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Equality or justice? Section 9 of the Constitution revisited — Part II

Summary

The purpose of this article is to establish whether section 9 of the Constitution guarantees equality or justice. The Constitution stipulates that everyone is equal before the law and has the right to equal protection and benefit of the law. It defines equality as including the full and equal enjoyment of all the rights and freedoms. It also prohibits unfair discrimination against anyone on one or more of the listed grounds. This provision aims to create an egalitarian society where all people are treated as human beings with dignity and self-worth. It cannot, however, be interpreted to mean that there will be total equality of all persons in every respect whatever their circumstances and that all people will enjoy all rights fully in the same way. The Constitutional Court has interpreted this provision to mean justice and fairness rather than complete equality. It has been accepted that in a democratic society differentiation is permissible and even necessary. However, permissible differentiation becomes impermissible (and consequently results in unfair discrimination) when the dignity of the person is violated. Although this approach has been criticised as being narrow in that it shifts emphasis from equality to dignity, it demonstrates that there is a close relationship between equality and dignity.

Gelykheid of geregtigheid? Artikel 9 van die Grondwet: 'n heroorweging - Deel II

Die doel van hierdie artikel is om artikel 9 van die Grondwet onder die loep te neem en vas te stel of die Grondwet gelykheid en regverdigheid waarborg. Die Grondwet bepaal dat almal gelyk is voor die reg en dus aanspraak kan maak op die gelyke beskerming en voordele wat die reg bied. Dit omskryf gelykheid as 'n begrip wat die volle en gelyke benutting van alle regte en vryhede insluit. Die Grondwet verbied ook onregverdige diskriminasie teenoor alle persone op een of meer van die gelyste gronde. Hierdie voorsiening beoog om 'n egalistiese samelewing, waarin almal menswaardig behandel word as menslike wesens met waardigheid en eiewaarde, daar te stel. Dit kan egter nie noodwendig vertolk word as bedoelende dat daar in alle opsigte algehele gelykheid tussen alle mense, wat ookal hul omstandighede, sal bestaan nie – of dat alle mense noodwendig in alle opsigte dieselfde regte ten volle sal geniet nie. Die Grondwetlike Hof vertolk hierdie bepaling as geregtigheid en regverdigheid eerder as volle gelykwaardigheid. Daar word aanvaar dat differensiasie in 'n demokratiese samelewing toelaatbaar en selfs nodig is, maar toelaatbare differensiasie word omskep in ontoelaatbare (en gevolglik onregverdige diskriminasie) wanneer 'n persoon se waardigheid geskend word. Alhoewel daar kritiek bestaan dat so 'n benadering as eng beskou kan word deurdat dit 'n klemverskuiwing vanaf gelykheid na waardigheid bewerkstellig, demonstreer dit tog dat daar 'n noue verband tussen gelykheid en waardigheid bestaan.

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5. The equality provision in the Constitution analysed

The equality provision has two dimensions; the first concernes the guarantee and promotion of equality and the second deals with the prohibition of unfair discrimination. The dimension that relates to the guarantee and promotion of equality is the one that stipulates that every person has the right to equality before the law, the right to equal protection and benefit of the law, the right to full and equal enjoyment of all rights and freedoms, and affirmative action. The other dimension, as already stated, is concerned with the prohibition of unfair discrimination, which entails the right not to be unfairly discriminated against on grounds including those listed.

Our equality provision is largely modelled on and closely resembles the Canadian equality provision.[1] The phrase "equal protection of the law" is similar to the 14th Amendment of the United States Constitution, although it also differs from it in that the 14th Amendment is not amplified by discrimination and affirmative action like our equality provision.[2] Although reference will be made to foreign jurisprudence in the interpretation of our equality provision one must bear in mind the South African historical context.[3]

Broadly put, the equality provision entails that no one should for any reason be above or beneath the law, but that everyone should be subject to the same law and that no one should be denied protection of the law.[4] In the South African historical context this is particularly significant because we have had a past where certain categories of person were denied the protection and benefit of the law. The purpose is to do away with this. Seen against this background it has been said that "equality before the law" entails equality of process which requires that persons be equally represented on the legislative bodies and that each person is granted equal concern and respect when the law is formulated or applied. Equal protection of the law encompasses laws which give benefits and prohibit people being subordinated by or disadvantaged through the law. It also entails that legislative and other steps should be taken to realise this equality – especially for categories of persons who were disadvantaged by years of unfair discrimination.[5] Equality, however, does not mean that all persons should be treated equally whatever their individual circumstances, but that unless there are compelling and objectively justifiable reasons people should be treated equally by the law and should be able to enjoy the same rights. There should not be one law for Peter and another for Paul. Moreover, there should be no unfair discrimination based on any of the listed and related

1 Section 15(1) of the Canadian Charter of Freedoms and Rights which provides as follows: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

2 Albertyn and Kentridge 1994:158.

3 *Brink v Kitshoff* NO 1996 (4) SA 197 (CC):216.

4 *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC), 1997 6 BCLR 259 (CC).

5 Albertyn and Kentridge 1994:160; De Vos 2000:63.

grounds. Classification will nonetheless take place. Even in the Constitution certain distinctions are made based on language, culture, religion and others. This demonstrates that equality does not mean that people should be treated as identical individuals, eating the same food and observing the same cultures. But none of these should be used to mete out unfair discriminatory treatment.[6]

Although it has been observed above that the equality clause has two dimensions, it does not mean that in practice these are kept separate. For this reason legislation to promote equality has been passed and it also deals with the prevention of unfair discrimination.[7] Similarly, the Employment Equity Act[8] was also passed to redress past and present imbalances and to ensure employment equity in the workplace. While it deals with affirmative action it also prohibits unfair discrimination based on the listed grounds.

The Constitution proscribes unfair discrimination based on listed grounds. The use of "unfair" to qualify discrimination underscores the fact that what is prohibited is not simply differentiation, but differentiation which is invidious or inequitably benefits certain groups or individuals. The addition of "unfair" to the word "discrimination" which already has a pejorative connotation, has been attributed to the concerns expressed by the drafter (especially of the interim Constitution) that discrimination has both a benign and pejorative meaning.[9] The implication of this, however, is that it can have an impact on the anti-discrimination legislation which should adopt the "unfair discrimination" label, failing which it could give rise to problems if the question is posed as to what the difference is between the conduct prohibited by the Constitution and that proscribed by legislation.[10] Moreover, the use of "unfair" is either tantologous or provides for too strong a text.

Section 9 (3) prohibits not only direct, but also indirect unfair discrimination based on the listed grounds. Direct discrimination involves the direct use of the attributes listed in section 9 to mete out discriminatory treatment. Indirect discrimination is wider and is concerned with the effects of apparently neutral laws that have a disproportionate impact on a certain group.[11] The use of the phrase "directly or indirectly" was aimed at providing comprehensive protection against unfair discrimination.[12]

The grounds listed in section 9 are the grounds that were commonly used in the past to mete out discriminatory treatment. Their common feature is that they are human attributes which are either immutable or extremely difficult to change or are intimately part of the human personality and are generally subject to stereotyping and prejudice. Their negative use therefore

6 *Prinsloo v Van der Linde* see footnote 114 above.
7 The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.
8 The Employment Equity Act 55/1998.
9 Albertyn and Kentridge 1994:161; Cachalia *et al* 1994:28-29; compare Fagan 1998:227.
10 Albertyn and Kentridge 1994:161; this has been taken into account in the drafting of the equality legislation.
11 Albertyn and Kentridge 1994:165.
12 Cachalia *et al* 1994:30; Albertyn and Kentridge 1994:164-165.

adversely affects the individual. The listed grounds are not exhaustive but the list is open. Not only the listed grounds but also those analogous to them are included. The use of the phrase "without derogating from the generality of this provision" in the interim Constitution which implied that the list remained open although it should not have been regarded as an open invitation to admit any ground or classification, was left out in the final Constitution. This is aimed at forestalling the courts from being inundated by claims from persons adversely affected by legislation.[13]

It has been said that the addition of the word "unfair" to discrimination is designed to ensure that the door to affirmative action is kept open in cases where the application of affirmative action policies prejudicially affects individuals who are not "persons or groups or categories of persons disadvantaged by unfair discrimination".[14] Owing to the commitment to substantive or real equality, the drafter had in mind that the affirmative action programmes should be seen as indispensable to and part of the attainment of equality and not to be regarded as a limitation or exception to the right to equality. Any person challenging such programmes bears the onus of proving that the programmes are illegal.[15] It is necessary to look cursorily at how the Constitutional Court has interpreted the equality provision.

6. The Constitutional Court and the equality provision

The Constitutional Court had on a number of occasions an opportunity to pronounce itself on the equality provision.[16] Initially the court was cautious in its interpretation of the provision and avoided any "sweeping interpretations" of section 8 of the interim Constitution, holding the view that our equality jurisprudence should be allowed to "develop slowly, and hopefully surely" and on a "case-by-case basis with special emphasis on the actual context in which the problem arises".[17] In a trilogy of cases, however, the court had to grasp the nettle and to clearly express itself on the meaning of this provision. These cases can be regarded as the ground-breaking cases in the history of the equality provision in South Africa. These cases are *Prinsloo v Van der Linde*,[18] *The President of the Republic of South Africa v Hugo* [19] and *Harksen v Lane*.[20] For this reason it will be necessary to discuss these cases at some length. This

13 Albertyn and Kentridge 1994:166-167.

14 Cachalia *et al* 1994:27, 30; Albertyn and Kentridge 1994:167-170.

15 Albertyn and Kentridge 1994:162; Govender 1997:265-266; See *Public Servants' Association of South Africa v Minister of Justice* 1997 (5) BCLR 577 (T); *Motala v University of Natal* 1995 (3) BCLR 374 (D).

16 See cases cited under footnote 10.

17 *S v Ntuli* 1996 (1) BCLR 141 (CC):para 19; quoted with approval in *Prinsloo v Van der Linde* 1997 6 BCLR 759 (CC) at 770; see also Carpenter 2001(a) and (b); Davis 1999:90.

18 1997 (3) SA (CC) 1012, 1997 (6) BCLR 259 (CC).

19 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC).

20 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC); for a discussion of this, see Freedman 1998:243.

interpretation was based on section 8 of the interim Constitution. Owing to the similarity between section 8 of the interim Constitution and section 9 of the final Constitution, albeit with some differences, this interpretation is regarded as applicable to section 9 of the final Constitution as well.

In *Prinsloo v Van der Linde* the court held that it was not the intention of section 8 of the interim Constitution that every differentiation made in terms of the law be reviewed for justification of unequal treatment. It held this view because it felt that if that was the case, the court would be called upon to review the reasonableness or fairness of every classification of rights, duties, privileges, immunities, benefits or disadvantages flowing from any law. The court was of the opinion that this is not the purpose of our equality provision. The purpose of this limitation is to prevent the opening up of the floodgates to cases of claims for constitutional scrutiny of legislation. What is necessary is to identify the criteria that distinguish legitimate differentiation from differentiation that is unconstitutional. The court drew a distinction between differentiation which does not involve unfair discrimination and differentiation which does entail unfair discrimination. In doing this the court said:

> It must be accepted that, in order to govern a modern country efficiently and to harmonise the interests of all its people for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without differentiation and without classifications which treat people differently and which impact on people differently… Differentiation which falls into this category very rarely constitutes unfair discrimination in respect of persons subject to such regulation, without the addition of a further element".[21]

The court therefore referred to this as "mere differentiation". As regards mere differentiation, the court held the view that a constitutional state is supposed to act in a rational manner and not to regulate the affairs of people in an arbitrary or capricious way or in a way that reveals naked preferences which serve no legitimate government purpose, because that would be in conflict with the rule of law and the fundamental premises of the constitutional state. As the court further pointed out, the purpose of this aspect of equality is to ensure that the state is bound to function in a rational manner in order to promote the need for governmental action to relate to a defensible vision of the public good and to enhance the coherence and integrity of legislation.

For this reason the court held that before it can be concluded that mere differentiation violates section 8, it has to be established that there is no rational relationship between the differentiation in question and the governmental purpose which is suggested to validate it. If there is no such rational relationship, the differentiation would infringe section 8. The existence of such a rational relationship is a necessary but not sufficient condition because the differentiation could still constitute unfair discrimination if a further element is present.

21 *Prinsloo v Van der Linde*:1024.

This further element is constituted by the specified grounds enumerated in section 8 on the basis of which no person should be unfairly discriminated against. These include race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language. *Prima facie* proof of discrimination on these grounds triggers the presumption that unfair discrimination has been sufficiently proved until the contrary is established. These specified grounds are not exhaustive. There may be unfair discrimination which is not based on specific grounds. In relation to that discrimination there is no presumption in favour of unfairness.

In further elaborating on what interpretation to give to unfair discrimination based on specified grounds the court had the following to say:

> Given the history of this country we are of the view that 'discrimination' has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them. We are emerging from a period of our history during which the humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short they were denied recognition of their inherent dignity. Although one thinks in the first instance of discrimination on the grounds of race and ethnic origin, one should never lose sight in any historical evaluation of other forms of discrimination such as that which has taken place on the grounds of sex and gender. In our view unfair discrimination, when used in this second form in section 8(2), in the context of section 8 as a whole, principally means treating persons differently in a way which impairs their fundamental dignity as human beings who are inherently equal in dignity.[22]

The court concluded that where discrimination resulted in people being treated differently in a way which impairs their fundamental dignity as human beings, it will be regarded as clearly violating the provisions of section 8(2). Similarly, other forms of differentiation which in some other way affect persons adversely in a comparably serious manner, could also constitute a violation of section 8(2).

In the case of *The President of the Republic of South Africa v Hugo*, Goldstone J had the opportunity to enunciate what the purpose of the prohibition of unfair discrimination is. He stated:

> The prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitution and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply

22 *Prinsloo v Van der Linde*:1026. In this case the court emphasised the historical context of the interpretation and application of the equality provision.

> inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.[23]

The learned judge referred to the Canadian case of *R v Big M Drug Mart Ltd* [24] where it was emphasized that the equality provision represents a commitment to recognizing a person's equal worth as a human being irrespective of individual differences. "Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity".

The judge further pointed out that it is not sufficient for the appellants to aver that the impact of the discrimination affected members of a group that was not historically disadvantaged, but they must also show in the context of the case under consideration that the impact of the discrimination on the people who were discriminated against was not unfair. Referring to section 8(3) of the interim Constitution, he pointed out that it expressly recognizes the need for measures to ameliorate disadvantages produced by past discrimination. As he further puts it:

> We need therefore, to develop a concept of unfair discrimination which recognizes that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.[25]

This interpretation was further expanded in the case of *Harksen v Lane*. In interpreting the provisions of section 8 of the interim Constitution Goldstone J said that it must be determined whether the law or conduct in question differentiates between individuals or groups of people. If the law or conduct in question does differentiate, then "in order not to fall foul of s8(1) of the interim Constitution there must be a rational connection between the differentiation in question and the legitimate governmental purpose it is designed to further or achieve". If it is justified in that way, it does not amount to a violation of section 8(1). But if there is no rational connection between the differentiation and the governmental purpose, then the law or conduct in question violates the provisions of section 8(1) of the interim Constitution. Should there be a rational connection, it is necessary to determine whether in spite of the rationality, the differentiation nonetheless amounts to unfair discrimination in terms of section 8(2) of the interim Constitution. To determine whether differentiation amounts to unfair discrimination in terms of section 8(2) requires a two stage analysis. First, it should be established

23 1977 (4) SA 1(CC):22-23.
24 [(1985) 13 CRR 64]:97.
25 At 23.

whether differentiation amounts to discrimination and secondly, if it does, it should further be established whether it amounts to unfair discrimination.

If the discrimination is on a specified ground, then it will be presumed to be unfair in terms of section 8(4). The onus will be on the respondent to rebut this presumption. If, however, the discrimination is on an unspecified ground, the onus will be on the complainant to prove unfairness. In order to determine whether the discriminatory provision is unfair the impact of the discrimination on the victim's human dignity will be decisive. Goldstone J stated that in assessing the impact of the discrimination on the victim, the court must consider the following factors:

(a) the position of the complainants in society and whether they suffered from past patterns of discrimination. If the complainants are part of a group which has suffered discrimination in the past, then it is more likely that the discrimination will be unfair;

(b) the nature of the provision or power and the purpose which it seeks to achieve. If its purpose is obviously not directed at impairing the complainants' dignity, but is aimed at achieving a worthy and important societal goal, this may have an important effect on whether the complainants have suffered the impairment in question; and

(c) if the discrimination is found to be unfair, then the law or governmental conduct in question will be an infringement of section 8(2). It will then necessitate a determination of whether unfair discrimination can be justified in terms of the limitation clause.

In her dissenting judgment O'Regan J pointed out that the court will weigh the infringement of section 8(2) against the purpose and effect of the law or conduct in question. This would entail balancing the extent of the infringement, the purpose of the law in question and whether the relationship between the purpose and the effect has been closely drawn.

The reasoning in the three cases referred to above was followed in a number of subsequent cases.[26] It can therefore be safely said that the three cases have laid the foundation on how the equality provision has to be interpreted and applied. The approach of the court in its interpretation of the

26 *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1998 (1) SA 745 (CC); *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); *Bangindawo and Others v Head of the Nyanda Regional Authority and Another H Lautlalala v Head of the Western Cape Tembuland Regional Authority and Others* 1998 (3) SA 262 (Tk); *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC); *Jooste v Score Supermarket Trading (Pty) Ltd Minister of Labour Intervening* 1999 (2) SA 1 (CC); *Maliszeurski and Others v Minister of Health and Another* 1999 (2) SA 399 (T); *Lotus River, Ottery, Grassy Park Residents Association and Another v South Peninsula Municipality* 1999 (2) SA 817 (C); *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 1999 (3) SA 173 (C); *Democratic Party v Minister of Home Affairs and Another* 1999 (3) SA 254 (CC).

equality clause has been trenchantly criticised by various commentators. It will be apposite to analyse this critique.

7. A critique of the Constitutional Court's approach

The major criticism against the approach of the Constitutional Court is that it has incorrectly placed dignity at the centre of the equality right.[27] While I agree with some of the criticism of the judgments of the Constitutional Court, I do so for different reasons. Before I advance my reasons for it, it is necessary to analyse briefly the reasons of the commentators referred to above. I shall then proceed to point out that although the Constitutional Court may be wrong, it is not totally wrong and then indicate what the proper approach should be.

The criticism levelled by Albertyn and Goldblatt against the Constitutional Court's decisions for instance, is that it is wrong in placing the value of dignity at the core of the equality right. They argue that the right to substantive equality should be given a meaning which is independent of the value of dignity and which is informed by the value of equality.[28] They further argue that by giving the value of dignity the central place in our equality jurisprudence the court has effectively enhanced the role of dignity and has relegated disadvantage or vulnerability and harm to a position of unimportance. The effect of this is to revert to the liberal and individualised conception of the right which tends to emphasise the individual personality and disregards the systemic issues and social relationships.[29]

Similarly, Fagan is of the opinion that the judges of the Constitutional Court were wrong in importing dignity as central to unfair discrimination. The purpose of this, it would appear, was to make a distinction between differentiation and discrimination. Discrimination is unfair if it impairs a person's dignity, as they put it. Fagan challenges this[30] and is of the opinion that the dignity-analysis of unfair discrimination lacks proper foundation. Consequently, it should be seen as purely rhetorical. In his opinion an act unfairly discriminates if "it confers benefits or imposes burdens on some but not on others, and in doing so infringes either an independent constitutional right or a constitutionally-grounded egalitarian principle".[31]

Davis is of the view that equality should be provided with substantive meaning owing to its central position. It does not have to depend on another value, namely dignity. He bemoans the fact that the Constitutional Court "has so muddled the jurisprudential waters that the meaning of the foundational principle of equality is all but clear".[32]

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27 Albertyn and Goldblatt 1998:254 and further; Fagan 1998:221 and further; De Vos 2000:65 and further.
28 1998:254.
29 1998:258 and further.
30 1998:225-227.
31 1998:233.
32 1998:90.

While the commentators agree that the use of the dignity-analysis is inappropriate to the equality right, they differ on what should take its place. While Albertyn and Goldblatt are of the view that disadvantage or harm should be the criterion to determine when discrimination is unfair and violates the right to equality,[33] Fagan is of the opinion that discrimination is unfair if there is no morally-relevant reason for meting out disparity of treatment. In this respect he feels that the right to equality is either empty or superfluous in that in order to establish whether it has been violated one has to resort to some other moral right than equality.[34] This criticism is too strong because it ignores the fact that the *prima facie* violation of the equality clause may not be unfair if there is justification for it. This is not unique. In the law of delict and criminal law for instance the *prima facie* violation of a rule may not lead to wrongfulness or unlawfulness, as the case may be. The act in question will only be wrongful or unlawful if there is no ground of justification.[35] There is therefore no reason why something which approximates a ground of justification in the area of constitutional law should not be recognized and which leads to a *prima facie* violation of the equality clause not being unconstitutional as being unfair.

It is now necessary to establish what the proper approach should be. But before that is done, it is appropriate to reiterate the rationale for the court's use of dignity in the equality analysis. The major reason why the Constitutional Court espoused dignity as the rationale for branding discrimination as unfair, as has been indicated above, is because it started from the premise that equality does not mean that everyone should be treated equally whatever their circumstances. Differentiation or classification *per se* therefore does not result in unfair discrimination at all times. Whether or not discrimination is unfair, depends on the presence of an additional element. This element is, as the court put it, the infringement of a person's human dignity. Although this might strike one as "a rather narrow conception of the harm of discrimination",[36] this is somewhat altered by the fact that the court provided a broad definition of "human dignity", when it stated that human dignity would be impaired whenever a differentiation treats people as "second-class citizens" or "demeans them" or "treats them as less capable for no good reason" or otherwise offends "fundamental human dignity" or where it "infringes an individual's self-esteem and personal integrity".[37] In the case of *Prinsloo v Van der Linde* the court interpreted discrimination also to mean not only the infringement of human dignity, but also "other forms of differentiation, which in some other way affect persons adversely in a comparably serious manner".[38]

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33 1998:258.

34 1998:240-241.

35 On the role of the grounds of justification in criminal law see Snyman 1989:96 and further; in delict see Neethling, Potgieter and Visser 1999:73 and further; Burchell 1992:67 and further.

36 De Vos 2000:65.

37 *Prinsloo v Van der Linde*:1024; *The President of the Republic of South Africa v Hugo* 22-23; see also De Vos 2000:65; Cowen 2001:42-45.

38 773; see also *Harksen v Lane*:1511.

Despite this amplification, the use by the Constitutional Court of dignity as the element which turns differentiation into unfair discrimination is not regarded as convincing. Although the use of the dignity-analysis is open to criticism, it would appear that the court did not err greatly. Admittedly, the use of dignity may be open to criticism in that it may exclude cases of discrimination which may not violate dignity but which may nonetheless be unfair. This was so in the *Harksen* case. The reason why dignity may be regarded as an appropriate element is that equality may not be regarded as an end in itself. It is a means to an end. The reason why it is important to treat people equally is because doing so protects their dignity and their feelings of self-worth. Equality and dignity are therefore closely related.[39]

The conceptual confusion may also largely arise from the terminology used. The amplification of "dignity" by the court demonstrates that what the court meant is not simply dignity *stricto sensu*, but basic equality or basic humanity which, of course, entails that people should be treated as human beings, with respect, and as people having dignity and self-worth. Seen in this perspective therefore discrimination is unfair if it violates basic equality or humanity. As stated earlier, sometimes commentators fail to realise that equality does not just mean one thing, but that it can be segmented to refer to basic equality, equality of those in similar circumstances and other permutations. Seen in this light therefore, dignity as a justification for regarding discrimination as unfair, is not entirely wrong. It is also more than a rhetorical flourish.[40] This interpretation also took into account the history of this country where people were discriminated against owing to their colour or race or gender and this resulted in their being demeaned or their dignity impugned.

As stated earlier, Albertyn and Goldblatt are of the opinion that harm or disadvantage should be the touchstone of the equality right violation. While this may be true of the majority of cases, disadvantage or harm also occurs to those who may not succeed to impugn an act as being unfairly discriminatory. The typical example is that of affirmative action. There is no doubt that a white person who is omitted in promotion or appointment in favour of a black person in the application of affirmative action will feel aggrieved or disadvantaged.[41]

Admittedly, in an earlier article Albertyn and Kentridge sought to distinguish between harm or disadvantage suffered by already disadvantaged groups and harm or disadvantage suffered by privileged or advantaged groups. As they put it:

> But while the discrimination may take the same form in both instances, and will doubtless cause harm in each case, the kind of harm is different in important ways. The harm caused by measures which disadvantage vulnerable and subordinate groups goes beyond the evil of discrimination. Such treatment is unfair in that it

39 Cowen 2001:48.
40 Compare Fagan 1998:233; Cowen 2001: 49 and further.
41 Otherwise we would not have had cases where people have challenged affirmative action.

> perpetuates and exacerbates existing disadvantage. Measures which disadvantage powerful and privileged groups, on the other hand, may be discriminatory but are not necessarily unfair in the same way. We deliberately use the words 'not necessarily' here to make it clear that we are not saying that the Constitution always permits discrimination against privileged groups. What we are saying is that, by using the word "unfairly" it accommodates the view that discrimination may have a different quality in different contexts, and requires that the specific context is taken into account.[42]

Notwithstanding this explanation, harm or disadvantage cannot be the appropriate criterion which should distinguish unfair discrimination from legitimate differentiation. As the authors say, it exists in both cases. What may differ is that in one case there is justification for it whereas in the other there is no justification. The justification in the case of affirmative action is that it is aimed at advancing persons or categories of persons who were disadvantaged by years of discrimination.[43] The justification in this case is, among others, that of need, based on the needs principle.[44] The major criticism against the view of Albertyn and Kentridge is that it tends to place too much emphasis on group disadvantage and to disregard the impact of discrimination on the individual.[45]

The views of Cowen[46] on this issue are much more appealing. She holds the views that key international human rights instruments regard dignity as a foundational value and right that is closely related to equality. It serves both individual and collective interests. The use of dignity can promote rather than frustrate substantive equality. Nor is dignity in conflict with the transformative ideal to which our Constitution is committed. It could even be used to justify the use of government intervention to remove material disadvantage and inequality. Admittedly the use of dignity in support of the equality right has some limitations and weaknesses that need to be addressed.[47]

Perhaps some minor criticism against the test used by the Constitutional Court in determining when discrimination is unfair is that it is a bit complex (with various sub-tests) and sometimes repetitive. We need a simple test. To start by saying that an act will not be unfairly differentiating if it is rationally connected to a legitimate government objective which is sought to validate it and then still to proceed to establish whether that will still be unfairly discriminatory is unnecessarily repetitive. It is difficult to conceive of a situation where an act which is rationally connected to a legitimate government purpose will still be unfairly discriminatory.

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42 1994:162.
43 Section 9(2); see further Klug 1991:323; Smith 1992:234.
44 Smith 1992:242-243.
45 Galloway 1993:79-80.
46 Cowen 2001:49 and further.
47 Cowen 2001:55 and further.

A simple test for unfair discrimination should be that an act (legislative or administrative) will be unfairly discriminatory if it violates basic equality, that is based on the listed and analogous grounds, or if there is no objectively justifiable and rational ground or reason for meting out discriminatory treatment. This test avoids the use of dignity which has been criticised by the authors referred to above. It does not include every form of inequality but inequality which violates basic humanity. It does not exclude discrimination which does not violate basic humanity but which is nonetheless unfair. For such discrimination to be permissible it must be rationally and objectively justifiable. If it is not justifiable, it is unfair and therefore impermissible.

8. Conclusion

The purpose of this article was to establish whether the constitution seeks to realise equality or justice in section 9 and whether complete equality can be realised at all times and under all circumstances. There is no doubt that section 9 of the Constitution is an important and influential section. It is based on one of the core democratic values which underpin our Constitution, and it guarantees equality and non-discrimination. Bearing in mind our past which was characterised by inequality and discrimination, the provisions of section 9 are therefore trend-setting. The way this section is interpreted and applied is of more than passing interest.

Section 9, however, promises more than what it can deliver. It guarantees equality before the law and equal protection and benefit of the law. While this section will be able to protect basic equality and prevent unfair discrimination, it cannot guarantee total and complete equality of all persons in every respect and it will not ensure that all people enjoy all rights equally. For this reason this section may unnecessarily raise expectations which cannot be met — especially in our country which is characterised by massive inequalities and poverty. It may nonetheless facilitate the progressive enjoyment of all rights.

In interpreting this section, the Constitutional Court has had to interpret it to mean fairness or justice rather than complete equality. It has felt that to summarily treat everyone equally whatever their circumstances could lead to injustice. As a result, the court has accepted that classification and differentiation are normal in a democratic society and are not necessarily unconstitutional, especially if there is a rational connection between the differentiation and a legitimate government purpose. Differentiation will be impermissible only if it amounts to unfair discrimination. What will turn permissible differentiation into unfair discrimination is the impairment of an individual's dignity or feelings of self worth. Although this dignity-analysis has been severely criticised, it simply means that discrimination will be impermissible if it violates a person's basic equality or humanity and in that sense this approach is not entirely incorrect.

The terminology in our Constitution is largely based on the terminology that has been used in foreign countries. While this may have certain advantages, it does definitely have negative implications. One of them is that we may not have what they had in mind. The use of equality (although we do not mean total equality) is a problem. In those countries where this was developed, they have realised the problems and limitations and yet we want to do the same thing. American and Canadian jurisprudence has had an effect on the drafting of our Constitution and the decisions of the Constitutional Court.

Relying on foreign jurisprudence is both easy and convenient. That explains why our Constitution is sometimes based on provisions found somewhere else. It prevents reinventing the wheel. After all, the problems that we are dealing with are not new or unique. They are the usual problems that people have and grapple with all over the world. The problem of unfair discrimination is a typical one.

In interpreting the equality provision, the Constitutional Court has evolved a useful test. This test could, however, be regarded as narrow. It does not lend itself to transformation. It is confined to correcting discrimination that was practised in the past in this country. That is why the court has had to emphasize the importance of our historical context, in particular where certain sections of the population were demeaned and where their dignity was impugned. Considering the effect of such discrimination, it cannot be said that the exercise is useless. It creates conditions where people can realise their potential and where transformation can take place. The instrumentalist use of the equality provision to ensure the radical transformation of our society is, however, limited. The role of the courts and of judicial precedent is understandably limited in eliminating social disadvantage, because "the adjudicative model is designed to deal with discrete wrongs and not with systemic inequality". Owing to the fact that judicial review focuses on particular laws, it cannot restructure the overall distribution of benefits in the community. That is a complex political role for which courts are ill-equipped.[48]

As mentioned, the interpretation placed on section 9 of the Constitution is more in accord with justice and fairness than simple equality. It has been to ensure that people are treated fairly and with justice rather than to create an utopia. This interpretation is reasonable and credible in the context of the South African situation. The critical question is: Why use the term "equality" if the purpose of section 9 is to see that justice is done? Although equality may be an element of justice, it is not simply synonymous with justice. There are instances where treating people equally would lead to injustice.

The answer to this seems to lie partly in what has already been said, namely that simply following provisions and decisions which have been made elsewhere is appealing because it is safer and more convenient. The other reason is that our past was pervaded by inequality – to provide for equality in the Constitution would demonstrate that we have a new era which is radically different from the past. Moreover, the use of "equality" may

48 Freedman 1998:251; see also Moon 1988:699-700.

also have a better impact than the use of "justice", which may be regarded as not only nebulous but also bland. We need to interpret this in the light of our history in order to bring it nearer the truth.

The fact that section 9 provides not only for equality, but also for non-discrimination on the basis of the listed grounds means that our equality is limited to some extent to the listed grounds. The door is, however, left open for legislation which promotes more substantive equality. Seen in the light of the above our equality provision is comparable to the defence of ignorance of law. As Hall points out one of the reasons why the *ignorantia iuris* rule caused problems was because it "enters the arena of criminal law theory as a roaring lion in occupation of a vast terrain, but after drastic reduction in current case law it makes it exist as a timid shorn lamb".[49] The same can be said of our equality clause. But, considering our history, the changes it has brought about are regarded as revolutionary.[50]

49 Cited by Burchell and Hunt 1983:163.
50 Chaskalson 2000:199.

Bibliography

ALBERTYN C AND KENTRIDGE J
1994. Introducing the right to equality in the interim Constitution. *South African Journal on Human Rights* 10:149-178.

ALBERTYN C AND GOLDBLATT B
1998. Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equality. *South African Journal on Human Rights* 14:248-276.

ANDERSON N
1978. *Liberty law and justice*. London: Stevens.

ARISTOTLE
1054. *The Nochomachean ethics*. Translated by Ross D. Bk v. London: Oxford University Press.

1962. *The politics*. Translated by Sinclair TA. Harmondsworth: Penguin.

BARRY B
1973. *The liberal theory of justice: a critical examination of the principal doctrines in A theory of justice by John Rawls*. Oxford: Clarendon Press.

BODENHEIMER E
1970. *Jurisprudence: the philosophy and method of the law*. Cambridge: Harvard University.

BUCKLAND WW
1963. *A textbook of Roman law: from Augustus to Justinian*. 3rd ed. Cambridge: University of Cambridge.

BURCHELL LJ
1993. *Principles of delict*. Cape Town: Juta.

BURCHELL EM AND HUNT PMA
1983. *South African criminal law and procedure vol 1* 2nd ed. Cape Town: Juta.

CACHALIA A *et al*
1994. *Fundamental rights in the new Constitution*. Cape Town: Juta.

CARPENTER G
2001(a). Equality and non-discrimination in the new South African constitutional order (1): the early cases. *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 64:409-429.

2001(b). Equality and non-discrimination in the new South African constitutional order (2): an important trilogy of decisions. *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 64:619-642.

CHASKALSON A
1999. Human dignity as a foundational value of our constitutional order. *South African Journal on Human Rights* 193-205.

CHASKALSON M *et al*
1995. *The constitutional law of South Africa*. Cape Town: Juta.

DAVIS D
1994. Equality and equal protection. Van Wyk D *et al*. 1994:196-211.

1999. *Democracy and deliberation: transformation and the South African legal order*. Cape Town: Juta.

DE BEER CR (ed)
1981. *The relevance of some current philosophies*. Publication series of the University of Zululand BN 13.49.

DEVENISH G
2000. *A commentary on the South African bill of rights*. Durban: Butterworths.

DE TOCQUEVILLE A
1954. *Democracy in America (1835-1840)*. New York: Vintage.

DE VOS P
1997. Pious wishes or directly enforceable human rights?: social and economic rights in South Africa's 1996 Constitution. *South African Journal on Human Rights* 13:67-101.

2000. Equality for all? A critical analysis of the equality jurisprudence of the Constitutional Court. *Journal of Contemporary Roman-Dutch Law* 63:62-75.

2001(a). Grootboom the right of access to housing and substantive equality as contextual fairness. *South African Journal on Human Rights* 17:260-276.

2001(b). A bridge too far? History as context in the interpretation of the South African Constitution. *South African Journal on Human Rights* 17:1-33.

DE WAAL J *et al*
2001. *The Bill of Rights handbook*. 4th ed. Cape Town: Juta.

DLAMINI CRM
1987. Law and justice: a South African perspective. *De Jure:* 270-284.

DOMANSKI A
1999. The quest for justice in Plato's Republic. *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 62:335-351, 475-494.

DUGARD J
1978. *Human rights and the South African legal order*. Cape Town: Juta.

1988. *Post-apartheid South Africa: utopia postponed?* Unpublished paper delivered at the University of Pretoria.

DU PLESSIS LM
1978. *Die juridiese relevansie van Christelike geregtigheid*. Unpublished LLD dissertation. Potchefstroom: Potchefstroom University for Christian Higher Education.

DWORKIN R
1977. *Taking rights seriously*. London: Duckworth.

EBENSTEIN W
1969. *Great political thinkers: Plato to the present*. 4th ed. New York: Holt, Reinhart and Winton Inc.

FAGAN A
1997. Dignity and unfair discrimination: a value misplaced and a right misunderstood. *South African Journal on Human Rights* 14:220-247.

FORSYTH CF AND SCHILLER J (eds)
1979. *Human rights: the Cape Town Conference*. Cape Town: Juta.

FRIEDMANN W
1967. *Legal theory*. 5th ed. London: Stevens.

GALLOWAY JDC
1993. Three models of (in)equality. *McGill Law Journal* 38:64.

GOVENDER K
1997. The impact of the equality provision on the Constitution. *Obiter*: 258-275.

HAHLO HR AND KAHN E
1968. *The South African legal system and its background*. Cape Town: Juta.

HART HLA
1961. *The concept of law*. Oxford: Clarendon Press.

HENKIN L
1978. *The rights of man today*. London: Stevens.

HOBBES T
1651. *Leviathan*. Ebenstein W. 1969: 372-389.

HOGG PW
1992. *Constitutional law of Canada*. 3rd ed. Scarborough, Ont: Carsewell.

KEMP J
1969. *The philosophy of Kant*. London: Oxford University Press.

KENTRIDGE J
1995. Equality. Chaskalson 1995: 722-741.

KLUG H
1991. Rethinking affirmative action in a non-racial democracy. *South African Journal on Human Rights* 7:317-333.

LIEBENBERG S
2001. The right to social assistance: the implications of Grootboom for policy reform in South Africa. *South African Journal on Human Rights* 17:232-257.

MARX K AND ENGELS F
1848. *The Communist Manifesto*. Ebenstein W 1969.

MOON R
1999. Discrimination and its justification: coping with equality rights under the charter. *Osgoode Hall Law Journal* 26:673-712.

MURRAY C AND KAGANAS F
1991. Law women and the family: the question of polygyny in a new South Africa. *Acta Juridica*.

NEETHLING J *et al*
2000. *Law of delict*. Durban: Butterworths.

NUGENT
2000. Judicial independence under threat. *Advocate* 37.

PIETERSE M
2001. Foreigners and socio-economic rights: legal entitlements or wishful thinking? *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 63:51-61.

PLATO
370 B.C. *The Republic*. Translated by Lee D. 2nd ed. Pretoria: UNISA.

RAWLS J
1971. *A theory of justice*. Cambridge: Belknap Press.

READ JS
1979. The protection of human rights in municipal law. Forsyth CF and Schiller JE (eds).

SCHWARTZ H
1992. Economic and social rights. *American University Journal of International Law and Policy*: 551-565.

SMITH N
1991. Affirmative action: its origin and point. *South African Journal on Human Rights* 7:234-248.

SNYMAN CR
1989. *Criminal law*. 2nd ed. Durban: Butterworths.

SPENCER H
1980. *The principles of ethics vol 11*. Indianapolis: Liberty Classics.

TUSMAN AND TENBROEK
1949. The equal protection of the laws. *California Law Review*: 37.

VAN DER VYVER JD
1975. *Seven lectures on human rights*. Cape Town: Juta.

VAN MARLE
2000. Equality: an ethical interpretation. *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 63:595-607.

VAN WIJK T AND VAN ZYL MC
1984. *Europe 1555-1848*. Pretoria: Academia.

VAN WYK D *et al*
1994. *Rights and constitutionalism: the new South African legal order*. Cape Town:Juta.

VAN WYK GJC
1981. Introductory notes on Rawls' theory of justice. De Beer C R (ed).

WESTERN P
1982. The empty idea of equality. *Harvard Law Review* 95:537-596.

WOLFF RP
1976. *Understanding Rawls: a reconstruction and critique of a theory of justice*. Princeton N J: Princeton University Press.

WUNSH B
2000. Treating judges properly. *Advocate*: 33.