

# Dignity and Equality in *Barnard*

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## I INTRODUCTION

At the fall of apartheid in 1994, white South Africans were reassured by the Constitution<sup>1</sup> of the democratic South Africa that their rights as a minority would be respected and that they would be full and valued citizens in the hopeful new country. The preamble of the Constitution promises to ‘establish a society based on democratic values, social justice and fundamental human rights’; s 9 declares that no person can be discriminated against on grounds of race (amongst others); s 25 promises to respect property rights. Despite the Truth and Reconciliation Commission, few white people were explicitly tried and punished for apartheid crimes, and for many, the transition to the ANC-led democracy brought less upheaval than they had expected.

Fears still linger, however, as whites face a reality in which they have to compete with blacks for jobs, and in which their privileged position – which largely remains – never feels quite morally or politically stable. The constitutional case *South African Police Service v Solidarity obo Barnard*<sup>2</sup> brought one of these fears to the surface, that they would be overlooked for jobs and deprived of opportunities, despite the Constitution’s commitment to protecting their dignity and equality. Here was a case that seemed to make the rumours and anxieties of parts of the white world justified and to reveal their real, undervalued position in the country, whatever its non-racial pretensions. From the perspective of some disaffected whites, ‘affirmative action’ measures are really ‘reverse discrimination’, racial bias directed against them in the face of the reassurances of the Constitution. From the perspective of many whites, therefore, *Barnard* tests the sincerity of the government’s promises to protect them from ‘majoritarian retribution’<sup>3</sup> and to consider them equal citizens. It also tests the force of the Constitution. For many South Africans of all colours, the case places under the spotlight how far the courts would permit the government to implement restitutionary measures to improve equality, and whether the Constitution can act as ‘a restraining influence on excessive consolidation of political power’, as Samuel Issacharoff notes.<sup>4</sup> The justices of the Court were faced, it seemed, with a direct conflict between respecting the dignity and moral equality of a particular person – in this case,

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<sup>1</sup> Constitution of the Republic of South Africa, 1996.

<sup>2</sup> *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23, 2014 (6) SA 123 (CC), 2014 (10) BCLR 1195 (CC) (*Barnard*).

<sup>3</sup> S Issacharoff ‘The Democratic Risk to Democratic Transitions’ (2013) 5 *Constitutional Court Review* 1, 5.

<sup>4</sup> *Ibid* at 3.

Renate Barnard, a white woman passed over for promotion – and respecting attempts by government agencies to have a more representative work-force, as part of ‘realising’ socio-economic equality. The justices saw this as a conflict, but also tried heroically to come to a decision that both respected the mandate to address inequality and that was not unfairly discriminatory against particular, valuable, individual persons.

*Barnard* raises many issues: moral, political, jurisprudential. I come to it as a philosopher not a legal scholar, and I will largely explore two (sets of) themes raised throughout the judgments. The first is how the judges handled the (apparent) conflict in this case between the rights of individuals and the rights of people as members of previously disadvantaged groups; or, how they understood and attempted to resolve the conflict between the dignity and moral equality of individual persons, and the ideal of realising social and economic equality for those disadvantaged by apartheid. Exploring this issue requires examining how the judges understood the notions of dignity, equality and fairness. The second is how white people might understand and relate to the judgment against Ms Barnard, and so to their own position in South Africa.<sup>5</sup>

The justification for examining the first set of interests is unproblematic: we rely on the Constitutional Court to interpret the guiding ideals of the Constitution and to come to fair decisions in hard cases. If its judgments reveal the justices’ own confusions or ambiguities in engaging with crucial concepts, then they are on shaky grounds and do not offer clear guidance for future cases. Given the inevitability (as I shall argue) of conflict between the ideals set out in the Constitution, justices in future cases will need guidance and convergence on, at least, the meaning of their principles and values. I do not do that work in this paper; rather, I merely show and explore some of the confusions and tensions and leave their possible resolution to legal scholars.

Dwelling on the second issue, that of white people’s potential responses to the judgment, may need more justification.<sup>6</sup> Why, it may be asked, should we care about what white South Africans think about judgments that go against their

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<sup>5</sup> Throughout this paper, I use ‘black’ and ‘white’ in the inclusive sense familiar in South Africa. That is, they capture the crude and broad distinction that apartheid law made between whites and non-whites. Though there are important differences within the broad group ‘black’ (eg Indians, Coloureds) this dichotomy is still apposite in South Africa and clearly marks the different power relations in the country. This usage would be frowned on in, for instance, the United States, where differences between less privileged groups are stressed.

Whites are certainly not a monolithic group either, and there may be great differences in the way individuals respond to their place in South Africa. Furthermore, there may be differences between the white Afrikaans and white English communities, as well as between different socio-economic classes within the white population. I acknowledge this, and hope that my discussion in Section III brings out the necessary nuance.

For a study of perceptions of Employment Equity practices in South Africa, see RM Oosthuizen and V Naidoo ‘Attitudes Towards and Experience of Employment Equity’ (2010) 36 *South African Journal of Industrial Psychology* 836.

<sup>6</sup> My focus on white South Africans continues the exploration of whiteness in my work over the past few years. For a defence of this focus see S Vice ‘How Do I Live in this Strange Place?’ (2010) 41 *Journal of Social Philosophy* 323; S Vice ‘Reflections on “How Do I Live in This Strange Place?”’ (2011) 30 *South African Journal of Philosophy* 503; S Vice ‘Race, Luck, and the Moral Emotions’ forthcoming in P Taylor, L Alcoff & L Anderson (eds) *The Routledge Companion to the Philosophy of Race*; and S Vice ‘Essentialising Rhetoric and Work on the Self’ (2016) 45 *Philosophical Papers* 103.

individual interests or seem disrespectful to their special value as human beings? They are certainly on no moral high ground from which to issue complaints and they need to come to terms with their status as a minority group with a morally tainted history. The Constitution promises them equal rights and protections as it does for any citizen, but it also requires that the historical and ongoing injustices and inequalities be rectified. Given that they were (and some would say, still are) the beneficiaries of that injustice, they cannot complain now if particular cases go against them. If the judgments are legally sound and if they are treated respectfully, there is nothing more to be said.

There are practical and political considerations that would make such a dismissive response naïve – for example, the fact that while whites may be stripped of political power, they still possess much of the wealth of the country and still therefore matter at least economically; or the more ethical and personal facts of their living in South Africa and thinking of it as home, and the importance for racial reconciliation of building a common sense of nationhood. In the current charged atmosphere of racial tensions and protests,<sup>7</sup> understanding themselves and their position, at least, seems ethically and psychologically required. Furthermore, while I am certainly interested in whites' position in the country, as a white person myself, our position and difficulties are also a particular instance of general ethical issues in which I am interested. One is the conflict between respecting the dignity of unique, valuable persons, on the one hand, and on the other, realising structural reforms that would compensate a group of people for past injustices and ameliorate their current situation. A second is how all of us can and ought to think of ourselves as both unique individuals and members of socially and politically significant groups. A third issue, affecting *Barnard* more generally throughout independently of the racial dynamics, is the longstanding debate about whether there can be real, deep conflicts between values, and about how to adjudicate apparent conflicts. These fundamental ethical issues, which lie beneath and inform *Barnard*, make the case philosophically as well as legally interesting and explain some of the difficulties attending the judges' reasoning and verdict.

My plan is as follows: in the next part, I explore how the judges understand 'dignity', 'equality' and 'fairness' in their concurring judgments on *Barnard*, and how they understand the (ostensible) conflict amongst those values. I place their views in the contexts of longstanding philosophical debates over conflict between values, and the Kantian tradition that informs their interpretation of these values. Against this background, I then explore possible white responses to the judgment in *Barnard* in Part III. Throughout, my framework draws on the liberal tradition in political and moral philosophy, though I remain optimistic – without argument here – that many of that tradition's suggestions and prescriptions are not merely parochial. My explorations are philosophical rather than legal; I hope only to add a different perspective on the issues that many eminent legal scholars have already grappled with.

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<sup>7</sup> I have written this paper in the midst of ongoing student protests over the cost of higher education and its lack of transformation.

## II VALUES AND CONFLICT

At issue in *Barnard* was whether the National Police Commissioner's decision not to promote Ms Barnard, a white woman, unfairly discriminated against her on the ground of race and thus contravened s 9 of the Constitution and s 6 of the Employment Equity Act.<sup>8</sup> A member of the South African Police Services (SAPS) since 1989, Ms Barnard applied for a position in the SAPS National Evaluation Service, after the post was advertised in 2005. Despite being short-listed, interviewed and declared the best candidate, she was not appointed because the Divisional Commissioner felt that insufficient attention had been paid to racial diversity. The decision was made to re-open the process and Ms Barnard re-applied. Once again, she was declared by an interview panel to be the leading candidate and her appointment was recommended to the National Commissioner, who declined to appoint her on grounds, once again, that insufficient attention had been paid to racial representivity.<sup>9</sup> The post remained unfilled in 2005, and was later withdrawn. Represented by the trade union Solidarity, Ms Barnard went to the Labour Court, and challenged the failure to promote her on grounds of unfair discrimination on the basis of race. The Labour court ruled in her favour.<sup>10</sup> The SAPS appealed the ruling, and the Labour Court of Appeal upheld the appeal.<sup>11</sup> Ms Barnard then took the case to the Supreme Court of Appeal, which again ruled in her favour, set aside the Labour Court of Appeal ruling, and with some amendments, reinstated the original Labour Court ruling.<sup>12</sup> The SAPS appealed the decision to the Constitutional Court, which found in its favour, overturning the Supreme Court of Appeal's previous judgment. The main judgment by Moseneke ACJ, writing for the majority, concluded that the alleged discrimination was justified because the Police Commissioner's hiring decisions qualified as a restitutionary measure to further equality, as set out in s 9(2) of the Constitution, and that this complied with the requirements of the Employment Equity Act. The other justices agreed with the outcome, but some differed in their reasons, and in what they took the Act to require. Cameron and Froneman JJ and Majiedt AJ disagreed with Moseneke ACJ that the Act requires only that the measures be rationally related to their purpose; they argued that the Act requires, in addition, that such measures meet the standard of fairness. Van der Westhuizen J used a proportionality analysis to balance the competing interests in the case and to weigh up the importance of the affirmative action measures in this case against the impact on individual rights.

The judges realised the difficulties and importance of the case, especially regarding the need to balance the claims of equality and of dignity. In his main judgment, Moseneke ACJ writes that we are 'seized with a dispute over pressing

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<sup>8</sup> Employment Equity Act 55 of 1998.

<sup>9</sup> The Constitutional Court only considered the second occasion.

<sup>10</sup> *Solidarity obo Barnard and Another v South African Police Services* [2010] ZALC 10, 2010 (10) BCLR 1094 (LC) (Labour Court judgment).

<sup>11</sup> *South African Police Services v Solidarity obo Barnard* [2012] ZALAC 31, 2013 (3) BCLR 320 (LAC) (Labour Appeal Court judgment).

<sup>12</sup> *Solidarity obo Barnard v South African Police Service* [2013] ZASCA 177, 2014 (2) SA 1 (SCA) (Supreme Court of Appeal judgment) per Navsa ADP, with Ponnar JA, Tshiqi JA, Theron JA and Zondi AJA concurring.

concerns of equality and non-discrimination – matters of considerable personal and public importance’.<sup>13</sup> Cameron and Froneman JJ and Majiedt AJ similarly consider the case important ‘since frank acknowledgment of these tensions is necessary to allow our society to move forward and to ensure a rational discussion that provides hope for the future for all’.<sup>14</sup>

I want now to set out the relevant values and issues with which the judges are concerned. Most generally, the issues at stake relate to the values of equality and dignity, and the tensions between them. Each individual person’s dignity must be respected, but at the same time equality must be progressively implemented. Sometimes, it appears that these two ends cannot be realised together, as furthering equality could in particular instances require treatment that, at least apparently, undermines the dignity of another party. A narrower tension is between the equality measures that are necessary to restore the dignity of those previously disadvantaged, and the dignity of those adversely affected by those measures. As dignity provides the justification for the discriminatory equality measures, this is a clash between ‘dignities’. A further two tensions, which I note but shall not discuss, are between service delivery and equality, and between service delivery and dignity. Delivering efficient service can pull against equality, if the person who can deliver is not one of the previously disadvantaged; and it can pull against dignity, if the person overlooked because of equality has his dignity undermined.

Making these tensions explicit reveals complexities in the moral issues at stake, disagreement about the meaning of the guiding values, and the inevitability of conflict between different values. I will be referring to most of the judgments in *Barnard*, without exploring the justices’ different arguments for their concurring judgments.<sup>15</sup> I take liberally from the judgments, treating them simply as a text to be explored in itself, and making no pretence of adequately engaging with the details of each, the differing reasons the judges give for their shared judgment, and with the vast jurisprudential literature on these issues.

## A Dignity and Equality

Famously, the new South Africa is founded on ‘[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms’.<sup>16</sup> These values, though not defined, are mentioned frequently, and they underlie and give substance to the rights in the Constitution.<sup>17</sup> Section 9 of the Constitution is concerned with the equality right:

9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

<sup>13</sup> *Barnard* (note 2 above) at para 4.

<sup>14</sup> *Ibid* at para 74.

<sup>15</sup> I do not refer to Jaftha J’s concurring judgment, because it is more concerned with a technical legal issue (on cause of action) than with the substantive issues that interest me here.

<sup>16</sup> Constitution, s 1.

<sup>17</sup> Perhaps this lack of definition is appropriate and intentional, given the kind of document the Constitution is – one that needs to speak to many different parties, and which sought to bring to the table all the still conflicting parties.

(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 [and many other grounds].

There are three points to note about how equality is used here. First, it is something to strive towards, something that our society has not yet reached. So it is a value that can be lost and regained, or that was never there to begin with – for example, the situation of non-whites during apartheid. Moseneke ACJ is careful to speak of the ‘achievement of equality’.<sup>18</sup>

Second, equality includes legal equality and equality of (legal) rights and freedoms, which were not available to blacks under apartheid. Presumably, however, these are founded on, and justified by, the *moral* equality of persons; this is not explicitly stated, but sometimes the language of equality in the judgments inclines more towards the moral than the socio-economic and legal sense.<sup>19</sup> If people were not morally equal in the sense of being of equal importance from the moral point of view, and deserving equal consideration in all matters that concern them, the other kinds of equality would not be required. Moral equality cannot be lost, then, though it can be ignored.

Third, s 9(2) suggests a wide reading of equality: legislative and ‘other measures’ can be taken to ‘protect or advance’ the disadvantaged. As policies of the ANC government and *Barnard* suggest, the equal ‘rights and freedoms’ include economic and social equality, and measures ‘other than’ legislative ones can be taken to ensure this (though what exactly these other measures are is not stated). As Rósaan Krüger writes, the Constitution has a substantive view of equality, a view which ‘takes social and economic conditions of groups and individuals into consideration when determining the meaning of equal treatment’, and tries to undo long-standing patterns of disadvantage.<sup>20</sup>

The Constitution is even briefer about the right to dignity. It states: ‘Everyone has inherent dignity and the right to have their dignity respected and protected.’

The value of dignity underlying this right is never defined, and the term has been understood in various ways by the Court.<sup>21</sup> However, if we read the Constitution as informed by the long and familiar Liberal-Christian intellectual

<sup>18</sup> *Barnard* (note 2 above) at para 28 (emphasis added).

<sup>19</sup> See, eg, *Barnard* (note 2 above) at paras 429, 30, 176 and note 194.

<sup>20</sup> R Krüger ‘Equality and Unfair Discrimination: Refining the *Harksen* Test’ (2011) 128 *South Africa Law Journal* 479.

<sup>21</sup> ‘Dignity’ is a complex term and can have other meanings in other contexts, as Christopher McCrudden’s useful history of the idea shows (C McCrudden ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19 *European Journal of International Law* 655). Stu Woolman’s thorough exploration of dignity suggests (controversially, I understand) that the notion has been understood in five main ways in the Court’s jurisprudence and has been used in three ways (S Woolman ‘Dignity’ in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2008) Chapter 36.2 to 36.3)) and has been used in three ways (Woolman, at 36.3). This variety, he argues, is organised by and draws on the central tenets of Kant’s ethics (S Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa’s Basic Law* (1st Edition, 2013)). The importance that the Court places on dignity is clear in *Dawood and Another; Shalabi and Another; Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8, 2000 (3) SA 936 (CC) at paras 27–39.

tradition, and by Kant's view of human value, as the Court and scholars tend to do, 'inherent dignity' is a special worth that comes from and along with being a human being.<sup>22</sup> 'Human' is a normative term – to be 'human' is already to be valuable, to have equal moral status, and is not a merely biological, non-normative term. Different accounts of dignity will ground this special value in different features. The Court has explicitly referred to and drawn from Kant, who grounds dignity in our rational nature.<sup>23</sup> 'Rationality' for Kant is a substantive, rather than merely instrumental ability; it is our ability to act for reasons, and to set ourselves ends through reason. Further, we are creatures who need not simply follow our natural instincts and desires (our 'empirical nature'), but who can rationally reflect on them and choose whether to indulge them. More generally, we can think of it as our ability to 'give an account of ourselves' to each other, as equal members of a moral community – an ideal Kant calls the 'kingdom of ends'.<sup>24</sup> Laurie Ackermann's expansive understanding of human dignity, draws on this substantial notion of rationality. He says that dignity

[arises] from all those aspects of the human personality that flow from human intellectual and moral capacity; which in turn separate humans from the impersonality of nature, enables them to exercise their own judgment, to have self-awareness and a sense of self-worth, to exercise self-determination, to shape themselves and nature, to develop their personalities and to strive for self-fulfilment in their lives.<sup>25</sup>

Of particular importance to the Court is Kant's central tenet, that the dignity of individuals ought to be respected and that doing so rules out treating people as 'mere means' or 'tools' for furthering others' interests.<sup>26</sup> Judgments must therefore treat all relevant parties as 'ends in themselves' and not as *mere* means for the achievement of some social or personal good. How to distinguish between treating a person as a *mere* means, and treating her (sometimes permissibly) as a *means*, is important in *Barnard*, as we shall see.<sup>27</sup>

<sup>22</sup> Most notable in South Africa, is Laurie Ackermann's exploration of dignity and its intellectual traditions, which draws extensively on Kantian ethics: L Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2012).

<sup>23</sup> See, eg, I Kant *Groundwork of the Metaphysics of Morals* (1785) (trans M Gregor, 1997) 4:428. This is the usual way of taking his claim, but sometimes Kant speaks as if it is autonomy (our ability to set ourselves the moral law) rather than rationality that is the ground of dignity; sometimes as if it is our moral dispositions; sometimes that only dutiful people (those with a 'good will') have dignity.

Rationality is not the only candidate for having dignity, and so, special value. One might instead think that being sentient, or the beloved creations of God, or merely being human, is the feature that confers moral status and special worth. Sentience, the feature chosen by the utilitarian moral tradition, has the benefit of including some animals, as well as human babies and human adults who are not rational; perhaps the theistic view is compatible with including animals. For an influential utilitarian approach to the moral status of animals, see work by Peter Singer, eg, his classic *Animal Liberation* (1975). For the importance of being human (in a rich, normative sense), see R Gaita *A Common Humanity* (2002).

<sup>24</sup> Kant (note 23 above) at 4:433f.

<sup>25</sup> Ackermann (note 22 above) at 23–24.

<sup>26</sup> Kant (note 23 above) at 4:428f.

<sup>27</sup> Kant allows that people may be treated as means; as social creatures who need each other's help to fulfil our ends, we do all the time. I treat the electrician as a means to have safe wiring; my students treat me as a means towards an education. This is permissible as long as we do not consider others significant only because they play these useful roles, and only if our interactions are also respectful of their dignity.

To be human, then, is to be valuable in a special way; one does not have to prove one's worthiness or earn dignity; it inheres in one regardless of what one does, solely in virtue of being rational. The Constitution and the Court's judgment in *Barnard* do not use this term, but perhaps they agree that dignity is also 'inalienable' – it cannot be lost or given up; there is nothing one can do that would remove one's dignity, and nothing others can do either. If this is so, then unlike legal equality and equality of (legal) rights and freedoms, but like moral equality, dignity can only be treated as if it did not exist, and that might have the effect of making people feel as if they have no dignity.<sup>28</sup> 'Destroying' dignity and moral equality is therefore, strictly speaking, impossible. Black people under apartheid were treated *as if* they had no dignity and little moral status; they were treated in ways that disrespected their dignity and moral equality, but they had them, nonetheless – otherwise there would be nothing to disrespect, and no harm in that attitude. The 'right to have their dignity respected', which the new Constitution promises them, would be unnecessary. It is thus interesting to note that the Constitution does not guarantee a 'right to dignity' but a 'right to have dignity protected and respected'. Apartheid was wrong (partly) because the value of black people was ignored and they were treated as moral inferiors. When we talk, as the judges do, of 'infringing', or 'undermining' or 'destroying' dignity, we mean attitudes and treatment that are not appropriate towards the special kind of value that humans have. So we can take appropriate or inappropriate attitudes towards a person, that express acknowledgement or lack of acknowledgement of the value that she nonetheless has, however she feels and however she is treated.<sup>29</sup> The judges are not always careful about this, and when I adopt their language and talk about 'denying', 'sacrificing' or 'invading' dignity, I am doing so loosely, and I mean behavior or attitudes that express disrespect for dignity and equality. For ease, I shall use 'disrespectful' or 'disrespect' to stand in for all such behavior and attitudes.<sup>30</sup>

Our dignity, then, demands respectful responses and behavior, and places limits on what can be done to us. Our moral equality grounds legal and socio-economic equality, and the government must progressively realise the socio-economic rights the latter value justifies. While moral equality and dignity are properties of individuals, legal/socio-economic equality is most naturally (but not necessarily) a property of certain defined groups of people, which already raises the possibility that the dignity of one person and the realisation of equality for a

<sup>28</sup> If one wants the notion of 'human' or 'natural' rights to underpin legal rights, then those rights, too, could not be lost, though they might be ignored. On the relation between dignity and rights, and the sense in which dignity can be lost, see A Gewirth 'Dignity as the Basis of Rights' in MJ Meyer & WA Parent (eds) *The Constitution of Rights: Human Dignity and American Values* (1992). One usage in which dignity *can* be lost or acquired is when we say that a person has a 'dignified bearing', or 'holds on to her dignity', or, simply has dignity or is dignified. This demeanour might be lost or retained in certain situations, and retaining it may be praise-worthy – 'dignity under fire'. This sense of dignity is closely related to self-respect and integrity.

<sup>29</sup> Christopher McCrudden calls this the 'relational element' of this conception of dignity. McCrudden (note 21 above) at 28.

<sup>30</sup> I also use 'human being' and 'person' interchangeably, though in other contexts they can significantly come apart, and when I speak of 'respecting persons', this is short hand for 'respecting persons' dignity'.

group could be opposed. I want now to explore how the apparently competing demands of dignity and equality are dealt with by the justices in *Barnard*, and what they understood by a *fair* conclusion to such conflict. I do so, not to disagree with their verdict in *Barnard*, but to understand better what is at stake. I do not think that any of my tentative conclusions would undermine the legitimacy of the judges' decisions in these kinds of cases; in fact, they would probably unduly add complexity to an already complicated situation. Nevertheless, ethics should be prepared to deal with more complications than law. Insofar as this case can stand as a test of affirmative action measures, both black and white South Africans have a stake in it. I will also place the judges' deliberations in the context of debates in philosophy about how to understand conflict between values in general, and how to understand the dignity of persons. In this paper I can do no more than gesture at these debates; I do not aim to resolve any of them.

## **B Conflicts of Value**

Isiah Berlin wrote:

If the ends of men are many, and not all of them are in principle compatible with each other, then the possibility of conflict - and of tragedy - can never wholly be eliminated from human life, either personal or social. The necessity of choosing between absolute claims is then an inescapable characteristic of the human condition.<sup>31</sup>

He thinks that value pluralism is a 'truer and more humane ideal' than the view that there is some way to reconcile all the varied 'ends of men', all the ideals that give substance and shape to a human life.

In the philosophical literature, there is much debate about whether values are at a fundamental level one or many; about how, precisely, to characterise conflict between values; and about whether Berlin is correct in thinking that a full reconciliation is impossible. These issues are an important contributor to the deep disagreement between consequentialist and non-consequentialist or deontological normative theories, and between pluralists and monists within both.<sup>32</sup> The axiology of the most influential form of consequentialism, utilitarianism, is monist and welfarist: there is one fundamental value, welfare (in some version or

<sup>31</sup> I Berlin 'Two Concepts of Liberty' in H Hardy (ed) *Liberty* (2002) 166, 214.

<sup>32</sup> In standard consequentialist normative theory, the states of affairs brought about through actions (or omissions) are all that is relevant for assessing the rightness or wrongness of actions. In principle, a person could be sacrificed for the greater good (though consequentialists have sophisticated ways of avoiding this in fact). Non-consequentialists or deontologists can admit that consequences are sometimes morally relevant, and that sometimes sacrificing one person for an important social goal might be justified (though Kant and some Christian philosophers would not admit this). However, they do not see consequences as the source of moral value and moral status, and sometimes such sacrifices will be impermissible, regardless of the good consequences.

another), and it ought to be promoted or maximised.<sup>33</sup> The axiology of Kantian ethics, the kind of non-consequentialist or deontological theory I focus on here, is also monist; as we have seen, the fundamental value is the dignity of rational nature, which must be respected in all our actions.<sup>34</sup> Both these theories make reference to their grounding value in situations of conflict, but partly because of the different responses they prescribe, these values operate in very different ways. I shall return to this point in relation to the conflicts in *Barnard*.

Bernard Williams agrees with Berlin that value-conflict is ‘necessarily involved in human values, and [is] to be taken as central by an adequate understanding of them’, but he also thinks that it is by no means clear what it is ‘for values to be plural, conflicting and irreducible’.<sup>35</sup> Putting aside internal or logical inconsistencies between values and concentrating on contingent conflicts, there are at least two ways of thinking about them. First, one could think that values are not comparable or commensurable,<sup>36</sup> in the sense that there is no higher-order or ‘super-value’ by which conflicts between lower-order values could be settled. A utilitarian would of course deny this: ‘welfare’ in whatever sense of the term settles conflict, so strictly speaking, there *is* no conflict fundamentally. When there is a conflict in a particular situation between, say, the demands of justice and the demands of love, we settle it by calculating which choice would maximise welfare. Conflicts are only ever apparent and there will be a correct answer about how to settle them. If your choice maximises welfare, then it is required; if another available choice would produce more welfare, it is impermissible not to choose it; if more than one choice would produce equal welfare, either is unproblematically permissible. There is no reason to feel guilt or regret over the option not taken.

A deontologist can agree that there might be one correct answer or less strongly, an all-things-considered right answer to a conflict. Kant, for instance, would

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<sup>33</sup> Utilitarianism understands ‘utility’ or ‘the social good’ in terms of happiness, desire satisfaction, or welfare. JS Mill’s *Utilitarianism* is the classic text (many editions; available at <http://www.gutenberg.org/files/11224/11224-h/11224-h.htm>). There can, however, be non-utilitarian consequentialist theories (eg GE Moore’s theory in GE Moore *Principia Ethica* (Revised 1st Edition, 1929) and GE Moore *Ethics* (2nd Edition, 1966), unhelpfully called ‘ideal utilitarianism’ – unhelpful because it is not, strictly speaking, utilitarianism).

In this paper, I consider only standard or classical consequentialism, and ignore later developments which depart from the strictly maximising approach to value, and which are sensitive to factors like rights, distribution, and the nature of the actions themselves. I do so because the conflict facing the judges in *Barnard* seems to be a fairly straightforward conflict between the deontological value of dignity and the urgent demand of realising social and economic goals to improve the welfare of the majority of South Africans. I am not sure that introducing complications to consequentialism here would help. For developments in consequentialism, see M Slote ‘Satisficing Consequentialism’ (1984) 58 *Proceedings of the Aristotelian Society* 139; A Sen ‘Consequential Evaluation and Practical Reason’ (2000) 96 *The Journal of Philosophy* 96, 477; and ‘Rights and Agency’ (1982) 11 *Philosophy and Public Affairs* 3.

<sup>34</sup> I focus on Kant’s ethics in this paper, but there are other examples of non-consequentialist moral theories – eg WD Ross’s in WD Ross *The Right and the Good* (1930), or TM Scanlon’s contractualism in, for instance, TM Scanlon *What We Owe to Each Other* (1998).

<sup>35</sup> B Williams ‘Conflicts of Values’ in *Moral Luck* (1981) 71, 72–73. See also B Williams ‘Ethical Consistency’ (1965) 39 *Proceedings of the Aristotelian Society, Supplementary Volumes* 103.

<sup>36</sup> While some philosophers keep these distinct, I will use the terms interchangeably. See J Raz *The Morality of Freedom* (1986) and R Chang ‘Introduction’ in R Chang (ed) *Incommensurability, Incomparability, and Practical Reason* (1997).

require strict compliance with the negative duties of right, which are grounded in respectful treatment of rational creatures; reason will arrive at an answer of how to act, and cannot, without internal incoherence, arrive at competing answers.<sup>37</sup> Other deontologists may not explain resolutions in terms of some ‘super-value’, or think that conflict would dissolve on rational reflection. Perhaps, in a particular situation, there is an all-things-considered best option, and all would agree that one did the right thing. However, this does not mean there is in fact only one thing that is right to do, nor that there is another more general value that settles the conflict, nor that the normative force of the rejected option evaporates. There can be more than one genuine obligation, and the moral force of the options not taken remains. In genuinely tragic situations, it can be the case that whatever a person does will be wrong, and there is no clear all-things-considered right choice. In these non-consequentialist interpretations of conflict, some ‘moral residue’ will be left, some sacrifice incurred. Regret may be a rational response, even though one has chosen in the best way possible.<sup>38</sup>

Second, there is another way of interpreting incommensurability that is available to non-consequentialists: rather than concerning whether there is a common measure or super-value by which to adjudicate conflict (a vertical model), it concerns whether two values can meaningfully be compared with each other (eg dignity and equality), or two instances of one value (the dignity of Ms Barnard and the dignity of those harmed by apartheid) – a horizontal comparison. To compare the dignity of one against the dignity of another, or many others, or the dignity of one against the inequality of a group, would be like trying to compare apples and oranges. More strongly, in ethically difficult cases it can sometimes be morally dubious or distasteful even to try. For non-consequentialists, if we do have to make a choice in these situations, the value of the option that was not chosen again remains and may exert normative force over us still; again, there will be moral residue and so grounds for regret. Consequentialists would reject incomparability in this sense and claim that welfare is always available to settle the conflict.

Against this background, let us return to *Barnard*. The Constitution states that no rights are absolute and that they may need to be limited if that can be shown to be ‘reasonable and justifiable in an open and democratic society’.<sup>39</sup> However, the limitations must be based on certain kinds of reasons, which themselves need

<sup>37</sup> Kant does not think there can be genuine conflicts between the necessary, *a priori* duties generated by the categorical imperative. On this, see J Timmermann ‘Kantian Dilemmas? Moral Conflict in Kant’s Ethical Theory’ (2013) 95 *Archiv für Geschichte der Philosophie* 36. The contrast between ‘duties of right’ and ‘duties of virtue’ is from Kant *Metaphysics of Morals* (1797) (trans M Gregor 1996). When duties of right clash with duties of virtue, the former should be followed.

<sup>38</sup> See Williams ‘Ethical Consistency’ (note 35 above). On tragic conflicts, see RB Marcus ‘Moral Dilemmas and Consistency’ (1987) *The Journal of Philosophy* 121; H Richardson *Practical Reasoning About Final Ends* (1994); M Nussbaum ‘The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis’ (2000) *Journal of Legal Studies* 1005.

<sup>39</sup> Constitution, s 36.

to take into account a number of factors beyond outcomes.<sup>40</sup> The Constitutional Court also makes use of a proportionality test to resolve conflict, which may or may not include the balancing of conflicting interests and rights.<sup>41</sup> The rights to dignity and equality can therefore in principle be limited or balanced against each other, so the fact that at least one may need to be infringed in a situation of conflict is not in itself surprising – though some might disagree that certain of those rights should ever be infringed. However, because of the way that equality and dignity are understood by the Court, and because of the facts of post-apartheid South Africa, it is almost inevitable that they will conflict, and resolving the conflict in a ‘reasonable and justifiable’ way with no moral residue will be, as I try to show, very difficult.

I begin with dignity. That the Court relies on a Kantian framework to give content to dignity introduces a difficulty and a tension that is not resolved in *Barnard*, and could not be. There are in fact two claims that are considered in the judgments. The first is that one person’s dignity cannot be weighed against another person’s, nor many others. We see this when Van der Westhuizen J calls the ‘balancing’ of one dignity against another inappropriate. Ms Barnard’s dignity cannot be ‘weighed’ against that of others, and neither can the dignity of the millions of victims of apartheid be weighed against her dignity.<sup>42</sup> The second is that dignity cannot be weighed against another value, like equality. Both claims seem to be understood through a Kantian lens.

On the first claim: Kant distinguishes dignity, which has worth, from everything else, which has a price.<sup>43</sup> This means ‘at least that whenever one must choose between something with dignity and something with mere price one should always choose the former’.<sup>44</sup> Things with price can be traded for each other and measured against each other; dignity cannot, and must always take precedence. This makes his ethics deeply antithetical towards consequentialist reasoning. One reason Kant thinks this is that rational nature, which grounds our dignity, is also the ground and condition of *all* value; there would be no value in the world without rational nature, which confers value through its choices.<sup>45</sup> While it is clear, then, that dignity takes precedence over things with price, it is not so clear whether Kant thought dignity could be measured against dignity. As we saw above, however, at least one Constitutional Court judge denies that this is appropriate. Weighing the value of each person against each other or against

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<sup>40</sup> Section 36(1) lists the following factors as relevant to considering whether a rights limitation would be justifiable: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

<sup>41</sup> See N Petersen ‘Proportionality and the Incommensurability Challenge – Some Lessons from the South African Constitutional Court’ (2013) *New York University Public Law and Legal Theory Working Papers* Paper 384. Van der Westhuizen J uses a proportionality analysis in his judgment in *Barnard* (note 2 above).

<sup>42</sup> *Barnard* (note 2 above) at para 178.

<sup>43</sup> See Kant (note 23 above) at 4:434–5 (‘In the kingdom of ends everything has either a *price* or a *dignity*. What has a price can be replaced by something else as its *equivalent*; what on the other hand is raised above all price and therefore admits of no equivalent has a dignity.’)

<sup>44</sup> TE Hill *Dignity and Practical Reason in Kant’s Moral Theory* (1992) 48.

<sup>45</sup> This is Christine Korsgaard’s interpretation of Kant (note 23 above) 4:428–9. See C Korsgaard ‘Aristotle and Kant on the Source of Value’ (1996) *Creating the Kingdom of Ends* 225, 240–241.

another value is impermissible and, strictly speaking, impossible. Dignity is not the kind of value individual instances of which can be weighed or traded against each other, and there is no common, higher-order measure against which trade-offs between it and another value could be made.

On this interpretation of the special value of dignity, comparing or weighing up the dignity of Ms Barnard and the dignity of the many people disadvantaged by apartheid is confused, and is to misunderstand what dignity is. That is, you can do it, and the justices do, and you could come to an all-things-considered conclusion on that basis, but your conclusion will not be morally valid, because you have not been debating *dignity* at all. Further, these attempts are themselves expressions of disrespect, as you are not responding appropriately to a special kind of value.

The difficulties increase when the demands of socio-economic equality enter the picture, and this leads us to the second claim. Because the judges are at least in principle committed to a Kantian understanding of dignity, they face the challenge of responding appropriately, both to dignity and equality, and to their conflict. *Moral* equality is subsumed into dignity for Kant, but legal and socio-economic equality are distinct and subordinate. In principle, then, a strict Kantian would face no tension at all. No-one's dignity can be traded for any amount of socio-economic equality. Other deontologists need not follow Kant on this point, and I am not insisting that the judges should either, but insofar as they are assuming a Kantian framework in some sense, it is at least a question they need to consider. In fact, the judges depart from Kant in seeing the case as one of at least apparent conflict about which they must reach a verdict, if not a solution. They retain the spirit of Kantian ethics, however, in not wanting to resort to crude consequentialist calculations that might without fuss or moral residue sacrifice an individual person's dignity for the goal of equality.<sup>46</sup> However, their judgments sometimes present the resolution of the conflict as if it would incur *no* loss – the decision against Ms Barnard is not unfair after all, and so is not disrespectful – and sometimes as if it would involve a sacrifice but one that is all-things-considered justified because of the importance of the other goal of equality. Cameron and Froneman JJ and Majiedt AJ, for instance, recognise the 'perils' of remedial action, which 'may exact a cost our racial history demands we recognise'.<sup>47</sup> However, they nonetheless conclude that the Police Commissioner's decision not to appoint Ms Barnard was fair, and that 'it is not necessarily an injury to dignity to view a person only through the lens of one ground listed in section 9(3), provided the reason for doing so is to redress historical inequality'.<sup>48</sup> Van der Westhuizen J admits the possibility of loss, and the possibility that the rights to and values of equality and dignity might sometimes compete. He writes:

[a]spects of a person's right to dignity may sometimes have to yield to the importance of promoting the full equality our Constitution envisages. Other times, the impact of

<sup>46</sup> How to give due consideration to consequences in a principled way is a long-standing problem for non-consequentialists. See, eg, P Foot 'The Problem of Abortion and the Doctrine of the Double Effect' (1978) *Virtues and Vices and Other Essays in Moral Philosophy*.

<sup>47</sup> *Barnard* (note 2 above) at para 79; and see para 93.

<sup>48</sup> *Ibid* at para 117; and for the judgement that the decision was fair see 121, 123.

equality-driven measures with laudable aims may not be justifiable in view of severe damage to human dignity.<sup>49</sup>

Further complicating matters is that in *Barnard* equality is sometimes understood as a condition for dignity; that is, equality is important because inequality is disrespectful to dignity. As Van der Westhuizen J says, '[m]easures to achieve equality are supposed to restore dignity'. However, he continues, 'their practical implementation could also impact on the human dignity of individuals'.<sup>50</sup> Here, presumably, 'equality' means legal and socio-economic equality. As this suggests, the relation between equality and dignity is not at all clear, neither in *Barnard* nor in other Court jurisprudence.<sup>51</sup> However, one relation here, it seems, is that the lack of equality leads to a diminished sense of dignity, and so working towards equality is one way of respecting dignity.<sup>52</sup> On the other hand, working towards equality in order to revive a sense of dignity can also lead to those who are negatively affected having *their* sense of dignity diminished.<sup>53</sup> And then one has to weigh the dignity of one with the dignity of others, in the name of both dignity and equality. Confusingly, Van der Westhuizen J denies that one person's dignity can be 'balanced' against another,<sup>54</sup> but right afterwards says that the calculation required to restore the dignity of some (via equality measures) at the cost of the dignity of others was done when the Constitution was agreed on.<sup>55</sup> Setting aside the apparent contradiction here (between not balancing, on the one hand, and calculating, on the other), this must mean that the Constitution from the start allows us to undermine the dignity of some if it is a (presumably necessary, indispensable and proportionate) means towards restoring the equality and thus the dignity of many others who were historically disadvantaged – in that situation dignity would not be unduly or unfairly disregarded. It would not be possible to realise equality if such a trade-off were ruled impermissible in principle.

That socio-economic equality is understood substantively and as something to be progressively realised, further contributes to the conflict of values the judges have to deal with. It requires them to take future-directed considerations into account –

<sup>49</sup> Ibid at para 169.

<sup>50</sup> Ibid at para 178; and see para 176.

<sup>51</sup> The connection between equality and dignity is not clarified in the Constitution, and there is ongoing debate about which, if either, is the more fundamental value, and whether one grounds the other. In other judgments, the Court has taken 'equality of dignity' to be basic. Rósaan Krüger writes: 'In the few years of constitutional democracy preceding the enactment of the Equality Act, the equality jurisprudence of the Constitutional Court of South Africa ... firmly established human dignity as the interest protected by the equality right, and therefore as the interest at the core of the prohibition of unfair discrimination' (R Krüger 'Small Steps to Equal Dignity: The Work of the South African Equality Courts' (2011) 7 *Equal Rights Review* 27). Justice Laurie Ackermann makes dignity the fundamental value and guiding ideal of the Constitution in Ackermann (note 22 above). For a helpful account of Ackermann's work on the connection, see C McConnachie 'Human Dignity, "Unfair Discrimination" and Guidance' (2014) 34 *Oxford Journal of Legal Studies* 609. McConnachie is sceptical that dignity can play the role that Ackermann wants.

<sup>52</sup> Whether equality, then, would be subordinate to dignity is not clear.

<sup>53</sup> My understanding of Van der Westhuizen J's claim in this paragraph does not support understanding equality in terms of equal dignity, ie we cannot say: 'What are we supposed to be equal in respect of?' and answer: 'Dignity', if equality can both undermine and enhance dignity.

<sup>54</sup> *Barnard* (note 2 above) at para 178.

<sup>55</sup> Ibid.

the ongoing requirement to realise equality – while at the same time responding to a present, already existing, value which places categorical constraints on decisions – the constraint imposed by the dignity of actual persons as ends-in-themselves. Rather than bring about a state of affairs which might not otherwise have existed, Kantian (and other deontological) ethical theories require us to respond with respect to the valuable creatures already existing. Their existence prevents us from bringing about some of the states of affairs consequentialist calculations would demand. The justices are required by the Constitution to permit measures (meeting certain conditions) that will realise substantive equality in the future, but doing that might require the kind of interference or disrespectful attitudes that are contrary towards a (some would say *the*<sup>56</sup>) foundational, deontological, value of the Constitution. As suggested earlier, the Court presumably cannot interpret the Constitution such that any conflict between equality and dignity must come down on the side of dignity, for that would be to render impossible the Constitution's transformational and egalitarian goals. This means that the Court is from the start open to, and indeed required to make, consequentialist calculations, despite its also being required to respect deontological values.

I have stressed that on the Kantian understanding of dignity, which infuses the judgments in *Barnard*, dignity is not comparable; one person's dignity cannot be weighed against another's or many others', nor against another value like equality. And I have stressed the complications that arise when the ideal of equality, which requires future-directed action, conflicts with the dignity claims of actual, existing ends-in-themselves. I have made much of these points, because they show the kinds of axiological complexities and sacrifices that are inevitable in cases like these.

We have (at least) three options in the face of this: First, 'dignity' could be given a different, non-Kantian interpretation (one that makes it a properly comparable notion). The work necessary for this still needs to be done, although ongoing work on the notion of Ubuntu might yield results.<sup>57</sup> Second, we could give up on all attempts to 'weigh' or 'balance' or 'trade' dignity with another value. Dignity 'trumps' all other considerations.<sup>58</sup> What to do when one person's dignity comes into conflict with another's, or that of many others, is not clear; perhaps this is where numbers legitimately count. However, it seems difficult to see how courts or government bodies could practically do without comparisons of value. Conflicting needs and conflicting rights, scarcity of resources, political impossibilities – all these mean that hard choices must be made. For those of a sturdy consequentialist temperament, the choices might be made with no sense of regret or sacrifice, but such purity seems incredible in the face of the wrenching decisions the judges are required to make. It is difficult to see how a

<sup>56</sup> See note 51 above.

<sup>57</sup> See D Cornell 'Is There a Difference That Makes a Difference Between uBuntu and Dignity?' (2010) 25 *South African Journal of Public Law* 382; Y Mokgoro & S Woolman 'Where Dignity Ends and uBuntu Begins: An Amplification Of, as well as an Identification Of a Tension in, Drucilla Cornell's Thoughts' (2010) 25 *South African Journal of Public Law* 400.

<sup>58</sup> See R Dworkin 'Rights As Trumps' in J Waldron (ed) *Theories of Rights* (1984) 153; and Robert Nozick on 'side constraints' in R Nozick *Anarchy, State, and Utopia* (1974) 26 (the section titled 'Moral Constraints and the State').

theoretical standpoint that denies the possibility of deep conflict, rational regret and unfortunate sacrifice would have any practical force; and it is difficult to see that it captures the phenomenon of a morally and politically complex country like South Africa. Third, one might accept that one is doing something inappropriate when one tries to weigh one dignity against another value or another dignity and accept it as the price we pay for a history of inequality; we have to work with a watered-down version if we are to work with it at all, and we have to work with it because the Constitution says so, as Moseneke ACJ trenchantly observes in another context.<sup>59</sup> Here, unlike the second option, we can see the situation in *Barnard* as a moral dilemma: whatever decision is reached, something of value will be sacrificed. There is no choice without moral residue. Recognising this would not help when making hard choices, of course, but it would guide the kinds of reasons one gives to justify one's choice, which as I explore below, is, on one understanding, important for the fairness of a decision. Admitting the sacrifice to those adversely affected would be a way of acknowledging that they matter and that they are losing something they reasonably want to retain.

While the judges grapple admirably with these issues, at the end of the day they resort to weighing and comparing considerations, even if they try not to be crude, and it is difficult to think of a more justifiable alternative. In a situation like ours in post-apartheid South Africa, dignity must be quantified and weighed against equality, and sometimes the dignity of one person must be weighed against the dignity of those people disadvantaged by apartheid. One conclusion that therefore suggests itself so far is that in the aftermath of systematic and long-lasting injustice, we may be required to act as if values that are strictly incomparable can be weighed or compared against each other; we may be required for political and practical reasons to think consequentially about a non-consequentialist value; or, we may have to disregard the dignity of one in the name of restoring and protecting the dignity and moral equality of many others. In the aftermath of injustice, we cannot always be just, and that is part of the injustice and its legacy.

This will strike many as too quick a conclusion. Surely, as the Constitution says and the judges emphasise, there are fair and unfair decisions in these cases. As long as the decision of the judges is fair, then the dignity of Ms Barnard is respected. A fair decision is not necessarily one all parties will agree with, but it is one in which there is no egregious sacrifice. The judgments in *Barnard* have a lot to say about fairness, and I end this section by looking briefly at this.

### C Fairness

Dignity and equality are similar in the sense that they can both rule out or require discriminatory measures. That a discriminatory measure would be disrespectful towards dignity can rule it out; that it would respect dignity can require it, or provide overriding reasons for it. Similarly, that a measure would enhance or set back equality are reasons for and against it. However, discrimination on the basis of certain grounds must be justified – it must be shown to be *fair*. On one, strong

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<sup>59</sup> *Barnard* (note 2 above) at para 37. He says this after observing that a measure that passes the three-fold *Harksen* test for fairness is fair, 'because the Constitution says so'.

interpretation of the Constitution (supported by s 9(5)), there is a presumption that discrimination is unfair unless shown to be otherwise; the burden of proof for its fairness is on those who wish to discriminate.<sup>60</sup> As I mentioned earlier, however, this would render the realisation of equality difficult. Matters are complicated because, as Cameron and Froneman JJ and Majiedt AJ note, some interpret the Constitution as making fairness itself an independent value, along with equality and dignity.<sup>61</sup> This leads them to choose fairness as the appropriate standard to use, one that is importantly consistent with the aims of the Employment Equity Act, 'namely, to avoid over-rigid implementation, to balance the interests of the various designated groups, and to respect the dignity of rejected applicants'.<sup>62</sup> I set this aside, however, as much of the judges' discussions concern whether the discrimination against Ms Barnard counted as fair or unfair, rather than whether fairness is a core constitutional value in its own right.

The concurring judgment of Cameron and Froneman JJ and Majiedt AJ makes fairness the appropriate standard of whether discrimination is justified or not.<sup>63</sup> Fairness seems to come down to whether the decision not to appoint Ms Barnard unduly impacted her dignity, and in order to avoid a vicious circle, 'unduly' cannot mean 'unfairly' or 'unjustifiably'. So we then have to investigate what 'undue' infringements of dignity are. The judges of course refer to other cases in which fairness was at issue, and in which tests for fairness were offered – for example, *Harksen* and *Van Heerden* – though they do not go into them in detail.<sup>64</sup> They refer to them, but their statements also make or suggest more fundamental points about fairness itself, and it is these, rather than legal tests for fairness, in which I am interested.

The past discrimination under apartheid was clearly unfair, but the Constitution allows that discrimination in post-apartheid South Africa could be fair. The state must realise equality, and it may do so by taking special measures to 'protect or advance persons, or categories of persons, disadvantaged by unfair discrimination'.<sup>65</sup> Special measures taken for this reason presumably might discriminate against other persons or groups of persons not previously disadvantaged, but that discrimination would not be unfair.

The main concern of the judges is that unfair discrimination may involve unjustified disrespect for dignity. However 'fairness' is tested, a fair verdict will express the appropriate attitudes and display appropriate treatment towards human beings. For example, Moseneke ACJ writes that measures that are 'directed at remedying past discrimination must be formulated with due care not

<sup>60</sup> 'Discrimination' is therefore used neutrally; an instance of discrimination can be fair or unfair. The Constitution is careful, in s 9(3)–(5), to prohibit *unfair* discrimination.

<sup>61</sup> In para 98 they quote O'Regan J in *Mphahuli*: 'Fairness is one of the core values of our constitutional order' (*Lufuno Mphahuli & Associates (Pty) Ltd v Andrews and Another* [2009] ZACC 6, 2009 (4) SA 529 (CC), 2009 (6) BCLR 527 (CC).

<sup>62</sup> *Barnard* (note 2 above) at para 97.

<sup>63</sup> *Ibid* at para 98.

<sup>64</sup> *Harksen v Lane NO and Others* [1997] ZACC 12, 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) and *Minister of Finance and Another v Van Heerden* [2004] ZACC 3, 2004 (6) SA 121 (CC), 2004 (11) BCLR 1125 (CC). See Krüger (note 20 above).

<sup>65</sup> *Barnard* (note 2 above) at para 29.

to invade unduly the dignity of all concerned'.<sup>66</sup> The Employment Equity Act, from which the judges draw, says that employers must diversify the workforce 'based on equal dignity and respect of all people'.<sup>67</sup> This might explain the importance Cameron and Froneman JJ, Majiedt AJ, and Van der Westhuizen J, place on the reasons given for their judgment. They must be capable of being understood by those they affect, because '[k]nowing why the decision was adverse enables the aggrieved person to understand – an understanding that encourages participation in rebuilding our divided country'.<sup>68</sup> Though they do not state it in this way, we could say on their behalf that reasons must be 'public'. Public reasons make reference only to reasons that are in principle acceptable to all citizens; they do not bypass citizens' rational capacities through manipulation, lying or other distortion, and they do not depend on highly controversial assumptions.<sup>69</sup> Not providing reasons, or expecting a person to accept idiosyncratic or contested views as reasons for an unfavourable judgment against her, would take away from the legitimacy of the judgment and suggest that the law does not speak for or on behalf of all citizens. It would, in Andrew Lister's words, 'fail to respect... fellow citizens as persons, which is to say as beings capable of recognising and responding to justificatory reasons'.<sup>70</sup> The provision of public reasons is especially important in such a diverse country as South Africa, where citizens who have to live together have deep disagreements about religion, the good life, liberal and traditional values, and many other matters. Critics of public reason would say that for this same reason, it is extremely difficult to find such uncontroversial reasons.

The publicity of the reasons may therefore provide a threshold for fair discrimination; it would show that a person's dignity was not unduly undermined and so no insupportable sacrifice of values results from the decision. Other possibilities for such a threshold can be gleaned from the judges' reasoning. First, after saying that equality measures must not unduly invade dignity, Moseneke ACJ says that we must take care that the measures 'are not an end in themselves'; they are 'not meant to be punitive or retaliatory', but rather urge us towards a more equal and fair society.<sup>71</sup> Second, Cameron and Froneman JJ and Majiedt

<sup>66</sup> Ibid at para 30; and see paras 31, 32.

<sup>67</sup> Ibid at para 42 (quoting s 15 of the Employment Equity Act). Jafta J argues that in fact, the Police Commissioner's decision can never have been considered unfair, because it follows s 6(2)(a) of the Employment Equity Act, which says that 'it is not unfair discrimination to take affirmative action measures consistent with the purpose of this Act' (ibid at para 208). This makes any discrimination consistent with the goal of 'achieving equity in the workplace' (Employment Equity Act s 2) already fair. If this is so, then the other judges' attempts to assess the fairness of the decision are unnecessary. Moseneke ACJ seems to make a similar point in paras 36–37, but in relation to the Constitution, rather than the Employment Equity Act. The judges also disagree over whether the fairness of the Employment Equity Plan itself is at issue, or the way that the Police Commissioner implemented it. I leave this point to legal experts, and for the sake of my ethical interests in this paper, do take into account what is said about fairness in the other judgments.

<sup>68</sup> Ibid at para 106, and see 111. Van der Westhuizen J makes a similar point at para 193.

<sup>69</sup> The notion of public reasons is especially associated with the work of John Rawls, eg in J Rawls *Political Liberalism* (Expanded Edition, 2005); J Habermas *Moral Consciousness and Communicative Action* (1983) (trans C Lenhardt & SW Nicholsen, 1999); and G Gaus *The Order of Public Reason* (2011).

<sup>70</sup> A Lister 'Public Reason and Moral Compromise' (2007) 37 *Canadian Journal of Philosophy* 1, 7. And see C Larmore 'The Moral Basis of Political Liberalism' (1999) 96 *The Journal of Philosophy* 599.

<sup>71</sup> Barnard (note 2 above) at para 30.

AJ write that the Constitution allows remedial measures ‘because it recognises that substantive equality can be achieved only by providing advantages to groups of people upon whom apartheid imposed heavy disadvantages’.<sup>72</sup> However, the motivation for these measures, while using the same racial classifications as apartheid, is ‘the opposite of what inspired apartheid: for their ultimate goal is to allow everyone to overcome the old divisions and subordinations’.<sup>73</sup> ‘It is not necessarily an injury to dignity to view a person only through the lens of one ground listed in section 9(3),’ they write, ‘provided the reason for doing so is to redress historical inequality’.<sup>74</sup> Third, Van der Westhuizen J asks whether the impact on Ms Barnard’s dignity was ‘reasonable and justifiable in light of the goal of substantive equality’,<sup>75</sup> and he answers that two factors need consideration in answering this: Was she treated as a mere means towards achieving the goal of equality? And was the measure taken by the National Commissioner an ‘absolute barrier’ to her career advancement?

We have, then, some possibilities for threshold criteria for fair treatment that do not unduly diminish dignity. Fair treatment is treatment that can be justified to the persons affected, in terms they can accept; discriminatory measures must not be chosen for their own sake but for the end of equality, must contribute to the goal of equality and reconciliation, and be motivated by that goal; the affected person must not be treated as a mere means towards the goal; and the treatment should not be an absolute barrier to a person’s career.

Whether any of these criteria are met might be difficult to discover in practice. One reason (though perhaps this is unfair) is that it is difficult to know the intentions and end of a decision and action. Did the National Commissioner *really* intend to contribute to the goal of equality? Identifying intentions is a murky business at best, but perhaps we can set this aside, or resort to an argument to the best explanation. Another reason is that it is difficult to judge in advance whether the decision in a particular case would in fact contribute to equality. This is an empirical matter to be settled in the future, once the effects of the decision are known. Whether there is an absolute barrier to a person’s career is also an empirical matter which may not be clear at the time.

These claims might be thought to be too quick: surely we can draw from experience and make reasonable predictions? Certainly, but at least in respect of legal decisions, we need to know in advance of waiting for the effects to play out whether our decision to allow them to play out was justified. Legal justifications cannot be hostage to fortune. It might also be said that I am ignoring the symbolic or expressive value of the judges’ decision. Their decision expresses, or is a symbol of, a commitment to equality, and so has great political significance in South Africa. Evidence for this interpretation is Van der Westhuizen J’s remark that even the *perception* that a person is treated as a mere means would undermine the pursuit of equality.<sup>76</sup> Presumably this is not (or not only) an empirical matter,

<sup>72</sup> Ibid at para 93.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid at para 117.

<sup>75</sup> Ibid at para 180.

<sup>76</sup> Ibid.

but a matter of what a commitment to ‘progressive realisation of equality’ consists in and requires. This is plausible, but the point pulls both ways – we can worry about the perceptions of both parties.

Finally, and perhaps most difficult to resolve given the explicitly acknowledged tension between equality and dignity, it is difficult to know when a person is being treated as a ‘mere means’. Ms Barnard is in some sense being evaluated as a means or an obstacle to furthering equality, otherwise, as all admit, she would have been appointed to the disputed position. But is she being treated as a *mere* means? The judges sometimes talk as if there is no real, or no significant, sacrifice of value if she is not *unduly* affected, but that does not help us here if by ‘unduly’ is meant ‘unfairly’ – we would be going in circles. We could also say on their behalf that she is not being treated as a mere means because her qualifications and her claim are given their serious attention. If she were being treated as a mere means, she need not even have been considered; in consequentialist reckoning, the plight of the disadvantaged in South Africa clearly outweighs, in brute numbers, the claims of one woman. That Ms Barnard’s claim is taken seriously by the Court shows its commitment to the deontological values in the Constitution, and a commitment against giving consequentialist reasoning automatic supremacy. The publicity criterion may be related to this: a person is not treated as a mere means when public reasons are provided; her rationality is not bypassed, but respected, even if she remains unhappy by the verdict. In explaining what Kant means by treating people as a mere means, Thomas Hill says that insofar as people are used as a means, ‘they must *be able* to adopt the agent’s end, under some appropriate description, without irrational conflict of will.’<sup>77</sup> This does not mean that they in fact *will* adopt the reasons; in particular situations that may be recalcitrant, irrational, overcome by resentment or fear of personal loss.

If we are seeking the criteria for acceptable compromises of dignity, therefore, the judgments in *Barnard* are inconclusive. There does not seem to be a clear, explicit and agreed upon interpretation of when discrimination is fair and when an injury to dignity is reasonably outweighed by claims of equality (assuming the two values can be weighed against each other). The references to *Harksen* and *Van Heerden* do not resolve the deeper philosophical uncertainties (and perhaps it is unfair to expect this from the judges). The publicity criterion provides a promising way to interpret what it means to treat a person as a mere means, but that criterion is nowhere explicitly stated or acknowledged, let alone defended, in *Barnard*. Appeals to fairness do not resolve what is at stake in *Barnard*.

### III WHITE SOUTH AFRICA

In the rest of this paper, I further explore the tensions between equality and dignity in South Africa, focussing now on white South Africans and their reactions to discrimination cases like *Barnard*. I am particularly interested in how those negatively affected – people like Ms Barnard – would take judgments against them, and what is at stake politically and morally in such debates. Would they accept the Court’s verdict as fair (setting aside whether it *is* fair), and what

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<sup>77</sup> Hill (note 44 above) at 45.

needs to be the case about them in order for that to be possible? Examining these questions takes us to issues of identity, and to how group membership may partly constitute identity.

## A Claims of Identity

Dignity is in the first instance an attribute of individual human beings, and to respect 'dignity' is to respect each person, in virtue of a property he shares with every other person. In this sense, dignity is both universal and individual: we respect individual persons, in virtue of a universally shared property. However, under the influence of what has come to be called 'identity politics' or 'the politics of difference', this sense of dignity and respect has been extended.<sup>78</sup> People must now be respected not only in virtue of their common humanity, but also in virtue of their differences from one another, and in virtue of the properties they share with only certain others. In this context, the relevant differences and similarities are a function of group membership and identity.<sup>79</sup> So I ought to be respected, not just because I am a human being, but also in virtue of my being a woman, or Jewish, or Zulu, or deaf etc. Not recognising and respecting my group identity is not recognising and respecting *me*. Supporting this view is a theory about the importance of group membership for identity formation.<sup>80</sup> Some judgments in *Barnard* recognise this shift to group membership; Van der Westhuizen J says that affirmative measures may affect the 'right to human dignity of people, individually or as members of a group'.<sup>81</sup>

'Equality' can be used for both individuals and for groups, as well as for individuals *qua* members of a group. That is, the following claims are possible (even if one does not agree with each): individuals are legally (and morally) equal to each other; socially and politically relevant groups are legally (and perhaps morally) equal; and individuals *qua* members of groups are legally (and morally) equal. Usually in *Barnard*, and in discussions over affirmative action more generally, 'equality' refers to persons *qua* members of a group (or sometimes to groups themselves). South Africa is trying to achieve equality for the group

<sup>78</sup> The classic essay on this vast topic is C Taylor 'The Politics of Recognition' in A Gutman (ed) *Multiculturalism: Examining the Politics of Recognition* (1994).

<sup>79</sup> The group memberships that are taken to be relevant vary. 'Identity Politics' is influential in feminism and race theory, where being a woman (belonging to the group 'women') or being black, is politically and morally relevant. See IM Young *Justice and the Politics of Difference* (1990). Other identity-conferring group memberships discussed in the ever-expanding literature are cultural, religious, political, ethnic etc.

<sup>80</sup> Taylor's essay gives an influential account of the identity-conferring role of group membership and why that membership should be respected: identity is not created *ex nihilo*, but 'dialogically'. 'We become full human agents, capable of understanding ourselves, and hence of defining our identity, through our acquisition of rich human languages of expression' (Taylor (note 78 above) at 32). These means of expression are acquired through our cultures. So we are human agents only in so far as we grow up in cultures that provide us with possible life narratives, and the expressive tools to articulate them. Our cultural membership is therefore a component of personal identity, and if persons are to be respected, then the conditions of their identity, among which will be cultural membership, should be supported. Will Kymlicka gives an influential liberal defence of this position (against so-called 'communitarian' positions) in W Kymlicka *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995).

<sup>81</sup> *Barnard* (note 2 above) at para 168.

‘black people’, whose members were afforded unequal status during apartheid, and who still experience entrenched patterns of disadvantage, so a black person might receive particular treatment as a member of the group ‘black’. However, sometimes the individual claim is also put in terms of equality in *Barnard*, and then this is set up against the equality of a group, like the previously disadvantaged, or more vaguely, ‘society’. For example, Cameron and Froneman JJ and Majiedt AJ say that ‘there is a tension between the equality entitlement of an individual and the equality of society as a whole’.<sup>82</sup>

I take it that they have legal and socio-economic equality in mind here, but we can recast equality talk into dignity talk, if equality is a necessary component of respecting dignity, or a necessary means towards protecting it. In this case, Ms Barnard’s ‘equality entitlement’ is her entitlement to equal consideration for jobs and promotions for which she is qualified. This talk of ‘individual’ entitlement to *equality* is, however, not as common in *Barnard* as talk of the entitlement of each individual person to have her *dignity* respected. That is, most often what is at stake is Ms Barnard’s dignity, not her equality, and at times equality of persons seems to collapse into the dignity of persons. So, ignoring the debate about which value, if any, is more fundamental in the Constitution, I shall for the most part be concerned with Ms Barnard’s dignity, and save ‘equality’ for the socio-political equality for the group of those disadvantaged by apartheid and its legacy.

In the context of the case, Ms Barnard’s dignity on the whole depends on her abilities and talents being properly recognised and taken into consideration. Even if correct, this view is not obvious, especially if dignity is given a Kantian interpretation, which makes it a function of a rational nature that we share. Just as a story needs to be told about the importance of group membership to identity, a story needs to be told about the role of abilities, talents and competencies for identity and for respectful treatment. It would presumably go something like this: if respecting the dignity of each person means respecting *her*, all that makes her the particular person she is, then we must properly acknowledge her abilities and professional merit. If she is the ablest at a job, she should be appointed to the job at the cost of not respecting her dignity. Note, however, that this account picks out features *particular* to Ms Barnard; it does not pick out her shared humanity, the basis for her dignity. The thought must be that one can only respect the shared humanity in a particular person by respecting the reason-infused capacities that humans have, and respecting how they are instantiated and exercised in different ways in different people.<sup>83</sup> Knowing how to respect Julia, and knowing how to respect James, will require knowledge and respect for the different rationally-infused qualities that make Julia and James morally distinct people, or the different ways in which they each realise and express them. However, a person is far more than her abilities, and there is a sense in which dignity is not fully respected if she is seen solely in that light. (I will return to this point.)

That is one aspect of respecting dignity. On the other hand, Ms Barnard’s membership of the advantaged group ‘white’ is just as important in this case

<sup>82</sup> Ibid at para 77.

<sup>83</sup> A good account of how reason infuses many human activities is found in T Metz *Meaning in Life* (2013) ch 12.

as her status as a rational human being, and the particularity expressed in her talents and abilities. The judgments, especially the judgment of Cameron and Froneman JJ and Majiedt AJ, think it necessary to see Ms Barnard ‘through the lens’<sup>84</sup> of her group membership and that can both undermine and enhance her dignity-based claims. First, she is, relevantly, a woman. Gender is one of the ‘grounds’ on which a person cannot be unfairly discriminated against, but the gender ‘woman’ is also a ‘designated group’ which has been discriminated against in the past and so is deserving of redress now, as part of the goal of achieving equality. Second, however, she is white. White people continue to benefit from apartheid, and racial patterns of inequality still exist, so discriminatory measures are therefore required to make whites and blacks more equal (presumably by levelling up, not down). The judges, rightly, see that this intersection of group identities complicates the case. Cameron J, Froneman J, and Majiedt AJ note the failure of the National Commissioner to consider gender representivity in his reasons, and think that points to unfairness.<sup>85</sup> Van der Westhuizen J claims that because Ms Barnard’s ‘traits sit at the intersection of privileged and under-privileged identities, she might suffer harm in unique ways compared to members of other groups, designated or not’.<sup>86</sup> Her dignity might already be undermined by her being a member of the group ‘women’, and then ignoring her merit for the job is an added insult. And yet she is also a member of the group ‘white people’, and blacks have a claim for restitution against that group. Ignoring that claim is ignoring *their* dignity.

So far, there are four features of Ms Barnard’s identity that are relevant: her value (her dignity) simply as a human being; her particular value as the particular human being she is, with particular competencies; her group identity as a woman (and disadvantaged); and her group identity as white (and privileged). The first three of these are in her favour (as a human being; as *herself*; as a woman); the fourth (her being white) is the feature that gives rise to the tension. The fact that she is white means that other peoples’ dignity and the goal of social equality give the judges reason to weigh equality more heavily, but doing so risks disrespecting her dignity, and her disadvantaged position as a woman. Notice that *one* feature of Ms Barnard provides reason for weighing equality more heavily than the three other features, separately or combined. Also notice that the dignity of the majority of people (respected through equality measures) outweighs the dignity of one. That provides a straightforward consequentialist reason for setting aside her dignity in this case; numbers count, and numbers count especially once race is taken into account. Still, as we have seen, the judges do not rest content with such reasons; they try to be fair in a non-consequentialist sense in the way they come to their decision. That is, the numbers at stake are not deemed sufficient for justifying the decision, and for making the decision a fair one; as explored earlier, other criteria seem to be playing a role, and some of those are non-consequentialist.

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<sup>84</sup> *Barnard* (note 2 above) at para 117.

<sup>85</sup> *Ibid* at para 120.

<sup>86</sup> *Ibid* at para 153.

One of those criteria, recall, was that the affected person be given reasons that she can understand and that make reference to principles and values she already accepts. Yet, there is a complication that comes out particularly in the case of white people in South Africa, who are officially the ‘losers’ in affirmative action (though of course that way of putting it is tendentious). In order for Ms Barnard (and any white person) to find the reasons behind the judgment acceptable, they must have accepted a number of things about themselves. One important fact whites have to acknowledge is that their whiteness *is* reasonably a mark against them. Defending this statement would take another paper: here I simply assert it.<sup>87</sup> In order for whites not to feel that they are being *unfairly* discriminated against in the very same way that blacks were under apartheid, they have to identify with, and fully acknowledge, their whiteness, and they have to acknowledge the negative meanings of whiteness. Whites have been especially adept at not considering their race important (when they acknowledge that they are raced at all); they often see it as incidental, not identity-defining. This nonchalance is impossible for blacks; in a white supremacist world, their race always matters. Whites therefore need to accept that in a world like ours their race is a legally and morally relevant fact about them, which they can only ignore in bad faith. Only once they have acknowledged this, will the judges’ decision seem reasonable to them. Until then, they will feel unfairly discriminated against; they will feel that their dignity is being traded off against others’ dignity in an objectionably crude consequentialist way, and, perhaps, that this is done intentionally as some kind of punishment for apartheid. These worries are certainly often raised in bad faith, but there is still something right in them: part of Kant’s point is that one person cannot be sacrificed for many; that is constitutive of being ‘an end in oneself’. The rights in the Constitution are our way of acknowledging this special value and are meant to rule out consequentialist reasoning at certain crucial points. I therefore do not think such worries are unjustified; there is something about affirmative action measures that remains ethically problematic even if in particular cases they are overall justified.

Earlier, I said that a person is far more than his abilities, and noted that perhaps dignity is not fully respected if he is seen only in their light. This thought is also lurking beneath this case. We all want to be valued ‘for ourselves’ and that vague phrase usually means more than ‘the sum of our attributes’. There is a sense in which a person is instrumentalised if he is seen only as a bundle of capacities and talents and physical attributes, which could be put to use for service delivery and equality, or stand in their way. In affirmative action cases like these, a person is measured – and he *is* measured – by his usefulness, his group membership, his history, and – most apposite in South Africa – his race. That this is done in aid of restitution can feel hollow when the discrimination is committed in the very racialised terms used by the apartheid system. This assessment of each other is obnoxious; we want to be seen and valued as being more than our most visible or most politically relevant features; we want to relate to each other directly, not

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<sup>87</sup> I have defended this in other work, eg Vice ‘How Do I Live in This Strange Place?’ (note 6 above), and Vice ‘Race, Luck, and the Moral Emotions’ (note 6 above).

through the mediation of race. That this can sometimes be impossible, and that white people might have contributed to its being impossible, is cold comfort.

Finally, in order for (white) people to accept verdicts like the Court's in *Barnard*, they have to see socio-economic equality as a value in its own right, or as an indispensable condition for the dignity of those still disadvantaged. Just as they value their dignity, they should see that others value theirs as much<sup>88</sup> and that dignity requires socio-economic support; they should recognise that redress is called for even if they cannot welcome the sacrifice it requires of them – it is unreasonable to call on them to deny that it *would* be a sacrifice. This recognition could take a number of forms. First, they could buy into a shared South African political and social project, which would justify the sacrifice of some individual goods for the common good. Second, they could commit themselves to the ideal of moral equality, which would require that they commit themselves to improving conditions of those far less privileged than themselves, who are in their bad position because the group to which they belong was not treated equally. Third, they could learn to see their own wellbeing as dependent on the wellbeing of others – a notion drawn from the influential idea of Ubuntu. This idea is present in *Barnard*: indeed, Van der Westhuizen J shows his awareness of it when he alludes to a sense of community between rights holders, which could dilute the competition between claims. Each person, 'as the bearer of the right to dignity, should not be understood as an isolated and unencumbered being. Dignity contains individualistic as well as collective impulses',<sup>89</sup> he writes. This may be true, and the value of Ubuntu may indeed be informing the way the drafters of the Constitution understood the values of dignity and equality. However, exactly how this is to help in this case is not at all clear; perhaps it adds weight to the 'equality' side of the weighting; certainly, it asks us to see our dignity as dependent on the dignity of others. Without considerably more information, the addition of yet another value to the already complex set is a complicating, rather than a helpful factor.<sup>90</sup>

The reference to Ubuntu does, however, alert us to the fact that in order to accept the reasons of the judges in *Barnard*, whites must think of themselves as part of one nation, a citizen amongst others with whom they are in mutual relations of dependency, trust and neighbourliness. They must already be committed to the goal of social equality that the Constitution sets out. Unless some kind of tie to others, *qua* South Africans, is felt and acknowledged, or unless they acknowledge basic moral solidarity with the victims of apartheid, they will feel they are the victims of unfair discrimination in cases like *Barnard*. They must already have made an ethical or political commitment to the goal of equality, and have accepted their implication in an unjust system, before affirmative action will seem just. Until this happens, they will feel as if their dignity is not being respected. Perhaps this ideal is what Van der Westhuizen J had in mind when he writes that

<sup>88</sup> This is a point Kant makes in a crucial passage in the *Groundwork*. Kant (note 23 above) at 4:429.

<sup>89</sup> *Barnard* (note 2 above) at para 174.

<sup>90</sup> Whether there is a difference and tension between dignity and Ubuntu in the South African Constitution is another matter of debate. See, eg, Cornell (note 57 above) and the response by Mokgoro & Woolman (note 57 above). There are different spellings of 'Ubuntu'/'uBuntu'.

‘restitutionary or affirmative measures should be welcomed rather than viewed with suspicion. They must be understood as equality-driven mechanisms in their own right, rather than carve-outs from what is discriminatory’.<sup>91</sup>

Perhaps this is a lot to accept, and bringing this case to the Labour Court in the first place is evidence that Ms Barnard did not fully accept it (though Van der Westhuizen J does commend her on her sensitivity).<sup>92</sup> Now, to be clear, I *do* think she and other whites need to accept (most) of these, and I *do* think the judges’ verdict in *Barnard* is all-things-considered just and reasonable. So the difficulties I speak of here are not evidence that the judgment is not reasonable. The point is rather ethical and psychological: whites have to accept a lot of statements about themselves as true before the judges’ reasoning will resonate. Like all people, they have reasonable concerns for their own well-being and reasonable aspirations to be accepted on their own merits, and Van der Westhuizen J agrees that they will need to make a sacrifice:

[Ms Barnard’s] race was the determinative factor in the National Commissioner’s decision not to promote her. Her attributes, experience and attitude were eclipsed by considerations of race. Her value as a human being in an employment environment was, to some extent, undermined.<sup>93</sup>

It is not helpful to expect any person to be unconcerned about her life, her security and her prospects and *happily* to give up the means for improving her condition. Affirmative action, even when its rationale is appreciated and accepted, is still something of a sacrifice for each person, and in part it undermines our moral system. This does not mean that it cannot be justified, only that its justification might be difficult to see if you do not already accept the goal.

#### IV CONCLUSION

Let me try to bring together the different strands of this paper. Insofar as there is an argument, one conclusion is that unjust circumstances can make it necessary to treat people in ways that can appropriately be seen as an affront to their dignity. As we see in *Barnard*, dignity will sometimes (perhaps often) need to be weighed against dignity and against other values. Trade-offs between social goals and individual dignity are inevitable. This does not, however, mean that they are made without moral costs. If Kant is correct and dignity has no price, then we are doing something wrong when we make these kinds of practically necessary calculations. Weighing one person’s dignity against others’ dignity or against equality is a *moral* mistake. You can do it, as we see in *Barnard*, but even if it is all-things-considered permissible, it can only be seen as the ‘least bad’ option, and this is already to accept the point that it *is*, indeed, bad. In an unjust world values have to be sacrificed and decisions made that are not clean, that have a moral residue. Equality and dignity are founding values in South Africa’s Constitution, but because of the facts of our socio-economic situation they will be impossible to realise together for a long time; and because of the complexity of

<sup>91</sup> *Barnard* (note 2 above) at para 137.

<sup>92</sup> *Ibid* at para 131.

<sup>93</sup> *Ibid* at para 177.

identity, many people will feel that their dignity is being impermissibly traded off. Comparing and weighing dignities *is* disrespectful, and in that regard, those like Ms Barnard would not be unreasonable if they felt undermined. I am not naïve enough to think we can do without trade-offs in this country, nor that examining the conflicts between values will stop us from comparing and weighing them. But there is some gain in integrity in facing up to the moral resonance of what we are forced by circumstances to do.

Despite the judges' commendable care and vigilance, then, *Barnard* suggests that the tension is irresolvable, at least in the current situation, and a harmonious reading of the Constitution's axiological commitments is therefore difficult to sustain.<sup>94</sup> We *cannot* have it all, both because of the facts of post-apartheid South Africa and because of the particular content and role given to the founding values in the Constitution. Perhaps this tension is contingent, and in better circumstances would not arise or would be resolvable without moral loss. However, in South Africa now, a clean solution is not possible, and this is a price we pay for apartheid.

However, and this is a second conclusion, there are different ways that these necessary but still bad trade-offs can be justified. Some will strike us as fairer than others and, as we saw, whether the decision against Ms Barnard was fair is a central issue in the judgments. I suggested that some of the criteria for fairness we can glean from the judgments are not very helpful, and I then suggested that the criterion of 'public reason' offers the best account of what makes a particular case of discrimination fair or unfair. This requires judges to make their reasoning transparent to the persons it affects, in terms that they can appreciate and where possible, share. In a Kantian framework, public reasons respect a person's rational nature, the source of her dignity. They give her reasons for a decision that negatively affects her in a manner that she can make sense of, that appeals to moral principles or values to which she sees the point or to which she is already committed. In that respect her dignity and moral status are appropriately acknowledged even if the particular decision is not to her liking. However, this position on fairness requires a lot more work to explain and defend it, which I cannot do here, and it is bound to be controversial in South Africa, with its uneasy mixture of liberal and traditional values.

A third conclusion, however, is that in order for whites to accept the reasoning of the judges as fair and public, they must already have undergone a significant (and required) moral change. They must have admitted that they continue to benefit from the ongoing unjust legacy of apartheid. They must have accepted the moral and political meanings of whiteness. They must have recognised that the dignity of others now requires sacrifices from them. Those sacrifices certainly matter morally and they have reason to feel unhappy. However, if they do not accept the judges' verdict in such cases, they are not being unjustly treated. The work they need to do on themselves before the reasons become, also, *their* reasons, *qua* citizens in a shared polity, therefore further complicates the publicity criterion for fairness. The judges' reasoning might indeed be suitably public, and so their verdict could be fair, without all those affected seeing this. This lack of insight on the part of those affected does not make the reasoning itself unacceptable;

<sup>94</sup> Ibid at paras 77–78 (Cameron J, Froneman J, and Majiedt AJ); at para 16 (Van der Westhuizen J).

they are in the wrong here, and their intransigence is part of the problems South Africa still grapple with. However, in a fractious country like ours, this situation makes reconciliation and racial justice more difficult.

Finally, there are two more general conclusions to draw from this discussion. The first is that there are real conflicts between different values and that a decision in favour of one does not mean a resolution of the conflict. We can see the conflict between dignity and equality in discrimination cases as a moral dilemma: any decision (and there must be a decision) will have some moral mark against it; there is no decision in which nothing will be sacrificed. The second general conclusion is that like so many difficult issues in politics and morality, we see a clash between two fundamental, and entirely different, approaches to morality. The Constitution is informed by the deontological approach of Kantian ethics, which requires that we respect people as ends in themselves at all times. That means we cannot view them solely as means to further social goals, and some treatment will be ruled out categorically. On the other hand, the needs and dignity of those people harmed by apartheid must be recognised and ameliorated. In this context, with scarce resources to share among millions of needy people, the sacrifice of an individual's dignity might be required, using practically necessary consequentialist calculations that might have results that are impermissible for a Kantian.

None of these conclusions offer solutions. If they are plausible, they are simply evidence of how difficult ethics and law is in a country in which ethics and legality were ignored for so long.