were necessitated, because of previous discrimination and disadvantage, so as to provide continuity in the service delivery of the Council – whilst working towards equality in terms of facilities and resources, during a period of transition.[155]

2.2. THE RIGHT TO EQUAL PROTECTION AND BENEFIT OF THE LAW

What remains to be discussed is equal protection and benefit of the law. One defining characteristic with the cases dealing with equal protection and benefit of the law is that an Act of parliament or the law itself differentiated between people or categories of people resulting in benefits being afforded to or burdens imposed on some but not to or on others, or some protected or provided with greater protection than others. The emphasis is on the law differentiating rather than the conduct of the executive. *Van der Merwe*, discussed above, is an

150 *Walker* 1998 (CC) at para. [23].

151 *Ibid.* at para. [137].

152 *Ibid.* at para. [27].

153 Before coming to his conclusion, he quoted the following passage from *Prinsloo* 1997 (CC) at para. [25]:

> "In regard to mere differentiation the constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest "naked preferences" that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner."

154 *Walker* 1998 (CC) at para. [27].

155 *Ibid.*

example of a case in which the Constitutional Court found an Act of Parliament no providing for equal protection of the law.

3. SECTIONS 9(3)-(5): EQUALITY AS FAIRNESS

The last sub-element of equality addressed on this chapter is the right against unfair discrimination contained in section 9(3), section 9(4), and section 9(5). It is important to understanding *where* within the Court's equality jurisprudence this aspect of equality fits into. One is concerned with (*i*) unfair (*ii*) discrimination and not mere differentiation or only discrimination. Both elements must be determined objectively and in the light of the facts of each particular case.[156] Discrimination is differentiated from "mere differentiation"[157] by virtue of the fact that discrimination[158] has acquired a pejorative meaning within South Africa in that for differentiation to constitute discrimination the ground(s) upon which persons or categories of persons are differentiated from each other must have the *potential* to impair human dignity.[159] The Constitution differentiates, again, no pun intended, between listed grounds and unlisted grounds

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156 *Walker* 1998 (CC) at para. [43]. See also *ibid.* at para. 113.

157 See *Prinsloo* 1997 (CC) at para. [23] where the majority held that "[t]he idea of differentiation … lie[s] at the heart of equality jurisprudence in general and of the s. 8 [now s. 9] right or rights in particular…".

158 S. 1 of The Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 200 (hereinafter referred to as "PEPUDA") defines "discrimination" as:

> "any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly-
> (*a*) imposes burdens, obligations or disadvantage on; or
> (*b*) withholds benefits, opportunities or advantages from,
> any person on one or more of the prohibited grounds[.]"

S. 1 of PEPUDA defines "prohibited grounds" as:

> "(*a*) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and HIV/AIDS status; or
> (*b*) any other ground where discrimination based on that other ground –
> (i) causes or perpetuates systemic disadvantage;
> (ii) undermines human dignity; or
> (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a)[.]"

s. 6(1) of the EEA, in turn, provides that:

> "No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground."

159 In *Prinsloo* 1997 (CC) at para. [31] the CC held as follows:

> "The proscribed activity is not stated to be 'unfair *differentiation*' but is stated to be 'unfair *discrimination*'. 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 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*. Although one thinks in the first instance of discrimination on the grounds of race and ethnic origin one should never lose sight in any historical evaluation of other forms of discrimination such as that which has taken place on the grounds of sex and gender. In our view, unfair discrimination, when used in this second form in s[.] 8(2), in the context of s[.] 8 as a whole, principally means *treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity*." [original and own emphasis and footnotes omitted]

in that section 9(5) provides that discrimination on "one or more of the grounds listed in … [section 9](3) is unfair unless it is established that the discrimination is fair". In short, section 9(3) provides that *differentiation* on one of the *listed* grounds is discrimination and section 9(5), in turn, provides that the discrimination on one of the listed grounds is *presumptively* unfair. The reason why the grounds listed in the Constitution both constitutes discrimination and presumptive unfairness is because we have, with the benefit of hindsight and historical experience, come to realise that the grounds listed in the Constitution – when used to differentiate between persons and categories of persons – actually *impairs* one's fundamental dignity. As regard to unspecified or unlisted grounds the Court has:

> "[… cautioned] against any narrow definition of these terms. What the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorise, marginalise and often oppress persons who have had, or who have been associated with, these attributes or characteristics. These grounds have the potential, when manipulated, to *demean persons in their inherent humanity and dignity*. There is often a complex relationship between these grounds. In some cases, they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features. The temptation to force them into neatly self-contained categories should be resisted. Section 8(2) seeks to prevent the unequal treatment of people based on such criteria which may, amongst other things, result in the construction of *patterns of disadvantage such as has occurred only too visibly in our history*."[160] [own emphasis]

The next topic under discussion is understanding and appreciating the difference between the different elements of equality. Section 9(2) provides for "remedial or restitutionary equality"[161] denoting, among other things, constitutionally mandated measures to bring about material transformation by fairly[162] discriminating on the grounds of, amongst others, race, sex,

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160 *Harksen* 1998 (CC) at para. [50].

161 The notion "restitutionary equality" was first used by Ackermann, J. in *Sodomy* 1999 (CC) at paras. [61]-[62]. The aforementioned matter did *not* concern any restitutionary measures but merely alleged unfair discrimination.

162 I vehemently reject any argument to the effect that restitutionary measures do not constitute discrimination, since to do so would be to reject the entirety of substantive equality itself – especially the dignity-based approach adopted by the CC. Let us make this point rather bluntly: to deny that restitutionary measures constitute discrimination is to deny that apartheid did not constitute discrimination. In the words of Mokgoro, J. in *Van Heerden* 2004 (CC) at para. [85]:

> "Another aspect of s[.] 9(2) is that it allows a person or categories of people to be advanced. This is important because of the nature of the unfair discrimination that was perpetrated by apartheid. The approach of apartheid was to categorise people and attach consequences to those categories. No relevance was attached to the circumstances of individuals. Advantages or disadvantages were meted out according to one's membership of a group. Recognising this, s[.] 9(2) allows for measures to be enacted which target whole categories of persons. Therefore[,] a person or groups of persons are advanced on the basis of membership of a group. The importance of this is that it is unnecessary for the State to show that each individual member of a group that was targeted by past unfair discrimination was in fact individually unfairly discriminated against when enacting a measure under s[.] 9(2). It is sufficient for a person to be a member of a group previously targeted by the apartheid state for unfair discrimination in order to benefit from a provision enacted in terms of s[.] 9(2)."

and gender. Anti-discrimination law seeks to prevent unfair discrimination in order to prevent the creation of patterns of disadvantage and entrenchment of systemic disadvantage. The right against unfair discrimination does not seek to transform. Whilst a substantive notion of equality renders the right against unfair discrimination cognisant of systemic disadvantage and patterns of disadvantage and, as such, sensitive thereto by taking it into consideration, it is not the aim of anti-discrimination laws to actively transform material potions *in the positive sense* as is envisaged in section 9(2). The interpretation and determination of fairness of specific discrimination must be influenced by the reality of systemic disadvantage and unequal power relations, but the right against unfair discrimination does not envisage an act of discrimination as a positive act towards transforming the material (unequal) position of the one at the expense of the other, since that is the work of section 9(2) of the Constitution. The need to prohibit patterns of discrimination is the purpose of the right against unfair discrimination[163] whilst still cognisant of the fact that:

> "[t]he prohibition on unfair discrimination in the … Constitution seeks not *only* to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked."[164] [own emphasis]

Consequently:

> "… the … Constitution contains an express recognition that there is a need for *measures* to seek to alleviate the disadvantage[,] which is the product of past discrimination. We need, therefore, to develop a *concept of unfair discrimination* which recognises that, although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by *insisting upon identical treatment in all circumstances* before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the *impact* of the *discriminatory action* upon the *particular people* concerned to determine whether its *overall impact* is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context."[165]

However, we cannot disregard the fact that the Court also held that "unfair discrimination … in the context of … [s. 9] as a whole, principally means treating persons

It is, thus, clear that the measures are aimed *exclusively* at the identity of a *group*, which group is identified on *exactly* the same basis as the morally abhorrent apartheid government did; namely, race, sex, gender, disability and so forth. The only reason why the discrimination is neither unfair nor presumptively unfair is "because the Constitution says so" – *Barnard* 2014 (CC) at para. [37]. See *Van Heerden* 2004 (CC) at para. [33].

163 *Brink* 1996 (CC) at para. [42].

164 *Hugo* 1997 (CC) at para. [41].

165 *Ibid.*

differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity [own emphasis]."[166] Considering the fact that to differentiate on a prohibited ground or one that, objectively speaking, has the potential to impair one's dignity constitutes discrimination it follows that to "determine whether that impact [of the discrimination] was unfair it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination".[167] The latter was confirmed in *Harksen*:

> "In order to determine whether the discriminatory provision has impacted on complainants unfairly, various factors must be considered. These would include:
>
> (*a*) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;
>
> (*b*) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question. In *Hugo*, for example, the purpose of the Presidential Act was to benefit three groups of prisoners, namely, disabled prisoners, young people and mothers of young children, as an act of mercy. The fact that all these groups were regarded as being particularly vulnerable in our society, and that in the case of the disabled and the young mothers, they belonged to groups who had been victims of discrimination in the past, weighed with the Court in concluding that the discrimination was not unfair;
>
> (*c*) with due regard to (*a*) and (*b*) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.
>
> These factors, assessed objectively, will assist in giving 'precision and elaboration' to the constitutional test of unfairness. They do not constitute a closed list. Others may emerge as our equality jurisprudence continues to develop. In any event, it is the cumulative effect of these factors that must be examined and in respect of which a determination must be made as to whether the discrimination is unfair."[168]

It is after the above quoted paragraph that Goldstone, J. formulated the (in)famous *Harksen*-test:

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166 *Prinsloo* 1997 (CC) at para. [31].
167 *Hugo* 1997 (CC) at para. [43].
168 *Harksen* 1998 (CC) at para. [52].

> "(*a*) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of s[.] 8(1)[, now s. 9(1) of the Constitution]. Even if it does bear a rational connection, it might nevertheless amount to discrimination.
>
> (*b*) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
>
> (*i*) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
>
> (*ii*) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.
>
> If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s[.] 8(2)[, now s. 9(3) or (4) of the Constitution].
>
> (*c*) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (s[.] 33 of the [I]nterim Constitution[, now s. 36(1) of the Constitution])."[169]

In Chapter 2 I asked whether the *Harksen*-test[170] ought not be open to progressive (re)definition? My argument is that the test has not been developed further than its initial formulation in *Harksen* although the test is not fixed nor are the factors mentioned in *Harksen* that must be considered to determine whether discrimination is unfair a closed list. The test in and of itself has not seen any development nor have we seen any new factors. Unfairness, in my opinion, requires to be *open* and not limited by what the Constitutional Court held in *Harksen* and I argue that the Courts have merely paid lip service to the professed open nature of the *Harksen*-test. My argument is that fairness ought to be determined by how the other (legal subject) *ought* to be conceived, which conception is to be informed by the *lived* experiences of those involved in a specific case and the society, in general. In addition, the impact of the differentiation in

169 *Ibid.* at para. [54]. Note that Ackermann, J. held in *Sodomy* 1999 (CC) at para. [18] that it "does not mean, however, that in all cases the rational connection inquiry of stage (*a*) must inevitably precede stage (*b*). The stage (*a*) rational connection inquiry would be clearly unnecessary in a case in which a court holds that the discrimination is unfair and unjustifiable". See *Hoffmann* 2001 (CC) at para. [24] and *S v Jordan (Sex Workers Education and Advocacy Task Force as Amici Curiae)* 2002 (6) 642 (CC) at para. [57] for a short-hand version of this (in)famous test.

170 In *Harksen* 1998 (CC) at para. [53] the CC formulated the so-called *Harksen*-test. For critique of this approach see van Marle, (2000, *An Ethical Interpretation*); Van Marle, (2001, *Reflections on Teaching Critical Race Theory at South African Universities/Law Faculties*), at p. 91 where she argues that the "*Harksen* test is a step towards *reification* of substantive equality and avoidance of its indeterminate meaning" [original emphasis].

question on the relationship between the relevant parties and citizenry, in general, should also inform fairness. *Ubuntu* informs an understanding of the relationship between human beings as ethical. *Ubuntu* addresses the "ethical relation",[171] which relation (*i*) places emphasis on the kind of person each one of us *ought* to become to develop a non-violative relationship with the other and (*ii*) concerns itself with a way of being (existing) in the world.[172] The *ethical* relation between human beings entails requires us to resist any fixed understanding of the kind of person each one of us *ought* to be to have developed a non-violative relationship with the other. Non-violative, in the context of discrimination, denotes not differentiating between persons on ground informed by ontological bias and/or ontological intolerance.

The breath of the right to unfair discrimination is extensive enough to include any indirect differentiation on the basis of one of the listed grounds or qualifying unlisted grounds to constitute indirect discrimination. In addition, it follows that intention is not a requirement to discriminate rendering the right to unfair discrimination open towards and receptive of a claim in respect of institutionalised racism or sexism – that is on the basis of systemic discrimination ingrained in the system. That is, to claim that, proverbially speaking, meting out of disadvantage and advantage on the basis of, for example, race has become part of the 'culture' or 'usual way of operating' at institutions, which *modus operandi* might even be unconscious. In other words, the right against unfair discrimination – in terms of the dignity-based approach – is open towards changing patterns of disadvantage and systemically entranced advantage. To state the obvious – to insist on merit can constitute unfair discrimination with the consequence that by not adopting affirmative action measures one can unfairly discriminate against those previously disadvantaged. Quite mindboggling is it not?

The impact of discrimination – replete with dignity as a value in giving content to fairness as a barometer in these circumstances – is also alive towards systemic concerns, but beyond mere materialist concerns. Dignity, as developed by the Court in the context of equality, transcends partisan and populist narrow-minded concerns of mere materiality. Dignity is far more nuanced and adaptable to the complexities of equality than a narrow-minded political and selfish a-contextual concern for and insistence upon disadvantage and difference.[173] To explain, the Court held that the discriminatory crime of sodomy that outlawed sex between men reinforced "already existing societal prejudices and severely increases the negative effects of such prejudices on their lives".[174] The Court also recognised that the crime, although unenforced,

171 Van Marle, (1996, *The Doubly Prized World*), at p. 332.
172 *Ibid.*
173 *Sodomy* 1999 (CC) at para. [23].
174 *Ibid.*

reduce gay men to unapprehended felons whereby stigma is entrenched and discrimination encouraged.[175] So has the Supreme Court of Canada in *Vriend v Alberta*:[176]

> "Perhaps most important is the psychological harm which may ensue from this state of affairs. Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem. Compounding that effect is the implicit A message conveyed by the exclusion, that gays and lesbians, unlike other individuals, are not worthy of protection. This is clearly an example of a distinction which demeans the individual and strengthens and perpetrates [*sic*] the view that gays and lesbians are less worthy of protection as individuals in Canada's society. The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination."[177]

Gay men suffered in the past from patterns of disadvantage and are a permanent minority in society.[178] Consequently, the impact of discrimination against them – especially in this instance of the crime of sodomy – is severe, affecting the dignity, personhood and identity of gay men at a deep level.[179] Most interestingly, it was held that the crime of sodomy had no other purpose than to criminalise conduct which fails to conform with the moral or religious views of a section of society.[180] In the final instance the "… discrimination has … gravely affected the rights and interests of gay men and deeply impaired their fundamental dignity".[181] In *Immigration* the Court specifically referred back to *Sodomy* when it held that, in *Sodomy*, it dealt with the seriously negative impact that societal discrimination – on the ground of sexual orientation – has had, and continues to have, on gays and their same-sex partnerships.[182] The concluded in *Sodomy* that gay men are a permanent minority in society and have suffered in the past from patterns of disadvantage.[183] The systemic discrimination experienced by gay men that formed certain patterns of disadvantage and entrenched disadvantage left gay men peculiarly disadvantaged in relation to heterosexual men and woman, but the experience of gay men are quite the same as that of lesbian women.[184] Ackermann, J. went on to state the following regarding the interaction between, on the one hand, patterns of disadvantage and systemically entrenched disadvantage and, on the other hand, infraction of human dignity – within the context of equality:

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175 *Ibid.*

176 *Vriend v. Alberta* [1998] 1 S.C.R. at p. 493.

177 As quoted in *Sodomy* 1999 (CC) at para. [23].

178 *Ibid.* at para. [26(a)].

179 *Ibid.*

180 *Ibid.* at para. [26(b)].

181 *Ibid.* at para. [26(c)].

182 *Immigration* 2000 (CC) at para. [42]. See *Sodomy* 1999 (CC) at paras. [20]-[27].

183 *Immigration* 2000 (CC) at para. [42] See *Sodomy* 1999 (CC) at para. [26(a)].

184 See *Immigration* 2000 (CC) at para. [42] where the CC held that, although the main focus of *Sodomy* was "on the criminalisation of sodomy and on other proscriptions of erotic expression between men, the conclusions regarding the minority status of gays and the patterns of discrimination to which they have been and continue to be subject are also applicable to lesbians".

> "Society … has, generally, accorded far less respect to lesbians and their intimate relationships with one another than to heterosexuals and their relationships. The sting of past and continuing discrimination against both gays and lesbians is the clear message that it conveys, namely, that *they … do not have … inherent dignity* and are *not worthy of the human respect* … accorded to heterosexuals and their relationships. This discrimination occurs at a deeply intimate level of *human existence and relationality*. It denies to gays and lesbians that which is foundational to our Constitution and the concepts of equality and dignity, which at this point are closely intertwined, *namely that all persons have the same inherent worth and dignity as human beings*, whatever their other differences may be. The denial of equal dignity and worth all too quickly and insidiously degenerates into a denial of humanity and leads to inhuman treatment by the rest of society in many other ways. This is deeply demeaning and frequently has the cruel effect of undermining the confidence and sense of self-worth and self-respect of lesbians and gays."[185]
>
> …
>
> "The message and impact are clear. Section 10 of the Constitution recognises and guarantees that everyone has inherent dignity and the right to have their dignity respected and protected. The message is that gays and lesbians lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected. It serves in addition to perpetuate and reinforce existing prejudices and stereotypes. The impact constitutes a crass, blunt, cruel and serious invasion of their dignity. The discrimination, based on sexual orientation, is severe because no concern, let alone anything approaching equal concern, is shown for the particular sexual orientation of gays and lesbians."[186]

It follows why Langa, D.P., intimated that differentiation imposing "identifiable disabilities", that threatens "to touch on or reinforce patterns of disadvantage", or "in some proximate and concrete manner threaten(s) the dignity or equal concern or worth of the persons affected" is of relevance when considering the impact of discrimination on those affected thereby. In 2001 the Constitutional Court had to decide whether it would agree with the South African Airways arguing that the life expectancy of people who are HIV positive was too short to warrant the costs of training them and sought to persuade the Court by alluding to the fact that other major airlines utilised similar practices. In this case the South African Airways refused to appoint Mr. Hoffmann on the basis of his HIV status.[187] In considering the proffered

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185 *Ibid.* The CC again referred to and relied upon the Canadian Supreme Court *Vriend v. Alberta* [1998] 1 S.C.R. at p. 385.

186 *Ibid.* at para. [54].

187 *Hoffmann* 2001 (CC) at paras. [5] & [48] – Mr. Hoffmann, together with 173 other applicants applied for employment at South African Airways as a cabin attendant. At the end of a four-stage selection process he was among 12 found to be suitable candidates for appointment, subject to their undergoing pre-employment medical examinations, which included blood tests for HIV/AIDS. He was clinically fit in terms of the medical examination and, thus, suitable for employment, but, because he was HIV positive in terms of the blood test his medical report was altered to read HIV positive and thus unsuitable for employment. The South African Airways informed him that he could not be employed as a cabin attendant because of his HIV positive status.

argument the Constitutional Court again returned to the basics of its unfair discrimination jurisprudence, or then its dignity-based approach,[188] and held:

> "At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity.[189] That dignity is impaired when a person is unfairly discriminated against. The determining factor regarding the unfairness of the discrimination is its impact on the person discriminated against.[190] Relevant considerations in this regard include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which the rights or interests of the victim of the discrimination have been affected and whether the discrimination has impaired the human dignity of the victim."[191]

The Court then continued to – again – substantively knit together notions of group-based advantage and disadvantage[192] as is evident from the following passage:

> "The appellant is living with HIV. People who are living with HIV constitute a minority. Society has responded to their plight with intense prejudice.[193] They have been subjected to *systemic disadvantage and discrimination*. They have been stigmatised and marginalised. As the present case demonstrates, they have been denied employment because of their HIV positive status without regard to their ability to perform the duties of the position from which they have been excluded. Society's response to them has forced many of them not to reveal their HIV status for fear of prejudice. This in turn has deprived them of the help they would otherwise have received. People who are living with HIV/AIDS are one of the *most vulnerable groups in our society*. *Notwithstanding the availability of compelling medical evidence as to how this disease is transmitted*, the *prejudices and stereotypes against HIV positive people still persist*. In view of the *prevailing prejudice* against HIV positive people, any discrimination against them can … be interpreted as a *fresh instance of stigmatisation*[, which is] an *assault on their dignity*. The impact of discrimination on HIV positive people is devastating. It is even more so when it occurs in the context of employment. It denies them the right to earn a living. For this reason[,] they enjoy special protection in our law."[194] [own emphasis and footnotes omitted]

In this case the Court was emphatical and held the value of human beings, imbued with dignity and incalculable worth, to be excessively exceeding in value than that of "[l]egitimate commercial requirements" although such requirements are, of course, an important consideration in determining whether to employ an individual.[195] We must be vigilant and disallow stereotyping and prejudice to (un)suspiciously and all willy-nilly tiptoe into our thoughts

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188 Please note that dignity-based approach is not only limited to the right against unfair discrimination.
189 *Hugo* 1997 (CC) at para. [41].
190 *Harksen* 1998 (CC) at para. [50].
191 *Ibid.* at para. [51].
192 In other words, systemic considerations of prejudice and unequal power relations translated into systems of power.
193 *Hoffmann* 2001 (CC) at paras. [47]; Ngwena, C., *HIV In the Workplace: Protecting Rights to Equality and Privacy,* Vol. 15, No. 4, (1999), South African Journal on Human Rights, pp. 513-540, at p. 514.
194 *Hoffmann* 2001 (CC) at para. [28].
195 *Ibid.* at para. [34].

under the guise of commercial interests.[196] The interest in recognition of the inherent dignity of every human being and the elimination of all forms of discrimination is far more greater and outweighs *justified* commercial interests beyond any arithmetical comparator known to man and Humankind.[197] It must then be understood that the Constitution, especially section 9, protects the weak, the marginalised, the socially outcast, and the victims of prejudice and stereotyping. True to the spirit of *Ubuntu* it is only when these groups are protected that we can be secure that our own rights are protected.[198] I must mention that, in the end, Ngcobo, J., as he was then, did also throw in *Ubuntu* for good measure:

> "People who are living with HIV must be treated with compassion and understanding. We must show [*U*]*buntu* towards them. They must not be condemned to 'economic death' by the denial of equal opportunity in employment. This is particularly true in our country, where the incidence of HIV infection is said to be disturbingly high."

Nicely tucked away in footnote 31 Ngcobo, J. wrote that *Ubuntu is* the "recognition of human worth and respect [in other words, dignity] for the dignity of every person" and referred to *Makwanyane* at paras. [224], [263], and [308].[199] The Constitutional Court has – in the context of equality – only referred to *Ubuntu* on two other occasions; namely, *Pillay* and *Barnard*.[200]

The right against unfair discrimination has now been discussed with strong reliance on case law to show the reader what the Court understands when it speaks the language of unfair discrimination. From the cases it is clear and undeniable that human dignity is central to the right against unfair discrimination. In addition, the right against unfair discrimination is also patently aware of systemic realities of disadvantage and unequal power relations. The Court takes social prejudice and past practices of discrimination into account when assessing claims of unfair discrimination. The material reality of the complainant is relevant and plays an authoritative role in assessment of *unfairness*. Whilst the concept of dignity might be understood as individualistic or considering the interest of the atomic individual against another atomic individual or a group, I submit that such an interpretation disregards the express wording of the Court's judgments and concomitant equality jurisprudence. Although *Ubuntu* can play a more determinative role in the

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196 My creative adaptation of Ngcobo, J.'s, as he was then, words in *ibid.*

197 See *ibid.* at para. [34].

198 *Ibid. Makwanyane* 1995 (CC) at para. [88]. *Hoffmann* 2001 (CC) at para. [37]:

> "Prejudice can never justify unfair discrimination. This country has recently emerged from institutionalised prejudice. Our law reports are replete with cases in which prejudice was taken into consideration in denying the rights that we now take for granted. Our constitutional democracy has ushered in a new era – it is an era characterised by respect for human dignity for all human beings. In this era, prejudice and stereotyping have no place. Indeed, if as a nation we are to achieve the goal of equality that we have fashioned in our Constitution we must never tolerate prejudice, either directly or indirectly. SAA, as a State organ that has a constitutional duty to uphold the Constitution, may not avoid its constitutional duty by bowing to prejudice and stereotyping."

199 I consciously reproduced his footnote in the body of my text.

200 *Pillay* 2008 (CC) at para. [53], *Barnard* 2014 (CC) at para. [174].

Court's equality jurisprudence, the Court's conception of the individual and its dignity cannot be designated the label of Eurocentric individualism or the liberal atomic self.[201]

Dignity – within the context of equality – identifies 'the problematic of differential treatment based on personally held characteristics', since it is dignity that is so crudely affected thereby. These personally held characteristics *identifies* a person as such and are those traits that signifies his or her *existence as* a human being. Persons are treated differently for *being* white, black, male, female, Homosexual, or Heterosexual. Someone is disadvantaged for his or her being not conforming to the disadvantagor's conception of being. It is because the disadvantagor regarded him or her as the other, that is the disadvantagor regarded the other's being as less worth than that of his or her own. In *Sodomy* Sachs, J., distinguished, in an *obiter dictum*, the violation of "dignity and self-worth" under section 9 from the violation of dignity under section 10 by basing the violation under section 9 on the impact which a *measure* has on an individual.[202] Differential measures target an individual *because* of his or her membership within a specific group and the group, usually a historically vulnerable group, is "identified and subjected to disadvantage by virtue of closely held personal characteristics of its members".[203] It is the "inequality of treatment that leads to and is proved by the indignity".[204] Differentiation is based on personally held characteristics of persons and once a group is identified by such characteristics such group is treated unequally by being subjected to disadvantage in that another group would be afforded certain advantages such as quality education, the right to own property, or the right to enter into and solemnise a marriage. The indignity is that of not being allowed, for example, to enter into and solemnise a marriage *because* of your sexual orientation. Ackermann's description of dignity includes certain functions performed by human beings. One of these functions is to form meaningful relationships with other human beings, which means that every human having inherent dignity entails respect for the *intrinsic* worth of such human being and consequently respect for the relationship that such person finds meaningful based on his or her own sexual orientation. The indignity is then precisely the *result of differentiation* between heterosexual and homosexual couples and disadvantaging the latter by not allowing them to enter into and solemnise a marriage *because* of their sexual orientation. To use another example: indignity is precisely the result of differentiation between heterosexual and homosexual couples and disadvantaging the latter by criminalising intentional sexual intercourse *per anum* between two

201 See above under the heading "Legal Subjects: Living Breathing Human Beings Existing Within a Specific Context". See also *Sodomy* 1999 (CC) at para. [117], *Pillay* 2008 (CC) at para. [53], and *Barnard* 2014 (CC) at para. [174].

202 *Sodomy* 1999 (CC) at para. [124].

203 *Ibid.*

204 *Ibid.*

human males *because* of their sexual orientation. The law punished men for *being* homosexual. The differential treatment (only punishing homosexual men) leads to the indignity; that is, the law declares it unlawful or then (morally) 'wrong' to be a homosexual man. It is *contra bonos mores* and such men are other than that which a heternormative society regard as a 'normal' human being; in other words, it is *contra* and the other to the being of the reductive self and the law – by outlawing homosexuality – seeks to reduce the other to the self.

In the abstract the relationship between dignity and equality is the differential treatment – conferring or affording benefits to one group, but not the other – that leads to and is proved by indignity (the indignity being identification of groups based on closely held characteristics, which characteristics relates to the functions performed by human beings forming part of the description of human dignity as set out above). To develop this relationship between dignity and equality even further, I submit that the differential treatment leading to indignity *ultimately* leads to material inequality and a person finding himself or herself in a material unequal position within society *because* of his or her membership within an historically disadvantaged group can, possibly, and in the current South African context mostly, leads an undignified life (that is, being systemically disadvantaged).

3.1. INDIRECT DISCRIMINATION

Walker is the only Constitutional Court judgment, to my knowledge, where the Court was asked to decide upon indirect discrimination. Unfair discrimination is prohibited, "whether it takes place 'directly or indirectly'",[205] and the inclusion of both direct and indirect discrimination in the text of section 9(3)[206] is evidence that concern is had and emphasis is placed on the consequence of an Act or conduct rather than its form.[207] The prohibition of unfair discrimination recognises that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination, and if it does, it falls within the purview of section 9(3).[208] Consistent with this consequentialist concern with impact is the emphasis on the impact of discrimination in deciding whether section 9(3) has been infringed (in other words, whether the discrimination is unfair).[209] Although the Court did not formulate a precise definition of indirect discrimination it held that:

> "conduct which differentiated between the treatment of residents of townships which were historically black areas and whose residents are still overwhelmingly black, and residents in

205 *Walker* 1998 (CC) at para. [30].

206 *Ibid.* at para. [31]. Note that the Court referred to s. 8(2) of the Interim Constitution and mention of s. 9(3) in this context and not that of s. 9(4) should not exclude s. 9(4) without more.

207 *Ibid.*

208 *Ibid.*

209 *Ibid.* at para. [32].

> municipalities which were historically white areas and whose residents are still overwhelmingly white constituted indirect discrimination on the grounds of race. The fact that the differential treatment was made applicable to geographical areas rather than to persons of a particular race may mean that the discrimination was not direct, but it does not in my view alter the fact that in the circumstances of the present case it constituted discrimination, albeit indirect, on the grounds of race. It would be artificial to make a comparison between an area known to be overwhelmingly a "black area" and another known to be overwhelmingly a "white area", on the grounds of geography alone. The effect of apartheid laws was that race and geography were inextricably linked and the application of a geographical standard, although seemingly neutral, may in fact be racially discriminatory. In this case, its impact was clearly one which differentiated in substance between black residents and white residents. The fact that there may have been a few black residents in old Pretoria does not detract from this."[210]

Indirect discrimination is thus conduct or policies that are not aimed – explicitly or surreptitiously, consciously or unconsciously – at persons or categories of persons identified by one or more of the grounds listed in section 9(3). Such conduct or policies may have the effect or consequence of disproportionately disadvantaging the members of a particular group. We are concerned with the impact of the conduct and the European Court of Human Rights has held that "[w]hen a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group".[211] After referring to the jurisprudence of the United States of America, Canada, and that of the European Court,[212] the Constitutional Court held that when interpreting section 9 it is of importance to take cognisance of the fact that the section contains both an equal protection clause and an anti-discrimination clause.[213] The purpose of the anti-discrimination clause is the protection of persons against treatment that amounts to unfair discrimination, it is not to punish those responsible for such treatment.[214] The protective purpose would be defeated if a complainant had to prove that he or she was unfairly discriminated against and that the unfair discrimination was intentional.[215] This is particularly true in cases involving indirect discrimination, since in such cases there is almost always some purpose other than a discriminatory purpose involved.[216] The language of section 9(3) does not

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210 *Ibid.*

211 *Shanaghan v U.K.* European Court of Human Rights, App. No. 37715/97; (decided 4 May 2001) at para. [191].

212 *Walker* 1998 (CC) at paras. [38]-[42].

213 *Ibid.* at para. [43].

214 *Ibid.*

215 *Ibid.*

216 *Ibid.*

justify an interpretation that requires proof of an intention to discriminate as a requirement for either direct or indirect discrimination.[217]

Structural discrimination has, as a key proposition, the consequence or ultimate effect of retaining minority groups in a subordinate position as opposed to intent. The societal structure of South Africa is an example where in certain points in the history there had been structural discrimination where collective agents (governmental (and private) institutions), intentionally created laws, rules, and policies with the aim of disadvantaging the members of certain groups, such as women and black people.

4. An Ethical Interpretation of The Constitution

I now turn to an ethical interpretation of the Constitution. An ethical interpretation of the Constitution providing for an ethical conception of equality, envisions the perpetual (re)imagination and (re)constitution of our-selves and society as well as the acknowledgement and celebration of difference and the rejection of the notion that a legal subject is an "isolated, lonely, and abstract figure possessing a disembodied and socially disconnected self".[218] Substantive equality already "acknowledges that people live in their bodies, their communities, their cultures, their places and their times",[219] but more than that an ethical conception of equality recognises the impossibility of accommodating the radical alterity of the other.[220] It sees as abhorrent any sweeping and all-encompassing characterisations of the other as undeniably privileged or irrefutably previously disadvantaged because such characterisation will end up defining difference itself. The call for equality cannot be answered by the ossification of identity or subjectivity as either privileged or disadvantaged. The Constitution is open to an interpretation in terms of which the citizens of South Africa are conceived as a plurality of selves; that is not a conception of a universal self and *alter egos*. As Mbembe puts it, "it is no

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217 *Ibid.*:

> "Consistent with the purposive approach that this Court has adopted to the interpretation of provisions of the Bill of Rights, … such intention is not required in order to establish that the conduct complained of infringes [s.] 9(3). Both elements, discrimination and unfairness, must be determined objectively in the light of the facts of each particular case. This seems to me to be consistent not only with the language of the section, but also with the equality jurisprudence as it has been developed by this Court. It is also consistent with the presumption in [s.] 8(4) which would be deprived of much of its force if proof of intention was required as a threshold requirement for the proof of discrimination."

218 Quoted from *Sodomy* 1999 (CC) at para. [117].

219 *Ibid.*

220 Van Marle, (2000, *An Ethical Interpretation*), at p. 595.

longer a matter of claiming the status of *alter ego* for Africans … but rather of asserting loudly and forcefully their alterity".[221]

The self of the hegemonically defined other must be asserted in its alterity. The latter is exactly what is envisioned by the Constitution, interpreted ethically, when it idealises a socially inclusive society; that is a society in which multiplicity of Selves are recognised and celebrated in their radical alterity. However, radical alterity cannot be accommodated by sweeping and contextually divorced characterisations such as advantaged or disadvantaged. This is the point at which the radical alterity of subjects *ought* to intersect with – not be defined by – the phenomenological reality perceived and experienced by the subject. Transformative equality within the paradigm of substantive equality is engulfed by a process in terms of which an attempt is made to transform the material reality from a society based on a wealth, power, and privilege disparity along racial and other lines to one in which the power relations are re-imagined, privilege is re-distributed, and wealth is transferred. A conception of a (re)imagined subjectivity is completely negated by this process. How we ought to perceive each other as human beings is relegated to a status of legal and political irrelevance. Only the material position of man *vis-à-vis* woman, or black *vis-à-vis* white is of importance and not the ethical relation *vis-à-vis* human beings.[222]

I have not said much of the said ethical interpretation, but the South African substantive constitutional revolution is the key to unlock an ethical conception of equality. It is submitted that the revolution (*i*) resulted in the constitution and imposition of a new legal order and (*ii*) provides for the possibility of an ethical interpretation of the Constitution, and thus, in consequence, an ethical conception of equality.

The gravamen of my argument is that the Constitution is open to or accommodating of an ethical conception of equality by taking a step backwards and arguing that the Constitution is susceptible to an ethical interpretation. Consequently, the equality jurisprudence flowing from such an interpretation must be susceptible to the same ethical interpretation rendering the conception of such equality ethical in nature. The people of South Africa, whether unbeknownst or consciously, longs for an ethical conception of equality. There is a 'post'-apartheid longing for a conception of equality in terms of which 'what is equal(ity),' both legally and otherwise, is

221 Mbembe, (2001, *African Modes of Self-Writing*), at p. 26.

222 The statement that we ought to focus on relationships between human beings *vis-à-vis* each other *as* human beings is not without critique – see Gachago, D. & Ngoasheng, A., *South Africa's 'Rainbow Nation' is a Myth that Students Need to Unlearn* (E-Pub. Date: 19 Oct. 2016) Electronic Article: The Conversation [Accessed on: 22 Oct. 2016]. The authors criticised the acceptance that only the "human race" exists and argued that one must recognise race, sex, gender, sexual orientation and the advantage and disadvantage occasioned thereby.

determined not only by doctrinal analysis or a rational, moral, or other epistemologically influenced semantic exercise. The question 'what is equal(ity)' is to be placed outside the reach and consciousness of the hegemonic rational man. Given our historic context, it is not problematic to assert that South Africans would strive for the *ideal* of equality and if "[w]e, the people of South Africa,"[223] are striving for the ideal of equality, so must the Constitution, adopted by "the people of South Africa[,]"[224] be directed at the ideal of equality. Therefore, because the Constitution is directed at an ideal the value ought to be directed at realising such ideal – in other words, South Africans value not only equality, but in fact the "achievement of equality".[225]

The Constitution is ethically interpreted to emphasise the *lived experience* of human beings and instigate and partake in an investigation regarding the manner in (and I submit that we ought to be open towards the manner in which) the Constitution shelters the meaning of being (existence *as*) a human being by asking how the Constitution has and can still make a difference in our lives. The proposed ethical interpretation of the Constitution is the *de jure* basis upon which my ethical conception of equality is to be constitutionally grounded. The perpetual nature of a substantive constitutional revolution is in support of and approves the notion of be-coming. It, accordingly, follows that the Constitution's revolutionary aspect and process of transformation *ought* not be self-enclosing and externally exclusionary nor posited on a specific future purpose or goal that is to come to a final and definite end as opposed to be complicit in the ethical and, thus, perpetual process of be-coming 'post'-apartheid.

The possibility of an ethical interpretation of the Constitution is the second consequence of the South African substantive constitutional revolution and this consequence is the substantive content under discussion. The statement that 'the Constitution is susceptible to an ethical interpretation' is neither extraordinary nor radical. Mohamed, J., as he was then, held that "[a]ll [c]onstitutions seek to articulate, with differing degrees of intensity and detail, the … *ethical direction* which that nation has identified for its future" [own emphasis].[226] In the words of O'Regan, J. this future is "the ideal of a new society".[227] Whist keeping the aforementioned in mind I am cognisant of the fact that the Constitution remains a written legal instrument, the text

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223 Preamble of the Constitution.
224 *Ibid.*
225 See s. 1(*a*) of the Constitution.
226 *Makwanyane* 1995 (CC) at para. [262].
227 *Ibid.* at para. [323].

of which must be interpreted within a legal framework. Accordingly, the Constitution, as a legal text, cannot express any meaning which we might wish.[228] I recollect the warning of Kriegler, J.:

> "To be true the judicial process cannot operate in an ethical vacuum … Nevertheless, the starting point, the framework and the outcome of the exercise must be legal … The incumbents are Judges, not sages; their discipline is the law, not ethics or philosophy and certainly not politics."[229]

Conscious of this warning, the starting point of my ethical interpretation of the Constitution is reliance on the text of the Constitution which text I submit is susceptible to an ethical interpretation. Interpretation, in this context, carries two meanings. First, interpretation denotes ordinary hermeneutics, whilst not excluding interpretation jurisprudence. Second, interpretation also incorporates Heidegger's phenomenological meaning, as discussed herein below. An ethical interpretation of the Constitution entails, among other things, approaching the Constitution *as* sheltering the truth of being (in Heidegger's sense) and, as such, treating the Constitution *as* an expression of (a possibility) of an ideal social order.

My submission is thus, Heidegger's treatment of interpretation *as* clarified or deepened (prior) understanding through experience acts as a philosophical impetus (stimulus) of an ordinary hermeneutical interpretation of the Constitution. This impetus allows us to take our history seriously and – as thoroughly detailed in Chapter 2 – historical context is part and parcel of any *de jure* interpretation of the Constitution. The Constitution is susceptible to an ethical interpretation once perceived as *a* being (entity) that a shelters the truth of being (in Heidegger's sense).[230] The Constitution, as a being, forms part of 'there' (world) that we (humans or *Da-sein*) inhibit and would have no meaning without us.[231] However, when approached in the right way the Constitution has the capacity, similar to us (*as Da-sein*), to indicate or signify (not identify) being (in Heidegger's sense) itself.[232] In this part, I set out such 'right' way of approaching the Constitution, thereby, indicating its susceptibility to an ethical interpretation.

The philosophical impetus of an ordinary hermeneutical interpretation of the Constitution is treatment of interpretation *as* clarified or deepened (prior) understanding through experience. Cognisant of Kriegler, J.'s warning, this philosophical impetus is not extra-legal in the sense of giving into the *ipse dixit,* personal moral convictions, or mere whim of the interpreter. Rather, the impetus allows us to take our history seriously, which is, legally considered, historical

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228 *Zuma* 1995 (CC) at para. [17]; *Makwanyane* 1995 (CC) at para. [207].
229 *Makwanyane* 1995 (CC) at para. [207].
230 See Polt, *Heidegger: An Introduction*, (1999), at pp. 149-152.
231 Without *Da-sein*, other entities could continue to be, but there would be no one to relate to them *as* entities and, consequently, their being (existence) would have no meaning at all – see Polt, *Heidegger: An Introduction*, (1999), at p. 30.
232 Polt, *Heidegger: An Introduction*, (1999), at pp. 149-152.

context. Interpretation means that as a being, the Constitution inhibits a 'there' (world) and, as such, we can pursue the Constitution's possibilities and use it (the possibilities) to unfold our (prior) understanding into a developed interpretation of the Constitution. Importantly, our historicity does not cut us off from reality; the contrary is true, our historicity opens us up to the meaning of being (in Heidegger's sense).[233] The right way of approaching the Constitution is *as* sheltering the truth of being (in Heidegger's sense). What this approach entails is now further developed, but whatever the meaning of being might be it includes the meaning of our (humans' or *Da-sein's*) being.

The philosophical impetus is interpretation *as* clarified or deepened (prior) understanding through experience. Thus, investigation of 'understanding' and 'interpretation' is required. Understanding is our (*Da-sein's*) "fundamental ability to be someone, to do things, to get around in the world. It is the basic 'know-how' that allows us (*Da-sein*) to deal with beings … and involves projection into the future; it opens up possibilities for us."[234] To elaborate, when encountering a stray dog one understands that if it bites you one *can* contract rabies. One, therefore, unsderstands the dog to be dangerous and, thus, treats it *as* dangerous. Similarly, when confonted with a fire one understands that if you decide to traverse its area of existence one *can* burn onselve. One, therefore, unsderstands the fire to be dangerous and, thus, treats it *as* dangerous. Understanding, in this sense, is more primordial than *a-priori* knowledge[235] or theoretical assertions about things, since it is quite unexpected that theoretical assertions of both fire and dogs would instigate human treatment of both *as* dangerous wthout more. Treatment *as* dangerous is situated in an experience in terms of which both the fire and the dog entailed a risk of being injured and, thus, a perception of danger comes to the fore. The understanding of fire and the dog as dangerous is situated in a specific experience. Understanding entails having possibilities and by projecting available ways to be, or then by projection of available possibilities (of being (exxisting *as*) human), we understand things (beings).[236] The essence of understanding is we must already understand things *before* we formulate propositions (expression of judgment or opinion) about them.[237] "When we pursue a possibility intensively and use it to *reveal beings further*, we are interpreting, and interpretation can give rise to assertions about things" [own emphasis].[238]

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233 *Ibid.* at p. 66.
234 *Ibid.* at p. 65.
235 Knowledge that is independent of (and precedes) experience.
236 Polt, *Heidegger: An Introduction*, (1999), at p. 69.
237 *Ibid.* at p. 68.
238 *Ibid.* at p. 69.

Interpretation, therefore, requires us to actively "pursue an available possibility and using it [the possibility] to unfold our understanding into a developed intetpretation".[239]

Thus understood, understanding, for Heidegger, is always a finite, historically situated interpretation.[240] We (*Da-sein*) are historical and without inherited interpretations (prior understanding) of the world ('there'), we would not be *Da-sein* at all, but rather an animal without culture, language, or norms.[241] Our past is active in the present, making it possible for us to operate as *Da-sein*. By approaching the Constitution *as* sheltering the truth of being, we can treat the Constitution *as* something similarly to as how we treat a noise *as* the sound of something or a hue *as* the colour of something. If we realise that the Constitution, as any other being, shelters the truth of being, we can experience its 'thereness' more fully; that is, experience all the ways in which the Constitution makes a difference in our being-in-the-world as both being-there and being-with. The Constitution can and does, accordingly, fit into an expression (a possibility) of an ideal social order. An interpretation of the Constitution must, therefore, entail understanding of its meaning *whilst* being actively engaged with and by it. True to the meaning of understanding as finite, historically situated interpretation, the text of the Constitution is an expression of our past being active in our present world. It shapes our culture as one of justification, our language as the language of substantive equality, and our norms as objective within a value system.

The Constitution finds engagement with us in and application to our particular context, or then in Heidegger's sense *Da-sein's* being-in-the-world. being-in-the-world holds that we (humans) are essentially involved in a context – "we have a place in a meaningful whole where we deal with other things and people".[242] The content of the relevant context depends on and varies from person to person, from culture to culture,[243] and, thus, from modernity to modernity. Humans are the 'there' of or for being (in Heidegger's sense). Humans are the site that being requires in order to (literally) take place.[244] Without *Da-sein*, other entities could continue to be, but there would be no one to relate to them *as* entities and, consequently, their being (objective presence) would have no meaning at all.[245] The Constitution is but another being in our world entailing that its being (objective presence) would be nothing without us – we give meaning to the being of the Constitution, which is a sophisticated way of expressing the legitimacy crisis. What the Constitution, through the revolutionary process of the South African substantive

239 *Ibid.* at p. 70.
240 *Ibid.* at p. 5.
241 *Ibid.* at p. 37.
242 Polt, *Heidegger: An Introduction*, (1999), at p. 46.
243 *Ibid.*
244 *Ibid.*
245 *Ibid.*

constitutional revolution, disclosed to us is a trace of being itself. This trace of being represents a realisation that the ontological being (as distinctive essence) of the other is *not* determined by physiological (ontic) characteristics.

4.1. INTERPRETING THE CONSTITUTION ETHICALLY

The Constitution is interpreted ethically in and through (interpretive) experience of the ways in which the Constitution has made and makes a difference in our world ('there'). Such ethical interpretation is furthered by realising that, phenomenologically considered, interpretation focuses on the experience of practical life and in everyday life we ought to interpret some-thing, including the Constitution, in order to improve it. Interpretation is an ongoing circular process, which hermeneutic circle is not vicious in getting us nowhere, since interpretation *can* clarify and *deepen* our understanding.[246] Interpretation is not an act of final en-closing of meaning, but rather an "open-ended, ongoing process which, *as long as it continues*, provides more insight than any static system ever can" [own emphasis].[247] Ethical interpretation is a historically situated open-ended, ongoing process of (re)interpretation *and* (re)imagination of prior understanding through intense and serious projection of future possibilities, which, if we so allow, includes projection of the Constitution's possibilities ultimately enclosing deepend understanding of our own being-in-the-world as well as the being (ojective presence) of things. Once *responsible* interpretation ceases, our world becomes a reified set of concepts and interpretation becomes a way of thinking that is no longer open towards (the possibility of) revised presuppositions (based on deepened (prior) understanding).

At this juncture the interpretation I propose meets the ethical – the fact that the interpretation of the Constitution ought to be left open in perpetuity; that is, open in two senses. Firstly, the Constitution ought to be open towards the possibility of being engaged by us as well as, secondly, open towards the possibility of engaging us. What does it mean to be engaged by the Constitution? An ethically responsible interpreter would approach the Constitution with presuppositions, which is based on (prior) understanding, but also be open towards the possibility of adjusting his or her presuppositions to the Constitution's possibilities of, for example, social justice and the achevement of equality. That is, an ethically responsible interpreter ought to be open towards the truth of being (in Heidegger's sense) sheltered by the Constitution. Otherwise put, an ethically responsible interpreter ought be open to the ways in which the Constitution matters to us and *can* make a difference in our world. A responsible

246 *Ibid.* at p. 72.
247 *Ibid.*

interpeter, thus, approaches the Constitution *as* sheltering the truth of being (in Heidegger's sense) and is open towards the ways in which it matters to us.

In addition, openness also denotes that any ethical interaction with the text of the Constitution enjoins an acknowledgement on the part of the interpreter that the meaning of the text, and, as such, any right or value contained therein, *ought* to be perpetually indeterminate. Indeterminacy entails that no single interpretation can ever be a final assertion as regard to the meaning of any right or value contained in the text. Ethical is more than a mere acceptance of indeterminacy as set out above, since it includes a ceaseless challenge of the *status quo*; that is a ceaseless challenge is continuously asserted in the process of be-coming. A ceaseless challenging does not entail mere obstructiveness for its own sake or for that of politics. The ceaseless challenge rather denotes responsible questioning of the meaning of a section or right contained in the Constitution and asking whether the current understanding of the section or right truly makes a difference in the lived experience of the legal subjects falling within or who ought to have falling within the field of application of the relevant section or right. Any interpretation that is so divorced and abstracted from the reality of the lived experience that it becomes meaningless to those to whom it apples, such interpretation does not serve any meaningful purpose, whether legal, moral, ethical, or otherwise. Ethical indeterminacy also encapsulates the notion of openness, which requires that no single meaning attached or attributable to an interpretation or interpretations *ought* to be final and, thus, is perpetually susceptible to future (deferred) (re)interpretation. Case in point is the *Harksen*-test that has stood the test of time, no pun intended. This test, once tentatively formulated in 1997, has reified into the (in)famous *locus classicus*. Although Goldstone, J. was clear that, for the purposes of measuring impact, the different considerations are listed in the judgment is not constitutive of a closed list, we have not seen any 'new' consideration applied by the Constitutional Court.

The above all converges upon the following paragraphs containing the gravamen of my argument in favour of an ethical interpretation of the Constitution. Approaching the Constitution *as* sheltering the truth of being (in Heidegger's sense) we can, and must, treat the Constitution *as* an expression of (a possibility) of an ideal social order. It shelters (past) understanding of (a possibility) of an ideal social order, but at the same time shelters the unknown that can never be fully known – a perpetually incomplete (open) interpretation of an ideal social order. In terms of (past) understanding *as* finite, historically situated interpretation through experience, we treat the Constitution *as* (the) supreme law by acknowledging its constitution of an objective normative value system that informs our entire legal system (legal

order) and subjects every one of us and all conduct to itself. Expression denotes an understanding in the sense that:

> "It is not so much that we see the objects and things but rather that we first talk about them. To put it more precisely: we do not say what we see, but rather the reverse, we see what one says about the matter."[248]

When saying a table is white one does not literally *see* the *being*-white of the table.[249] When the Constitution proclaims that everyone is equal we do not see the *being*-equal of everyone.[250] However, 'expression', in this context, denotes that it *matters* what is said or proclaimed about a subject-matter. Thus, the Constitution is an embodiment of what we, the people of South Africa, have said and are saying about equality, human dignity, freedom, human rights, politics and political power, and social bigotries. We have declared that South Africa is one sovereign republic inhibiting citizenry that are innately equal *viz-à-viz* dignity and a state wherein the Constitution and democracy reign supreme whilst furthering the call for the advancement of both human rights and freedoms. True to the meaning of understanding a finite, historically situated interpretation, the text of the Constitution is an expression of our past being active in our present world. The (text of the) Constitution shapes our culture as one of justification, our language as the language of substantive equality, and our norms as objective within a value system. Whilst the South African substantive constitutional revolution ran its course and the (Interim) Constitution saw the light of day black South Africans were no longer treated *as* non-humans. Although never stripped of their dignity and humanity, the (Interim) Constitution delivered the *de jure* birth of black *as* also human being with immense *de facto* consequences. The South African substantive constitutional revolution, as already stated, carried with it ontological consequences, which is recalled here in thought, but not *verbatim* in the text.

I now turn to expanding upon an ethical interpretation of the Constitution in terms of which the text of the Constitution is *open* towards treating the Constitution *as* (*i*) be-coming by adopting equality as an ideal to be achieved, (*ii*) indicative (not determinative) of the meaning of being human by adopting dignity as an Idea(l) attributed (to humanity), (*iii*) cognisant of ethical understanding by enjoining advancement of both human rights and freedom conjunctively, and (*iv*) African by actively embracing the lived ethical concept of *Ubuntu*. The entirety of these *as*-es constitutes an ethical interpretation of the Constitution, which by its very designation as ethical must be open towards further (re)-interpretation(s). The ethical interpretation of the

248 Moran, *Introduction to Phenomenology*, (2000), at p. 234.

249 *Ibid.*

250 Nothing turns on the fact that the proclamation (that everyone is equal) of the Constitution (being) is further removed and abstracted from the perceptive (that what can be perceived) when compared to the perceptibility of a table (being).

Constitution is proposed through experience of the way in which the Constitution (can) make(s) a difference in our world – 'post'-apartheid South Africa. Each *as*, or then (*i*)-(*iv*) has an element of ethical within it, but what ties them all together is the notion of an ideal.

Ideals mark a place of irreducibility to that which is actually valued or prized, which is values, since values are defined as that which is "actually liked, prized, esteemed, or approved by actual groups or individuals".[251] These ideals mark a place of irreducibility, which is the ideal of a new society, of which the Constitution is an expression, since, as has been said already, the Constitution details the ethical direction which that nation has identified for its future as the ideal of a new society or then the place of irreducibility. The ideals traced within the ethos of the Constitution positions us at the ideal society and ethical values as contained in the Constitution requires everyone to aspire towards living in accordance with ethical values, as opposed to merely values. An ethical value is one that stands in relation to the ideal represented by such value, but which ideal can never be reduced to the value. Ideals as such, cannot be reduced to or by that which is actually valued or prized by any actual group or individuals and their *subjective* interests. The envisioned ideal society is, accordingly, ideality in itself, marked by and grounded on ideals only. Ethical, within an ethical interpretation of the Constitution, entails being open towards the truth of being (in Heidegger's sense) sheltered by the Constitution. Otherwise put, be open to the ways in which the Constitution matters to us. It, therefore, enails being open towards being engaged by the ideals towards which the Constitution is directed, which ideals are objectively detached from, irreducable to, and not susceptible to mis-appropriation and, thus, mis-interpretation by subjective interests. Ideals are also open, indeterminate, and incapable of being fully understood in that they relate to the meaning of being (in Heidegger's sense), and being is radically indeterminate. Within this ideal society everyone within the said imagined society *is* equal. Importantly, the inherent dignity of everyone is an irrefutable and phenomenal fact – in reality *everyone* is objectively possessed with dignity not because it is stated as such, but because it *is* an irrefutable and phenomenal fact. What the meaning is and consequences of everyone that is equal and to be objectively possessed with dignity can never be answered because ideals cannot ever be an object of consciousness – ideals mark a place of irreducibility, and accordingly are in themselves irreducible to any 'clear, neutral and objective meaning'.

Cornell & Fuller interpreted Kelsen as follows: "… a *Grundnorm* is an external moral or ethical ideal that is the foundation for the entire legal system in question".[252] I understand the term *Grundnorm* as an external ethical value that is the foundation of an entire legal system. An

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251 Cornell & Van Marle, (2005, *Exploring Ubuntu: Tentative Reflections*), at p. 205.
252 Cornell & Fuller, *Introduction*, (2013), at pp. 5-6.

ethical value, in turn, is a value that perpetually stands in relation to and acts as a momentary signifier of the ideal signified by such value. In other words, the constitutional values of freedom, dignity, and equality are ethical values that are perpetually directed towards the ideal but only momentarily concretely signifies the ideals once the value is given content (meaning) to. The ethical nature of these values renders their meaning perpetually susceptible to and open towards difference. In other words, the meaning of a value always remains open towards a different meaning, never to be understood as being finally determinate. As will be seen hereunder, *Ubuntu* is an ethical concept, although not conceived as a value as such.

4.1.1. DIGNITY AS AN IDEA(L) ATTRIBUTED (TO HUMANITY)

I submit that an ordinary hermeneutic interpretation of the Constitution's text justifies the conclusion that we *can* treat the Constitution *as* indicative (not determinative) of the meaning of being (existing *as*) human by adopting dignity as an Idea(l) attributed (to humanity). Human dignity – as contained in the text – of the Constitution, is open towards an ethical interpretation and such understanding of dignity is informed by, among other things,[253] Kantian ethics (as understood by Wood)[254] that informed the Constitutional Court's conception of human dignity. In our 'post'-apartheid constitutional dispensation dignity (worth) *is* an ideal attribution: Dignity (worth) *is* an Idea(l) attributed to humanity.[255] 'Humanity', in this context, denotes any being (existing) *as* human and 'Idea' in 'Idea(l)' denotes dignity as an Idea or Ideal with the accompanying realisation that attribution of dignity to humanity *as* an ideal is not the work or result of the law or any one person or group of persons. Dignity is an ontological mental impression (Idea (of humans)) to the effect that within each one of us – *as* human beings – dignity (worth) innately (naturally) inheres.

I now turn to the structure of the Constitution, more specific the Bill of Rights, in order to investigate the text of the Constitution and the manner in which human dignity is incorporated therein. Section 1(*a*) of the Constitution provides that the "Republic of South Africa is one, sovereign, democratic state founded on the … value of, among others, … [h]uman dignity". Section 7(1) continues by determining that the Bill of Rights "enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality[,] and freedom". Section 10 designates the status of fundamental human right to human dignity by declaring that "[e]veryone has inherent dignity and the right to have their dignity respected and protected". Everyone includes any detained person and sentenced prisoner, since every detainee

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253 I interlace human dignity, as particularized by Kantian ethics, with *Ubuntu*.

254 Wood, (2008, *Human Dignity, Right and the Realm of Ends*).

255 See Cornell & Fuller, *Introduction*, (2013), at p. 8.

and prisoner have, in terms of section 35(2)(*e*), the "right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment". Human dignity is also of importance in the context of limitation of rights in that section 36(1) provides that the "… rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom …". The Constitution considers human dignity to be of utmost importance to human beings in that, in terms of section 37(5)(*c*), human dignity is a non-derogable right in its entirety in a state of emergency.

Whilst cognisant of the through manner in which human dignity occurs throughout the Bill of rights, our concern lies primarily with section 10 proclaiming that everyone has inherent dignity. In other words, human beings have intrinsic worth by virtue of being (existing *as*) humans and, as such, equal intrinsic worth.[256] It is then not mere happenstance that section 10 of the Constitution proclaims that "[e]veryone has *inherent* dignity". To understand dignity as an ideal attribution one must have recourse to Kant's conception of human dignity. To explain his conception of human dignity Kant contrasted price with dignity (worth). Any-thing (being) that has a price holds a value and can, thus, be rationally sacrificed or traded away for some other-thing, which has an equal or greater value.[257] In contrast with price, dignity is a value with no comparator and, as such, its value is absolute.[258] Dignity is immeasurable in relation to any other values because dignity can never be rationally sacrificed or traded for any-thing at all, which is the converse to any-thing that has a price and holds a comparable value.[259] Although human life is finite, the *value* of every human being is absolute and irreplaceable as one cannot substitute the value of any human being – not even with the value of another human being.[260]

Because, in terms of *Ubuntu*, we all are interconnected, and the meaning *Ubuntu* attaches to the ethical relation, simply existing does not confer a human being with inherent worth. Rather, it is the respect and support given to all human beings that confers such worth. At first blush *Ubuntu* seems irreconcilable with the above interpretation of section 10, but I argue that it is not. The reference to simply existing is a mere recognition that without the other there is no I, and that "I am because of others, in a relationship with others. I am not an island of myself, I am

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256 See Huges, *Human Dignity and Fundamental Rights in South Africa and Ireland*, (2014), at p. 36: "The dignity of the person refers to the special status given to all individuals by virtue of being human".

257 Wood, (2008, *Human Dignity, Right and the Realm of Ends*), at p. 49, Wood explains that "[t]he market price of a commodity … is the ratio at which it may be exchanged for other commodities whose value is deemed equal for the purposes of exchange".

258 *Ibid.*

259 *Ibid.*

260 *Ibid.*

part of a community".[261] Thus understood, a human is in his or her being-with others. The moment a person is born – as a human being – he or she will, by virtue of belonging in a community, be given respect and support and, in this sense then, *ab initio* any human being *has* worth. Once born, a human is born into the 'there', but is simultaneously being-there as in being-in-the-world. We, as humans, *are* in such a way as to be 'there'. In terms of *Ubuntu* worth is *conferred* by the community on the individual human being, but such community is inscribed within said individual, thereby rendering such worth, albeit implicitly, inherent. Since existence pre-cedes essence, I exist in the world in and through by being-with others before any futile attempt to notice, know, and ultimately understand the other. In terms of Ackermann's conception of human dignity, worth is *wholly* inherent to any individual human being. It is my opinion that one ought to adopt a conception of dignity understood as communally conferred worth and implicit inherent worth.

For Ackermann it is "significant that s[ection] 10 first proclaims that [']everyone *has* inherent dignity['] before entrenching the right of [']everyone … to have their dignity respected and protected[']" [original emphasis].[262] I agree with this significance and therewith I argue that the constitutional text itself highlights the fact that the Constitution recognises human dignity as "definitional to what it means to be a human being".[263] In terms of dignity, understood though *Ubuntu* as communally conferred worth, definitional of what it means to be a human being is to be interconnected with others and this is exactly the antithesis of apartheid defining the ontological essence of humanity as being separated from the other, which is the inverse of being-in-the-world. Section 10, according to Ackermann, attributes meaning to being human, but more than that – it attributes an Ideal to every human being; namely that every human being has incalculable and intrinsic worth. *Ubuntu* goes even further and holds that being human means to be interconnected with others and the incalculable worth of every human being is due to respect and support given by others, which worth is intrinsic by reason of the *inscription of the other within each one of us*.

In Kantian ethics, a human being is the most basic, but most important, value, and contrary hereto are the actions humans value and are those belonging to the state of affairs, which state is the result "that we seek or shun" in such actions to achieve the aforesaid result or then state of affairs.[264] Wood states that the result or state of affairs boils down to human

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261 Gade, (2012, *What is Ubuntu? Different Interpretations Among South Africans of African Descent*), at p. 493.
262 Ackermann, (2004, *The Legal Nature of the South African Constitutional Revolution*), at p. 647.
263 *Ibid.*
264 Wood, (2008, *Human Dignity, Right and the Realm of Ends*), at p. 51.

happiness or unhappiness.[265] Having regard to the importance that I postulate to human dignity one can easily, even without hesitation and any condition, accept that human happiness *ought* to *matter* only because a human being, endowed, or then conferred with absolute worth, although still being intrinsic, *matters* to us[266] – the community. To bring Kantian ethics in line with Heidegger's thought, I remind the reader of the meaning of being denoting how a being shelters being, which is reflected in the difference something makes or why something is matters to us. Kantian ethics can be relied upon to show *why* the other ought to matter to the self but more importantly it can indicate what value the self ought to afford to the other's humanity. For Kant the humanity in every person is an end in itself and for him there is a difference between an end in itself and an end *to be produced*, where the latter is the "results or state of affairs we peruse in our actions".[267] An end is anything "we act for the sake of" and an end *to be produced* is one qualifying as an end because human beings act, not for the sake of *per se*, but rather to bring such an end to the fore or realise such an end.[268] Thus, a human being, or the humanity in such person, cannot be a result *to be produced* because such human being, or the humanity in such person, is an end in itself and, accordingly, something *already existing*.[269] Human beings are ends in themselves because we act for their sake *per se*, not to bring their humanity about.

Ubuntu, understood as the *potential* of being human, in that it is *Ubuntu* which both "'guarantees … a separation between men, woman and the beast[,]'" has as a consequence that *only* that which has *humanity* can have the potential of being a human. Humanity, for Kant, is the "capacity to set ends, choose means to them and combine them into an idea of happiness".[270] We have humanity because we are possessed of such capacity and it is this capacity that renders, potential, human beings ends in themselves. Every one of us has the potential to be a human being if we live up to that which *Ubuntu* requires from us, but the mere fact that there is a potentiality present, does not negate the ideality of humanity itself. To state this rather bluntly – the refusal of some to respect and support others does not strip the latter of their dignity, it has quite the opposite effect: "black people were refused respect and dignity and thereby the dignity of all South Africans was diminished."[271] It is in this sense then, both in terms of Ackermann's

265 *Ibid.*, this comprises of pleasure, pain, satisfaction, and frustration.

266 *Ibid.*

267 *Ibid.* at p. 52.

268 *Ibid.*

269 *Ibid.* at p. 53: "It is humanity … that is an end in itself and that … we must always treat as an end, never merely as a means".

270 *Ibid.* at p. 53. See also Adams, (1997, *Individualism, Moral Autonomy, and the Language of Human Rights*), at p. 504 where it is stated that according to Kant the self is only free if "it is capable of holding these features of its social situation at a distance and judging them according to the dictates of reason".

271 *Makwanyane* 1995 (CC) at para. [329].

understanding of inherent worth and *Ubuntu* as conferred and implicit inherent worth, that dignity is an ideal attribution of every human being and not subject to subjective recognition.

Langa, J., as he was then, opined that the concept of *Ubuntu* is of relevance in respect of the values that must be upheld. He went on to describe *Ubuntu* as a culture that emphasises communality and the "*interdependence* of the members of the community" [own emphasis].[272] For him, *Ubuntu* recognises every person's 'status' as a human being and because of this 'status' as a human being every human being is entitled to "unconditional respect, dignity and acceptance from the [other] members of the community" to which said person forms part of.[273] In this sense there can be a point of convergence between *Ubuntu* and Kant in that the recognition of the inherent worth of human beings and that one must treat another human being as an end and never merely as a means forms part of the categorical imperative; that is it is an unconditional command. It shall be remembered that Mokgoro, J. argued that *Ubuntu* ought to influence the entire jurisprudence of South Africa in that, *inter alia*, "law, experienced by an individual within a [community], [ought to be] bound to individual duty as opposed to individual rights or entitlements".[274] What Mokgoro, J. meant by the latter is, in my opinion, that *Ubuntu*, in addition to what Langa, J., as he was then, had said, entails the converse thereof as well:

> "Every person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community [and, more importantly,] … [*Ubuntu*] regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all."[275]

The conclusion that human beings are ends in themselves because we act for their sake *per se*, not to bring their humanity about, is unerringly the basis of Ackermann's argument that the statement in section 10 of the Constitution that "[e]veryone *has* dignity" is "a constitutional proclamation about the essence of the natural person respected and protected by the Constitution".[276] The word essence in the immediately aforementioned quote might seem to be problematic. Indeed, to some it might, but the essence of humanity as dignity is everything but determinate. In other words, the essence, dignity, is indeterminate. For Ackermann, the phrase is a "supra-constitutional declaration – an onto-anthropological statement … – of what a person already *is*, what she *has*, before the invocation of any right in the Constitution".[277] It is rather unclear what he meant with "onto-anthropological statement". Therefore, instead of using the

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272 *Ibid.* at para. [224].
273 *Ibid.*
274 Mokgoro, (1998, *Ubuntu and the Law in South Africa*), at p. 29.
275 *Makwanyane* 1995 (CC) at para. [224].
276 Ackermann, *Human Dignity: Lodestar for Equality in South Africa*, (2012), at p. 95.
277 *Ibid.*

latter, a more appropriate phrase would be an ontological assumption. Be that as it may, human dignity is not acquired by constitutional conferment because dignity is already, although implicitly, inherent in every human being, hence 'human dignity'. One can reconcile Ackermann's conception of human dignity with dignity as an ideal attribution because he recognises that in an "imperfect world" (reality) the "*right to dignity*" suffers infringement, but the "inherent dignity that every human being *has* cannot be destroyed", short of death [original emphasis].[278] As such, dignity – as an ideal attribution – can never be "confused with the real phenomenal fact of our *actual* existence, nor identified with any of our *actual* values" [own emphasis].[279] Section 10 of the Constitution is a statement, but not a statement of an objective fact or truth. Dignity inheres in each one of us, not because of qualitative or quantitative proof of its existence within each one of us, but because we *state* it as such. Dignity is then a notional and not a real or phenomenal fact. Dignity inheres in us, but is, paradoxically, an ideal, found not in reality, but is a notional construct of what it means to be a human being marking a place of irreducibility, in other words the ideal society.

An ethical interpretation of the Constitution entails asking what difference the Constitution makes in our lived experience *as* human beings and entails being open to engage and be engaged by the Constitution. Thus, the Constitution will be engaged by us when we required constitutional assistance or relief, but we ought to be engaged by the Constitution in order to determine whether such relief or assistance sought accords with what the Constitution envisions within the ideal society, of which it is an expression. The Constitution, ethically interpreted, envisions an ideal society in which every human being is vested with innate, inalienable, and incalculable worth, which is communally conferred an such conferment is translatable as and is a confirmation that each one of us ought not be treated only as means, since each one of us, because of being-with others, is an end in ourselves. Being engaged by the Constitution entails taking our history seriously, since the text of the Constitution is an expression of our past being active in our present world. The Constitution collectively shelters an experience of a nation, which experience has been pronounced to be a 'crime against humanity' and, as such, impacted upon and influenced the entirety of humanity.[280] The Constitution shelters an experience of a nation and proclaims 'never again' shall we commit the crime of

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278 *Ibid.*

279 Cornell & Fuller, *Introduction*, (2013), at p. 13.

280 Art. 7(1)(*j*) of the Rome Statute of the International Criminal Court, of 1998 provides that "crime against humanity" means the "crime of apartheid" when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. Art. 7(2)(*h*) defines the crime of apartheid as "… inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime".

apartheid and society was devoid of respect for human dignity and the ontological essence of humanity was defined as being separated from the other, which is the inverse of *Ubuntu* providing for an alternative conception of humanity as entailing 'to be' means being in a relationship with the other, which corresponds with being-with. Engagement with the Constitution entails having recourse to and relying on the Constitution the effect *de facto* change in one's experience, since only then can one proclaim that the Constitution made a difference to you. Such change occurs either through the legislator by passing legislation that is constitutionally consonant or by the Courts when a litigant seeks (constitutional) relief.

However, the difference that the Constitution makes in our lives is not limited to an individual litigant's fate, but rather finds macro elucidation when considering the performative possibilities tied within the law and a judicial judgment.[281] For the purpose of this thesis, however, I focus on understanding and appreciating the ontological consequences the Constitution brought about, but also, the ontological consequences the Constitution still can provide for. The South African substantive constitutional revolution is *the* reason for and catalyst of an ethical interpretation exactly because of the historical injustices plaguing both our past as well as the present. It is the *circumstances* that gave rise and content to the (Interim) Constitution that sets the (Interim) Constitution apart from any other. The *de jure* difference that the (Interim) Constitution made has been alluded to, at length. However, transformation of the social, or then society, is but *a possibility*, which if pursued we can partake in the process of interpretation, as alluded to above. More importantly, however, the (Interim) Constitution also had *de facto* consequences occasioned by the constitution of a new legal order signified by an objective normative value system. These *de facto* consequences impacted upon the lives of legal subjects in a profound manner in that legal subjects hither hereto never recognised as of representative of humanity and not vested with dignity as such had been proclaimed as being equal in dignity *viz-à-viz* the other. Before enactment of the (Interim) Constitution certain legal subjects had been ascribed a value or price as opposed as having been recognised as human beings of incalculable worth. Antithetical to *Ubuntu*, members of the community implemented a system of confined separation in terms of which black (human) beings were spatially confined and ontologically constrained; otherwise known as apartheid. It shall be recalled that ontological constrainment

[281] In fashioning an appropriate remedy in *Immigration*, Ackermann, J., noted that a remedy, in any context, must vindicate constitutional rights, but such vindication must occur at a level beyond mere abstract vindication and, in the context of equality, a remedy must operate to eradicate stereotypes, since our constitutional commitment to non-discrimination and equal protection demands this. It was held, in *Immigration* 2000 (CC) at para. [82]., that the bell rings for everyone because:

> "[The … s]ocial cost of discrimination is insupportably high and these insidious practices are damaging not only to the individuals who suffer from the discrimination, but also the very fabric of society" –

entailed defining the being of black (human) beings as – with the intention to control and suppress. Those in power arbitrarily defined the identity of a black person *as* inferior,[282] uneducated,[283] criminal[284] and so forth. In order to encapsulate Blackness with utmost scorn, ridicule, contempt and a sense of belittlement they were referred to as *kaffirs*.[285] Definitional to being (existing *as*) human, for Ackermann, is the "ability to understand or at least define oneself through one's own powers and to act freely as a moral agent pursuant to such understanding or self-determination".[286] A black person could not control the most basic aspects of human life, such as, among other things, with whom one may associate, whether social or sexual, where one may live or where one may go to school.[287] Where one lives, with whom you associate yourself with, and where you receive your education is developmental of your identity. A black person did not define him- or herself according to his or her own powers; otherwise put, a black person was devoid of self-determination and of any sense of volitional subjectivity. His or her identity was arbitrarily attributed to or rather forced upon him or her by the government treating him or her as a mere object *only* and not as a human being of infinite worth.

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282 *Daniels* 2004 (CC) at para. [48], Ngcobo, J., as he then was, in writing a minority concurring judgment stated that "[b]lack people were denied respect and dignity. They were regarded as inferior to other races". In *Moller* 1911 it was accepted "[a]s a matter of public history we know that the first civilized legislators in South Africa came from Holland and regarded the aboriginal natives of the country as belonging to an inferior race, whom the Dutch, as Europeans, were entitled to rule over, and whom they refused to admit to social or political equality".

283 In *S v Xhego* at para. H76, p. 197 the Court noted that there were other factors which "militated strongly against the acceptance of the allegations of the accused, again resulting largely from the inherent foolishness of the Bantu character".

284 See Penny & Lindeque, (May, 2016) where, as recently as May 2016, a High Court Judge, Mabel Jansen, stated that non-consensual sex (in other words rape) is "[i]n their [black people's] culture".

285 De Vos, in De Vos, *On 'Kaffirs', 'Queers', 'Moffies', and Other Hurtful Terms* (E-Pub Feb., 2008) wrote on the meaning of *kaffir* thus:

> "This term has an ugly history in South Africa and was almost exclusively used by white racists as a gross generalisation to denigrate black South Africans. To be called a 'kaffir' is to be called a lazy and stupid person. But the assumption behind the word is that by being lazy and stupid one is merely behaving as all black people always behave – as white people expect black people and know all black people to behave. So even when a white person is called a 'kaffir', the recipient of the insult is being told that he or she is just as lazy and stupid as all black people are known to be by all racist white people."

In *Ryan v Petrus* 2010 (ECG)it was held that "[w]hen a black man is called a 'kaffir' by somebody of another race, as a rule the term is one which is disparaging, derogatory and contemptuous and causes humiliation" and in *Prinsloo v S* 2014 (SCA) at para. [20] the SCA held:

> "In our racist past it was used to hurt, humiliate, denigrate and dehumanise Africans. This obnoxious word caused untold sorrow and pain to the feelings and dignity of the African people of this country. …[S]uch conduct seeks to negate the valiant efforts made to break from the past and has no place in a country like ours which is founded upon the democratic values of human dignity, and the advancement of human rights and freedoms."

286 Ackermann, (2004, *The Legal Nature of the South African Constitutional Revolution*), at p. 645.

287 In *Brink* 1996 (CC) at para. [40], O'Regan, J. held that:

> "Our history is of particular relevance to the concept of equality … apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in ['white'] areas …; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and *inferior* facilities were provided." [own emphasis]

Consequent upon the South African substantive constitutional revolution, which produced the (Interim) Constitution, with a single instantaneous act of enacting, South Africa, caused a substantive and *de jure* (re)imagination and (re)constitution of the meaning of being (existing *as*) human. I submit that, within a South African context, the meaning of being (existing *as*) human was expanded to include, for the first time, black human beings, Women, homosexual human beings, and any other category hitherto not recognised as being representative of humanity. I do admit that apartheid impacted upon black Africans the most insidiously, and, as such, I am quite limited in my discussion to this category. Any legal rule, whether contained in statute or the common law, that was not congruent with the objective normative value system constituted by the (Interim) Constitution ceased to exist. It is now accepted that the crime of apartheid was a given effect to and implemented through the instrumentality of the law and, holistically considered, was an instantiation of *de jure* social engineering. The legal system did not recognise, instead disregarded, the worth of black human beings, Women,[288] and homosexual human beings.[289] However, with the advent of the (Interim) Constitution such *de jure* ontological constrainment was brought to an instantaneous and abrupt end, which entailed the (re)imagination and (re)constitution of the being of black persons, Women, and homosexual persons *as* human beings. However, as shown *infra* when discussing the achievement of equality, any assertion of the meaning of (being) human is and can never be a final pronunciation thereon or definition thereof, since we (*Da-sein*) is always in a perpetual process of be-coming.

An ethical interpretation of the Constitution is being open towards being engaged by or informed by the Constitution as opposed to attributing subjective impartial and ultimately exclusionary meaning to the text and the purport of the Constitution by relying and irresponsibly insisting upon and essential(ist) historical context. Such a (political) interaction with and interpretation of the Constitution is in direct conflict with an a-political and ethical interpretation of the Constitution insisting upon taking history seriously, based on experience.

As already made clear above in discussing dignity in terms of *Ubuntu* and Ackermann's interpretation of section 10 of the Constitution, *Ubuntu* is an important ethical concept within an ethical interpretation of the Constitution in that, as concept giving meaning to *an* conception of being (existing *as*) human, it emphasises the interconnectedness of human beings in their being-

[288] In *Masiya v Director of Public Prosecutions Pretoria* 2007 (5) SA (CC) at para. [21], Nkabinde, J. held as follows:

> "… [I]n patriarchal societies criminalised rape to protect property rights of men over women. The patriarchal structure of families subjected women entirely to the guardianship of their husbands and gave men a civil right not only over their spouses' property, but also over their persons. Roman-Dutch law placed force at the centre of the definition with the concomitant requirement of 'hue and cry' to indicate a woman's lack of consent. Submission to intercourse through fear, duress, fraud or deceit as well as intercourse with an unconscious or mentally impaired woman did not constitute rape but a lesser offence of *stuprum*" [footnotes omitted].

[289] See *Sodomy* 1999 (CC) at paras. [20]-[27] & *Immigration* 2000 (CC) at para. [42].

in-the-world *as* being-with others; that is existing as humans in ethical relation(ships) with each other. *Ubuntu* is an expression of *a* way of being-in-the-world and, it shall be remembered that I held in Chapter 1 that, with such influence of the notion of *Da-sein*, it is my understanding that the being of humans is flued and refers to an expression of the ways of being (existing *as*) human. An expression of the ways of being human refers, in turn, to habits, customs, behaviour, and systems of humans, which is informed by both the past and the possibilities of the future. *Ubuntu* can provide content to the aforementioned as denoting that:

> "[e]very person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community [and, more importantly, … [*Ubuntu*] regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all."[290]

4.1.2. The Achievement of Equality

In developing the ethical interpretation of the Constitution and building upon dignity as an ideal attribution, I submit that an ordinary hermeneutic interpretation of the Constitution's text justifies the conclusion that we *can* treat the Constitution *as* be-coming by our adoption of equality as an ideal to be achieved. To treat the Constitution as a being that shelters the meaning of being (in Heidegger's sense) one is being open towards experiencing all the ways in which the Constitution makes a difference in our being-in-the-world as both being-there and being-with. That is, to be open towards the ways in which the Constitution matters to us is being open to being engaged by the Constitution so as to (re)interpret prior understanding. A responsible interpreter would approach the Constitution with presuppositions (based on (prior) understanding), but also adjust his or her presuppositions to the Constitution; that is to be open towards the truth of being (in Heidegger's sense) it shelters. Otherwise put, be open to the ways in which the Constitution matters to us and the ways in which it *can* make a difference in our world. A responsible interpeter, thus, approaches the Constitution *as* sheltering the truth of being (in Heidegger's sense) and is open towards the ways in which it matters to us. Thus understood, the Constitution can and does fit into an expression (a possibility) of an ideal social order.

Deference in favour of and excessive use of a grand narrative of history, which has emerged into constitutional existence as the so-called "essential context", can entrench one version of history, which can, if so deployed or left unchecked, limit or prohibit new meanings in the constitutional interpretation of the right to equality and, thereby, stifle progression. Unwillingness of or if, for some reason, the Constitutional Court finds itself unable to reflect on

[290] *Makwanyane* 1995 (CC) at para. [224].

the entrenched version of this grand narrative of an essentialsist and exclusionary understanding of history it would stifle discovery or recognition of other (new) forms of oppression and marginalisation. Even more alarming is the fact that the essentialist grand narrative of an essential historical context has constituted a new form of oppression and marginalisation, which, even if denied by scholars and politicians alike, is the domination by the majority black population of the minorit*ies*. The right to equality has entered a stage of stagnation with the repression of any knowledge of South Africans as to who they are and how they fit into the world that is not congruent with or accepting of what may continue to exist in an absolutist partisan and populist majoritarian representative hegemony clothed in constitutional "radical" transformative jurisprudence devoid of any justification based on the *Grundnorm* of both constitutional values and *Ubuntu*. As difficult as it might seem to believe, history includes the years including and following 1994 to date. A refusal to concede that history has progressed beyond the circumstances and state of affairs of 1994 precludes 'post'-apartheid progressive interpretations of the right to equality. Simply put, we, as South Africans, will only perpetuate the general misconception that *all* black South Africans *are still* disadvantaged, marginalised, discriminated against, and perceived – whether by white South Africans or others – as sub-human if *all of us* do not recognise that **not** *all* black South Africans are in the same position as on 27 April 1994, recognising that *some* progression has been made – some black South Africans have been empowered. Such a recognition includes acceptance, as the Constitutional Court did, that black South Africans are a political majority rendering white South Africans a vulnerable political minority.[291] The next step ought to be a recognition of black empowerment that had already taken place.

Returning to the text of section 1 of the Constitution, I direct my thought to the value 'achievement of equality'. Because of the syntaxical structure of section 1, emphasis is placed on *achievement of* equality rather than on equality *per se*. The relevant portion of section 1(*a*) of the Constitution holds that the Republic of South Africa is one, sovereign, democratic state founded on, *inter alia*, the value of the achievement of equality. The subject of the sentence is the 'Republic of South Africa' being one, sovereign, democratic state. However, the sentence has two objects, the first being the direct object; namely 'the achievement', and the second being the prepositional object; namely 'of equality'. As such, the mere structure of section 1(*a*) is indicative of the value signifying, not equality *per se*, but the *achievement of* equality. The value found in section 1(*a*) signifies the 'not yet', that which is yet to be articulated, nor understood and can never be fully understood. In other words, we act within an envisioned 'what if' every human

291 *Walker* 1998 (CC) at para. [48].

being *is* equal because, each one of us, by virtue of being a human being, has *equal* intrinsic worth. The value, achievement of equality, is the signifier of the Ideal: equality that has been *achieved*. In other words, the value is the articulation by the Constitution of the ethical direction for our future – the Ideal of equality that has been achieved, which marks a place of irreducibility, that is the ideal society. Within this society the ideal of equality is realised by in that everyone *is* equal. Accordingly, the statement that everyone *is* equal *vis-à-vis* another in relation to their dignity must not be confused with the real phenomenal fact of our actual existence, nor identified with any of our actual values.

We place value on equality by articulating the ideal of equality as being equal *vis-à-vis* another in relation to our dignity. That articulation of equality is *not* the ideal itself, but merely an articulation thereof in the form of a value that seeks to encapsulate, as far as humanly possible, the ideal of equality, which is impossible. By recognising that everyone is equal *vis-à-vis* another in relation to their dignity we are merely relating the ideal of equality to dignity as an ideal attribution. In this sense the Constitution is aspirational, in that it calls upon South Africans to aspire to live *as if* we are all equal *vis-à-vis* another in relation to our dignity. To live up to the aspirational ideal of equality carries with it the responsibility flowing from living *as if* we are all equal *vis-à-vis* another in relation to our dignity. This responsibility is, as we understand notions of dignity and equality at the moment, inclusive of the appreciation that any human being ought to be treated as an end in himself or herself and never merely as a means.

Returning to the notion of be-coming, I must pause and emphatically state that this concept is central to the ethical interpretation of the Constitution, and thus, section 9 thereof as well. The reader will recall that in my understanding of be-coming, 'be' (v.) is used to denote existence whereas 'come' (adj.), in turn, is used to denote occur, happen, and *take place*. The hyphen is used to separate existence from occurrence to indicate that any being (thing) does not merely exist, but its existence occurs, happens, or takes place. Be-coming is *not mere* imagination and constitution of the self and society, since be-coming, whilst suspect of *a fortiori* knowledge, does not deny that we emerge into existence with certain background understanding. Thus, we cannot escape a pre-imagined and pre-constituted self, but, instead of adopting a nihilist perspective or merely accepting the preordained and unquestionability of who and what you are, an ethical understanding is always open towards (re)imagination and (re)constitution of the self by perpetually calling into question the pre-imagined and pre-constituted self or then a former (re)imagined and a (re)constituted self to a previous pre-imagined and pre-constituted self. Be-coming is, therefore, the perpetual (re)imagination and (re)constitution of the self and perpetual (re)imagination and (re)constitution of society. The double movement of molar and molecular

politics, leads to an acceptance that the meaning of any-thing is accompanied by deferred (re)imagination of the same meaning in the same act of asserting. The assertion of meaning is, thus, merely an event *taking place* in the process of be-coming. It is deferred (re)imagination of the same meaning in the same act of assertion because any asserted meaning is always incomplete by excluding or lacking the hitherto never asserted meaning. No asserted meaning can, therefore, be final and is always open towards (re)assertion, rather than reassurance, through imagining the hitherto never asserted meaning Be-coming entails that any assertion of any-thing, which includes a conception of our-selves, be accompanied by the simultaneous but deferred questioning of the very same meaning in the very act of asserting. Thus understood, be-coming is perpetual and what is at stake in be-coming 'post'-apartheid is both "becoming of individuals/subjects" and the "becoming of communities[/society]".[292]

My notion of be-coming – rendering an ethical interpretation indisputably open – specifically incorporates the ethical relation to integrate the second prong of Cornell's interpretation of the subject of transformation and, as such, social transformation. The ethical relation concerns the kind of person one must be-come to develop a non-violative relationship to the other. "The concern of the ethical relation, in other words, is a way of … [being-in-the-world] that spans divergent value systems and allows us to criticize the repressive aspects of competing moral systems".[293] It is re-iterated that be-coming demands that no 'answer' forthcoming from *Ubuntu* in respect of the ethical relation can be final, since any assertion – inspired by the philosophical concept of *Ubuntu* – cannot be final because the moment that the assertion is uttered it is devoid of the non-asserted; that is, the hitherto never asserted meaning.

The reader is referred to my creative adaptation of Cornell's second prong of her interpretation of the subject of transformation, providing substantive content to the notion of social transformation, as 'perpetual be-coming of our-selves opens us to (the possibility of) new worlds'. The text of the Constitution invites the notion of be-coming into constitutional jurisprudence simply. First, the Constitution was adopted to "… [l]ay the *foundations* [as opposed to the establishment of the society *per se*] for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law … [and to … i]mprove the quality of life of all citizens and free the potential of each person". Second, the value in section 1(*a*) reads "achievement of equality". Third, section 7(2) of the Constitution enjoins the State to respect, protect, promote, and fulfil the rights to equality. The basis of a society has been established in which (*i*) every citizen is equally protected by law and (*ii*) it is

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292 Van Marle, (2010, *Reflections on Post-Apartheid Being and Becoming*), at p. 350.
293 Cornell, *Philosophy of the Limit*, (1992), at p. 13.

aimed to improve the quality of life of all citizens and free the potential of each person. The value of equality, thus, denotes the positive equal protection of the law and the achievement of equality being signified by the process in terms of which the quality of life of each person is improved as well as the potential within each one of is developed. The latter process identifies with what I have discussed in Part I of Chapter 2 as a dignified experience of humanity. The achievement of equality seeks to develop a context (a world or a 'there') within which each South African can be afforded a dignified experience of humanity. The Constitution, forming part of and being constitutive of the social imaginary ([insert]), is, therefore, the moral order that has or is still to influence the current social imaginary and, thus, the 'post'-apartheid modernity. Since the *de jure* substantive revolution has already taken place, the *de facto* social transformation is still to come about and central to such transformation is the transformation of the meaning of being (existing *as*) human as well as the (ethical) relation between the South African citizenry.

Incorporation of the notion of be-coming can assist in transforming the perceptions that we have of each other's being (existence *as*) or even worse being (objective presence) as opposed to being (belonging to *Da-sein*) that is informed by ontologically constructed bias and ontologically constructed intolerance. With an ideological mind shift adopting an ethical paradigm within which one reasons, as opposed to a political paradigm, one can partake in the process of be-coming, once falling disillusioned by the ethical moment; which is understanding that nobody is capable of not thinking (whether conscious of unconscious), at some point in time, that he or she is superior to or more deserving than any other based on personally held characteristics and appreciating (understanding the entire situation by grasping implications translating into acceptance) that he or she *ought* not to do so. Thus, self-realisation that one can be vested with ontological bias or intolerance would open one up to the possibility of conceiing a new world within which one is being-with another human being *differently* based on how one (re)imagined his or her being (existing *as*) a human being. One is open towards the ways in which the (re)imagined other can make a difference in your life and once such (re)imagination is taken seriously the other has been ontologically (re)constituted, although never finally. In incorporating be-coming one is allowing the other to engage yourself (the self) in its own state of thitherto state of individualist sovereignty and, if one is true to the ethical notion of *Ubuntu*, one is then being open towards the true self, since the other is already inscribed in the self. (Re)imagination and (re)constitution of the other is, in this sense, (re)imagination and (re)constitution of the self. Since be-coming is indicative of and is an express separation of existence from occurrence it denotes any being (thing) does not merely exist, but its existence occurs, happens, or takes place. I submit that be-coming denotes that the being (existing *as*) of human is no different in that,

being congruent with *Ubuntu*, simply existing is not indicative of being at all. However, existence is an occurrence and takes place with the consequence that human beings occur in their existence together with and in a relationship with each other where our being-with each other signifies our being-in-the-world *as* taking place.

4.1.3. Advancement of Human Rights and Freedoms

In building upon an (ethical) understanding of human dignity as an Idea(l) attributed (to humanity) and an acceptance that the Constitution is receptive and approves of the notion of be-coming, since the text itself adopted equality as an ideal to be achieved, I now turn to expanding upon an ethical interpretation of the Constitution in terms of which the text of the Constitution is *open* towards treating the Constitution *as* cognisant of ethical understanding by enjoining advancement of both human rights and freedom conjunctively. Simply put, an ethical interpretation promotes the Constitution being *open* towards (receptive of as opposed to dismissive) treating the Constitution *as* cognisant of ethical understanding by enjoining advancement of **both** human rights *and* freedom conjunctively.

My textual or then syntaxical argument relating to achievement of equality applies *mutatis mutandis* to the value, articulated in section 1(*a*) as, the advancement of human rights and freedoms. The phrase *mutatis mutandis* is relevant, since a difference is located in nuances between the arguments pertaining to each fundamental value as the text requires the advancement, not of freedom(s) *per se*, but the advancement of *both* human rights *and* freedoms. Before turning to the significance of requiring advancement of both human rights and freedoms, I must indicate the fundamental importance of the propositional object 'advancement', as contained in section 1(*a*), since it emphasises the fact that human beings must determine their own destinies in an imperfect world. In our context, our imperfect world is characterised by a society that remains inundated with the *aftermath* (*consequences*) of apartheid. However, within the ideal society, marked by the ideal of freedom, an ideal community exists possessed with a truly free(d) humanity; that is, a humanity characterised by the ability to act autonomously. For humanity to be free from socially constructed prejudices (such as, racism, sexism, and homophobia) would be to act autonomously from socially constructed bigotries. Consequently, and with the privilege of hindsight, if human beings had been able to act autonomously so as to be free from "the pulls and tugs of our day-to-day world and determine ourselves according to what we ought to be or what we ought to do"[294] we would have been aspiring to the ideal of freedom – that is the ideal of a free(d) humanity – and not be left with the aftermath of a crime against humanity, like apartheid.

[294] Cornell & Fuller, (2013), at p. 9.

It follows that if human beings are capable of acting autonomously from social bigotries (ontologically constructed intolerance), the need for human rights might become superfluous. However, if the reader disagrees with the statement that human rights might become superfluous in general, at minimum the right to equality – specifically anti-discrimination law – must become unnecessary. Differentiation based on personally held characteristics and resultant disadvantage are non-existent where the ideal of equality is a reality and if there is one irrefutable objective truth that history has put beyond question is that the human race is incapable of acting autonomously from social bigotries (ontologically constructed intolerance). Colonialism, slavery, and apartheid are but some examples of this inability. Once we realise this impossibility of acting autonomously and, in consequence, achieving equality, we have reached an ethical moment. As such, attributing significance to the specific wording of section 1(*a*) – the inclusion of human rights *and* freedoms – in the sense that we *ought* to advance human rights because we are ***not*** free, in this context not free from socially constructed prejudice, would be a recognition of the said ethical moment.

Freedom includes liberty in the negative sense as the "right of individuals not to have 'obstacles to possible choices' placed in their way by the State"[295] or then the freedom to act without interference from anyone. Positive liberty, as allowance of interference, on the other hand, is the "examination of when and how interference is to be allowed and further examination of the values behind that interference when we allow political legislation to limit negative liberty".[296] It is on this point where I diverge from Cornell & Fuller when they argue for South Africa to be regulated "under the name of freedom", through adopting Kant's conception of positive freedom, "and not simply limit freedom through external ideals such as equality".[297] The argument they propose runs contrary to the interpretive interdependence of the rights contained in the Bill of Rights as well as the hermeneutic importance of the values[298] that underlie our constitutional democracy. There cannot be one value to rule them all, just as there cannot be one ideal to rule them all. However, I will confess that autonomy as described *supra* forms part of Kant's conception of positive freedom, but I have argued that the capacity to act with autonomy is alien to the real phenomenal world and confined autonomy, in this sense, to the ideal realm similar to, but not the same as, that which Cornell & Fuller refers to as regulating

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295 *Ferreira* 1996 (CC) at para. [54].

296 Cornell & Fuller, (2013), at p. 14.

297 *Ibid.* at p. 16.

298 See O'Regan, (2008, *From Form to Substance: The Constitutional Jurisprudence of Laurie Ackermann*) at p. 15 where it is said that the values of human dignity, equality, and freedom are of "hermeneutic importance both in interpreting the content of the Bill of Rights; and in determining the justifiability of the limitation of rights" [footnotes omitted].

ourselves in accordance with the possibility of positive freedom in the Kingdom of Ends.[299] As such, I do not argue for regulation in the name of freedom, but rather for the recognition that human beings are unable to attribute to themselves absolute negative freedom in the sense that *ab initio* one is free to think for oneself, because one is not. Any person is rather constrained by socially constructed bias and his or her thoughts are structured by and in terms of such bias as opposed to *a priori* knowledge and understanding that is divorced from the 'here-and-now' context within which a person exists.

I argue then that we should adopt the inversion of the hallmark of Western philosophy, that is 'I think, therefore I am'. In the context of freedom, I argue for the inversion of I think, and as such I am – because I am free to think, or to rephrase, I am because I am free to think. This traditional Western ontological starting point, being preoccupied with a free and autonomous individual, is, in my opinion, that which made domination possible. This individual, possessed with natural, and in a sense absolute, negative liberty, is then free to think that I *am* superior to the other or I am free to think that I have the *right* to rule over others or, to hit more closer to home, "the Dutch, as Europeans, were entitled to rule over [the aboriginal natives and were entitled to] refuse[…] to admit [them] to social or political equality".[300] The inverse would then be the recognition that I am *not* free to think that I am superior to the other or I am *not* free to think that I have the right to rule over others, or that "the Dutch, as Europeans, were [***not***] entitled to rule over [the aboriginal natives and were ***not*** entitled to] refuse[…] to admit [them] to social or political equality".[301] The latter recognition follows from the ethical acceptance of the impossibility inherent to the human race – that of acting autonomously. The ethical acceptance, occasioned by said impossibility, would expose supposed superiority and justified entitlements based on personally held characteristics (difference in identity) for that which it in fact is; namely, ontologically constructed bias and intolerance. What it *ought* to mean to live in accordance with the ideal of freedom is to "determine ourselves according to what we *ought* to be or what we *ought* to do" [own emphasis].[302] Even though we cannot always act autonomously we *ought* to act autonomously and we *ought* to be autonomous human beings; that is, free from socially constructed bias and bigotries. As such, we are enjoined not only to advance freedoms, but human rights and freedoms because in a material *Rechtsstaat* liberty is not protected merely for liberty's sake, which means in a material *Rechtsstaat*, such as South Africa, no person is free, or at

299 Cornell & Fuller, (2013), at p. 9.
300 *Moller* 1911 at pp. 642-644.
301 My own rewriting of a part of the passage quoted from *ibid.*
302 Cornell & Fuller, (2013), at p. 9.

liberty, to be a racist or a sexist, although we recognise that at times human beings will inevitably fall into the chasm of social prejudice.

The aforementioned ethical acceptance is indicative of the fact that we chose to regulate our unequal society not only in accordance with (negative) freedom, but also in conjunction with other constitutional rights and values, such as the *achievement* of equality and human dignity. Cornell's second prong of the meaning of the subject of transformation has been creatively adapted, but remains denoting the kind of individuals we would have to be[-]come to open ourselves to new worlds. What this kind of individual is and ought to be is radically indeterminate, but for any of us to partake in the process be-coming we must strive to be an individual that is *open* to new worlds (in which the self is being-with thitherto human beings that 'never existed' in the ontological sense) and, as such, be disillusioned by the said ethical moment and both understand and appreciate that nobody is capable of not thinking, at some point in time, that he or she is superior to any other, but is, however capable of understanding that he or she *ought* not to do so. To be open to any new world, we must, first, realise that we are not *ab initio* free and autonomous individuals and, thereafter, be willing to deconstruct the current reality so as to open our world (reality) to the possibility of new worlds. As van Marle puts it "[d]econstruction seeks to disrupt the present or the given without at the same time seeking to replace the 'old' with the 'new', ensur[ing] the possibility of transformation and justice".[303]

I now build on the recognition that freedom does not only relate to autonomy (the right to be left alone) and is inclusive of the notion of 'interdependence'. Sachs, J., in an *obiter dictum*, opined on the role and meaning of freedom in South Africa as a *Rechtsstaat*, as he understands it:

> "To equate freedom simply with autonomy or the right to be left alone does not accord with the reality of life in a modern, industrialised society. Far from violating freedom, the normal rules regulating human interaction and securing the peace are *preconditions* for its enjoyment. [For example, w]ithout traffic regulation, it would be impossible to *exercise* freedom of movement in a meaningful sense. The *[R]echtsstaat* … is not simply a state in which government is regulated by law and forbidden to encroach on a constitutionally protected private realm. It is one where government is required to establish a *lawfully regulated regime outside of itself* in which people can … develop their personalities and pursue individual and collective destinies with a reasonable degree of confidence and security. … [M]eaningful personal interventions and abstinences … depend not only on the State refraining from interfering with individual choice, but on the State helping to create conditions within which individuals can effectively make such choices. Freedom and personal security are … achieved … by protecting human autonomy[,] on the one hand, and by *acknowledging human interdependence*[,] on the other. The *interdependence is not a* limitation *on freedom*, *but an element of it.*

303 Van Marle, (2010, *Reflections on Post-Apartheid Being and Becoming*), at pp. 336-337.

> It follows that the definition of freedom requires not the exclusion of interdependence."[304] [own emphasis and footnotes omitted]

It was not the intention of Sachs, J. to incorporate *Ubuntu* in the South African constitutional freedom jurisprudence by his passage as I am about to do, but Sachs, J. will not deny that such possibility is more than jurisprudentially viable in a South African context. As already indicated *supra*, Langa, J., as he was then, described *Ubuntu* as a culture that emphasises communality and the "interdependence of the members of the community".[305] In terms of *Ubuntu*, through its emphasis on communality and interdependence, and by virtue its recognition of every person's status as a human being, every human being forms part of a community characterised by unconditional and reciprocal respect, dignity, and acceptance between community members.[306] By incorporating the recognition of interdependence as an element of freedom itself, as advocated by Sachs, j., one can, by virtue of *Ubuntu*, incorporate reciprocal respect, dignity, and acceptance between community members. Another way to argue the point is to take the stance that *Ubuntu* necessitates a conception of freedom that recognises interdependence as an element of freedom itself because the emphasis placed by *Ubuntu* on communality and interdependence thereby requiring unconditional and reciprocal respect, dignity, and acceptance between community members.

As I have stated above, the ethical relation places emphasis on the kind or person each one of us must be-come to develop a non-violative relationship with the other.[307] I continued and said that if one's conception of equality is ethical, then the relation in which one stand must be an ethical relation and the concern of the ethical relation is a way of being in the world. Thereafter I opined that *Ubuntu* addresses both be-coming a person to develop a non- violative relationship with the other and 'a way of being in the world' – in other words *Ubuntu* can address the ethical relation in its totality. As such, my discussion on *Ubuntu supra*, finds, in this context, application with equal force and as such, in arguing the inverse of "I think, therefore I am", as I have been arguing, *Ubuntu* is "I am because of others". *Ubuntu*, as an ethical concept, is relatable to the ethical moment described *supra* in that, although we cannot act autonomously, through *Ubuntu* accepting that I am because of others we open ourselves to the possibility of a new worlds, ones in which being a human being is to be interconnected with others.

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304 *Ferreira* 1996 (CC) at paras. [240]-[251].

305 *Makwanyane* 1995 (CC) at para. [224].

306 *Ibid.*

307 Van Marle, (2010, *Reflections on Post-Apartheid Being and Becoming*), at p. 332.