35 Equality

Catherine Albertyn & Beth Goldblatt

9 Equality

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

(2) Equality includes full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.[1]

35.1 Equality in the Final Constitution

(a) Introduction

The founding provisions describe South Africa as 'one sovereign, democratic state founded on the … values [of] … human dignity, the achievement of *equality* and the advancement of human rights and freedoms, non-racialism and non-sexism'.[2] The Bill of Rights includes a detailed and substantive equality right that embraces freedom from unfair discrimination, as well as positive measures to advance equality. In addition, the Bill of Rights as a whole is described as 'a cornerstone of democracy … [that] … affirms the democratic values of human dignity, *equality* and freedom'.[3]

The achievement of equality is thus a constitutional imperative of the first order. As the Constitutional Court has put it: '[The] Constitution *commands* us to strive for a society built on the democratic values of human dignity, the achievement of equality and freedom.'[4] This project is, in turn, part of a broader project aimed at the transformation of South African society:

> Both the Constitutional Court and other courts view the Constitution as transformative. The previous Chief Justice has written that a 'commitment to transform our society lies at the heart of the new constitutional order'. It is clear that the notion of transformation has played and will play a vital role in interpreting the Constitution.[5]

[1] Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)('Final Constitution' or 'FC').

[2] FC s 1*(a)* (emphasis added). See also FC s 36(1) which permits limitations of the rights guaranteed in the Bill of Rights only where such limitation is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom', and FC s 39(1)*(a)* which enjoins courts to 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom' when interpreting the Bill of Rights.

[3] FC s 7(1). (emphasis added).

[4] *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC), 2004 (11) BCLR 1125 (CC) at para 22 (emphasis added).

[5] P Langa 'Transformative Constitutionalism' (2006) 17 *Stellenbosch LR* 351, 351 (footnotes omitted).

The enormity of this challenge in relation to the achievement of equality is reflected in former Chief Justice Arthur Chaskalson's reminder of the deep inequalities of the past:

> In 1996 when the Constitutional Assembly adopted a Constitution for South Africa we were one of the most unequal societies in the world. We had recently emerged, almost miraculously, from a repressive and undemocratic legal order, and had embraced democracy. The past hung over us and profoundly affected the environment in which we were living. The great majority of our people had been the victims of a vicious system of racial discrimination and repression which had affected them deeply in almost all aspects of their lives. This was seen most obviously in the disparities of wealth and skills between those who had benefited from colonial rule and apartheid and those who had not. In the contrast between those with land, and the millions of landless people; between those with homes and the millions without access to adequate housing; between those living in comfort and the millions without access to adequate health facilities, clean water and electricity, between those with secure occupations and the millions who were unemployed or had limited employment opportunities.[1]

Inequalities in South Africa are deep and pervasive, scarring every aspect of society. The scope and complexity of these inequalities complicate the constitutional task of achieving equality, provide many potential answers to the question 'equality of what?',[2] and pose difficult challenges to courts tasked with enforcing the Final Constitution. Another Chief Justice, Beverley McLaughlin of the Canadian Supreme Court, has called equality 'the most difficult right' — a right that often promises more than it can deliver and tends to trouble the boundary between the judiciary, the legislature and the executive.[3]

This chapter explores this 'most difficult of rights' — equality — as both a value and a right. The constitutional value of achieving equality underwrites broad aspirations about the constitution of a future society. Unfettered by institutional constraints, the value enables a democratic dialogue about the nature and the goals of transformation.[4] Together with other constitutional values — such as dignity, freedom, openness and democracy — equality gives meaning to specific substantive constitutional rights. The right to equality, on the other hand, provides an important mechanism for 'achieving equality', and the Constitutional

[1] 'Equality as a Founding Value of the South African Constitution' *Oliver Schreiner Lecture* University of the Witwatersrand (February 2001).

[2] It is, perhaps, trite now to say that the idea of equality always entails this question. See A Sen *Inequality Re-examined* (1992) 23–26.

[3] B McLachlin 'Equality: The Most Difficult Right' (2000) 14 *The Supreme Court Law Review* 17.

[4] Drawing on the work of Henk Botha and Johan van der Walt, Chief Justice Langa refers to the notion that 'transformation is a permanent ideal — a way of looking at the world that creates a space in which the idea of change is constant'. This enables an ongoing dialogue in which 'new ways of being are constantly explored and created, accepted and rejected'. Langa (supra) at 345 citing H Botha 'Metaphoric Reasoning and Transformative Constitutionalism: Part I' (2002) *TSAR* 512; H Botha 'Metaphoric Reasoning and Transformative Constitutionalism: Part I' (2003) *TSAR* 612; and J van der Walt *Law and Sacrifice* (2006).

Court has used this tool to develop a powerful and progressive jurisprudence. However, because rights give rise to rules and enforceable claims,[1] they are limited in ways values are not: namely, they are constrained by the contours of justiciability and by the role of courts in a constitutional democracy.

The next section explores the meaning of the 'value' of equality, with explicit reference to the nature of inequality in South Africa. It endorses a substantive conception of equality and adumbrates the consequences of a theory of 'substantive equality' for the enforcement of the right to equality. To this end, it focuses particularly on the values underlying the equality right, and the manner in which they shape its application. The following section, § 35.2, provides an overview of the right, FC s 9, followed by a detailed discussion of each of its provisions in §§ 35.3–35.5. The chapter concludes with a brief discussion of the Promotion of Equality and Prevention of Unfair Discrimination Act.

(b) The meaning of equality

The meaning of equality in any jurisdiction is influenced by the historical, socio-political and legal conditions of the society concerned. An important starting point for understanding equality in South Africa is the nature of the inequalities that have characterized its past and still haunt its present. For centuries that past was defined by the extensive and systematic exclusion and subordination of black people in all aspects of political, social and economic life.[2] Under colonialism and apartheid, the colour of one's skin determined whether one could vote or access quality education, where one could own land or live, the services and amenities one could enjoy, and the nature and availability of economic opportunities. These systems produced and reinforced racially-based inequalities that became part of the structure of economic and social relations. Deep-seated racial prejudice and racial disparities in education, health status, income and employment, access to land and housing persist to this day.

South Africa is also a deeply patriarchal society in which women have been subordinated in public and private life. All women live in the shadow of gendered stereotypes that act as obstacles to their full participation in society. In general, women have less access to economic opportunities than men, and are more likely

[1] *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) & Others* 2005 (3) SA 280 (CC), 2004 (5) BCLR 445 (CC) at para 21. See also S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) § 36.3*(d)*(Dignity operates as a first order rule, a second order rule, a correlative right and a grundnorm. As a first order rule, the right to dignity disposes of specific disputes. As a second order rule, the right to dignity shapes the Court's application of another right, say equality, to a specific dispute. As a grundnorm, the value of dignity shapes both the interpretation of specific substantive rights and informs the justifications for limitations of specific substantive rights.)

[2] Several cases have addressed this past: *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at para 40; *Pretoria City Council v Walker* 1998 (2) SA 263 (CC), 1998 (3) BCLR 257 (CC) at para 46; *Moseneke v Master of the High Court* 2001 (2) SA 18 (CC), 2001 (2) BCLR 103 (CC); *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC); *Zondi v Member of the Executive Council for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC), 2005 (4) BCLR 347 (CC).

to be poor or dependent upon men to meet their basic needs.[1] At the same time, the gendered division of labour in the household affects the ability of all women to participate fully in the economy.[2] To make matters worse, women are subject to high levels of violence and abuse, especially in the home.[3] Many women live at the confluence of poverty and violence and possess limited access to basic amenities and resources.[4] The majority of these women are black and rural or working class. The strong links between gender, race and class continually reinforce the social and economic subordination of women in South Africa.

Although race, class and gender inequalities are particularly visible, our society is also marked by other inequalities that intersect with race and gender. Thus racial discrimination has often masked, reflected or reinforced inequalities based on religion, language, culture, ethnicity and colour. South Africa is also said to be a deeply xenophobic society.[5] Deep-rooted prejudices against gay and lesbian people,[6] stigmatization of persons on the basis of their actual or perceived HIV status[7] and systemic discrimination against disabled persons[8] remain widespread.

All of these inequalities are captured in the protection against unfair discrimination in FC s 9,[9] and addressing them is an important part of the constitutional project of transformation.[10] To do so requires both a strong concept of equality

[1] While the unemployment rate amongst all Africans is 50,2%, it is 57,8% among African women. This exceeds that of coloured (28,6%), Indian (18,7%) and white (6,6%) women. Of those women who are employed, 84% of African women (1 181 897 out of 1 402 338) are in elementary (unskilled) occupations. Only 0,005% of Indian women and 0,014% of white women are in elementary (unskilled) occupations. See Statistics South Africa *Census 2001: Census in Brief* (2003) 55, 71.

[2] See *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 38.

[3] Official research reveals that 2,1% of women report sexual abuse. Statistics South Africa *Quantitative Research Finding on Rape in South Africa* (2000). Women's organizations estimate that as few as one in 20 rapes are reported. These levels of gender violence in South African society exist across race and class. Poor women are more vulnerable not only because of their greater economic dependency, but also because of factors such as lack of secure housing, reliance on often-dangerous forms of public transport, and lack of municipal amenities such as street lighting.

[4] 37% of rural women-headed households fall within the poorest group of households, as compared with 23% of rural male-headed households, 15% of urban women-headed households and 5% of urban male-headed households. D Budlender *Women and Men* (1998) 5 Figure 3. On the problems with the concepts of woman-headed and male-headed households, see D Budlender 'Women and Poverty' (2005) *Agenda* 30-31.

[5] See, eg, *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* CCT 39/09 judgment of 12 December 2006 (as yet unreported)('*Union of Refugee Women*').

[6] For more on sexual orientation and equality, see § 35.5*(g)*(v) infra.

[7] See, eg, *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC).

[8] South African Human Rights Commission *Towards a Barrier-free Society: A Report on Accessibility in Built Environments* (2002).

[9] FC ss 9(3) and (4) list fourteen grounds of impermissible unfair discrimination. See § 35.5*(g)* below.

[10] The notion of transformative constitutionalism has characterized much of the writing on equality. See K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146. See also C Albertyn & B Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *SAJHR* 248 ('Facing the Challenge of Transformation'); S Liebenberg & M O'Sullivan 'South Africa's New Equality Legislation. A Tool for Advancing Women's Socio-economic Equality?' in S Jagwanth & E Kalula (eds) *Equality Law*: *Reflections from South Africa and*

and an idea of law as a tool for social change. For many in academia and the Constitutional Court, this combination of concepts is best located in the idea of substantive equality. In a 2006 address at Stellenbosch University, Langa CJ identified substantive equality as one of the key measures of transformation in our society. Here he was referring to the aspirational value of substantive equality: a social and economic revolution in which all enjoy equal access to the resources and amenities of life, and are able to develop to their full human potential.[1] This goal requires the dismantling of systemic inequalities, the eradication of poverty and disadvantage (economic equality) and the affirmation of diverse human identities and capabilities (social equality). It confirms a strong relationship between substantive equality and the achievement of socio-economic rights.[2]

The value of substantive equality does not provide a definitive answer to the question: 'equality of what?' It does, however, suggest that the constitutional answer is, at the very least, a social democratic vision that entails both equality of opportunities and equality of outcomes. Such a vision also embraces the idea of redistribution of power and resources and the elimination of material disadvantage. This is not an uncontested vision, however. Former Constitutional Court Judge Laurie Ackermann has recently argued that the meaning of equality in South Africa is determined solely by the idea of dignity.[3] Several feminist scholars, on the other hand, have criticized the focus on disadvantage within substantive equality: they contend that it ignores the agency and capabilities of human beings.[4]

The aspirational value of achieving equality is capable of an expansive meaning. It is largely unencumbered by more practical considerations manifest in the doctrine of the separation of powers and related concerns regarding institutional competence. However, constitutional rights, as legal entitlements, must be enforced through the courts. How, then, is the idea of substantive equality captured in law, and more particularly, within the equality right?

(c) Substantive equality in law

The best way of understanding the legal idea of substantive equality is to contrast it with the dominant idea of equality in Anglo-American jurisprudence: formal

Elsewhere (2001) 70; P de Vos '*Grootboom,* the Right of Access to Housing and Substantive Equality as Contextual Fairness' (2001) 17 *SAJHR* 258; AJ van der Walt 'A South African Reading of Frank Michelman's Theory of Justice' in H Botha, AJ van der Walt & J van der Walt *Rights and Democracy in a Transformative Constitution* (2003); S Jagwanth 'Expanding Equality' in C Murray & M O'Sullivan (eds) *Advancing Women's Rights* (2005) 131; S Jagwanth & C Murray 'No Nation Can Be Free When One Half of It is Enslaved: Constitutional Equality for Women in South Africa' in B Baines & R Rubio-Marin *The Gender of Constitutional Jurisprudence* (2005) 230; Langa (supra) at 352.

[1] Langa (supra) at 352-53 citing Albertyn & Goldblatt 'Facing the Challenge of Transformation' (supra) at 248.

[2] For a discussion on the relationship between equality and socio-economic rights, see B Goldblatt & S Liebenberg 'Achieving Substantive Equality in South Africa: The Relationship between Equality and Socio-Economic Rights' (forthcoming, 2007).

[3] 'Equality and Non-discrimination: Some Analytical Thoughts' (2006) 22 *SAJHR* 606.

[4] See, eg, K van Marle 'Equality: An Ethical Interpretation' (2000) 63 *THRHR* 595; N Bohler-Muller 'The Promise of Equality Courts' (2006) 22 *SAJHR* 380.

equality. Formal equality is based on the idea that inequality is irrational and arbitrary. It presumes that all persons are equal, and that any differential treatment on the basis of arbitrary grounds, such as race or gender, is almost inevitably suspect and irrational. Formal equality also entails a formal approach to law (legal formalism) in which issues are narrowly defined and abstracted from social life. The actual social and economic differences between individuals and groups are not seen to be essential to the legal enquiry. Formal equality is perhaps best described as the abstract prescription of equal treatment for all persons, regardless of their actual circumstances. It perceives inequalities as irrational aberrations in an otherwise just social order. These aberrations can be overcome by extending the same rights and entitlements to all, in accordance with the same 'neutral' standard of measurement.[1]

As a result, a formal equality approach cannot tolerate differences: affirmative action measures are seen as forms of discrimination, rather than as efforts to further a commitment to equality.[2] Its reliance on 'neutrality' tends to mask forms of judicial bias and also ignores the actual social and economic differences between individuals and groups. The application of standards that appear to be neutral, but which often embody the interests and experiences of socially privileged groups, means that a legal commitment to formal equality may exacerbate the inequality of socially or economically disadvantaged groups.[3]

By contrast, a legal understanding of substantive equality proceeds from the recognition that inequality not only emerges from irrational legal distinctions, but is often more deeply rooted in social and economic cleavages between groups in society. Such inequalities are referred to as 'systemic', as they are rooted in the structures and institutions of society. Legal claims (usually of discrimination) that target such inequalities require an understanding of the underlying social and economic conditions that create and reinforce these inequalities, if such claims are to remedy inequality.

A legal commitment to substantive equality entails attention to context,[4] and that context must encompass the influences of the private sphere on disadvantage and subordination. Equality claims are thus assessed in relation to lived

[1] Formal equality, arguably, underlies the jurisprudence of FC s 9(1). See § 35.3 infra.

[2] In both the US and Canada, this reliance on formal equality led to difficulties in arguing that the failure to accord women maternity benefits was a form of sex or gender discrimination. Courts tended to find that pregnancy was the result of a real (biological) difference and thus differentiation on this basis could not amount to discrimination. Because pregnancy is unique to women, employers could exclude pregnancy from insurance coverage (and thus deny maternity pay). See *Geduldig v Aiello* 417 US 484, n 21 (1974); *General Electric Co. v Gilbert* 429 US 125 (1976); *Bliss v A-G Canada* [1979] 1 SCR 183, (1979) 92 DLR (3rd) 417.

[3] See M Minow 'The Supreme Court 1986 Term Foreword: Justice Engendered' (1987) 101 *Harvard LR* 10.

[4] A contextual approach was adopted by the Canadian Supreme Court in *Andrews v Law Society of British Columbia*. [1989] 1 SCR 143. The *Andrews* Court found that 'to approach the ideal of full equality before and under the law, the main consideration must be the impact on the individual or group concerned'. Ibid at 165. This approach has also been endorsed by the South African Constitutional Court. See § 35.5*(h)* infra.

inequalities. Substantive equality recognizes that it is not the fact of difference that is the problem, but rather the harm that may flow from this. The focus of the legal enquiry is therefore on the impact of the act[1] (rather than on difference per se) and on the nature of the harm that the act creates. Equality can thus be advanced through similar or differential treatment, depending on the context. Difference is regarded as a positive value where it is not linked to harm and disadvantage.[2] Difference is also seen as 'relational' rather than hierarchical. There is no necessary valuing of one group over another. Rather, it is the relationship between groups (including the substantive arrangements that produce or prevent a group's social prosperity or political self-determination) that should be examined.[3]

A legal commitment to substantive equality thus requires a retreat from legal formalism. Importantly, the assessment of context and impact should be guided by the purpose of the right and its underlying values.[4] While an analysis of the context in which the alleged violation occurs enhances a court's understanding of the legal claim, a clear exposition of the purpose of the right to equality, and of the constitutional values that underpin it, provide the court with crucial signposts to a decision most faithful to the Final Constitution. These signposts assist the courts in determining when an impugned differentiation (or failure to differentiate) amounts to a violation of the equality right. Moreover, as discussed below, they provide courts with the flexibility required to negotiate the boundaries of institutional competence.

This flexibility is also required in order to address the multiple and varied legal claims for equality implied by the complex picture of inequality discussed above. Some are claims for consistency — for similar treatment across difference. Others are claims for recognition, for inclusion and acceptance of the status of individuals and groups as full and equal members of society. Yet others have been more redistributive claims, seeking access to economic benefits and resources. In practice, many claims involve aspects of both recognition and redistribution, suggesting the two are often inextricably intertwined in the pursuit of equality, and that the dismantling of systemic inequality is always the goal of effective equality claims.[5]

[1] See § 35.5*(b)* infra

[2] Ibid.

[3] Martha Minow argues that difference does not inhere in the individual or group but in the relation between individuals and/or groups. It is not the characteristics of the individual or the group that are the concern, but the social arrangements that make these differences matter. Minow (supra) at 10; M Minow *Making All the Difference: Inclusion, Exclusion and American Law* (1990).

[4] See L du Plessis 'Interpretation' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 32.

[5] The distinction between recognition or status and redistribution was first used by Nancy Fraser in *Justice Interruptus: Critical Reflection on the 'Postsocialist' Condition* (1997). South African writers have used this distinction in relation to socio-economic rights. S Liebenberg 'Needs, Rights and Transformation. Adjudicating Social Rights in South Africa (2006) 17 *Stellenbosch LR* 5. For a general discussion on this distinction, see S Fredman 'Equality as a Social Right' (forthcoming, 2007) and C Albertyn 'Substantive Equality' (forthcoming, 2007).

(d) Values underlying the equality right

The nature, content and application of the principles and values that underlie the equality right are some of the more disputed issues in substantive equality jurisprudence, especially in the two jurisdictions that have taken the lead in this area: South Africa and Canada. In both countries, the courts have given prominence to dignity as the value that largely defines the right. This priority of dignity has generated debate about the content of dignity as well as its role in determining the ambit of protection of the equality right. It has also raised questions about the role of the other foundational values — especially that of the value of equality in determining the content and scope of the right. In this section we explore the role of both these values in relation to the equality right.

In early debates on substantive equality, many critical and feminist legal scholars argued that the application of equality should be guided by the principles of anti-subordination and anti-disadvantage.[1] This approach fitted with the idea of inequality as systemic — deeply embedded within society, and manifest in group disadvantage through social stigma and stereotypes, material inequality or social and economic forms of exclusion. The purpose of the equality right was to remedy and to overcome this disadvantage and exclusion. In the first unfair discrimination case under the Interim Constitution,[2] *Brink v Kitshoff*, O'Regan J wrote that the equality clause was adopted

> in the recognition that discrimination against people who are members of disfavoured groups can lead to patterns of group disadvantage and harm. Such discrimination is unfair: it builds and entrenches inequality amongst different groups in our society. ... The need to prohibit such patterns of discrimination and remedy their results are the primary purposes of section 8.[3]

(i) *Dignity*

In *President of the RSA v Hugo*, the Court identified dignity as a core value and purpose of the right, whilst retaining the idea of remedying disadvantage within the overall assessment of unfair discrimination:

> At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal *dignity* and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked. In *Egan v Canada*, Heureux-Dubé J analysed the purpose of (the Canadian right to equality) as follows:

[1] C Pateman 'Equality, Difference, Subordination: The Politics of Motherhood and Women's Citizenship' in G Bock & S James (eds) *Beyond Equality and Difference* (1992) 17-28; D Rhode 'The Politics of Paradigms' in G Bock & S James (supra) at 149. See also R Colker 'Section 1, Contextuality and the Anti-Disadvantage Principle' (1992) 42 *University of Toronto LJ* 77.

[2] Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC').

[3] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC)('*Brink*') at para 42.

> Equality, as that concept is enshrined as a fundamental right . . . means nothing if it does not represent a commitment to recognising each person's equal worth as a human being, regardless 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*.[1]

The idea of dignity as meaning equal moral worth — the right to be treated with equal concern and respect — derives from the Kantian notion of the equal moral worth of all human beings.[2] Here dignity is closely related to ideas of equality. Amaryta Sen admits that a common feature of being egalitarian 'in some significant way relates to the need to have equal concern, at some level, for all persons involved'.[3] However, it is not necessarily related to ideas of substantive equality. 'Equal concern and respect' based on 'equal moral worth' is a fairly abstract concept that requires further elucidation to determine exactly what it means when a failure to treat people with equal dignity, or equal concern and respect, contravenes the equality right.[4]

In both South African and Canadian jurisprudence, the use of 'dignity' in equality jurisprudence has been criticized for its indeterminism and for its potential to narrow the right. The narrow definition of dignity in *Harksen v Lane NO*[5] — which turned on the way the applicant felt about the impugned law (did she feel less worthy of respect?)[6] — generated concerns that the use of dignity might reinforce an individualized and abstract conception of equality divorced from actual social and economic disadvantage and the systemic nature of inequality. Some commentators suggested that more content should be given to the value of equality so that the right might better address structural disadvantage and inequalities. Other legal scholars argued that dignity could be interpreted in a way that addressed group-based inequalities and disadvantage.[7]

[1] 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC)('*Hugo*') at para 41, quoting *Egan v Canada* [1995] 2 SCR 513 (footnotes omitted). See also *Prinsloo v Van der Linde* 1997 (3) 1012 (CC), 1997 (6) BCLR 708 (CC) at para 41.

[2] For a detailed account of how Kant's variations on the categorical imperative inform both our dignity and our equality jurisprudence, see S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2006) § 36.2.

[3] A Sen *Inequality Re-examined* (1992).

[4] Dennis Davis has argued that the indeterminate meaning of dignity meant that it was inappropriate as the dominant conceptual tool for interpreting the equality right. 'Equality: The Majesty of Legoland Jurisprudence' (1999) 15 *SALJ* 398 ('Legoland Jurisprudence'). See also D Davis *Democracy and Deliberation* (1999) 69–95. For a critique of Davis's position, see Woolman 'Dignity' (supra) at § 36.5.

[5] 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC)('*Harksen*').

[6] See Albertyn & Goldblatt 'Facing the Challenge of Transformation' (supra) at 24.

[7] S Cowen 'Can Dignity Guide our Equality Jurisprudence?' (2001) 17 *SAJHR* 34; S Liebenberg 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 *SAJHR* 1 (in relation to socio-economic rights), S Liebenberg 'The Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, 2003) Chapter 33.

This latter view has been partially borne out by the way the Constitutional Court has developed the meaning of dignity under the Final Constitution. With some notable exceptions,[1] the Court has adopted a contextual rather than an abstract understanding of dignity, and has moved from a narrow focus on individual, personal autonomy and psychological self-worth to a systemic understanding of individual and group-based civil, political and material inequalities.[2] This development has been explicit in relation to socio-economic rights, where the Court has linked dignity (together with freedom and equality) to the achievement of basic needs: 'There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing and shelter.'[3] The Court in *Khosa v Minister of Social Development* not only emphasized the material conditions necessary for the recognition of an individual's dignity,[4] it also suggested that dignity is a group-based concept involving a collective concern for the well-being of others:

> Sharing responsibility for the problems and consequences of poverty equally as a community represents the extent to which wealthier members of the community view the minimal well-being of the poor as connected with their well-being and the well-being of the community as a whole.[5]

In developing the meaning of dignity in relation to equality, the Court has offered a variety of meanings to give content to the more abstract idea of 'equal concern and respect' — the expression of equal dignity or equal 'moral worth'. However, the Court has also missed important opportunities to link this concept to systemic forms of inequality.

At its most formal, equal concern and respect has been applied to the irrational treatment of a group on an arbitrary ground such as race. A constitutional challenge to the unequal, racially-based enforcement of municipal debts in *Pretoria City Council v Walker* offers a good example of this formal approach.[6] In *Walker*, the Court found the enforcement policy to constitute an impairment of dignity and thus amount to unfair discrimination:

[1] See *Jordan & Others v S (Sex Workers Education and Advocacy Task Force & Others as* Amici Curiae*)* 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC). See also § 35.5*(g)*(ii)(bb) infra.

[2] This more expansive approach was arguably implicit in cases such as *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at para 24 and *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC) at para 38. For a discussion of the five different definitions of dignity employed by the Constitutional Court, and an explanation as to how they cohere, as variations on Kant's categorical imperative and his notion of a realm of ends, see Woolman 'Dignity' (supra) at § 36.2.

[3] See *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) at para 23. Later on, the *Grootboom* Court states: 'A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality'. Ibid at para 44. See also A Chaskalson 'The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of Our Constitutional Order' (2000) 16 *SAJHR* 193.

[4] 2004 (6) 505 (CC), 2004 (6) BCLR 569 (CC).

[5] Ibid at para 74.

[6] See *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC)('*Walker*') at paras 69–81. For the facts of this case, see § 35.3*(a)* infra.

> No members of a racial group should be made to feel that they are not deserving of equal 'concern, respect and consideration' and that the law is more likely to be used against them more harshly than others who belong to other racial groups.[1]

A series of claims for equality by gay and lesbian claimants has led to the development of a deeper understanding of 'equal concern and respect'.[2] In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, the Court spoke of 'equal concern and respect' in relation to the social consequences of legal exclusion for gay and lesbian couples.[3] This exclusion was said to reinforce harmful stereotypes of gay and lesbian relationships, in particular the message that gay and lesbian people lacked the inherent humanity to constitute families and live within the protection of the law. The Court found such gross invasion of individual self-worth to constitute a violation of dignity and, therefore, of equality.[4] 'Equal concern and respect' thus entails respect across differences and an affirmation of diversity. This theme runs through the entire body of sexual orientation jurisprudence. In *Minister of Home Affairs v Fourie,* the Court wrote:

> Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour.[5]

In cases on gender and citizenship, the Court has found that legal measures that create or reinforce the social and/or economic exclusion of women[6] and non-citizens[7] deny them 'equal concern and respect'. On the other hand, the fact that legal measures do not exacerbate systemic inequalities has led the Court to conclude that certain claimants have *not* been treated *without* 'equal concern and respect'.[8]

At the same time, the Constitutional Court has missed significant opportunities to understand and address the systemic nature of social exclusion in cases relating to gender and to refugees. In *Jordan v The State*, a case concerning the criminalization of sex work, the majority judgment failed to understand how the systemic

[1] *Walker* (supra) at para 81.
[2] See § 35.5*(g)*(v) infra
[3] 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC).
[4] Ibid at paras 45–53.
[5] *Minister of Home Affairs v Fourie & Another; Lesbian and Gay Equality Project & Others v Minister of Home Affairs* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) at para 60.
[6] *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC)(In relation to the customary rule of primogeniture.) See § 35.*(g)*(ii)(aa) infra.
[7] *Larbi-Odam & Others v Member of the Executive Council for Education & Another* 1998 (1) SA 745 (CC), 1997 (12) BCLR 1655 (CC)(On equality of access to economic opportunities (teaching posts).) See § 35.5*(e)* infra.
[8] See *Walker* (supra) at para 68 (The Court found that the applicants were not a disadvantaged group and that the impact of the flat rate, with its concurrent implications of cross-subsidisation in favour of black areas, did not exacerbate any (economic) disadvantage.) See also *Hugo* (supra) at para 40 (The Court found that fathers were not a disadvantaged group — socially or economically.)

social stereotypes underlying sex work might mean that sex workers were not treated 'with equal concern and respect'.[1] In *National Union of Refugee Women v Director: Private Security Industry Regulatory Authority*, the Court similarly failed to see the systemic foundations of the legal exclusion of refugees.[2]

In a small number of cases, the Constitutional Court has connected the value of dignity and the commitment to equal concern and respect to the goal of eliminating group-based material disadvantage. In *Khosa v Minister for Social Development*, the Court found the exclusion of permanent residents from social assistance to be 'intentional, statutorily sanctioned unequal treatment' that affected the material and social well-being of the applicants. [3] The Court found that 'decisions about the allocation of public benefits represent the extent to which poor people are treated as equal members of society'. The applicants, excluded from such public benefits, were forced into 'relationships of dependency upon families, friends and community', 'relegated to the margins of society' and 'cast in the role of supplicants'.[4] In *Khosa*, the exacerbation of material disadvantage, even destitution, reflected an absence of equal concern and respect. This absence was not merely a concern of the state, but of society as a whole.

The primacy of the value of dignity within the equality right — manifest in the notion of equal moral worth and the requirement that all persons be treated with equal concern and respect — is a malleable concept. It easily embraces ideas of status or recognition, related to social disadvantage, which are implicated in the majority of equality (unfair discrimination) cases. Here the value of dignity evinces a constitutional concern with the equal moral worth of persons and groups, with their inclusion and participation within society as equals, without stereotyping, prejudice and isolation. Although the value of dignity has been tied to material disadvantage, this connection has had limited application in our jurisprudence.[5] In equality cases, this conception of dignity has only been employed where the underlying inequality is supported by a violation of a socio-economic right.[6] That said, these cases demonstrate that dignity *is* capable of supporting a substantive understanding of equality that explores and seeks to remedy systemic

[1] 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC).

[2] *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* CCT Case No. 39/09 (Judgment of 12 December 2006 (as yet unreported)('*Union of Refugee Women*') at para 38 (majority's findings) and para 119 (minority's findings).

[3] 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC).

[4] Ibid at paras 74, 76, 77.

[5] For a sustained argument connecting the right to dignity to the material conditions of existence (and thus material disadvantage), see Woolman 'Dignity' (supra) at § 36.2.

[6] For a discussion of this idea of dignity in relation to socio-economic rights, see S Liebenberg 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 *SAJHR* 1. For a discussion of the relationship between equality and socio-economic rights, see S Fredman 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21 *SAJHR* 163; B Goldblatt & S Liebenberg 'Achieving Substantive Equality in South Africa: The Relationship between Equality and Socio-Economic Rights' (2007, forthcoming).

inequalities and disadvantage. At the same time, they reveal that a different definition of dignity, often combined with legal formalism, may block a substantive understanding of equality. Trenchant criticisms of dignity in Canadian jurisprudence have revealed that the courts' reliance on dignity may place undue emphasis on whether a particular person or group has been treated with 'equal concern and respect' and fail to assess whether the broader goals of substantive equality have been achieved.[1]

(ii) *Equality*

Despite its dominance, dignity is not the only value that has informed the interpretation of the right to equality. The Constitutional Court has recently developed the value of substantive equality in relation to the equality right, especially in cases concerned with the positive and the restitutionary aspects of the right that flow from FC s 9(2).

The constitutional value of substantive equality is linked to the achievement of social and economic equality and the dismantling of structural inequalities. The Constitutional Court has consistently referred to the achievement of equality in the context of South Africa's apartheid past.[2] In *Minister of Finance v Van Heerden*, Moseneke DCJ spoke of the need for 'a credible and abiding process of reparation for past exclusion, dispossession and indignity within the discipline of our constitutional framework'.[3] This statement was perhaps the first detailed and explicit recognition of the relationship between the value of equality and right to equality. *Van Heerden* was also the first case to engage FC s 9(2): this provision provides constitutional protection for *positive* measures designed to remedy unfair discrimination.

In *Van Heerden*, the Court linked the achievement of equality with the achievement of a society based on 'social justice'. However, such an achievement would only be possible if there was a 'positive commitment progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege'.[4] This commitment requires remedial or restitutionary

[1] See, eg, C Sheppard 'Inclusive Equality and New Forms of Social Governance' (2004) 24 *Supreme Court LR* (2d) 45; S Moreau 'The Wrongs of Unequal Treatment' (2004) 54 *University of Toronto LJ* 291; J Fudge 'Substantive Equality, The Supreme Court of Canada and the Limits to Redistribution' (2007, forthcoming).

[2] See, eg, *Walker* (supra) at paras 45-48; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at paras 60-62; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) at para 72-77. That the value of equality embraces an idea of material equality and economic redistribution has been endorsed by was also expressed by former Chief Justice, Arthur Chaskalson, and by present Chief Justice, Pius Langa. See A Chaskalson 'The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of Our Constitutional Order' (2000) 16 *SAJHR* 193; P Langa 'Transformative Constitutionalism' (2006) 17 *Stellenbosch Law Review* 351.

[3] 2004 (6) SA 121 (CC), 2004 (11) BCLR 1125 (CC)('*Van Heerden*') at para 25. For a discussion of the facts of this case, see § 35.4*(b)* infra. For earlier statements of this idea, see *Walker* (supra) at paras 45-48; *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC)('*NCGLE I*') at paras 60-62.

[4] *Van Heerden* (supra) at para 31.

equality.[1] Although the *Van Heerden* Court does not use the term 'redistribution', its interpretation of the value of equality clearly envisages a degree of economic redistribution and the removal of material disparities. Of course, such redistribution would be constitutionally constrained by the criteria for positive measures established under FC s 9(2).

(iii) *Values, substantive equality and institutional boundaries*

In the end, a redistributive function does not always fit comfortably with the institutional role of courts and with the distinction courts seek to draw between issues of social policy and issues of law.[2] The meaning accorded to the value of dignity has become influential in defining the boundaries of the right,[3] and its flexibility and degree of abstraction has been useful for courts as they negotiate the redistributive and institutional difficulties posed by the equality right. The value of equality is far more explicit in its commitment to redistribution, but the Constitutional Court's embrace of the redistributive aspects of equality has been constitutionally and legally constrained — either by the presence of other rights in the Final Constitution (the right to social assistance in *Khosa*[4]) or in legislation (the Maintenance Act in *Bannatyne*[5] and the Political Office Bearers Pension Fund in *Van Heerden*). Fredman suggests that the presence of such express rights is an important indicator of whether a court will act in such a redistributive manner.[6]

Dignity's place in our equality jurisprudence means that it will have to be harnessed in a manner that enables jurists to use the right to equality to achieve transformative ends. However, it is important to remember that the rights and the values of both dignity and equality respond to different kinds of claims, and that each has its place in addressing systemic social and economic inequalities in South Africa.

35.2 Overview of the Right to Equality

The equality right set out in FC s 9 — the successor to IC s 8 — contains five discrete provisions. Each provision reflects a different aspect of the right and a different 'level' of equality protection. This section provides a brief overview of

[1] *Van Heerden* (supra) at para 30 and at paras 73-74 (Mokgoro J).

[2] See *NCGLE I* (supra) at para 123 (Sachs J expresses concern regarding 'over-intrusive judicial intervention in matters of broad social policy'.)

[3] See also S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2006) § 36.4.

[4] *Khosa & Others v Minister of Social Development & Others; Mahlaule & Another v Minister of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) SA 569 (CC).

[5] *Bannatyne v Bannatyne (Commission for Gender Equality, as* Amicus Curiae*)* 2003 (2) SA 363 (CC), 2003 (2) BCLR 111 (CC).

[6] S Fredman 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21 *SAJHR* 163.

the right, and the relationship of the provisions to one another. In this respect, the Constitutional Court has argued that '[a] comprehensive understanding of the Constitution's conception of equality requires a harmonious reading of the provisions of section 9'.[1] This reading also requires the right to be approached holistically rather than formulaically, in which the right, as a whole, produces an approach to achieving equality which is 'cumulative, interrelated and indivisible'.[2] Thus, although various tests are formulated for different aspects of the right, it is important to apply these tests in a manner that understands the overall meaning and purpose of the right. Central to this understanding are a theory of substantive equality and an appreciation for the set of values that underpin the right. More than a decade after the onset of constitutional democracy, the Constitutional Court's equality jurisprudence is reasonably well established in relation to all sections of the right, and it is relatively easy to navigate its different pathways.

IC s 8(1) provided that 'every person shall have the right to equality before the law and equal protection of the law', while FC s 9(1) provides that 'everyone is equal before the law and has the right to equal protection *and benefit* of the law'.[3] The Constitutional Court has accorded no meaning to this textual change.[4] Both IC s 8(1) and FC s 9(1) provide constitutional protection against any irrational or arbitrary classifications (on any basis) made by the state. This weak rationality constraint on state action renders irrational or arbitrary classifications unconstitutional. The failure of law to meet FC s 9(1)'s requirements forestalls the need for further assessment under FC s 9(3). Moreover, a violation of FC s 9(1) cannot be saved by the higher justificatory standards of reasonableness and proportionality that ground FC s 36's limitations analysis.

FC s 9(1) also has a secondary and less developed meaning. In a few cases, IC s 8(1) and FC s 9(1) have been interpreted as a guarantee of equal treatment by the courts or 'equality in the legal process'.[5] This interpretation overlaps, but does not fully coincide with, FC s 9(1) as a rationality constraint. It remains unclear as to whether it protects merely against irrational actions, or whether it also reflects a stronger standard of justification. Its relationship to equality of outcome, and not just equality of process, remains an open question.

FC ss 9(3) and (4) and IC s 8(2) prohibit unfair discrimination on a series of listed and unlisted grounds.[6] There is no material difference between the two constitutional texts, except that FC s 9 adds three further prohibited grounds,

[1] *Van Heerden* (supra) at para 28.

[2] Ibid at para 135 (Sachs J).

[3] For a full discussion of this section, see § 35.3 infra.

[4] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at paras 58-59.

[5] See § 35.3*(c)* infra.

[6] The major equality cases decided under IC s 8 were: *Brink v Kitshoff NO* 1996 (1) SA 197 (CC), 1996 (6) BCLR 752 (CC); *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC); *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC); *Harksen v Lane NO* 1998 (1) 300 (CC), 1997 (11) BCLR 1489 (CC); *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC); *Jordan v S* 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC).

namely, pregnancy, marital status and birth, as well as a specific protection against unfair discrimination in the private sphere, in FC s 9(4). If the differentiation complained of is on a ground listed in these sections (or a similar ground defined by its potential to impair dignity), then there is no need to apply FC s 9(1) — one can proceed directly to FC s 9(3) or FC s 9(4).

FC ss 9(3) and (4) provide the main substantive protection afforded by FC s 9. Once one is able to show discrimination on a listed or similar ground, the enquiry shifts to determine whether this discrimination is fair or unfair. This essentially moral enquiry focuses on the impact of the discrimination on the complainant and his or her group. The court must consider issues of disadvantage and vulnerability, the purpose of the discrimination, and whether the discrimination is so invasive of the rights and interests of the complainant as to impair his or her dignity or to constitute a similarly serious violation of another right. FC s 9(5) states that discrimination on a listed ground is presumed to be unfair, unless shown to be fair.

If the discrimination complained of relates to a positive measure to achieve equality, then the respondent (usually the state) is able raise a defence to the FC s 9(3) claim under FC s 9(2). FC s 9(2) states that equality includes 'the full and equal enjoyment of all rights and freedoms'. It confirms that the equality right 'includes the adoption of positive measures to achieve equality', in addition to providing protection against unfair discrimination. It differs from IC s 8(3)*(a)* in its positive phrasing, affirming that the meaning of equality includes positive measures. As such, it is an important statement of principle and provides textual support for the remedial and restitutionary aspect of the right. FC s 9(2) also contains a set of criteria that can constitute a complete defence to a claim of unfair discrimination. If a defence of positive measures is raised, then the enquiry proceeds directly to FC s 9(2). Under these circumstances the presumption of unfairness in FC s 9(5) does not apply. If the claim is successfully defended under FC s 9(2), then the positive measure is not unfair. It is only if the impugned measure is not saved under FC s 9(2) that the matter falls to be assessed in terms of FC s 9(3).

FC s 36 provides that a right may be limited if such limitation is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. It is logically impossible for a violation of FC s 9(1) to be saved under this section. It is also unlikely, though not logically impossible, for a violation of FC s 9(3) or FC s (4) to be justified under FC s 36.[1]

[1] For a more detailed explanation of the relationship between unfair discrimination analysis and limitations analysis, and the extent to which FC s 9 analysis exhausts the grounds for justification of discrimination, see S Woolman & H Botha 'Limitations' in in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

35.3 FC s 9(1)

Early academic commentary on IC s 8(1) and FC s 9(1) suggested that the subsection should be given broad, substantive content. It was argued, for example, that the provision should be read as an overarching expression of the equality right to permit affirmative action and redistribution, oppose subordination through the law and provide substantive protection in the legal process.[1] The Constitutional Court did not follow this approach and accorded IC s 8(1) a particular meaning, separate from the rest of the clause. The first cases on IC s 8(1) focused on the idea of equality before the law as at least entitling everyone to equal treatment by courts of law.[2] Although this interpretation has not been superseded, the dominant function accorded to IC s 8(1) in *Prinsloo v Van der Linde,* and subsequent cases under FC s 9(1), has been to protect claimants against inequality qua irrationality.[3] Thus IC s 8(1) and FC s 9(1) are largely limited to protection against arbitrary and irrational distinctions made by the legislature or the administration. This connotation of inequality forms part of a wider constitutional commitment to the legality principle and the rule of law doctrine.[4]

(a) FC s 9(1) as a minimum rationality requirement

A useful starting point for the courts' interpretation of IC s 8(1) and FC s 9(1) as a rationality constraint is the idea that differentiation lies at the heart of both inequality and effective governance. The constitutional question is when such differentiation is permissible, and under what circumstances it is impermissible and unconstitutional as a violation of equality. IC s 8(2) and FC s 9(3) and (4) clearly outlaw differentiation as discrimination. Are there other forms of differentiation that also amount to inequality? In answering this question, the Constitutional Court distinguishes between what it terms 'mere differentiation' and differentiation that amounts to discrimination.[5] While discrimination clearly refers to distinctions made on the basis of prohibited grounds,[6] 'mere differentiation' describes the myriad distinctions that are made by a modern state in the business of effective governance. Examples of these range from income classification for the purposes of taxation or social welfare grants to distinctions made for the

[1] See C Albertyn & J Kentridge 'Introducing the Right to Equality in the Interim Constitution' (1994) 10 *SAJHR* 149, 157-160; D Davis 'Equality' in D Davis *et al Fundamental Rights in the Constitution* (1997) 52–55.

[2] *S v Ntuli* 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC) at para 91.

[3] 1997 (3) SA 1012 (CC), 1997 (6) SA 759 (CC).

[4] See C Albertyn 'Equality' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) Chapter 4. See also *Van der Merwe v The Road Accident Fund* 2007 (1) SA 176 (CC), 2006 (6) BCLR 682 (CC) at n67.

[5] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 23.

[6] See § 35.5*(b)* infra.

distribution of various types of drugs, or the sentencing of offenders for different crimes, or the privileges accorded different categories of prisoners. It is these 'mere differentiations' that are regulated by FC s 9(1).

In *Prinsloo v Van der Linde,* the Constitutional Court established that these distinctions will only contravene the equality right if they are irrational.[1] Ackermann J explained the point as follows:

> [T]he constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest naked preferences that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation.[2]

Described thus, rationality is part of accountability and justification in a democratic state. As apparent in the above extract, however, it is capable of at least two meanings: a weak version in which rationality encompasses the principle of the rule of law that the exercise of public power should not be arbitrary; and a strong version which requires a degree of principled justification of state action ('a defensible vision of the public good'). It is the first and weaker rationality constraint that has become the test for constitutionality under FC s 9(1).[3]

In *Harksen v Lane NO*, decided under IC s 8(1), the Constitutional Court distilled the conclusions of *Prinsloo v Van der Linde* into a simple test:

> Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.[4]

(i) *Has there been a differentiation between individuals or groups?*

Differentiation between individuals or groups triggers FC s 9(1) scrutiny. The Constitutional Court has suggested that this differentiation can be either direct or indirect, although there is no reported case on indirect differentiation.[5] If there

[1] This proposition is widely accepted in other jurisdictions. See, eg, P Hogg *Constitutional Law of Canada* (1996) 1240-1243.

[2] *Prinsloo v Van der Linde* (supra) at para 25 (footnotes omitted).

[3] Although this weak rationality constraint has dominated FC s 9(1) jurisprudence, *Union of Refugee Women* demonstrates a shift to a more principled defence. In *Union of Refugee Women*, the Court did identify a defensible vision of the public good in the important role of the security industry in protecting the human rights, especially the freedom and security, of the public at large. *Union of Refugee Women* (supra) at paras 37-41.

[4] 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 38.

[5] See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC)('*NCGLE v Minister of Justice*') at para 63 (The Constitutional Court found that the reference to 'direct and indirect discrimination' in s 9(3) meant that the enquiry under s 9(1) necessarily encompasses both direct and indirect differentiation.)

is no differentiation, then there can be no violation of FC s 9(1).[1] If the differentiation is on a prohibited ground, then it is possible to proceed directly to an enquiry under FC s 9(3) or (4). FC s 9(1) is thus not a necessary step in an equality claim.[2]

Although the fact of differentiation will not usually be in dispute, the Constitutional Court has given some guidance to interpreting contested legislative distinctions. In *Jordan v The State*[3] the state challenged the assumption that the impugned provision criminalized sex workers and not their clients.[4] The minority judgment of O'Regan and Sachs JJ addressed the criteria for the proper interpretation of the section.[5] Overall, they suggested that the Court would 'consider whether there is a constitutionally compatible interpretation of the section' that the provision is 'reasonably capable of bearing'.[6] In doing this, the Court would look at what interpretation had been generally accepted in South African law, the natural reading of the section, and the context of the enactment of the provision.[7] Where the alleged distinction related to a crime, the Court would avoid broadening the definition of the crime, a task that ordinarily fell to the legislature and not the courts. In general, it would be contrary to constitutional values, including the principle of legality, to accept an extended definition of a crime.[8]

(ii) *Does the differentiation have a rational connection to a legitimate government purpose?*

The interrogation of this relationship involves first, the identification of a legitimate purpose, and second, the finding of a rational connection between the differentiation and this purpose. It is not sufficient to identify a generic purpose for the impugned provision or conduct. In *Van der Merwe v Road Accident Fund*[9] the Constitutional Court warned that '[a] court remains obliged to identify and examine the specific government object sought to be achieved'. It might be that the generic purpose is not 'open to constitutional doubt', but that the specific purpose is.[10] In this case, the applicant sought to recover damages from the Road Accident Fund for injuries suffered as a result of her husband's intentionally

[1] Irrational state action that does not arise from a differentiation is prohibited under the the rule of law doctrine. See F Michelman 'The Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 11.

[2] *NCGLE v Minister of Justice* (supra) at para 18.

[3] 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC)('*Jordan*').

[4] Section 20(1)(aA) of the Sexual Offences Act. *Jordan* (supra) at paras 8, 40. Note that this case was decided under IC s 8(1).

[5] Note that this aspect of the judgement does not seem to be contested by the majority, who agree with the finding that there is such a distinction. See *Jordan* (supra) at para 8.

[6] Ibid at para 40.

[7] Ibid at paras 41-44.

[8] Ibid at paras 45-46.

[9] 2007 (1) SA 176 (CC), 2006 (6) BCLR 682 (CC)('*Van der Merwe*').

[10] Ibid at para 33.

knocking her down with his car and then reversing over her.[1] The Fund raised a special plea that it was not liable for patrimonial damages by reason of s 18, read with s 19 of the Matrimonial Property Act 88 of 1984.[2] These provisions prevented a spouse married in community of property from recovering damages for patrimonial loss 'in respect of bodily injuries suffered by him and attributable either wholly or partly to the fault of that spouse'.[3] The applicant consequently challenged these provisions under FC s 9. In defending the claim in relation to FC s 9(1), the Fund argued that s 18 had the legitimate purpose of 'regulat[ing] the patrimonial consequences of marriage'. The Court responded that even if this general purpose was constitutionally valid, one needed to have regard to the specific purpose of the provision to see if that 'specific part of the scheme was constitutionally valid'.[4]

The determination of whether the specified purpose is legitimate or not entails an evaluation of the reasons given for this purpose. To meet the criterion of legitimacy under FC s 9(1), the state merely has to show that its purpose is neither arbitrary nor irrational. In general, legitimacy is equated with a weak form of rationality. The government does not have to justify its purpose against substantive constitutional values or any conception of 'the general good'. In a rare finding of an illegitimate purpose in *Van der Merwe v Road Accident Fund*, the Constitutional Court concluded that that the reasons given for pursuing the specified purpose of avoiding the futility of spousal claims were no longer valid. They had fallen away with changes in the concept of, and legislative framework for, the 'joint estate' in marriage. As such, the purpose was based on a 'relic of the common law of marriage' which was neither useful nor legitimate.[5]

The related question of whether the scheme or measure chosen by Parliament or the government is rationally connected to the identified purpose is also a limited enquiry. The Constitutional Court has cautioned that

> [t]he question is not whether the government may have achieved its purposes more effectively in a different manner, or whether its regulation or conduct could have been more closely connected to its purpose. The test is simply whether there is a reason for the differentiation that is rationally connected to a legitimate government purpose.[6]

In *Van der Merwe*, the Constitutional Court found that the scheme which excluded spouses married in community of property from claiming patrimonial damages from their spouses was not rationally connected to its (already illegitimate) purpose. The Court's analysis reveals that there were no valid reasons for the legislative scheme. On the contrary, it found the reasons proffered to be outdated,

[1] *Van der Merwe* (supra) at para 11.
[2] Ibid at para 14.
[3] Section 18*(b)* of the Act.
[4] *Van der Merwe* (supra) at para 33
[5] Ibid at paras 34 and 50-52.
[6] *East Zulu Motors (Pty) Limited v Empangeni/Ngwelezane Transitional Local Council* 1998 (2) SA 61 (CC), 1998 (1) BCLR 1 (CC) at para 24. See also *Prinsloo v Van der Linde* (supra) at paras 35-38.

arbitrary and absurd. The absurdity of the legislation was reflected in its differential treatment of the negligent driving of a spouse in one class of marriage (out of community of property), which created liability for patrimonial damages, from the negligent driving of another class of spouse (in community of property), which did not create such liability.[1] The legislation also offered no rational explanation for the divide between non-patrimonial damages (which were permitted) and patrimonial damages (which were not). Overall the Court found no rational basis for the scheme or purpose of the Act. The differentiation was thus impermissible as an arbitrary distinction that served no legitimate public end.[2]

In *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)*,[3] the Constitutional Court considered the provisions of the Compensation for Occupational Injuries and Diseases Act.[4] The Act required employees to claim damages for injuries incurred in the course of their employment in terms of that Act and thus precluded such employees from claiming under the common law. The *Jooste* Court found this distinction to be rationally connected to the legitimate government purpose of providing compensation for disability caused by injuries sustained during the course of employment.[5] In doing so, the Court said:

> It is clear that the only purpose of the rationality review is an inquiry into whether the differentiation is arbitrary or irrational, or manifests naked preference and it is irrelevant to this enquiry whether the scheme chosen by the legislature could be improved in one respect or another. Whether an employee ought to have retained a common law right to claim damages, either over and above or as an alternative to the advantages conferred by the Compensation Act, represents a highly debatable, controversial and complex matter of policy. It involves a policy choice which the legislature and not a court must make.[6]

In summary, FC s 9(1) protects against arbitrary and irrational state action. Although it requires that the purpose and scheme be examined in their proper context, it does not require an analysis of the impact of the impugned action or of the policy choices made.[7] It merely requires the state to have a defensible purpose, together with reasons for its actions that bear some relationship to the stated purpose. This weak rationality constraint is extremely deferential to the legislature[8] and most laws will pass constitutional muster under this

[1] *Van der Merwe* (supra) at para 55.
[2] Ibid at paras 52-58
[3] 1999 (2) SA 1 (CC), 1999 (2) BCLR 139 (CC).
[4] Act 130 of 1993.
[5] Ibid at paras 12-16.
[6] Ibid at para 16. See also *Bel Porto School Governing Body v Premier of the Province, Western Cape* 2002 (3) SA 265 (CC), 2002 (9) BCLR 891 (CC) at para 45.
[7] *The Union of Refugee Women v The Director: The Private Security Industry Regulatory Authority* CCT 39/09 (as yet unreported judgment of 12 December 2006)('*Union of Refugee Women*') at para 37.
[8] In US constitutional law, a similar strong presumption of constitutionality informs rationality review. See L Tribe *American Constitutional Law* (2nd Edition, 1988) 1439-43.

provision.[1] Thus far, *Van der Merwe v Road Accident Fund* is the only case that has reached the Constitutional Court that has failed the rationality test. *Pretoria City Council v Walker* provides an interesting example of the failure to meet the rationality requirement of FC s 9(1). (It was not, however, decided on such grounds.)[2] The *Walker* Court was confronted with the constitutionality of the City Council's selective enforcement of the debts of defaulting residents. It concluded that this practice was not based on a 'rational and coherent' policy, but was adopted and implemented in a secretive and misleading manner by Council officials, apparently without Council authority and in conflict with a Council resolution.[3] Although the *Walker* Court found this to be unfair, indirect, racial discrimination, the facts also support a claim that the differential treatment was irrational and arbitrary.

(b) Can irrationality be justified under FC s 36?[4]

FC s 36 provides that the rights in the Bill of Rights may be limited by 'law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.

[1] Examples of the unsuccessful application of FC s 9(1) include: *Prinsloo v Van der Linde* (supra) at paras 35-42 (A presumption of negligence in the Forest Act 122 of 1984 in respect of causing veld, forest or mountain fires that was imposed on owners of land outside fire control areas, and not on land-owners within such areas, was found to be rationally connected to the legitimate government purpose of preventing veld fires); *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC)('*Walker*') at para 27 (Geographic differentiation in methods of charging for municipal services for residents of Pretoria townships, where a flat rate was charged, and 'old Pretoria', where metered rates were charged, was found to be rationally connected to the purpose of equalising the provision of such services to residents of areas that were deeply unequal in the past.); *Harksen v Lane NO* 1998 (1) 300 (CC), 1997 (11) BCLR 1489 (CC) at paras 58 (A provision in the Insolvency Act 24 of 1936 that the property of the solvent spouse should vest in the Master and be treated as if part of the insolvent estate was found to be rationally connected to the government's purpose of protecting creditors and facilitating the often complicated process of sequestration); *Bel Porto School Governing Body v Premier of the Province, Western Cape* 2002 (3) SA 365 (CC), 2002 (9) BCLR 891 (CC) at paras 41-45 (Not irrational to distinguish between departmental and school employees in developing a staffing policy for Western Cape schools that sought to equalise posts across schools within budgetary constraints); *Jordan* (supra) at para 58 (Not irrational to target the criminal conduct of one group (sex workers or purveyors of sex for reward) and not another (clients or purchasers)); *De Reuck v Director of Public Prosecutions, WLD* 2004 (1) SA 406 (CC), 2003 (12) BCLR 1333 (CC) at paras 39-41 (The distinction between defences available to 'mere possessors' and to distributors or broadcasters of publications found to be child pornography under the Films and Publications Act 65 of 1996 is rationally connected to the legitimate government objective of combating harm caused by pornographic and violent materials); *Union of Refugee Women* (supra) at paras 35-42 (Differentiating between citizens and permanent residents on the one hand, and all foreigners on the other, in registration requirements for security officers is rationally connected to the legitimate government purpose of achieving and maintaining a trustworthy and legitimate private security industry.)

[2] *Walker* (supra) at paras 27-28. Although the Court applied IC s 8(1) to the question of whether the imposition of a flat rate for municipal services in certain geographical areas violated the equality guarantee, it did not do so in relation to the question of whether the selective enforcement of debts violated the equality right.

[3] Ibid at paras 73 and 76.

[4] For a discussion of 'irrationality' and the criteria for the law of general application test in FC s 36, see S Woolman & H Botha 'Limitations' in in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

The minimum rationality test means that most claims based on 'mere differentiation' will be filtered out (as rational) by the FC s 9(1) enquiry and will not be subject to any greater standard of justification. If, however, a legislative measure is found to be irrational under FC s 9(1), it is difficult to see how such irrationality could be saved by FC s 36, which sets a higher standard of justification than the rationality standard set by FC s (1). It is more likely that measures that fail FC s 9(1) will be found to be irretrievably unconstitutional.

This point is illustrated by *Van der Merwe v Road Accident Fund*. Here the Court sought to engage in a justification enquiry, but found that the absence of a legitimate purpose for the legislation rendered this enquiry impossible:

> [T]he pursuit of a legitimate government purpose is central to a limitation analysis. The court is required to assess the importance of the purpose of a law, the relationship between a limitation and its purpose and the existence of less restricted means to achieve the purpose. However, in this case there is nothing to assess. The lack of a legitimate purpose renders, at the outset, the limitation unjustifiable.[1]

(c) FC s 9(1) as a guarantee of equality in the legal process

The Constitutional Court has emphasized that its equality jurisprudence is constantly evolving, and that each case requires it to address the particular context of inequality in South Africa. Most IC s 8(1) and FC s 9(1) cases have interpreted these provisions as imposing a weak rationality constraint on the state, especially its legislative, executive and administrative arms. This reading does not constitute the sole meaning of FC s 9(1). On the contrary, a small but significant group of cases have used IC s 8(1) and FC s 9(1) to address questions of equality in the legal process, especially in relation to criminal procedure.

The idea that IC s 8(1) and FC s 9(1) might protect equality in the legal process has also been mooted by some legal scholars. These scholars suggest that it might provide both procedural and substantive protection (and thereby embrace both the substance and the content of the law).[2]

In *S v Ntuli*, Didcott J argued that IC s 8(1) 'surely entitles everybody, at the very least, to equal treatment by our courts of law'.[3] *Ntuli* was decided before the establishment of the rational connection test under IC s 8(1). The case addressed the constitutional validity of provisions in the Criminal Procedure Act that differentiated between categories of criminal appellants.[4] The first category consisted

[1] *Van der Merwe* (supra) at para 63. For an analysis of whether a violation of the right to equality can ever, as a matter of logic in terms of FC s 9(1), or as an empirical matter in terms of FC s 9(3) and FC s 9 (4), be justified under FC s 36, see S Woolman & Botha 'Limitations' (supra).

[2] C Albertyn & J Kentridge 'Introducing the Right to Equality in the Interim Constitution' (1994) 10 *SAJHR* 149, 160 and 178.

[3] 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC) at para 18.

[4] Act 51 of 1977 s 309 read with s 305.

of prisoners, who had been convicted in the lower courts without legal representation, and who required a judge to certify that there were reasonable grounds for an appeal before proceeding with the appeal. The second category — all other criminal appellants — did not require this intervening step of judicial certification before commencing an appeal. The *Ntuli* Court found that the provision violated IC s 25(3)*(h)* — the right to a fair trial, in particular the right 'to have recourse by way of appeal or review to a higher court than the court of first instance' — as well as IC s 8(1). The IC s 25(3) enquiry engaged the standard of substantive fairness in investigating the working and impact of the different appeal procedures. It found a violation of the right to a fair trial.[1] The Court also found that the differentiation between the two categories of criminal appellants, in which one group could appeal as of right and the other required a judge's certificate to do so, amounted to unequal treatment and thus violated the guarantee of 'equality before the law'.[2]

Equal treatment by the courts or equality of legal process does not require identical procedures in different courts, but it does seem to require fair procedures across groups.[3] This suggests that the standard of constitutionality in relation to legal process is not rationality but fairness.[4] At the very least, the substantive content of IC s 8(1) and FC s 9(1) has been enhanced in relation to criminal trials by the fair trial guarantee in IC s 25 and FC s 35. In addition, the idea of 'equality of arms'[5] that has been included within the meaning of 'equality before the law' is linked to the concept of a fair trial. Equality of arms requires that the state and an accused person be placed in an equal position: 'Although inequalities between accused persons are inherent within any criminal justice system, inequalities between opposing litigants in a criminal trial are contrary to the principle of a fair trial.'[6] Two High Court cases have applied this doctrine. The *Lavhengwa* court applied the doctrine during its assessment of a summary procedure relating to contempt of court in the magistrates' courts.[7] The *Qozeleni* court applied the doctrine to the right of a defendant to have full access to the records and other documents in a criminal case.[8]

Thus far, the cases have concerned laws relating to the criminal process. Would the same principles apply in civil trials and procedures, or to the application rather than the content of the law? In *Cary v Cary*, which concerned an application for costs of a pending matrimonial action under Rule 43(1)*(a)*, the High Court found

[1] *S v Ntuli* (supra) at paras 13-16.
[2] Ibid at paras 18-20.
[3] *S v Rens* 1996 (1) SA 1218 (CC), 1996 (2) BCLR 155 (CC) at para 29.
[4] See *S v Lavhengwa* 1996 (2) SACR 453, 479A-B (W).
[5] See *Qozeleni v Minister of Law and Order* 1994 (1) BCLR 75, 88 (E), 1994 (3) SA 625, 642 (E)('*Qozeleni*'); *S v Lavhengwa* (supra) at 477D–478C.
[6] *S v Lavhengwa* (supra) at 478B.
[7] Ibid at 477D–478C.
[8] *Qozeleni* (supra) at 642C-I.

that its discretion was subject to the right to equality before the law, which, in turn, required equality of arms in a divorce action.[1]

In *Van der Walt v Metcash Trading* the Constitutional Court was asked to consider whether FC s 9(1) guaranteed 'equality in outcome in litigation based upon materially identical facts and circumstances'.[2] The Supreme Court of Appeal had been petitioned in two separate, but materially identical, cases for leave to appeal. Two different panels of judges made contrary orders. Writing for the majority, Goldstone J noted that, unlike *S v Ntuli*, a legal right was not denied to one litigant but granted to another. Rather, the exercise of the same right by both litigants resulted in different outcomes.[3] The issue was thus not differential statutory provisions, but a different outcome that flowed from the exercise of judicial discretion. Thus, although FC s 9(1) required 'all persons in a similar position must be afforded the same right to access the courts and to the same fair and just procedures with regard to such access', it did not extend to a guarantee of equality of outcome in matters where judicial discretion is exercised.[4] The Final Constitution does not protect the public from incorrect decisions[5] — although the case suggests that it does protect the public against judges who act in an arbitrary and irrational manner.[6] The *Metcash* Court found that FC s 9(1) offered no substantive protection and that its procedural protection of equality did not require the Supreme Court of Appeal to ensure that identical applications were heard by the same panel of judges (this duty lay with the attorneys, not the judges). Ngcobo J, in dissent, argued that the Supreme Court of Appeal was bound to ensure that similar applications were heard by the same panel, and was thus obliged to structure the process in such a way as to guarantee equal outcomes.[7]

(d) Can inequality in the legal process be justified under FC s 36?

It is logically impossible for a violation of FC s 9(1) as a rationality constraint to be justified under FC s 36. If, however, the interpretation of FC s 9(1) as a guarantee of equality in legal process set a higher standard of justification, such as fairness, then one might still be tempted to ask whether an unfair legal process could be found to be 'reasonable and justifiable in an open and democratic society based upon human dignity, equality and freedom'.[8] We think that a finding of unfairness will probably exhaust all possible justifications that might be offered under FC s 36.

[1] *Cary v Cary* 1999 (8) BCLR 877, 881-82 (C).
[2] 2002 (4) SA 317 (CC), 2002 (5) BCLR 454 (CC) at para 15.
[3] Ibid at paras 16 and 17.
[4] Ibid at para 24.
[5] Ibid at para 19.
[6] Ibid at para 18.
[7] Ibid at paras 41-42.
[8] See *S v Ntuli* (supra) at paras 21-25 (Court found that the unequal treatment of two groups of convicted persons was unreasonable and thus not justified under IC s 33(1).) But see *S v Lavhengwa* (supra) at 478d-482e (Summary procedure in relation to contempt was found to be justified under IC s 33(1).)

(e) The future scope of FC s 9(1)

The dominant meaning of the right to equality before the law and to equal protection and benefit of the law is that it prohibits irrational distinctions or classifications made by the government and Parliament. A second, parallel, meaning is that FC s 9(1) guarantees, at the very least, equal treatment by the courts of law and equality of legal process. Both meanings raise questions of regarding the future development of the right: Is the rationality constraint sufficient to protect those who cannot claim unfair discrimination? Does equality of process include equality in the content and application of the law?

(i) *Beyond rationality?*

The interpretation of FC s 9(1) as a rationality constraint developed in the context of establishing a conceptual separation between legislative distinctions that involve 'unfair discrimination' and those that do not ('mere differentiation').[1] The meaning of FC s 9(1) has thus partly evolved in relation to the centrifugal force of discrimination within the right to equality.[2] The relationship between of FC s 9(1) and FC s 9(3) or (4) means that all legislative and other classifications are only subject to a weak rationality constraint, unless the claimant is able to show that the distinction is based on a ground prohibited under FC ss 9(3) or (4). Distinctions based on a ground prohibited under FC ss 9(3) or (4) trigger the higher level of constitutional scrutiny, namely fairness.

Does FC s 9(1) need to be limited to a rationality test? One argument in favour of a wider interpretation is that the protection against irrational and arbitrary state action exists elsewhere in the Final Constitution. In *New National Party of South Africa v Government of the RSA*, a case dealing with the constitutionality of the Electoral Act, the Constitutional Court found that the legality principle and the rule of law doctrine, constituted a rationality constraint binding all parts of the state.[3] The rule of law doctrine provides a minimum threshold for the exercise of public power that exists 'prior' to the enquiry into the infringement of fundamental rights.[4] The legality principle mirrors the FC s 9(1) test:

[1] This process began in *Prinsloo v Van der Linde*. See *Prinsloo* (supra) at para 23.

[2] This proposition was confirmed in *National Coalition for Gay and Lesbian Equality v Minister of Justice*. 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC)('*NCGLE v Minister of Justice*') at para 63 (Ackerman J held that differentiation under FC s 9(1) could be direct or indirect, reasoning that this 'must necessarily flow from the reference in section 9(3) to "direct and indirect discrimination"'.)

[3] 1999 (3) SA 191 (CC), 1999 (5) BCLR 489 (CC)('*New National Party*').

[4] Ibid at para 24. See also *Mphahlele v First National Bank of South Africa Ltd* 1999 (2) SA 667 (CC), 1999 (3) BCLR 253 (CC)(On the role of the rule of law as a foundational value of the Constitution.)

> The first of the constitutional constraints placed on Parliament is that there must be a rational relationship between the scheme it adopts and a legitimate government purpose. Parliament cannot act capriciously or arbitrarily. The absence of such a rational connection will result in the measure being unconstitutional.[1]

Although an overlap in sources of constitutional protection is neither impermissible nor exceptional, it does suggest that rationality is not a necessary interpretation of FC s 9 (1) and that further judicial constructions of FC s 9(1) are possible.

Second, it might be argued that FC s 9(1) is conceptually flawed in that it does not conform to the purpose of the right, namely, substantive equality. The idea of equality as rationality refers to a formal notion of equality that sees inequality as a function of laws that irrationally single out groups, rather than as emerging from a social and economic context of inequality.[2] It is also a value-neutral process that tests legislative classifications by the presence of reasons, rather than by the substantive choices made by the law and the values underlying these choices.

On the other hand, one could argue that, viewed holistically, FC s 9 embraces substantive equality.[3] By limiting the meaning of FC s 9(1), the Constitutional Court has made a choice between those legal distinctions that are subject to minimum scrutiny and those that are subject to a more substantive enquiry. It has also determined which policy decisions remain largely in the realm of Parliament and government, and which are tested by the courts, thus paying attention to the separation of powers doctrine.[4] In principle, it is correct that such a choice should be made. It is also appropriate to limit the equality guarantee to certain individuals and groups, to avoid its injudicious use by, for example, corporations,[5] and to apply judicial resources frugally in testing government policy. The critical question here is whether the Court has drawn the line in the correct place. Are there groups who deserve greater protection under the equality right curently excluded from its ambit?

[1] *New National Party* (supra) at para 19. See also *Pharmaceutical Manufacturers Association of SA; In Re: Ex Parte Application of President of the RSA* 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) especially at paras 83–85 (Concerned judicial review of executive action, and whether the exercise of public power was rationally related to the purpose for which it was given.)

[2] See H Lessard 'Equality and Access to Justice in the Work of Bertha Wilson' (1992) 15 *Dalhousie Law Journal* 55, 56.

[3] See *NCGLE v Minister of Justice* (supra) at paras 58-64 (This appears to have been the response of the Constitutional Court to the *amicus*.)

[4] See *Bel Porto School Governing Body v Premier of the Province, Western Cape* 2002 (3) SA 365 (CC), 2002 (9) BCLR 891 (CC)(Chaskalson P) at para 46 ('If we were to apply a "reasonableness" review at the stage of the section 9(1) enquiry, we would be called upon to review all laws for reasonableness, which is not the function of the court.')

[5] The early Canadian experience of the equality right (s 15 of the Canadian Charter of Rights) was that it was abused by juristic persons for largely economic ends. See G Brodsky & Shelagh Day *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back* (1989).

Several legal distinctions not protected by FC s 9(3) can give rise to levels of disadvantage that deserve greater constitutional scrutiny than rationality.[1] Among those classifications that warrant heightened scrutiny are the category of offender, whether one is in prison,[2] and distinctions made on the basis of property ownership or income level.[3] For example, a municipality passes a by-law that imposes a flat rates charge of R100 per plot, regardless of property size or the income of proprietor. This distinction amounts to a wealth classification that may not be tested under FC s 9(3).[4] Any equality challenge based upon FC s 9(1) would only requires 'good' reasons for state action and will not necessarily scrutinize policy choices. However, other options exist. The test under FC s 9(1) could be strengthened. Or one could employ the FC s 9(3) or FC s (4) unfair discrimination test and contend that grounds such as socio-economic status or prisoner-status ought to be recognized as additional (unlisted) grounds.

The question of unlisted grounds is dealt with below. There are several ways of developing FC s 9(1) into a more substantive enquiry.[5] The first would be to strengthen the rationality constraint to require a more substantive interrogation of the relationship between means and ends, or a greater defence of the public good.[6] Although this new test may create some overlap with FC s 36, it would provide a stronger standard of constitutional justification. Alternatively, one could develop a different test by, for example, asking a series of questions that flow from the value of equality and an expanded idea of 'equal protection and benefit of the law'. As suggested elsewhere,[7] these questions could relate to the role of the law in fulfilling the Final Constitution's egalitarian vision of full and equal participation in society. Does the provision facilitate or impede this vision by reinforcing or

[1] It has been suggested that the criterion of fairness should be built into FC s 9(1) so that it applies to those who do not qualify under FC s 9(3) but nevertheless deserve the protection of the Final Constitution. See G Swart 'An Outcomes-based Approach to the Interpretation of the Right to Equality' 1998 (13) *SAPR/PL* 217, 224-233. See also *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC)(Didcott J) at para 57.

[2] As a result, most of the challenges to differentiation that arise in criminal law and procedure have taken place under FC s 9(1). See, eg, *S v Ntuli* (supra); *S v Rens* 1996 (1) SA 1218 (CC), 1996 (2) BCLR 155 (CC).

[3] See L Tribe *American Constitutional Law* (2nd Edition, 1988) 1635-38 (For a discussion of equal protection law and the changing constitutional scrutiny of wealth classifications in the US.)

[4] Given the convergence of poverty and race in South Africa, one could argue that the differential rates amount to indirect racial discrimination. However, such an argument misses those class and wealth dimensions of the problem that are not reducible to race. Alternatively, it could be argued that socio-economic status is a prohibited, but unlisted ground.

[5] This development cannot be achieved through a more substantive enquiry under the rationality test. It would entail an interrogation of means and purpose that would too closely mirror the limitations analysis under FC s 36. Indeed, the rationality test is based on US jurisprudence that does not separate a limitations enquiry from the enquiry into the contravention of the right.

[6] See *Union of Refugee Women* (supra) at paras 37-41

[7] C Albertyn 'Equality' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2nd Edition, 2005) Chapter 4.

removing systemic barriers to advancement in our society? If it can be shown that the flat rate places an intolerable burden on poor people, the constitutional culture of justification[1] demands that such a measure be subject to the kind of justification required by FC s 36, rather than the test of rationality. According to this line of analysis, FC s 9(1) is more than a mere rationality constraint. It is, rather, a substantive provision that ensures the fullest respect for the value of substantive equality and for the constitutional value of accountability for government action.

(ii) *Equality of process as equality of substance and outcome?*

The ambit of FC s 9(1) in protecting equality in the legal process remains a moot point for two reasons. Firstly, it is unclear whether the standard of protection is limited to rationality or extends beyond rationality to questions of, for example, fairness. Second, in *Van der Walt v Metcash Trading*, Goldstone J left open the question whether FC s 9(1) should necessarily be confined to matters of procedure and not substance.[2] Whether, and the extent to which, equality before the law guarantees equal outcomes remains undecided. Both of these areas of equality law will require further clarification by the Constitutional Court.

(f) FC s 9(1) and horizontal application?

None of the jurisprudence on FC s 9(1) suggests that it is horizontally applicable. On the contrary, the interpretation of FC s 9(1) has been entirely located within an understanding of the role and responsibilities of the state in a constitutional democracy. In its present incarnation, therefore, FC s 9(1) cannot apply horizontally either by virtue of the nature of the right, or by virtue of the nature of the duty imposed by the right.[3] To shift the meaning of the right to include private actors would require a jurisprudential development of the human rights obligations of, for example, large national and multinational corporations.

35.4 FC s 9(2): Positive Measures, Substantive Equality and Equality of Rights

FC s 9(2) states that '[e]quality includes the full and equal enjoyment of all rights and freedoms' and that positive measures are permitted to 'promote the achievement of equality' for persons and groups who have been 'disadvantaged by unfair

[1] This 'culture of justification' has been referred to in several cases. See *Shabalala v Attorney-General of the Transvaal* 1996 (1) SA 725 (CC), 1995 (12) BCLR 1593 (CC) at para 26; *Prinsloo v Van der Linde* (supra) at para 25.

[2] *Van der Walt* (supra) at para 25.

[3] FC s 8(2). For more on the application of the Bill of Rights, and specifically its horizontal application, see S Woolman 'Application' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) § 31.2, § 31.4 and the Appendix.

discrimination'. IC s 8(3)*(a)* permitted positive measures 'to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms'. The textual difference means little in so far as the provision was only given a detailed interpretation by the Constitutional Court under the Final Constitution.

The Constitutional Court has consistently referred to IC s 8(3)*(a)* and to FC s 9(2) as important indicators of the commitment to substantive equality. Thus it has acknowledged the remedial and restitutionary aspects of the right and the significance of achieving equality within the overall constitutional vision of transformation. More recently, the Court has confirmed that FC s 9(2) is an important shield of protection for positive measures, providing a complete constitutional defence to a claim of unfair discrimination.

(a) FC s 9(2) as a statement of substantive equality

The Constitutional Court has always recognized that the achievement of equality in South Africa entails the need to overcome a past characterized by deep social and economic inequalities, in which race, gender and other patterns of exclusion and disadvantage structured access to, and enjoyment of, opportunities and benefits.[1] A substantive notion of equality entails the recognition and dismantling of these 'forms of social differentiation and systematic under-privilege'.[2] It also recognizes that the positive, remedial and restitutionary measures referred to in IC s 8(3)*(b)* and FC s 9(2) are fundamental to the achievement of equality and to the creation of conditions for full and equal participation in society.[3] IC s 8(3)*(b)* and FC s 9(2) thus cohere with the transformative purpose of the two constitutions and the idea that the achievement of equality is an ongoing process that is 'remedial and restitutionary'.[4] In the words of Moseneke J, writing for the majority in the leading case on FC s 9(2), *Minister of Finance v Van Heerden*, the equality right is part of 'a credible and abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of our constitutional framework'.[5]

[1] See *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC)(O'Regan J) at para 42. See also *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC); *NCGLE v Minister of Justice* (supra) at para 62.

[2] *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC), 2004 (11) BCLR 1125 (CC)('*Van Heerden*') at para 27. See § 35.1 supra.

[3] *Van Heerden* (supra) at paras 22-32.

[4] *NCGLE v Minister of Justice* (supra) at para 61. *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) at paras 73-77.

[5] *Van Heerden* (supra) at para 25.

FC s 9(2) also states that equality includes the equal enjoyment of the rights and freedoms set out in the Bill of Rights.[1] Writing extra-curially, (then) Chief Justice Arthur Chaskalson has suggested that this statement envisages a society in which all people enjoy a level of psychological, physical and material well-being, enabling them to enjoy all rights and participate fully in that society.[2] In this sense, the assertion of equal rights within the equality clause is an important statement of principle, prefiguring the fundamental transformation of our society. Together with FC s 9(2) as a whole, it confirms that equality does not merely offer protection against past discrimination. It also mandates the achievement of equality in line with a particularly South African (constitutional) vision of social justice.[3]

(b) Positive measures

FC s 9(2) provides for positive measures to advance equality. It reflects a change in wording from IC s 8(3)*(a)* of the Interim Constitution and offers a more positive phrasing of the right's commitment to the promotion of equality. Early concerns that positive measures would be seen as exceptions to equality, rather than as part of substantive equality, were dispelled by this textual change and by the subsequent jurisprudence of the Constitutional Court.[4] However, even with such improvements, many questions remained about the interpretation and the application of FC s 9(2), especially its position in the equality right, its relation to the protection against unfair discrimination in FC s 9(3), the application of the FC s 9(5) presumption to FC s 9(2) and the interpretation of the 'internal criteria' in FC s 9(2).

These questions were largely settled in *Minister of Finance v Van Heerden*. The case concerned an equality challenge to the Political Office Bearers Pension Fund established for members of Parliament after the transition to democracy in 1994. Between 1994 and 1999, the rules of the Fund provided an additional benefit to members of Parliament, who had entered the institution for the first time in 1994, in the form of enhanced employer contributions calculated on a particular scale. Van Heerden, a member who had served in the pre- and post-1994 parliaments, claimed that the scheme amounted to unfair discrimination.[5] The Constitutional Court found the scheme to be constitutionally permissible as a positive measure under FC s 9(2). In doing so, the Court set out the constitutional standards for remedial, positive action by the state.

[1] This provision in FC s 9(2) is textually distinct from FC s 9(2)'s statement on positive measures. In IC s 8(3)*(a)* the provision directly linked positive measures to the equal enjoyment of rights. It thus permitted positive measures 'to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, *in order to enable their full and equal enjoyment of all rights and freedom*' (emphasis added).

[2] See A Chaskalson 'The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of Our Constitutional Order' (2000) 16 *SAJHR* 193, 203.

[3] See *Van Heerden* (supra) at paras 22-32.

[4] Ibid at paras 30-31. But see *NCGLE v Minister of Justice* (supra) at para 62.

[5] See *Van Heerden* (supra) at paras 4-11 (Summary of the facts.)

(c) The relationship of FC s 9(2) to FC s 9(3) and FC s 9(5)

One of the main questions in academic debate about IC s 8(3)*(b)* and FC s 9(2) has been its conceptual and practical relationship with unfair discrimination and FC s 9(3) and, by necessity, with FC s 9(5). Two related issues arise. First, is FC s 9(2) a complete defence to a claim of unfair discrimination under FC s 9(3),[1] or does it merely provide additional guidelines to the determination of fairness in terms of FC s 9(3)?[2] Secondly, does the FC s 9(5) presumption of unfairness apply to FC s 9(2)? In other words, are positive measures presumptively unfair, thus requiring the state to prove their fairness?

In general, the High Courts had approached FC s 9(2) as if it were a special defence of 'fairness' to a claim of unfair discrimination, but found that special measures were presumptively unfair in so far as they were based on the grounds listed in FC s 9(3).[3] Positive measures thus attracted an onus of establishing on the balance of probabilities that they were taken to promote the achievement of equality. In *Minister of Finance v Van Heerden*, the Constitutional Court agreed that FC s 9(2) constituted a defence to unfair discrimination, but found that it was conceptually wrong to allow special measures to be seen as presumptively unfair.[4]

(i) *Fairness*

The *Van Heerden* Court reiterated the idea that

> [r]emedial measures are not a derogation from, but [are] a substantive and composite part of, the equality protection envisaged by the provisions of section 9 and of the Constitution as a whole. Their primary object is to promote the achievement of equality.[5]

However, implicit in the majority judgment, and made explicit by Sachs J, is the notion that fairness remains an important principle in FC s 9(2) analysis. The enquiry entails an interrogation of many of the factors relevant to the fairness enquiry under FC s 9(3), albeit with an emphasis on the group being advanced, rather than the group being prejudiced. Conceptually therefore, compliance with FC s 9(2) does not make positive measures 'exempt' from attack as unfair discrimination, rather it means that the measures are fair.[6]

[1] See Employment Equity Act 55 of 1998. Under the Act, affirmative action is a complete defence to a claim of unfair discrimination and is not weighed up within the fairness enquiry. See *Eskom v Hiemstra NO* 1999 (11) BCLR 1320 (LC).

[2] See Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Under PEPUDA, a court is required to investigate all the listed criteria of unfairness, even if the defence is one of affirmative action or positive measures. See C Albertyn, B Goldblatt & C Roederer (eds) *An Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 36.

[3] 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); *Minister of Finance v Van Heerden & Another* Cape High Court Case 7067/01 judgment of 12 June 2003 (as yet unreported)('*Van Heerden HC*').

[4] *Van Heerden* (supra) at para 32.

[5] Ibid.

[6] Ibid at para 140.

(ii) *A complete defence*

The *Van Heerden* Court found further that that 'differentiation aimed at protecting or advancing persons disadvantaged by unfair discrimination is warranted provided the measures are shown to conform to the internal test set by section 9(2)'.[1] In other words, FC s 9(2) provides a complete defence to a claim that positive measures constitute unfair discrimination. All that is required to succeed in this defence is to demonstrate compliance with the internal conditions established in FC s 9(2).

(iii) *The place of FC s 9(3)*

If the measure is found to comply with FC s 9(2), then the enquiry ends. If it does not pass muster under FC s 9(2), and if the measure is based on a listed or unlisted ground prohibited by FC s 9(3), then it will still need to be tested under FC s 9(3) to determine whether it amounts to unfair discrimination.[2] In *Van Heerden*, the minority judgments of Mokgoro and Ngcobo JJ followed this route. Both found the legislative scheme to constitute fair discrimination, mainly because the measure did not impact negatively on, nor impair the dignity of, the claimant.[3]

(d) Proving the defence: the internal criteria in FC s 9(2)

The *Van Heerden* Court identified three criteria that must be satisfied for a defence to succeed under FC s 9(2):

- Does the measure target persons or categories of persons who have been disadvantaged by unfair discrimination?
- Is the measure designed to protect persons or categories of persons who have been disadvantaged by unfair discrimination?
- Does the measure promote the achievement of equality?[4]

Before considering these criteria, it is useful to consider what measures fall under FC s 9(2), and whether the section is limited to measures taken by the state or whether it also applies to positive measures in the private sphere. The broad formulation of the term 'legislative or other measures' seems to suggest that all public or state measures can rely on FC s 9(2) for constitutional protection. The High Court decision in *Motala v University of Natal* took the view that IC s 8(3)*(a)* also applied horizontally.[5] Unless it is decided that the inclusion of the word

[1] *Van Heerden* (supra) at para 32.
[2] Ibid at para 36. All four judgments in *Van Heerden* agree on this approach to FC s 9(2).
[3] *Van Heerden* (supra) at para 97.
[4] Ibid at para 37. Note that all the judges are in accord about the nature of this test. Ibid at paras 82 and 108. Mokgoro J and Ngcobo J, however, each come to different conclusions in applying the test.
[5] 1995 (3) BCLR 374 (D).

'legislative' limits FC s 9(2) to public, rather than private, measures, there is no reason in principle why FC s 9(2) should not apply horizontally. In most instances, the provisions of the Employment Equity Act will regulate positive measures in the workplace.[1] However, the jurisdiction of the Promotion of Equality and Prevention of Unfair Discrimination Act is far less clear, and no precedent exists that currently requires that this Act to be used rather than the Final Constitution.[2]

(i) *Does the measure target persons or categories of persons who have been disadvantaged by unfair discrimination?*

The first criterion focuses on the group that is being promoted by the measure to determine whether it is constituted by 'persons or categories of persons disadvantaged by unfair discrimination' described in FC s 9(2). Two issues are important here: First, to what extent does one have to show actual disadvantage in the group being targeted? Second, can one distinguish between persons within a particular disadvantaged group by targeting a section of a disadvantaged group (the idea of relative disadvantage)?

To answer the first question, one needs to start with the Constitutional Court's recognition that the fundamental cleavages in South African society emerged from group-based attributes such as race or gender. These cleavages permeated the attitudes, practices, institutions and structures of an entire society, and they continue to exist more than a decade after the Final Constitution was enacted. They require extensive remedial and group-based action. To meet this criterion, the 'programme of redress must favour a group or category designated by section 9(2)' and 'the beneficiaries must be shown to be disadvantaged by unfair discrimination'.[3] In practice, this part of the FC s 9(2) test requires that the programme must be shown to benefit a group that is both disadvantaged and defined by a ground that is prohibited under FC s 9(3) (black rather than white, female rather than male etc). Although some evidence to this effect ought to be offered, courts will often be prepared to take judicial notice of such a disadvantaged group. It does not yet matter that the group consists of 'privileged' members of the disadvantaged group, as arguably, Members of Parliament in South Africa are. Nor does it matter if some members of the overall group being advanced by the

[1] Act 55 of 1998.

[2] In *Du Preez v Minister of Justice and Constitutional Development*, the Equality Court did not follow the Constitutional Court in *Van Heerden* in interpreting this Act's provision for positive measures (s 14(1)). 2006 (5) SA 592 (EC). On the contrary, it seemed to suggest that challenges to positive measures under the Act — in this case a challenge to shortlisting criteria for appointment to the position of a regional magistrate — should be tested under the unfair discrimination provisions of the Act (s 13 read with s 14 (2) and (3)) and not in terms of the internal criteria set out in s 14(1), despite the similarity in the wording of s 14(1) and FC s 9(2). This approach does not seem, to us, to be correct. The Act should rather be interpreted in a manner that coheres with, rather than contradicts, *Van Heerden*.

[3] *Van Heerden* (supra) at para 8.

measure belong to a privileged group. A measure will not fail because it includes persons who have not, in fact, been disadvantaged. It is sufficient that 'an overwhelming majority' have been so disadvantaged.[1]

In *Van Heerden*, the group or 'category of persons' who received the beneficial treatment by way of enhanced employer contributions to the Pension Fund comprised all members who entered Parliament for the first time in 1994. This group of 251 people included 53 white people, some of whom were members of the New National Party (the previous governing party). In finding this group to be 'disadvantaged by unfair discrimination', the majority judgment found that the group was largely defined by those 'who were excluded from Parliamentary participation on account of race, political affiliation or belief'.[2] The majority judgment thus accepted that the group was 'disadvantaged' even though up to 20 percent of its members were not historically disadvantaged.[3] In doing so, they did not interrogate the issue of 'membership' closely, but acknowledged that the definition of a class to benefit from a positive measure is a difficult task which would not always be guided by clearly defined boundaries of disadvantage.

It was this loose definition of the group that was found wanting by the minority judgments of Mokgoro and Ngcobo JJ. Both justices found that the group included too many people from an advantaged group, was not defined by race, and could not be seen to be a 'disadvantaged' group.[4] These dissents turned in part over a disagreement over what constitutes an 'overwhelming' majority or a 'tiny minority' within the group (Moseneke J's description of the group). While Mokgoro J agreed that one did not have to show actual disadvantage, she argued that one did have to show that they were all members of a group that was previously disadvantaged.

This difference of judicial opinion goes to a more substantive disagreement about the level of scrutiny that the court will impose on positive measures. The majority judgment signifies a more deferential approach to positive measures, setting the threshold for compliance at a relatively low level and leaving significant space for government and Parliament to address the patterns of subordination and disadvantage in South African society. By contrast, the minority judgments argue that the lines should be drawn differently. In defending the need for greater scrutiny, Mokgoro warns that

> section 9(2), as an instrument of transformation and the creation of a truly equal society, is powerful and unapologetic. It would therefore be improper and unfortunate for section 9(2) to be used in circumstances for which it was not intended. If used in circumstances where a measure does not in fact advance those previously targeted for disadvantage, the effect would be to render constitutionally compliant a measure which has the potential to discriminate unfairly.[5]

[1] *Van Heerden* (supra) at paras 38-40.
[2] Ibid at paras 38-40.
[3] Twenty percent of the group were white, although some of these individuals were members of the African National Congress. Ibid at para 93.
[4] Ibid at paras 88, 105 and 108.
[5] Ibid at para 87.

These questions also go to a wider debate in South African society about the continuing use of positive measures as past inequalities are reduced through greater access to educational and economic opportunities. Although not immediately likely, it is possible that the Constitutional Court's approach to the delineation of a disadvantaged group will change over time. It is interesting to note that the Indian Supreme Court eventually narrowed its approach to the definition of disadvantage after it became apparent that preferential policies, entrenched in the Indian Constitution since the 1950s,[1] had only benefited a small and privileged elite within the defined groups.[2] The Indian Supreme Court now requires both membership in a named group, as well as evidence of low socio-economic status, in order to qualify for preferential treatment.[3]

A related question in South Africa is whether the group may be constituted by a portion of a disadvantaged group, for example, black Africans within the larger black group. The issue of relative disadvantage was not discussed by the majority in *Van Heerden*. Sachs J, in his minority judgment, noted that such relative disadvantage creates 'a more difficult case'.[4] The issue of relative disadvantage did arise in *Motala v University of Natal*.[5] In this case, an Indian student, with five distinctions in matric, challenged the University of Natal's refusal to admit her to medical school. The refusal was based on the decision by the medical school to limit the admission of Indian students to a certain percentage so that more African students could have an opportunity to enter the school. The poor quality of African education under apartheid meant that Africans could not compete equally in a purely merit-based system. The High Court held that, although Indian students were disadvantaged by apartheid, African students had experienced greater disadvantage. As a result, the measure that preferred one black group over another was lawful.[6]

The complex forms of inequality in South Africa, where factors such as race, class, religion and gender intersect in a multitude of ways, means that positive measures may be tailored to particular groups. For example, a particular measure may be targeted at black women, rather than all women, or at Africans rather than

[1] Articles 15(3), 15(4) and 16(4) of the Indian Constitution allow 'special provision' for women and children, Scheduled Castes and Scheduled Tribes and socially and educationally backward classes of citizens. These provisions apply generally (art 15) and to appointments and posts in the state (art 16).

[2] See WF Menski 'The Indian Experience and its Lessons for Britain' in B Hepple & E Szyszczak *Discrimination: The Limits of the Law* (1992) 330; V Nair 'Search for Equality through Constitutional Process: The Indian Experience' in S Jagwanth & E Kalula (eds) *Equality Law: Reflections from South African and Elsewhere* (2001) 255.

[3] See *Indra Sawhney v Union of India* (1993) AIR SC 477; *Indra Sawhney v Union of India* (2000) AIR SC 498.

[4] *Van Heerden* (supra) at para 149. The minority judgement of Mokgoro J suggested that the relative disadvantage experienced by African, coloured and Indian South Africans should have been addressed. Ibid at para 93.

[5] 1995 (3) BCLR 374 (D)('*Motala*').

[6] Ibid at 383B–F.

all black people. In such cases of relative disadvantage, it might be that the scrutiny of the group would need to be higher.[1] Thus, such measures may be constitutional if, in each case, the definition of the group is justified with reference to the actual historic or current unfair discrimination suffered by the majority of that group in a particular context. For example, it is the actual relative privilege of the majority of Indian learners over African learners, as shown in statistics, which allowed the kind of measure contemplated in *Motala* to be found to be constitutional.[2]

(ii) *Is the measure designed to protect persons or categories of persons who have been disadvantaged by unfair discrimination?*

The second condition placed on positive measures by FC s 9(2) is that they should be 'designed to protect or advance' certain persons or groups. Writing about the Interim Constitution, Mureinik argued that the 'culture of justification' brought about by the new Constitution required the courts to test both the purpose and the means of positive measures. Thus, a court should ask what a measure was intended to achieve, and, thereafter, assess whether the design of the measure makes it objectively probable that it will, in fact, achieve the intended ends.[3] Following this general approach, the High Court in *Van Heerden* had required both a causal connection and a necessary connection between the designed measures and the objectives.[4]

This approach was rejected by the Constitutional Court. Moseneke J found that the remedial measure must be 'reasonably capable of attaining the desired outcome'.[5] This phrase meant that the measure should not be 'arbitrary, capricious or display naked preference'.[6] However, the Court did not expect any 'precise prediction of a future outcome', merely a 'reasonable likelihood' that the measure will realize the purpose. This standard does not entail any tests of necessity, precision or proportionality.[7] It is not necessary to establish that the objective *will* be achieved, that it was *necessary* to prejudice one group to advantage another, or that there might be *less onerous* ways to achieve the objective.[8]

An important difference in the standards set by the High Court and the Constitutional Court relates to the question of the onus. The High Court found the onus of fairness to lie with the state and thus required a heavier

[1] Sachs J, in *Van Heerden*, describes an assessment of relative disadvantage as constituting a 'more difficult case'. *Van Heerden* (supra) at para 149.
[2] *Motala* (supra) at 383 B-F.
[3] E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31, 47.
[4] *Van Heerden* (supra) at para 14. See also *Public Servants' Association of South Africa v Minister of Justice* 1997 (5) BCLR 577, 639–641 (T).
[5] *Van Heerden* (supra) at para 41.
[6] Ibid at paras 42 and 149.
[7] Ibid at paras 42 and 43
[8] Ibid at para 42.

burden of proof; the Constitutional Court established that the presumption of unfairness did not apply to FC s 9(2). Relieved of the presumption, the standard applied by the Constitutional Court does not seem to be much more onerous than a rationality test: generally such a standard requires 'a clear and rational consideration' of the relationship between means and purpose.[1] However, the Court has not set the test at this level of scrutiny, but has rather required a level of 'reasonableness' in the design of the programme. Hence it noted that the scheme 'distribute[d] pension benefits on an equitable basis with the purpose of diminishing the inequality between privileged and disadvantaged parliamentarians.[2] The Court also noted that the scheme was transitional, a limited and temporary tool with a five-year life span. It said that the classification of the group related to the need to ameliorate past disadvantage and that there was a 'clear connection' between the differentiation (the definition of the group) and the need.[3] In general, the Court's consideration of the pension scheme demonstrated a fairly detailed scrutiny of the issues, even if it did not apply a very strict standard of assessment. Again, the interpretation and the application of the criterion demonstrate deference to the other branches of government. However, the criterion of reasonableness also provides a degree of flexibility and suggests that the parameters of this requirement will be developed over time.

(iii) *Does the measure promote the achievement of equality?*

The third criterion of constitutionality under FC s 9(2) is that the purpose of the measure must be to achieve equality by protecting or advancing disadvantaged persons or groups. The purpose is tested against the constitutional vision of equality and the creation of a 'non-racial, non-sexist society in which each person will be recognised and treated as a human being of equal worth and dignity'.[4] To achieve this constitutional purpose, remedial actions need to be taken, even though they 'may often come at a price for those who were previously advantaged'.[5]

In assessing a measure, a court will look to at its remedial purpose. It is likely that this remedial purpose must go beyond compensation[6] and should seek to ameliorate past disadvantage.[7] The overall purpose must be to promote equality, rather than to harm or to punish previously advantaged groups.[8]

[1] *Van Heerden* (supra) at para 52.
[2] Ibid.
[3] Ibid at paras 47, 50 and 52.
[4] Ibid at para 44.
[5] Ibid. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) at para 76.
[6] See *Action Travail des Femmes v Canadian National Railway Co* (1988) 40 DLR (4th) 193, 213.
[7] *Van Heerden* (supra) at para 48.
[8] Ibid at para 76.

The application of this criterion requires a weighing up of the beneficial purpose of the measure against the possible harm that it might cause. This weighing up means that the court must consider the impact of the measure on both groups — although the emphasis falls on the group being promoted by the measure. The court must ensure that the measure is not an abuse of power, and does not impose 'substantial and undue harm' on those excluded from the measure. In assessing harm, one must look to the entire class complaining of unfair discrimination. It is a contextual, group-based analysis, not one of individual misfortune. One of the determinative factors in *Van Heerden* was that, apart from a few 'jammergevalle', the majority of those left out of the measure remained better off than those who benefited from the measure.[1] The presence of these 'jammergevalle' or 'unfortunate ones' who are prejudiced by the measure, but are unrepresentative of the class complaining of unfair discrimination, does not negate the measure.[2]

This criterion allows courts to assess the need for, and impact of, positive measures in different contexts as the transformation project begins to shift social and economic relations in South Africa.[3] In undertaking such regular reviews of this project, Sachs J suggests that the courts should have overall regard to the values of dignity and non-racialism,[4] and to the transformative project of achieving substantive equality.

(e) Applying the FC s 9(2) criteria to the case

Van Heerden demonstrates that the application of the FC s 9(2) criteria to a particular case involves a fairly detailed scrutiny of the issues. This assessment requires looking at the scheme or measure as a whole, its historical context, the duration, nature and purpose of the measure, the position of the person complaining of unfair discrimination and the impact of the measure of him or her and his/her class, as well as the position of the group being promoted.[5] In other words, the issues considered in the enquiry are similar to those considered in the enquiry into unfair discrimination. Like that latter enquiry, FC s 9(2) demands a contextual enquiry into impact, but with an emphasis on the group being promoted.[6]

As Sachs J points out, the enquiry is closely linked to FC s 9(3) and its idea of fairness. If fairness is a moral concept that allows an examination of the competing moral claims within the social and historical context of inequality in our society, then the FC s 9(2) enquiry also entails the balancing of the prejudice

[1] *Van Heerden* (supra) at paras 55-56.
[2] Ibid.
[3] Ibid at paras 145 and 149-150 (Sachs J).
[4] Ibid at para 151.
[5] Ibid at para 45.
[6] Ibid at paras 77-80 (Mokgoro J).

caused to individuals by positive measures and the collective benefit of these measures to society in overcoming past discrimination and disadvantage.[1] The overlap between FC s 9(2) and (3) is also illustrated in cases where the courts have dealt with challenges to 'positive measures' in terms of unfair discrimination under FC s 9(3). In *Pretoria City Council v Walker*, for example, the Constitutional Court addressed the constitutionality of a flat rate for municipal charges as a question of unfair discrimination and assessed its validity with reference to the criterion of fairness.[2] Cases such as *Walker* highlight the conceptual relationship between FC s 9(2) and FC s 9(3). The overlap between the principle of remedial equality underlying FC s 9(2) and unfair discrimination in FC s 9(3) has been recognized by the Constitutional Court.[3]

The difference between the two enquiries appears to lie mainly in the manner in which the issues are assessed. An FC s 9(2) enquiry is more deferential to the legislature or government, using a light brush of reasonableness and setting a lower threshold of constitutional validity. It has a forward-looking focus that considers the remedial aspects of equality as applied to a disadvantaged group, rather then an assessment of the past impact of allegedly discriminatory measures. In the overall assessment, more weight is placed on the remedial purpose of the measure, than on its impact on those complaining of unfair discrimination.[4] In a FC s 9(3) enquiry, it is the impact on the complainant which is the key factor. These differences reflect the different aspects of South Africa's broad and substantive equality right.

(f) FC s 9(2) as a sword or a shield?

If FC s 9(2) provides a defence or a shield to positive measures, then does it also provide a sword, or a claim for positive action by the state? Can a court compel the state to act, or does this prerogative lie within the purview of Parliament and the executive? The question of principle is clear — there is a constitutional duty to promote the achievement of equality:

> Our supreme law says more about equality than do comparable constitutions. Like other constitutions, it confers the right to equal protection and benefit of the law and the right to non-discrimination. But it also imposes a positive duty on all organs of state to protect and promote the achievement of equality — a duty which binds the judiciary too.[5]

[1] Most commentators on the right to equality have adopted this position. See, eg, C Albertyn & J Kentridge 'Introducing the Right to Equality in the Interim Constitution' (1994) 10 *SAJHR* 149; D Davis 'Equality' in D Davis, H Cheadle & N Haysom *Fundamental Rights in the Constitution: Commentary and Cases* (1997).

[2] 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC). The low 'flat rate' imposed for municipal services in previously black townships that was challenged in this case was a positive measure in favour of the more economically disadvantage residents of these townships.

[3] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at paras 61-62.

[4] Mokgoro J makes this distinction in *Van Heerden. Van Heerden* (supra) at paras 78-80.

[5] Ibid at para 24.

The permissive language of FC s 9(2) and the deferent approach that the Constitutional Court has adopted in relation to positive measures militate against an interpretation of FC s 9(2) as providing a sword to compel the state to act.[1] In the words of the *Van Heerden* Court: 'presumptive unfairness would unduly require the judiciary to second-guess the legislature and the executive concerning the appropriate measures to overcome the effect of unfair discrimination'.[2] It is the Court's concern for the proper separation of powers which suggests that FC s 9(2) does not ground a challenge based upon the state's failure to act.

It is more likely that actions to compel the state to enact positive measures to promote equality may be founded on FC s 9(3),[3] or on other substantive rights as defined by the value of equality and/or read with the FC s 9(2) guarantee of the equal enjoyment of rights. The Promotion of Equality and Prevention of Unfair Discrimination Act may also be used to generate remedies that require positive state action or positive private action.[4]

FC s 9(2) states that equality includes the equal enjoyment of the rights and freedoms set out in the Bill of Rights. This clause is textually separated from the statement on positive measures. (In IC s 8(3)*(a)* the provision linked positive measures to the equal enjoyment of rights.) This textual separation strengthens the claim that the statement has an independent meaning under FC s 9. However, it is not clear whether it also forms an independent basis for a claim for equal access to, and enjoyment of, other rights.

This point may be considered in relation to socio-economic rights. Can one ground a challenge to inequalities in the provision of social assistance or housing in FC s 9(2)? The answer is clearly 'no' in relation to inequalities that arise out of a ground prohibited under FC s 9(3). And it is also likely to be 'no' in relation to inequalities arising out of other grounds. Although the principle of the non-discriminatory enjoyment of all rights might be captured in FC s 9(2), it is undoubtedly FC s 9(3) that provides the core operating mechanism for challenging discrimination in the provision of social assistance, housing or education. It is improbable that FC s 9(2) provides an independent mechanism for addressing inequalities that are not caught in the net of FC s 9(3) or FC s 9(4). On the other hand, if a claim is based on a listed socio-economic right such as the right of access to health care under FC s 27 or housing under FC s 26, then it is likely that reliance may be placed on the value of substantive equality (as articulated in part by FC s 9(2)) and the principle of non-discrimination in international law to

[1] *Van Heerden* (supra) at para 33.
[2] Ibid at paras 33 and 152.
[3] See § 35.5 infra.
[4] Act 4 of 2000. For further discussion of PEPUDA, see § 35.8 infra.

demand the consistent application of the right.[1] This approach is apparent in *Khosa v Minister for Social Development*. In *Khosa*, the applicants successfully claimed access to various social benefits, denied to them because of their status as non-citizens, under FC s 9(3) and FC s 27.[2] In discussing their claim of access to social assistance under FC s 27, the Constitutional Court referred to the foundational value of equality which informed the interpretation of the right to mean equal access to socio-economic rights for all persons.[3] The *Khosa* Court also found that the unequal enjoyment of the right could found a claim of unfair discrimination.[4]

(g) FC s 9(2) and FC s 36

FC s 36 provides that a right may be limited, but only to the extent that the limitation is 'reasonable and justifiable in an open and democratic society based of human dignity, equality and freedom'. This limitation provision does not apply directly to FC s 9(2), either conceptually or practically. The primary purpose of FC s 9(2) concerns the promotion of equality not the violation or the limitation of the right. If a measure fails to conform to the guidelines for promotional measures under FC s 9(2), then the next step is to test whether it violates the equality right under FC s 9(3). If it does violate FC s 9(3), then FC s 36 would apply if the limitation on the right to equality arose from a law of general application.[5]

35.5 FC ss 9(3), (4) and (5): Prohibition Against Unfair Discrimination

The subsections dealing with unfair discrimination comprise the functional centre of the equality right. It is here that the court considers whether the state (FC s 9(3)) or a private actor (FC s 9(4)) has unfairly discriminated against another person. The Constitutional Court has considered the meaning of unfair discrimination in a number of cases and has developed a detailed test to be followed in claims of unfair discrimination.

[1] FC s 39(1) requires a court to consider international law. On this matter, see *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) at paras 26-33. The principle of equality or non-discrimination in the enjoyment of rights is a central one in international law. Indeed, the principle of non-discrimination has been identified as a core obligation in, for example, the right to the highest attainable standard of health care established in the International Covenant on Economic, Social and Cultural Rights (article 12). See, eg, Committee on Economic, Social and Cultural Rights General Comment 14 'The Right to the Highest Attainable Standard of Health' (Twenty-second session, 2000) UN Doc E/C.12/2000/4 paras 18-19 and 43 (The state has a responsibility to ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups.)

[2] *Khosa & Others v Minister of Social Development & Others; Mahlaule & Another v Minister of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) SA 569 (CC).

[3] Ibid at para 42.

[4] Ibid at para 44.

[5] See § 35.5*(d)* infra.

(a) Test for unfair discrimination

The test was first set out in *Harksen v Lane NO*. Goldstone J summarized the test as follows:

> 1(i) Does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
> (ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 9(3).
> 2. If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (s 36).[1]

We can pare this test down to three queries:

1 Does the differentiation amount to discrimination?
2. If so, was it unfair?
3 If so, can it be justified in terms of the limitations clause (FC s 36)?

(b) Step 1: Does the differentiation amount to discrimination?

The equality right has the unusual feature of prohibiting discrimination that is unfair. Fairness is the means of sorting permissible from impermissible forms of discrimination.[2] While discrimination itself contains a negative or pejorative connotation entailing some harm based on difference, unfair discrimination goes further in deepening or worsening existing disadvantage.[3] The Final Constitution requires that disadvantaged groups must be assisted.[4] This requirement does not mean that privileged groups will never be protected by FC s 9(3). It does, however, point to the importance of understanding unfair discrimination contextually,[5] historically and in light of the values underlying the Final Constitution.

[1] 1997 (4) SA 1 (CC), 1997 (11) BCLR 1489 (CC)('*Harksen*') at para 53. Although the test was developed under the Interim Constitution, it has been followed under the Final Constitution. See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) at para 15.

[2] See J Kentridge 'Equality' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS3, 1999) Chapter 14, 14-18.

[3] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 31.

[4] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at para 42.

[5] See Kentridge 'Equality' (supra) at 14-18.

In comparative jurisprudence a distinction is drawn between symmetrical and asymmetrical approaches to discrimination law.[1] A symmetrical approach would regard all differentiation on a prohibited ground to be unacceptable, while an asymmetrical approach would find that measures to benefit disadvantaged groups might be permissible.[2] The existence of positive measures in FC s 9(2) clearly points to an asymmetrical approach to FC s 9 as a whole. The *Harksen* test for unfair discrimination has the curious feature of seeming to offer both a symmetrical and asymmetrical approach in different parts of the test. In step 1 the court says that differentiation on a listed ground is discrimination. There is no suggestion in *Harksen* that the differentiation would need to entail some prejudice to the person complaining of the discrimination. At this stage of the FC s 9(3) enquiry the approach is entirely symmetrical. This approach seems to have been followed in the majority decision in *Walker* and led to the criticism in the minority judgment of Sachs J that 'the measure must at least impose identifiable disabilities, burdens or inconveniences, or threaten to touch on or reinforce patterns of disadvantage, or in some proximate or concrete manner threaten the dignity or equal concern or worth of the persons affected'.[3] Sachs J was, however, commenting only on indirect discrimination on a prohibited ground.[4] Jagwanth has criticized the *Harksen* test as reducing 'the first part of the enquiry into a decontextualised, abstract and mechanical exercise of formal equality'.[5] She explains that an asymmetrical approach that understands difference within social hierarchies of power would result in a more contextual examination that would exclude certain privileged groups from even succeeding at the first stage of the enquiry.

It seems that in applying its own test, the Constitutional Court has sometimes assumed some form of prejudice to be present.[6] While the first step of the FC s 9(3) enquiry may benefit certain privileged groups, they will still have to go through the second step involving the unfairness enquiry. This second step is a more challenging standard to satisfy. Thus, while ideally there should be a better flow in the FC s 9(3) test as a whole between an initial examination of prejudice and later questions of disadvantage (elucidated by looking at impact and context),

[1] See T Loenen 'The Equality Clause in South Africa: Some Remarks from a Comparative Perspective' (1997) 13 *SAJHR* 401; C O'Regan 'Equality at Work and the Limits of the Law: Symmetry and Individualism in Anti-Discrimination Law' (1994) *Acta Juridica* 64.

[2] See C Albertyn 'Equality' in H Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2002) 4-46 — 4-47.

[3] *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC)('*Walker*') at para 113. Sachs J, while correct to require prejudice, seems to require a demonstration of disadvantage at this stage rather than at the unfairness stage. See C Albertyn & B Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *SAJHR* 248, 268-269 ('Facing the Challenge').

[4] For further discussion of direct and indirect discrimination, see § 35.5*(c)* infra.

[5] S Jagwanth 'What is the Difference? Group Categorization in *Pretoria City Council v Walker*' (1999) 15 *SAJHR* 200, 204.

[6] *National Coalition for Gay and Lesbian Equality v Home Affairs* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC)('*NCGLE v Minister of Home Affairs*') at paras 32-40.

the test is capable of resulting in an appropriate substantive equality analysis. Arguably, the broad reach of the first step of the test has the benefit of not excluding people who deserve their 'day in court'. The overall test for unfair discrimination provides a mechanism for courts to examine the complexities of cases that come before them and produce just results.

The other issue that is important at the first stage of the FC s 9(3) enquiry is the proper definition of the group affected by the discrimination. Falling within a listed ground enables a group to get through step one without anything further. It also provides access to the presumption of unfairness in FC s 9(4).[1] In *Hugo*, the male prisoner was unsuccessful because the majority of the Court saw him as part of the group of privileged fathers rather than as a primary care-giver or a disadvantaged father within the broader group of privileged fathers.[2] The need to understand the context of discrimination is therefore important for the purpose of steps 1 and 2 of the FC s 9(3) test. As Jagwanth has pointed out, a proper contextual enquiry at the discrimination stage of the test will allow for a substantive approach to equality where comparisons between groups are understood within the social context of unequal power and hierarchies.[3] It should also be noted that, while equality is a comparative concept, substantive equality enables one to move away from a rigid analytical framework. Thus, in an infamous US decision, pregnancy was equated to disability and, since male workers were not entitled to disability leave, the court denied female workers any entitlement to pregnancy leave. This type of formalism takes the idea of a comparator to an illogical extreme and fails to acknowledge the historical, contextual and even biological factors involved in an evaluation of discrimination.[4]

The Court has said that intention on the part of the alleged discriminator is not relevant to the enquiry as to whether there has been discrimination. It must be determined objectively in light of the facts of each case.[5] Considerations of intention may arise at the fairness stage (step 2 of the test) and in relation to justification (step 3 of the test).

Discrimination can arise where there is an offending act or where there is a failure to act that in itself causes discrimination. The failure to take measures to assist a disadvantaged group such as the lack of sign language interpreters in hospitals can result in a finding of discrimination.[6] There is some debate as to

[1] The choice of ground can also affect remedy. For example, in *NCGLE v Minister of Home Affairs,* the Court decided the issue on the ground of sexual orientation, thus limiting the remedy to same sex couples. Had they decided that there was unfair marital status discrimination against non-spouses, heterosexual domestic partners might also have benefited. See Albertyn 'Equality' (supra) at 4-46. For more on remedies, see M Bishop, M Chaskalson, S Budlender & J Klaaren 'Remedies' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2007) Chapter 9.

[2] Albertyn & Goldblatt 'Facing the Challenge' (supra) at 264-65.

[3] Jagwanth (supra) at 205.

[4] See *Law v Canada* [1999] 1 SCR 497 at para 58, cited in Albertyn 'Equality' (supra) at 4-49 — 4-50.

[5] See *Walker* (supra) at para 43; *Harksen* (supra) at para 47.

[6] See *Eldridge v A-G of British Columbia* (1997) 151 DLR (4th) 577 (SCC).

whether our equality right can be used to require the state to provide services where none exist.[1]

In the Constitutional Court's jurisprudence to date, there has been little dispute over the issue of proof of discrimination, both in relation to the question whether there has been discrimination at all, and also whether, if so, such discrimination is based on a prohibited ground. In discrimination law more widely (both labour claims in South Africa and general discrimination claims elsewhere) these issues have been strongly contested. There have, however, been two cases, *NCGLE v Home Affairs* and *Jordan v The State*, in which the Constitutional Court has touched on these issues. These decisions provide some insight as to how disputes about whether there was discrimination and its relationship to the ground might be resolved.

In *Jordan,* the very fact of the legislative distinction was in dispute. Did the provision that criminalized sex work differentiate between sex workers and their clients? It was argued by the state that it did not, since the provision criminalized the conduct of both sex worker and client.[2] The majority accepted that there may be a distinction, but found against the complainant on the relationship of the distinction to the ground, ie that there was no discrimination on the basis of gender. The minority judgment addressed the criteria for the proper interpretation of the provision[3] by looking at issues of statutory interpretation as well as the context in which the provision operated.[4] The minority's approach led to a finding that the provision did differentiate between sex worker and client, and that this differentation amounted to gender discrimination.

In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*, the state sought to argue that the exclusion of gay and lesbian partners from certain benefits was not discrimination based on sexual orientation, but discrimination based on the fact that these partners were 'non-spouses'. The Constitutional Court went to some lengths to show how meanings of 'spouse' were based on harmful exclusions of gay and lesbian people. This more contextual approach stands in contrast to that of the majority in *Jordan*.

It is likely that these issues will be further contested where more complicated claims of intersectional or indirect discrimination are asserted. The courts should adopt a substantive rather than mechanical approach to the issue of whether there has been discrimination.

[1] See S Fredman 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21 *SAJHR* 163.

[2] *Jordan & Others v S & Others* 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC)('*Jordan*') at paras 8 and 40.

[3] Note that this aspect of the judgement does not seem to be contested by the majority, who agree with the finding that there is such a distinction. Ibid at para 8.

[4] Ibid at paras 41-44.

(c) 'Directly or indirectly'

The prohibition in FC s 9(3) and (4) applies to both 'direct' and 'indirect' unfair discrimination. Direct discrimination occurs where a provision specifically differentiates on the basis of a listed or unlisted ground. For example, the common law definition of marriage specifically referred to 'a man and a woman' and thus discriminated directly against same-sex couples on the ground of sexual orientation. Indirect discrimination occurs where differentiation appears to be neutral and hence benign but has the effect of discriminating on a prohibited ground, whether listed or unlisted. For example, where a measure that treats people in one geographical area differently from people in another area is really based on the fact that white people live in the one area while black people live in the other, indirect discrimination on the basis of race may have occurred. In *Walker*, the Court noted that the reference in the right to direct and indirect discrimination reflected a concern for the 'consequences' rather than the 'form' of the conduct. This approach was consistent with the *Walker* Court's desire to uncover the impact of discrimination.[1]

In *Jordan*, the majority's failure to consider the substantive issues of sex work prevented it from understanding the challenged law as indirect gender discrimination. In particular, the majority failed to see the criminalization of the conduct of the sex worker (usually a woman) but not of the client (usually a man) as indirect gender discrimination. The Court did not go beyond the wording of the gender-neutral legislation to look at the different realities of its impact on men and women. This refusal to look at different realities indicates an inability to understand the social context of sex work and the unequal gender relations in society that shape this occupation. The minority reached the opposite conclusion with a more context-sensitive interpretation of the legislation. O'Regan and Sachs JJ looked beyond the statute, which made no distinction between male and female sex workers or clients, to the actual circumstances of sex work in South Africa. In this way they were able to challenge the stereotyped assumption that female sex workers are to blame for selling themselves rather than the men who 'create the demand for it'.[2] As a general matter, however, we would suggest that the distinction between direct and indirect discrimination is not especially significant since our jurisprudence focuses on the impact of the impugned law on the complainant and enables courts to look beneath any masked prejudice to discover the true face of discrimination.[3]

[1] *Walker* (supra) at paras 31-32.

[2] *Jordan* (supra) at para 65. For another, related, critique of *Jordan,* see S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 44.

[3] Albertyn 'Equality' (supra) at 4-34 — 4-35.

(d) 'Anyone'

FC s 9(3) prohibits unfair discrimination against 'anyone'.[1] This raises the question whether the prohibition only applies to natural persons or also to corporations. While the unfairness test generally requires an impairment of dignity, which could not apply to non-humans, it also allows a claim to succeed where an adverse effect of a comparably serious manner is shown. Kentridge suggests that this may allow a corporation to show that it was subject to unfair discrimination on the basis of race if a law precluded black-owned companies from obtaining some benefit.[2] This test seems appropriately flexible and inclusive of possible scenarios where rights violations might occur.

(e) 'Including': unspecified grounds

FC s 9(3) prohibits unfair discrimination on a list of grounds but is careful to say 'including' before listing these grounds. This word clearly indicates that the list of grounds is not closed and that other grounds of unfair discrimination are possible. In respect of IC s 8(2), which stipulated that the listed grounds did not derogate from the generality of the provision, the Constitutional Court held that the list of grounds was not 'exhaustive'. Despite the absence of an express non-derogation provision, FC s 9(3) must be taken to include unspecified (also referred to as unlisted or analogous) grounds of discrimination. The fact that FC s 9(5) presumes discrimination on a listed ground to be unfair also strongly suggests that there can be discrimination on the basis of unspecified grounds (where the presumption would not apply).

The Court in *Harksen* explained how it sees the specified grounds:[3]

> What the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorise, marginalise and often oppress persons who have had, or who have been associated with, these attributes or characteristics. These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity. There is often a complex relationship between these grounds. In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features. The temptation to force them into neatly self-contained categories should be resisted.

In the light of this understanding of specified grounds, the Court explained how the unspecified grounds must be determined:[4]

[1] FC s 9(4) similarly prohibits unfair discrimination by private persons.
[2] Kentridge 'Equality' (supra) at 14-48.
[3] *Harksen* (supra) at para 49.
[4] Ibid at para 46.

> There will be discrimination on an unspecified ground if it based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner.

Kentridge has pointed out that there is a similarity between the enquiry into whether differentiation on an unspecified ground amounts to discrimination and the unfairness enquiry since both consider the question of impairment of dignity. This is a somewhat problematic overlap since discrimination entails 'a demonstration of immediate harm that flows from differentiation' while the unfairness enquiry is a deeper exploration of the impact of the discrimination on the individual and her group.[1] The unspecified grounds enquiry looks generally at the group involved while there is more room in the unfairness enquiry to examine the specific complaint. The two enquiries have different objectives: the former distinguishes differentiation from discrimination while the latter has to determine whether a particular act of discrimination was unfair. The two enquiries are, however, related and may overlap somewhat.

The only difference between unspecified and listed grounds is that the former do not benefit from the presumption of unfairness in FC s 9(5).[2] The Court has also said that the enquiry into whether there has been differentiation on a listed or unspecified ground is an objective one.[3]

Under the Interim Constitution, marital status was not a listed ground. In both *Brink* and *Harksen*, O'Regan J found it to be an unspecified ground of discrimination.[4] This view was vindicated by the inclusion of the ground in the list of grounds in FC s 9(3).

The unspecified ground of 'citizenship' illustrates the application of the test. It has now been used in a number of cases where foreign nationals living in South Africa have been the subject of discrimination. Non-citizens are a classic vulnerable group who face xenophobia and even violence. This situation is likely to worsen as the number of immigrants increases and the desperation of those South Africans waiting for services grows. The equality right becomes a critical mechanism for this group to assert its entitlement to the promise of (most rights in) the Final Constitution. Both *Larbi-Odam* and *Khosa* offer positive examples of the courts' support for non-citizens. In *Larbi-Odam*, the Constitutional Court first recognized the ground of citizenship as an additional ground of unfair discrimination. In *Larbi-Odam,* Mokgoro J noted that 'foreign citizens are a minority in all countries, and have little political muscle'. She also said that citizenship is 'a personal attribute that is difficult to change'. The judge compared the experience of foreign citizens to the hardships suffered historically by black South Africans

[1] Albertyn 'Equality' (supra) at 4-49.

[2] For an interesting discussion of discrimination on the unlisted ground of appearance, see M Pieterse 'Discrimination through the Eye of the Beholder' (2000) 17 *SAJHR* 121.

[3] *Harksen* (supra) at para 47.

[4] Ibid at para 92.

living in Bantustan 'homelands' who were effectively denied their citizenship rights. Lastly, she referred to evidence of intimidation and exclusion of foreign teachers that indicated the vulnerability of the non-citizens in this case.[1]

Khosa reiterated the reasons set out in *Larbi-Odam* for treating citizenship as an unlisted ground of discrimination.[2] The judgment was significant in extending access to social grants to permanent residents. Williams notes, however, that courts must take care not to reinforce hierarchies of entitlement within the group of non-citizens, ie permanent residents, legal immigrants, refugees and illegal immigrants, in a way that deepens the vulnerability of the worst off.[3]

In *Hoffman*, the Court found there to be discrimination on the basis of HIV status. It said the following:[4]

> The appellant is living with HIV. People who are living with HIV constitute a minority. Society has responded to their plight with intense prejudice. They have been subjected to systemic disadvantage and discrimination. They have been stigmatised and marginalised. As the present case demonstrates, they have been denied employment because of their HIV positive status without regard to their ability to perform the duties of the position from which they have been excluded. Society's response to them has forced many of them not to reveal their HIV status for fear of prejudice. This in turn has deprived them of the help they would otherwise have received. People who are living with HIV/AIDS are one of the most vulnerable groups in our society. Notwithstanding the availability of compelling medical evidence as to how this disease is transmitted, the prejudices and stereotypes against HIV positive people still persist. In view of the prevailing prejudice against HIV positive people, any discrimination against them can, to my mind, be interpreted as a fresh instance of stigmatisation and I consider this to be an assault on their dignity. The impact of discrimination on HIV positive people is devastating. It is even more so when it occurs in the context of employment. It denies them the right to earn a living. For this reason they enjoy special protection in our law. (footnotes omitted)

HIV status was included in the list of additional grounds for possible inclusion in s 34 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) and is obviously of great importance in a country such as South Africa where millions of people are living with HIV/AIDS.

There has been some debate over whether the dignity-based test for additional grounds can be extended to include groups whose vulnerability arises from their material disadvantage.[5] In *Khosa*, while the ground of citizenship was used to

[1] *Larbi-Odam & Others v Member of the Executive Council for Education & Another* 1998 (1) SA 745 (CC), 1997 (12) BCLR 1655 (CC) at paras 19-20.

[2] *Khosa & Others v Minister of Social Development & Others; Mahlaule & Another v Minister of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) SA 569 (CC) at para 71.

[3] See L Williams 'Issues and Challenges in Addressing Poverty and Legal Rights: A Comparative United States/South Africa Analysis' (2005) 21 *SAJHR* 436, 468. For the Constitutional Court's views on refugees as a group discriminated against in relation to citizens and permanent residents, see *Union of Refugee Women v The Director: The Private Security Industry Regulatory Authority* CCT 39/06 Unreported judgment 12 December 2006) at para 45.

[4] *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC) at para 28.

[5] See Albertyn 'Equality' (supra) at 4-43 — 4-44.

assist this group, the poverty and related vulnerability of this group were also stressed in the judgment. The test for unlisted grounds, while focusing on dignity impairments, arguably has scope to include other forms of disadvantage. As set out above, the Court uses dignity as a primary criterion but also asks whether an adverse effect 'in a comparably serious manner' should be examined to decide whether a group was discriminated against on an unlisted ground. PEPUDA includes socio-economic status, like HIV status, as an additional ground to be considered for inclusion in the list of prohibited grounds of discrimination. The next ten years may witness cases being brought by people who feel that they have been left behind during South Africa's recent and significant economic expansion. Appropriate claims of discrimination on the grounds of poverty or socio-economic status should be considered by our courts.[1]

(f) 'On one or more grounds'

The phrase 'on one or more grounds' indicates that discrimination can be based on a listed or unlisted ground on its own, or with other listed or unlisted grounds. In *Brink*, O'Regan J made it clear that even where two grounds were implicated in a case, it was enough to make a finding on the basis of only one of the grounds.[2] The Court in *NCGLE v Home Affairs* also pointed to the existence of 'overlapping' and 'intersecting' grounds of discrimination.[3] Sachs J in *NCGLE v Minister of Justice* gave detailed consideration to this issue. His starting point was that

> [R]ights must fit the people, not the people the rights. This requires looking at rights and their violations from a persons-centred rather than a formula-based position, and analysing them contextually rather than abstractly.[4]

He further noted that:

> One consequence of an approach based on context and impact would be the acknowledgment that grounds of unfair discrimination can intersect, so that the evaluation of discriminatory impact is done not according to one ground of discrimination or another, but on a combination of both, that is globally and contextually, not separately and abstractly. The objective is to determine in a qualitative rather than a quantitative way if the group concerned is subjected to scarring of a sufficiently serious nature as to merit constitutional intervention. Thus, black foreigners in South Africa might be subject to discrimination in a way that foreigners generally, and blacks as a rule, are not; it could in certain circumstances be a fatal combination. The same might possibly apply to unmarried mothers, or homosexual parents, where nuanced rather than categorical approaches would

[1] These grounds will in all likelihood often overlap with other listed grounds such as race, gender and age or other unlisted grounds such as citizenship and landlessness.

[2] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at para 43.

[3] *National Coalition for Gay and Lesbian Equality v Home Affairs* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) at para 40.

[4] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC) ('*NCGLE v Minister of Justice*') at para 112.

> be appropriate. Alternatively, a context rather than category-based approach might suggest that overlapping vulnerability is capable of producing overlapping discrimination. A notorious example would be African widows, who historically have suffered discrimination as blacks, as Africans, as women, as African women, as widows and usually, as older people, intensified by the fact that they are frequently amongst the lowest paid workers.[1]

This discussion concerns the issue of what commentators in other jurisdictions have referred to as intersectional grounds of discrimination.[2] An example is where a company employs only black men and white women, with the result that black women fall through the cracks as a separate category of people who fail to benefit from positive measures to advance previously disadvantaged work seekers. An interesting question is whether intersectional grounds of discrimination based on existing grounds result in the creation of a new unlisted ground or are treated as the combination of listed grounds. This is an important distinction since listed grounds benefit from the presumption of unfairness in FC s 9(5) while discrimination on the basis of unlisted grounds does not. It is suggested that the presumption should benefit the new category of discrimination where existing listed grounds are implicated. This expansive interpretation is based on the word 'one or more grounds' in FC s 9(3) and the view that rights should be interpreted in favour of those complaining of violations.

The other possibility contained in anti-discrimination law is the existence of multiple forms of discrimination. Here, a single legislative provision may result in discrimination that affects more than one group.[3] For example, a law prohibiting polygamous unions might discriminate against Muslim people on the ground of religion and against African people on the ground of culture.

A contextual approach requires that different layers of disadvantage be teased out and addressed in their full complexity. Sachs J refers (in a footnote to the above quote) to the view of L'Heureux-Dubé in *Egan v Canada*:

> In reality, it is no longer the 'grounds' that are dispositive of the question of whether discrimination exists, but the *social context* of the distinction that matters. (C)ontext is of primary importance and that abstract 'grounds of distinction' are simply an indirect method to achieve a goal which could be achieved more simply and truthfully by asking the direct question: 'Does this distinction discriminate against this group of people?'.[4]

[1] *NCGLE v Minster of Justice* (supra) at para 113.

[2] K Crenshaw 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) *University of Chicago Legal Forum* 139; N Iyer 'Categorical Denials: Equality Rights and the Shaping of Social Identity' (1993) 19 *Queen's Law Journal* 179.

[3] Albertyn 'Equality' (supra) at 4-45 — 4-46.

[4] (1995) 29 CRR (2d) 79, 120.

While the Constitutional Court may not be ready to abandon grounds completely as suggested here, it has thus far taken a relatively expansive and contextual approach to both the listed and unlisted grounds. However, it has been argued that the Court has not always been clear of the difference between multiple and intersectional discrimination, leading to the outcome in *Hugo* that favoured mothers rather than fathers because of an inability to understand the complexities of sex and gender for primary care-giver fathers.[1]

(g) Grounds of discrimination

FC s 9(3) prohibits unfair discrimination on a list of grounds. This list also applies to FC s 9(4) and (5).[2] The grounds were discussed by the Constitutional Court in *Harksen* in a passage quoted earlier. The passage is worth repeating here:

> [T]hey have been used (or misused) in the past (both in South Africa and elsewhere) to categorise, marginalise and often oppress persons who have had, or who have been associated with, these attributes or characteristics. These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity. There is often a complex relationship between these grounds. In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features. The temptation to force them into neatly self-contained categories should be resisted. Section 8(2) seeks to prevent the unequal treatment of people based on such criteria which may, amongst other things, result in the construction of patterns of disadvantage such as has occurred only too visibly in our history.[3]

While there were slight changes to the list between the Interim Constitution and the Final Constitution, the Constitutional Court's conceptual understanding of the grounds has remained consistent. Most of the cases that have come to court have been decided on the basis of a small number of listed grounds: race, gender, marital status and sexual orientation. It is not surprising that in post-apartheid South Africa there would be race discrimination challenges. The challenges based on gender and sexual orientation reflect to some extent the role of two key social movements — the women's movement and the gay and lesbian equality campaign — both of which have used the courts actively in their struggles. As rights awareness becomes more deeply entrenched, challenges on the basis of other grounds are likely to come to court.

[1] See Albertyn 'Equality' (supra) at 4-45 — 4-46.
[2] See § 35.6 - § 35.7 infra.
[3] *Harksen v Lane NO* 1997 (4) SA 1 (CC), 1997 (11) BCLR 1489 (CC) at para 49.

(i) *Race and colour*

South Africa's history of apartheid makes race a central category in understanding discrimination. 'Non-racialism' is included alongside 'non-sexism' as a founding value in FC s 1*(b)*. The Constitutional Court has repeatedly referred to this unjust history and the need to remove discriminatory laws. O'Regan J, in *Harksen*, said the following:

> Our history is of particular relevance to the concept of equality. The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as 'white', which constituted nearly 90% of the landmass of South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society. It is in the light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted.[1]

Race discrimination occurs where physical attributes associated with a particular race group are used to prejudice the group or its individual members.[2] In South Africa's racist past, racial categories were explicitly defined as including African, coloured, Asian and white and these categories continue to shape people's thinking and people's experiences of disadvantage. Colour discrimination is less familiar to South Africans but is closely tied to discrimination on the basis of race. In the USA, there is some recognition of discrimination on the basis of a person's skin tone within a racial group.[3] Those persons with lighter skins may be given preference over those with darker skins. Discrimination against albinos may fall into this category, and simultaneously intersect with disability discrimination.

The Constitutional Court has decided a number of cases dealing with race discrimination: *Walker*,[4] *Bel Porto School Governing Body v Premier, Western Cape*,[5]

[1] *Harksen* (supra) at para 40.

[2] For a more detailed discussion of 'racialism' see M Pieterse 'It's a Black Thing: Upholding Culture and Customary Law in a Society Founded on Non-racialism' (2001) 17 *SAJHR* 364, 365-67.

[3] See T Jones 'Shades of Brown: The Law of Skin Colour' (2000) 49 *Duke Law Journal* 1487.

[4] *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at para 81 (The case concerned a complaint against alleged differential treatment by the Pretoria City Council. The Council's policy saw residents of a formerly white suburb paying metered rates for municipal services while residents of the adjacent, formerly black township paid a flat rate. The Constitutional Court said that there was race discrimination (albeit indirect) but that it was not unfair as the flat rate was the only practical response to the immediate post-apartheid situation. In the second part of the case, however, the Court held that the Council's differential debt collection policy constituted unfair discrimination. However, Sachs J, in dissent, found that the selective enforcement of debts by the Council was not unfair race discrimination.)

[5] 2002 (3) SA 265 (CC), 2002 (9) BCLR 891 (CC)(The Court in found that the distinction between previously black and white schools did not result in unfair race discrimination.)

Moseneke[1] and *Bhe*.[2] In two cases, the Constitutional Court found there to be unfair discrimination on the basis of unlisted grounds that were closely associated with race.[3]

As the legal remnants of apartheid dwindle, fewer cases of this (formal equality) type are likely to reach the courts: although indirect race discrimination cases may continue for as long as the social and material legacy of past racism remains. Challenges to affirmative action cases dealing with issues of race brought under FC s 9(2) may well increase as previously advantaged groups question the continued existence of positive measures.[4] It is also likely that a number of race discrimination cases will be brought under the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA), rather than FC s 9, because it is expressly designed to cover issues of racism and inequality in daily life.

(ii) *Sex, gender and pregnancy*

Many national constitutions refer only to sex as a ground of discrimination. The Final Constitution's expansive list of grounds provides for sex and gender discrimination as well as pregnancy discrimination, a category often subsumed under sex.[5] The Constitutional Court tends to use sex and gender interchangeably in the relatively large number of cases it has considered on these grounds. Sex is generally taken to mean the biological differences between men and women, while gender is the term used to describe the socially and culturally constructed differences between men and women. Pregnancy is one of the most common biological

[1] *Moseneke v Master of the High Court* 2001 (2) SA 18 (CC), 2001 (2) BCLR 103 (CC) at para 21 (In this case a section of the Black Administration Act treating the administration of the estates of black people differently from that of others in the country was declared to be unfair race discrimination on the basis of race, colour and ethnic origin.) See also *Ex Parte Western Cape Provincial Government; In Re: DVB Behuising (Pty) Ltd v North West Provincial Government* 2001 (1) SA 500 (CC), 2000 (4) BCLR 347 (CC)(On the racist history of the Black Administration Act and its predecessors.)

[2] *Bhe v Magistrate, Khayelitsha* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) at paras 60-68 (The case concerned, among other issues, a challenge to succession provisions under the Black Administration Act and to the customary law of male primogeniture. The offending section of the Act was found to constitute unfair race discrimination.)

[3] See *Mabaso v Law Society of the Northern Provinces & Another* 2005 (2) SA 117 (CC), 2005 (2) BCLR 129 (CC) at para 38 (Concerned a challenge to legislation that prevented attorneys admitted in a former 'homeland' from being allowed to enrol in the same way as other 'non-homeland' attorneys were allowed to do. The Court found there to be unfair discrimination on the basis of the unlisted ground of those covered by former 'homeland' legislation. This difference was clearly informed by past racist measures.) See also *Zondi v Member of the Executive Council for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC), 2005 (4) BCLR 347 (CC) at paras 94-96 (The Court found there to be unfair discrimination on the basis of landlessness as well as race. The High Court had found there to be discrimination on the basis of colour and landownership since franchise, which was racially determined, and land ownership were qualifications in the challenged legislation. The Constitutional Court understood landlessness as having been shaped by racism.)

[4] For further discussion of FC s 9(2), see § 35.4 supra.

[5] See § 35.5*(g)*(iii) infra.

attributes of women used to deny them opportunities. But while some aspects of human reproduction are confined of necessity to women, many other components of child rearing are defined by society as 'women's work' because of underlying patriarchal assumptions.[1] *Fraser* highlighted the fact that men may suffer unfair gender discrimination where sexist cultural assumptions prevent them from participating in child care.[2]

The Constitutional Court has pointed to the deeply entrenched gender inequalities in our society that cause harm to women. Such harm may sometimes be more insidious than race discrimination, and, thus, they are equally unacceptable.[3] In *Brink*, the Court drew attention to the relationship between race and gender discrimination which results in black women in South Africa facing particularly acute barriers to advancement. Many of the gender discrimination cases overlap with marital status discrimination cases since a number of laws have treated — and still treat — married women differently from married men.[4]

(aa) Women's property

Historically, married women have had legal restrictions placed on their contractual capacity and their right to own and control property independently of men. One of the last vestiges of this position — the unfairly discriminatory effect of insurance laws on wives — was considered in *Brink*. The assumption underlying the law was that the defrauding of creditors could be avoided if wives were unable to benefit fully from a policy. However, the law did not cover situations where a husband might similarly attempt to defraud creditors. The Constitutional Court found unfair discrimination based on sex.[5]

Harksen concerned a challenge to insolvency laws that affected the rights of insolvent spouses.[6] The majority found there not to be any unfair discrimination. The minority opinion of O'Regan J, however, found there to be unfair discrimination based on marital status: such unfair discrimination was characterized as a form of sex discrimination encountered by married women.

Bhe found the customary law rule of primogeniture to be unfair discrimination on the basis of gender.[7] The minority decision concluded that there was also

[1] See *President of the RSA & Another v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at paras 37-39.

[2] *Fraser v Children's Court, Pretoria North & Others* 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC) at para 25 (While Mohamed DP found the distinction between fathers married in terms of Muslim law and those married in terms of customary law to be the primary basis for a finding of unfair discrimination, he also noted the unfair gender discrimination between unmarried mothers and fathers.)

[3] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC)('*Brink*') at paras 41 and 44 (O'Regan J); *Volks NO v Robinson & Others* 2005 (5) BCLR 446 (CC) at paras 163-64 (Sachs J).

[4] On marital status, see § 35.5*(g)*(iii) infra.

[5] *Brink* (supra) at paras 43-44.

[6] *Harksen v Lane NO* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC).

[7] *Bhe & Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; SAHRC & Another v President of the RSA &Another* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC)('*Bhe*').

discrimination based on age and birth, but found that such discrimination was justifiable. The discrimination based on gender could not be justified.[1]

Volks dealt with the rights of unmarried domestic partners and was decided on the basis of marital status discrimination. However, the majority offered the following gloss on the issue of gender inequality with regard to women's property in intimate partnerships:

> Structural dependence of women in marriage and in relationships of heterosexual unmarried couples is a reality in our country and in other countries. Many women become economically dependent on men and are left destitute and suffer hardships on the death of their male partners … Women remain generally less powerful in these relationships. They often wish to be married, but the nature of the power relations within the relationship makes a translation of that wish into reality difficult. This is because the more powerful participants in the relationship would not agree to be bound by marriage. The consequences are that women are taken advantage of and the essential contributions by women to a joint household through labour and emotional support is not compensated for.[2]

(bb) Women's bodies

Women face domestic violence and rape on a dramatic scale in South Africa. This violence is directly linked to women's unequal position in society and the prevalent social belief that women are required to submit to their fathers, husbands and other men in their lives. Women's control over their bodies relates also to their reproductive rights and their decision to engage in sex work. While other constitutional provisions such as the right to freedom and security of the person in FC s 12 are implicated in some cases concerning women's physical rights, there is a close link to the right to equality and the prohibition of unfair sex and gender discrimination. The Constitutional Court has recognized the prevalence of violence against women in South Africa and has stressed the need to ensure that the law assists women in protecting them from such violence. In *Carmichele*, the Court recognized that violence against women was an obstacle to their enjoyment of all of their fundamental rights and freedoms:[3]

> In addressing these obligations in relation to dignity and the freedom and security of the person, few things can be more important to women than freedom from the threat of sexual violence. As it was put by counsel on behalf of the amicus curiae: 'Sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women.'

[1] *Bhe* (supra) at para 179-191.

[2] *Volks* (supra) at paras 63-64. The minority opinion of O'Regan and Mokgoro JJ and the minority opinion of Sachs J link marital status discrimination to gender discrimination.

[3] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), 2001 (10) BCLR 995 (CC) at para 62. See also *S v Baloyi* 2000 (2) SA 425 (CC), 2000 (1) BCLR 86 (CC), 2001 (1) SACR 81 (CC)(Court's response to a challenge to the Prevention of Family Violence Act 133 of 1993); *Omar v Government of the RSA* 2006 (2) SA 289 (CC), 2006 (2) BCLR 253 (CC)(Court entertains a challenge to the Domestic Violence Act 116 of 1998.); *Masiya v Director of Public Prosecutions (Pretoria) & Others (Centre for Applied Legal Studies and Tshwaranang Legal Advocacy Centre as* Amici Curiae) CCT 54/06 judgment of 10 May 2007 (as yet unreported)(Court extended the common-law definition of rape to include anal penetration of females, but refused to extend its reach to males.)

The Court referred, in that context, to the following statement by the Supreme Court of Appeal in *S v Chapman*:

> The courts are under a duty to send a clear message to the accused, to other potential rapists and to the community. We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights.[1]

In *Van der Merwe*, the Constitutional Court considered the position of people married in community of property to recover delictual patrimonial benefits from damages arising from bodily injury inflicted by a spouse.[2] The complainant had been seriously injured when her husband intentionally rode over her in his car. The Court considered gender discrimination arguments, but made no finding under FC s 9(3) since the case could be disposed of in terms FC s 9(1).[3] The Court did however note the following:

> There is no doubt that in our society domestic violence and economic vulnerability are gendered in nature. Both are a sad sequel to patriarchy. Women are more likely to fall victim to the battery, abuse or negligent driving of their domestic partner than otherwise and are therefore more likely to be non-suited for patrimonial damages than their husbands. Even more demeaning is that victims of domestic and other violence within marriages in community of property would have to solicit their abuser's consent to meet medical and other bills or to make up loss of earnings out of the joint estate. Moreover, in these circumstances third party insurers, if any, are not liable to reimburse the injured spouse or the joint estate. In this way, the burden of abuse and economic dependency becomes mutually reinforcing and most intolerable.[4]

The issue of sex work and its relationship to gender discrimination arose in *Jordan*. The equality challenge was that the law criminalizing sex work treated the sex worker, usually female, more harshly than the customer, usually male. The majority of the Constitutional Court rejected these challenges: holding that there was no unfair sex or gender discrimination as the legislation was 'gender-neutral' in that it applied to male and female sex workers and customers. By contrast, and in a more contextual judgment, the minority found there to be unfair gender discrimination.

The ground of pregnancy discrimination has not been considered by the Constitutional Court. It was considered by the Labour Appeal Court in *Woolworths v Whitehead*. The court upheld the appellant's failure to employ a pregnant applicant.[5] It is also an issue that arises in relation to pregnant learners in the education

[1] 1997 (3) SA 341, 345 C-D (A), quoted in *Carmichele* (supra) at para 62.
[2] *Van der Merwe v Road Accident Fund* 2006 (4) 2 SA 230 (CC), 2006 (6) BCLR 682 (CC)('*Van der Merwe*').
[3] See § 35.3*(a)*(ii) supra.
[4] *Van der Merwe* (supra) at para 67.
[5] *Woolworths (Pty) Ltd v Whitehead* 2000 (12) BCLR 1340 (LAC).

system.[1] While pregnant women elsewhere in the world have sometimes struggled to succeed in equality claims, the existence of this ground within a strong equality right means South African women are more likely to be assisted by the courts.

(cc) Women, men and children

The Constitutional Court has considered the relationship between men and their children in two important FC s 9(3) cases.[2] As discussed above, *Fraser* was brought by an unmarried father who opposed the lack of consent afforded to him in the adoption of his child. The *Fraser* Court recognized that the existence of a marriage might have little to do with whether or not a father involved himself with his children.[3] The Court also stressed the 'deep disadvantage experienced by the single mothers in our society'.[4]

Hugo concerned a challenge to a presidential pardon that favoured women with young children but excluded fathers. The majority found that there was no unfair discrimination against such fathers. The *Hugo* Court said that:[5]

> As many fathers play only a secondary role in child rearing, the release of male prisoners would not have contributed as significantly to the achievement of the President's purpose as the release of mothers.

The various judgments of the *Hugo* Court debated the interesting strategic issue of whether the lack of involvement of fathers in their children's lives should be punished by the law or whether the law should be used to encourage a greater involvment.

(dd) Critical responses to the Court's gender equality jurisprudence

A number of writers have evaluated the first decade of the Constitutional Court's gender equality judgments.[6] The Court has been commended for acknowledging feminist theory as an aid to the proper interpretation of the Final Constitution. The Court has referred to a public/private divide that has the effect of silencing women's claims in the home and other spheres of life considered 'private'.[7] It

[1] See M O'Sullivan 'Reproductive Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) § 37.4.

[2] The Court has acknowledged the gender inequalities within the judicial maintenance system where mothers depend on the financial assistance of fathers to look after children in their custody. See *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC), 2003 (2) BCLR 111 (CC)('*Bannatyne*') at paras 27-30.

[3] *Fraser v Children's Court, Pretoria North & Others* 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC)('*Fraser*') at para 26.

[4] Ibid at para 44.

[5] *President of the RSA & Another v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC)('*Hugo*') at para 46.

[6] C Albertyn (2005) 'Defending and Securing Rights through Law: Feminism, Law and the Courts in South Africa' (2005) 32(2) *Politikon* 217 ('Defending and Securing'); E Bonthuys (2007) 'Institutional Openness and Resistance to Feminist Arguments: The Example of the South African Constitutional Court' *Canadian Journal of Women and the Law* (forthcoming); S Jagwanth 'Expanding Equality' in C Murray & M O'Sullivan (eds) *Advancing Women's Rights* (2005) 131; Saras Jagwanth & Christina Murray 'No Nation Can Be Free When One Half of It is Enslaved: Constitutional Equality for Women in South Africa' in B Baines & R Rubio-Marin *The Gender of Constitutional Jurisprudence* (2005) 230.

[7] For more on this point, and the Court's views in *S v Baloyi*, see Albertyn 'Defending and Securing' (supra) at 225-226.

has acknowledged that there is a sexual division of labour that burdens women with child care and household responsibilities.[1] And it has recognized that the feminization of poverty results when families break down and women are usually left with the responsibility for children and consequent greater financial difficulties. In *Bannatyne*, Mokgoro J considered the administrative problems of the judicial maintenance system and said the following:

> Compounding these logistical difficulties is the gendered nature of the maintenance system. The material shows that on the breakdown of a marriage or similar relationship it is almost always mothers who become the custodial parent and have to care for the children. This places an additional financial burden on them and inhibits their ability to obtain remunerative employment. Divorced or separated mothers accordingly face the double disadvantage of being overburdened in terms of responsibilities and under-resourced in terms of means. Fathers, on the other hand, remain actively employed and generally become economically enriched. Maintenance payments are therefore essential to relieve this financial burden.
>
> These disparities undermine the achievement of gender equality which is a founding value of the Constitution. The enforcement of maintenance payments therefore not only secures the rights of children, it also upholds the dignity of women and promotes the foundational values of achieving equality and non-sexism. Fatalistic acceptance of the insufficiencies of the maintenance system compounds the denial of rights involved. Effective mechanisms for the enforcement of maintenance obligations are thus essential for the simultaneous achievement of the rights of the child and the promotion of gender equality.[2]

While some of the Court's decisions have taken account of the context of women's lives and the multiple burdens that arise in South Africa's patriarchal society, some commentators point to a disappointing failure by the majority of the Court in *Jordan* and *Volks*. These decisions both resulted in a refusal to assist two categories of disadvantaged women — sex workers and unmarried cohabitants. Ultimately, a deferential approach was followed where the legislature was seen as 'knowing what it was doing' (*Jordan*) or 'needing to improve the situation' (*Volks*). In *Jordan,* the majority failed to heed the Court's own jurisprudence by not looking into the private sphere of sexuality, ignoring context and reinforcing harmful stereotypes.[3] In *Volks*, the majority again resorted to a formal equality approach and moral conservatism.[4] These decisions point to the possibility that a substantive interpretation of FC s 9 with regard to gender equality is not always

[1] See Jagwanth & Murray (supra) at 245 (On *Hugo*.) See also *Volks* (supra) at para 110 (O'Regan and Mokgoro JJ on the gendered division of labour.)

[2] *Bannatyne* (supra) at paras 29-30.

[3] See Albertyn 'Defending and Securing' (supra) at 228-9. See also D Meyerson 'Does the Constitutional Court of South Africa Take Rights Seriously? The Case of *S v Jordan*' (2004) *Acta Juridica* 138-54 (Both majority and minority judgments are criticised for failing to follow a high standard of justification where constitutional rights are at stake.) See also R Kruger 'Sex Work From a Feminist Perspective: A Visit To the *Jordan* Case' (2004) *SAJHR* 20, 138-50.

[4] See Albertyn 'Defending and Securing' (supra) at 229-30. See also Jagwanth 'Expanding Equality' (supra) at 135–36; C Lind 'Domestic Partnerships and Marital Status Discrimination' (2005) *Acta Juridica* 108.

understood or applied adequately by all of the judges on the Court. Gender issues seem to test many ideas around prejudice and stereotyping that seem less complex when seen through the prism of race.

(iii) *Marital status*

The ground of marital status was not included in the Interim Constitution. It is a listed ground in the Final Constitution. In *Brink*, which was brought under the Interim Constitution, the ground of marital status was recognized but not considered since the Court felt the case could be decided with reference only to sex discrimination.[1] In *Harksen*, also decided under the Interim Constitution, O'Regan J, in dissent, wrote that marital status was a ground of discrimination. She said:

> I agree that marital status is a matter of significant importance to all individuals, closely related to human dignity and liberty. For most people, the decision to enter into a permanent personal relationship with another is a momentous and defining one. It requires related decisions concerning the nature of the relationship, its personal and proprietary consequences.[2]

As discussed under the grounds of sex and gender, there is often an overlap between discrimination affecting men and women and marital status discrimination. This overlap occurs because marital systems (civil, customary and religious) have historically contained provisions that give lesser rights and benefits to women.[3] Apartheid thinking also resulted in inequalities between marital systems, with the civil law system generally given preference over customary and religious systems.[4] Here, marital status discrimination overlaps with discrimination on the basis of race, religion and culture. There is also a frequent overlap between marital status and the ground of sexual orientation since same-sex couples have, until recently, been unable to marry.[5] *Fourie* contains a detailed discussion of the nature and benefits of marriage and why same-sex couples' exclusion from marriage is harmful.[6] The exclusion of unmarried partners from the benefits and consequences of marriage has also been raised as a source of marital status discrimination.[7] In *Volks* the exclusion of unmarried cohabitants from the

[1] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at para 43.

[2] *Harksen v Lane NO* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 92.

[3] Ibid at para 94 (O'Regan J). See also *Daniels v Campbell NO* 2004 (5) SA 331 (CC), 2004 (7) BCLR 735 (CC)('*Daniels*').

[4] *Daniels* (supra) at paras 19-20.

[5] For cases dealing with this overlap, see *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) at para 40; *Du Toit & Another v Minister for Welfare and Population Development & Others* 2003 (2) SA 198 (CC), 2002 (10) BCLR 1006 (CC) at para 26; *J & Another v Director General, Department of Home Affairs & Others* 2003 (5) SA 621 (CC), 2003 (5) BCLR 463 (CC) at para 13. For a discussion of the ground of sexual orientation, see § 35.*3(g)(v)* infra.

[6] *Minister of Home Affairs v Fourie & Another; Lesbian and Gay Equality Project & Others v Minister of Home Affairs* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) at paras 63-74.

[7] *Volks* (supra) at para 49.

provisions of the Maintenance of Surviving Spouses Act was held by the majority to be marital status discrimination but was not found to be unfair.[1] The court pointed to the importance of marriage as an institution and the choice provided to heterosexual couples to enter into marriage or remain outside of it. There is also a detailed discussion of marriage in the minority judgment of O'Regan and Mokgoro JJ that finds that the Act does discriminate unfairly against unmarried partners on the basis of marital status. The minority points to stigma facing such couples as well as a lack of legal protection and finds that cohabiting partners are a vulnerable group.[2]

There is a discussion of the scope of the ground of marital status discrimination in the case of *Van der Merwe v Road Accident Fund*. In *Van der Merwe,* a woman was intentionally injured by her husband. The Road Accident Fund argued that it did not have to pay for her patrimonial damages since she was married in community of property and the Matrimonial Property Act contains a provision that one spouse can not recover such damages from the other.[3] The injured woman challenged this provision on the basis that it unfairly discriminated against people married in community of property, as opposed to those married under other property regimes, on the ground of marital status. The Constitutional Court decided this case in terms of FC s 9(1) and thus found it unnecessary to decide the FC s 9(3) claims. Nevertheless, the Court made certain *obiter* statements about the ground of marital status.[4] The Court said that the existing jurisprudence on marital status related to 'protectable interests or disabilities of being married or not married'[5] and expressed doubt as to whether it could encompass a case where the 'law denies one class of married people a protection that another class enjoys'.[6] The Court seemed to reject the applicant's assertion that it should adopt a generous and expansive interpretation of marital status to encompass people covered by different property regimes within marriage. This position is somewhat at odds with the decision of the Court in *Fraser*. Mohamed DP found there to be unfair discrimination against fathers married in terms of Muslim law as opposed to fathers married in terms of customary law.[7] Thus, in *Fraser*, a distinction is drawn between the benefits afforded to those persons in one form of marriage and the denial of those same benefits to people married under another system. The *Fraser* Court did not expressly describe this distinction as 'marital status' discrimination.

[1] Act 27 of 1990.
[2] *Volks* (supra) at para 135.
[3] Act 88 of 1984.
[4] *Van der Mewe* (supra) at paras 45-47.
[5] Ibid at para 46.
[6] Ibid at para 45.
[7] *Fraser* (supra) at paras 21-23.

(iv) *Ethnic or social origin*

Discrimination on the basis of ethnic or social origin is closely related to race. Ethnic origin is taken to combine 'a biological group that shares a common descent, with a common cultural heritage and, sometimes, a territorial base'.[1] In South Africa, ethnicity was used under apartheid to further divide African people into 'homelands' and for other harmful purposes. Private bodies like the mining houses also segregated ethnic groups within their hostel system. Ethnicity was also used to stigmatize non-indigenous groups such as the Chinese, Malays and Indians. Thus far, the case law has raised 'ethnic origin' as a ground of discrimination in cases dealing with race discrimination.[2]

Social origin relates to ethnic origin where it concerns one's position in a particular clan or group. But it can also refer to one's position in a hierarchy within a family, tribe or other social group. It obviously intersects with age, gender and other categories that affect one's position and status within a particular social group. An international example of social origin discrimination is the caste system in India, which is the subject of efforts to address inequality through Indian anti-discrimination laws. This ground has not yet been considered by our courts.

Social origin discrimination is also used to describe the differential treatment of people on the basis of class. Here, it relates to the additional ground of 'socio-economic status' in s 34 of PEPUDA. Socio-economic status is defined in s 1 of the Act as including 'a social and economic condition or perceived condition of a person who is disadvantaged by poverty, low employment status or lack of or low-level educational qualifications'. In South Africa, class tends to correspond with race and gender in as much as Africans and women constitute the greatest proportion of the poor.[3]

Although *Khosa*, concerned the rights of non-citizens living in poverty to state support, Mokgoro J links the ground of citizenship to poverty in pointing out the need for the poor to be treated as equal members of society.[4] Social origin may also be linked to the ground of 'birth' since it may involve discriminating against a person because of their position or status in a family.

[1] C Albertyn, B Goldblatt & C Roederer (eds) *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (2001) 79-80.

[2] See *Moseneke v Master of the High Court* 2001 (2) SA 18 (CC), 2001 (2) BCLR 103 (CC) at paras 21-22, *Bhe & Others v Magistrate, Khayelitsha & Others; Shibi v Sithole & Others; SAHRC & Another v President of the RSA &Another* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) at para 60-61; *Mabaso v Law Society of the Northern Provinces & Another* 2005 (2) SA 117 (CC), 2005 (2) BCLR 129 (CC).

[3] Poverty, race and gender might also be understood as intersecting grounds of discrimination. See S Fredman 'Providing Equality: Substantive Equality and the Positive Duty to Provide' (2005) 21 *SAJHR* 163, 182-5; M Jackman 'Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination under the Canadian Charter and Human Rights Law' (1994) 2 *Review of Constitutional Studies* 76-122; B Goldblatt & S Liebenberg 'Achieving Substantive Equality in South Africa: The Relationship between Equality and Socio-Economic Rights' (2007)(forthcoming).

[4] *Khosa & Others v Minister of Social Development & Others; Mahlaule & Another v Minister of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) SA 569 (CC) at para 74. For a discussion of unspecified grounds, see § 35.5*(c)* supra.

(v) *Sexual orientation*

South African laws and social practices reflect a history of exclusion and marginalization of gays and lesbians. The ground of sexual orientation discrimination was included following intense lobbying in the constitution-writing process by gay and lesbian rights activists.[1] A large number of cases have been brought to the courts by organizations representing gay and lesbian interests and by individuals challenging sexual orientation discrimination. The organizations followed a carefully formulated litigation strategy starting with challenges to the criminal law (*NCGLE v Minister of Justice*) and moving to challenges to the status of gay and lesbian relationships (*NCGLE v Home Affairs*).[2] *Satchwell*, *Du Toit* and *J*, although brought by individuals rather than the movement, fit well into the strategy of including same-sex relationships within the benefits afforded to heterosexual spouses.[3] *Fourie*, which requires the state to legislate for same-sex marriage, is the culmination of a careful building-block approach that has placed South African law on the same advanced footing as a handful of other countries in the world with regard to the removal of sexual orientation discrimination.[4]

The sexual orientation judgments were relatively straightforward formal equality decisions since the legislative discrimination was so overtly unfair. One of the authors has argued that this series of cases is inclusive rather than transformatory since it allows gays and lesbians into the protected social institution of marriage without challenging the position of this institution in the wider idea of family in

[1] See C Stychin 'Constituting Sexuality: The Struggle for Sexual Orientation in the South African Bill of Rights' (1996) 23(4) *Journal of Law and Society* 455; S Croucher 'South Africa's Democratisation and the Politics of Gay Liberation' (2002) 28(2) *Journal of Southern African Studies* 315-330; R Louw 'A Decade of Gay and Lesbian Equality Litigation' in M du Plessis & S Pete (eds) *Constitutional Democracy in South Africa 1994-2004* (2004) 65-79.

[2] *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* 1999 (1) SA 6 (CC), 1998 (1) BCLR 1517 (CC)('*NCGLE v Minister of Justice*')(Found the criminalisation of sodomy to be unfair discrimination); *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC)('*NCGLE v Minister of Home Affairs*')(Found the failure to confer immigration benefits provided to spouses on permanent, same sex life partners to be unfairly discriminatory.)

[3] *Satchwell v President of the Republic of South Africa & Another* 2003 (4) SA 266 (CC), 2002 (9) BCLR 986 (CC)('*Satchwell*')(Unfair exclusion of same sex couples from the provisions of the Judges Remuneration and Conditions of Employment Act 88 of 1989); *Du Toit & Another v Minister for Welfare and Population Development & Others* 2003 (2) SA 198 (CC), 2002 (10) BCLR 1006 (CC)('*Du Toit*')(Finding provisions of the Child Care Act 74 of 1983 unconstitutional for limiting joint adoption to married people to the exclusion of same sex couples); *J & Another v Director-General, Department of Home Affairs & Others* 2003 (5) SA 621 (CC), 2003 (5) BCLR 463 (CC)('*J*').

[4] *Minister of Home Affairs & Another v Fourie & Others; Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC)('*Fourie*').

South African law.[1] However, she argues that inclusion does not preclude future transformation and may in fact 'assist in setting democratic norms that may eventually shift the social norms'.[2]

The Court has adopted the definition of 'sexual orientation' used by Edwin Cameron as defining people 'by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex; in the case of gays and lesbians, to members of the same sex'. [3] Ackermann J, in *NCGLE v Minister of Justice*, said that the concept of sexual orientation must be given a generous interpretation. It applied equally to bisexuals and transsexuals and even to the orientation of persons who might, on a single occasion only, be erotically attracted to a member of their own sex.[4] In *NCGLE v Minister of Home Affairs* the Court described the impact of sexual orientation discrimination on gays and lesbians as denying their inherent dignity which 'insidiously degenerates into a denial of humanity and leads to inhuman treatment by the rest of society in many other ways'.[5]

(aa) Recognition of same-sex relationships: material benefits

Langemaat v Minister of Safety and Security concerned a successful claim by a police woman to have her partner registered on her medical aid.[6] Following the case, a new Medical Schemes Act was introduced which defines a dependant as a 'spouse or partner'.[7] In 2001 a case challenging the Pension Fund Act 41 of 1963, which excluded same-sex life partners from state pension benefits accorded to heterosexual spouses, was settled to allow their inclusion. *Satchwell v Minister of Justice* was brought by a High Court judge to challenge legislation regarding judges' pensions and other benefits of service. While this case did not benefit very many people directly, the judgment was important in recognizing that same-sex couples who depend upon each other are entitled to financial benefits.[8] In *Farr v Mutual and Federal*, an insurance policy holder in a gay relationship wished to have his partner covered by his motor vehicle insurer following an accident.[9] The policy excluded

[1] C Albertyn 'Defending and Securing Rights through Law: Feminism, Law and the Courts in South Africa' (2005) 32 *Politikon* 217, 233. But see S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36 (Woolman contends that the case law on sexual orientation traces a clear arc from mere privacy concerns to full public acknowledgement of the difference of same-sex life partnerships and that the Court's recognition of the rights of same-sex couples to marry constitutes a direct challenge to the conservative mores of the vast majority of South Africans.) See also *Volks NO v Robinson & Others* 2005 (5) BCLR 446 (CC)(Sachs J) at paras 146-242 (On the transformation of family law.)

[2] Albertyn 'Defending and Securing' (supra) at 233.

[3] E Cameron 'Sexual Orientation and the Constitution: A Test Case for Human Rights' (1993) 110 *SALJ* 450, quoted in *NCGLE v Minister of Justice* (supra) at para 20.

[4] *NCGLE v Minister of Justice* (supra) at para 21.

[5] *NCGLE v Minister of Home Affairs* (supra) at para 42 (Ackermann J).

[6] 1998 (3) SA 312 (T), 1998 (4) BCLR 444 (T).

[7] Act 131 of 1998.

[8] *Satchwell* (supra) at paras 23–25.

[9] 2000 (3) SA 684 (C).

'a member of the policy holder's family normally resident with him' from its cover. He argued that his partner was not a family member. The judge found for the insurer on the basis that a permanent same-sex relationship does constitute a family based on the current social context. A number of cases were successfully taken to the pension fund adjudicator by gays and lesbians wishing to include their partners as beneficiaries. The Closed Pension Fund Act thereafter addressed sexual orientation discrimination for pension holders.[1]

In *Du Plessis v RAF*, the Supreme Court of Appeal delivered a highly significant judgment recognizing that there is a common-law duty of support in permanent, same-sex relationships.[2] The unanimous judgment by Cloete JA found that the partner of a man killed in a car accident was entitled to claim damages against the Road Accident Fund for loss of support. The court, relying on *Satchwell*, found that such an action did exist. The *Satchwell* Court had said:

> In a society where the range of family formations has widened, such a duty of support may be inferred as a matter of fact in certain cases of persons involved in permanent, same sex life partnerships. [3]

In *Gory v Kolver,* the Court found the provisions of the Intestate Succession Act[4] that exclude same-sex partners from being treated as 'spouses' to be unconstitutional.[5] The case is significant in that it goes beyond the earlier cases where third parties were required to allow partners in same-sex relationships to benefit where spouses already did. It concerns recognition of the inheritance rights to the entire estate of a partner in a same-sex partnership. Interestingly, the changes to the Act read in by the Court are retrospective and take effect from 27 April 2004.

(bb) Recognition of same-sex relationships — status benefits

NCGLE v Minister of Home Affairs concerned a challenge to the Aliens Control Act 96 of 1991 that gave immigration rights to spouses of permanent residents but not to same-sex partners. The judgment was important in not only finding the laws to be invalid but in reading the wording 'or partner, in a permanent same-sex life partnership' after the word 'spouse' into the offending legislation. The case highlighted the importance of context and impact, vulnerability and patterns of group disadvantage in the discrimination enquiry and advanced the idea that families take many forms, all deserving recognition and protection. Marriage was

[1] Act 41 of 1999.
[2] 2004 (1) SA 359 (SCA), 2003 (11) BCLR 1220 (SCA).
[3] *Satchwell* (supra) at para 25.
[4] Act 81 of 1987.
[5] *Gory v Kolver NO & Others (Starke & Others Intervening)* 2007 (3) BCLR 249 (CC).

only one form of valid life partnership. The language used by the court in its reading-in order has become an important standard for later judgments and even for some legislation.

(cc) Recognition of different types of families

Du Toit v Minister of Welfare was an adoption case also brought by a High Court judge and her partner to challenge the adoption provisions of the Child Care Act.[1] That Act allowed only one partner in a same-sex relationship to be registered as the legally recognized parent of adopted children. Skweyiya AJ made some important remarks about the changing and varied nature of family in society.

J v D-G, Department of Home Affairs amended the Children's Status Act 82 of 1987 to include same-sex partners as parents of children conceived by way of artificial insemination. Here, the one woman carried twins who had been conceived by way of artificial insemination from the ova of the second woman and sperm from an anonymous donor. The birth mother was registered as the parent of the children but the Department of Home Affairs refused to register the other woman as a parent.

These two important cases extended the legal recognition of family to same-sex relationships and their children.

(dd) Marriage[2]

In 2002, a lesbian couple (Fourie and Bonthuys) began their struggle for the right to marry under South African law. After approaching the High Court, then the Supreme Court of Appeal, and finally the Constitutional Court, they were told in December 2005 that they would have to wait another year for the law to be changed by Parliament, or failing this, by the automatic operation of the Court's own order on 2 December 2006, in order to marry.

The couple had asked the Court to address their exclusion from the common-law definition of marriage, which says that marriage is 'a union of one man with one woman, to the exclusion, while it lasts, of all others'. The Court was asked, in a separate (but joined) case brought by the Lesbian and Gay Equality Project, to remedy the problematic marriage formula in the Marriage Act 25 of 1961 that refers to a person taking another person as his or her 'lawful wife (or husband)'. The state opposed both cases. Sachs J gave a judgment on behalf of the majority of the Court which held that the common law and the formula in the Marriage Act were inconsistent with the Final Constitution and invalid to the extent that

[1] Act 74 of 1983.

[2] For an expanded discussion of the *Fourie* decision, see B Goldblatt 'Case Note: Same-Sex Marriage in South Africa — The Constitutional Court's Judgment' (2006) *Feminist Legal Studies* (forthcoming).

they excluded same-sex couples from marriage. The decision was based primarily on the right to equality and the right to dignity.

Sachs J stressed the need for tolerance and 'respect across difference'. He said:

> [W]hat is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting.[1]

The majority decided to suspend the declaration of invalidity for one year from the date of judgment to allow the legislature to correct the defects in the common law and Marriage Act. In the event that the defects were not corrected through legislation the offending words in the marriage formula would be read as including the words 'or spouse' after the words 'or husband'. The common law would become invalid to the extent that it did 'not permit same-sex couples to enjoy the status and benefits coupled with responsibilities it accords to heterosexual couples'. Sachs J said any legislation designed to cure the defects in the common law and the Marriage Act must ensure that same-sex couples are 'not subjected to marginalization or exclusion by the law, either directly or indirectly'.[2] The judgment set out the principles that must be applied to ensure that any new law is constitutionally adequate.[3] These are that:

- The objective of the new measure must be to promote dignity, equality and the advancement of human rights and freedoms.
- A new law must not create equal disadvantage for everyone, ie levelling down to get rid of civil marriage.
- Parliament must be sensitive to avoid a remedy that appears equal but actually creates a separation that further marginalizes same-sex couples — segregation that reflects distaste for one group will cause insult to that group. The approach to impact and context taken in our equality jurisprudence would not allow this. Differential treatment may be possible if it enhances dignity and promotes equality.
- The measure chosen must be as 'generous and accepting towards same sex couples as it is to heterosexual couples' in terms of 'tangibles and intangibles'.

Parliament recently passed the Civil Union Act.[4] The Act purports to address *Fourie* by creating the new institution of a 'civil union'. This new institution, available to same-sex and heterosexual couples, provides such couples with the full consequences of marriage. The union can be called a marriage or a civil partnership. The new Act appears to comply with the principles set out in *Fourie*.[5]

[1] *Fourie* (supra) at para 60.
[2] Ibid at para 147.
[3] Ibid at paras 148-53.
[4] Act 17 of 2006.
[5] The Marriage Act continues to remain solely available to opposite-sex couples.

However failure by government to introduce law reforms that would comprehensively address the rights of same-sex couples has resulted in a number of admonishing statements by the Constitutional Court. Goldstone J in *J* said:

> It is unsatisfactory for the courts to grant piecemeal relief to members of the gay and lesbian community as and when aspects of their relationships are found to be prejudiced by unconstitutional legislation. The executive and legislature are therefore obliged to deal comprehensively and timeously with existing unfair discrimination against gays and lesbians.[1]

(Similar remarks were made in *Satchwell* and *Du Toit*.[2]) The passing of the Civil Union Act — at the eleventh hour — seems to indicate that the government is grudgingly heeding the Constitutional Court's call. However, for those same-sex (and heterosexual) couples who do not choose to marry but remain as domestic partners, the law remains inadequate in recognizing their relationships and protecting a surviving partners' interests.

(vi) *Age*

Age discrimination has been defined in s 1 of PEPUDA as including 'the conditions of disadvantage and vulnerability suffered by persons on the basis of their age, especially advanced age'. It also obviously applies to discrimination of the youth, as minors and young adults are sometimes unfairly denied benefits available to older people. The elderly, particularly in modern, western societies, often become vulnerable and disadvantaged.[3] The Constitutional Court has only considered this ground in the minority judgment of Ngcobo J in *Bhe* where he discussed the rights of the eldest male child to succeed to the status of the deceased and found this to be reasonable and justifiable.[4]

The High Court considered age discrimination in *Christian Lawyers Association v Minister of Health*.[5] In this case, a challenge to the provisions of the Choice on Termination of Pregnancy Act, the applicants argued that girls under the age of 18 should not be able to choose to terminate their pregnancies without parental consent because they were not capable of making this decision alone.[6] The court rejected this challenge. It concluded that the Act made informed consent, and not age, the basis for its regulation of access to termination of pregnancy. Mojapelo J said the following:

[1] *J* (supra) at para 23.
[2] *Satchwell* (supra) at para 29; *Du Toit* (supra) at para 41.
[3] See Albertyn, Goldblatt & Roederer (supra) at 73-75.
[4] See § 35.5*(g)*(ix) infra.
[5] 2005 (1) SA 509 (T).
[6] Act 92 of 1996.

> Section 9(1) moreover provides that 'everyone' is equal before the law and has the right to 'equal protection and benefit of the law'. Section 9(3) goes further to prevent unfair discrimination against 'anyone' inter alia on the ground of 'age'. Any distinction between women on the ground of their age, would invade these rights.[1]

The High Court also found there to be unfair age discrimination in *Harris v Minister of Education*: government policy prevented a child from entering Grade 1 in an independent school before the age of 7.[2] The *Harris* Court found that from an educational perspective there was no reason why a 6-year-old should not be ready for school and the government had offered no sound pedagogical reasons for the exclusion. Moreover, since the case related to an independent school rather than a government school, no good administrative reasons existed for preventing 6-year-olds from beginning grade 1 at independent schools.

(vii) *Disability*

Many stereotypes accompany disability. Disabled people are assumed to be incapable, abnormal or ill. Discrimination can also occur where there is a perceived rather than actual disability. Equality for the disabled involves removing barriers to opportunities, eradicating discrimination and providing positive measures to accommodate and include them. PEPUDA addresses these issues in some detail.[3] A number of other countries have disability discrimination laws or constitutional provisions addressing this and their case law may be of assistance.[4] International law, including the recently introduced UN Convention on the Rights of Persons with Disabilities, can be used to inform our approach.[5]

In *Hoffman*, the Constitutional Court found there to be unfair discrimination on the basis of HIV status — a status said to be similar in many respects to disability discrimination.[6] The Court pointed to the denial of employment, prejudice and stigma suffered by HIV-positive people in South Africa.[7]

In *IMATU v City of Cape Town*, the Labour Court found there to be unfair discrimination on the ground of disability in terms of the Employment Equity Act.[8] In this case, a law enforcement officer applied to be transferred to the

[1] *Christian Lawyers* (supra) at 528E.
[2] 2001 (8) BCLR 796 (T).
[3] See Albertyn, Goldblatt & Roederer (supra) at 65-67.
[4] See *Eldridge v Attorney General of British Columbia* (1997) 151 DLR (4th) 577 (SCC); *Auton v British Columbia (Attorney General)* 2004 SCC 78. See also *Autism v France* Complaint No: 13/2002 European Committee of Social Rights (2002).
[5] UN General Assembly (25 August 2006). The UN Convention on the Rights of Persons with Disabilities was signed by South Africa on 30 March 2007, but has not yet been ratified.
[6] *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC). However the Court chose not to decide whether discrimination had also occurred on the listed ground of disability. Ibid at para 40.
[7] Ibid at para 28.
[8] [2005] 10 BLLR 1084 (LC).

position of fire fighter. His application was turned down on the basis that he was an insulin-dependent diabetic and might become ill while under pressure.

(viii) *Religion, conscience, belief, culture, language*

Language, culture and religion cases have not often come to court under the equality right but have been considered more fully under their own specific rights in FC ss 30, 31 and 15.[1] While FC s 9 provides protection against unfair discrimination on the basis of these grounds, the specific rights offer broader protections for people to practise their religion, use their language and participate in their culture.

South Africa's history of state-sanctioned racial discrimination overlapped with language discrimination since Afrikaans and English were promoted over other languages. It was the requirement that African children be taught subjects in Afrikaans that was one of the main causes of the Soweto uprising in 1976. Cultural intolerance was intimately linked to racism in the courts' and the lawmaker's approach to customary law. Christianity as understood by the National Party government shaped the apartheid education system. South Africa remains a deeply religious society with Christianity as the major religion. The need for tolerance within and between religions and cultures is an important theme of the Final Constitution.

(aa) Discrimination on the basis of religion, conscience and belief

Protection against discrimination on the basis of religion includes protection of individual and group identification with a particular religion as well as practices and beliefs in terms of that religion. Belief and conscience may extend to moral or other value systems part of, or separate from, faith-based systems of religion. Discrimination on the basis of conscience might result where a person is required by law to do something that contradicts their values or ethics.

In *Christian Education of SA v Minister of Education* concerning the prohibition of corporal punishment, the Constitutional Court addressed the issue of religion and equality in brief. Sachs J said the following:

> The respondent contended that, in line with the above considerations, the State had two powerful interests in the matter. The first was to uphold the principle of equality. It contended that to affirm the existence of a special exemption in favour of religious practices

[1] See P Farlam 'Freedom of Religion, Belief and Opinion' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 41; S Woolman 'Community Rights: Language, Culture and Religion' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 58. These related rights make specific mention of the need for such rights to be exercised in a manner that is consistent with other provisions in the Bill of Rights. See, eg, *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC), 1997 (10) BCLR 1348 (CC)(Sunday liquor sales); *Prince v President, Cape Law Society* 2002 (2) SA 794 (CC), 2001 (2) BCLR 133 (CC)(Ban on marijuana and rights of Rastafarians.)

> of certain children only, would be to violate the equality provisions contained in s 9 of the Bill of Rights. More particularly, it would involve treating some children differently from others on grounds of their religion or the type of school they attended. I think this approach misinterprets the equality provisions. It is true that to single out a member of a religious community for disadvantageous treatment would, on the face of it, constitute unfair discrimination against that community. The contrary, however, does not hold. To grant respect to sincerely held religious views of a community and make an exception from a general law to accommodate them, would not be unfair to anyone else who did not hold those views. As the Court said in *Prinsloo v Van der Linde & Another*, the essence of equality lies not in treating everyone in the same way, but in treating everyone with equal concern and respect. Permission to allow the practice to continue would, in these circumstances, not be inconsistent with the equality provisions of the Bill of Rights.[1]

The Constitutional Court has considered unfair discrimination on the ground of religion in a small number of cases.[2] The High Court has also considered religious discrimination in cases concerning a Sunday horse racing prohibition[3] and the terms of an educational trust.[4]

(bb) Discrimination on the basis of culture

Culture, often difficult to define, refers to the values, practices, rules and behaviour of different social groups.[5] Culture is an important component of human

[1] 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 42. See also *Minister of Home Affairs & Another v Fourie & Others; Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC)('*Fourie*') at para 159.

[2] *Daniels* involved the question whether a Muslim wife was a spouse in terms of the Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990. It is worth noting that a finding on gender, marital status or religious discrimination was deemed to be unnecessary, since the Court simply interpreted the word spouse to include a party to a Muslim marriage. Moseneke J however, in a minority judgment, found this to be a strained interpretation. He preferred instead to find the exclusion of Muslim marriages to be unfair discrimination (on the basis of marital status, religion and culture) and the appropriate remedy to be reading in. Interestingly, in *Fraser v Children's Court, Pretoria North*, the Court found that there was unfair discrimination between fathers of children married in terms of Islam (but not recognised as having to consent to the adoption of their child in terms of the Child Care Act 74 of 1983) and fathers married in terms of customary law (who were recognized by that Act). See also *Fourie* (supra) at paras 88-98 (The Court upheld the rights of gays and lesbians to marry and rejected arguments that marriage should remain a heterosexual preserve. However, it also held that no religious denomination and no religious official could be forced to consecrate homosexual unions.)

[3] *Gold Circle (Pty) Ltd & Another v Premier, Kwazulu-Natal* 2005 (4) SA 402 (D)(The Court found the prohibition of horse racing on a Sunday to constitute unfair discrimination on the basis of religion since the prohibition was designed around the Christian Sabbath and yet prevented other religious groups from attending horse racing meetings.)

[4] *Minister of Education v Syfrets Trust Ltd NO* 2006 (4) SA 205 (C)(The court found that the terms of an educational bequest requiring that funds not go to Jews was unfair discrimination on the basis of religion.)

[5] For more on the difficulty of defining 'culture', see S Woolman 'Community Rights' (supra) at § 58.1*(a)–(c)*.

identity and may change over time.[1] The content of a particular culture may be contested by individuals or groups within it and this may result in a court having to weigh up competing rights and grounds of discrimination. These issues arose in *Bhe*, where the applicants challenged the customary law rule of primogeniture (succession along the male line). The Constitutional Court found the rule to be inconsistent with the Final Constitution in that it discriminated against women and extramarital children. The Court noted the evolving nature of customary law and looked at the case within the historical and current context of South Africa. It found that African customs had been distorted by apartheid and violated the dignity and equality rights of women.[2]

(cc) Discrimination on the basis of language

There are a number of strong constitutional protections of language in the Final Constitution in addition to the prohibition against discrimination on this ground. The issue of language discrimination has arisen in relation to the medium of schooling in a number of cases.[3] Language cannot be used as indirect race discrimination to keep black children out of formerly white or coloured schools.[4] In *Ex parte Gauteng Provincial Legislature* Sachs J discussed the position of Afrikaans in schools. He said:

> Thus, if persons were denied access to school because they spoke Afrikaans, or belonged to a cultural group which identified itself as Afrikaner, they could claim a violation of their constitutional rights. Similarly, any person who was denied access to State facilities because they did not speak Afrikaans or did not belong to the self-constituted Afrikaner community could allege that their fundamental rights were being infringed.[5]

[1] C Albertyn 'Equality' (supra) at 4-42.

[2] See *Pillay v KwaZulu-Natal MEC of Education* 2006 (10) BCLR 1237 (N)(An appeal against an Equality Court found that in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act, a school's practice of prohibiting a learner from wearing a nose stud prevented her and her community from enjoying their culture and practising their religion.) See also *Ex Parte Gauteng Provincial Legislature: In Re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill Of 1995* 1996 (3) SA 165 (CC), 1996 (4) BCLR 537 (CC)('*Ex Parte Gauteng Provincial Legislature*') at paras 69-72 (Discussion by Sachs J of the protection of culture in human rights law, in particular the rights of minorities. He pointed to six interrelated principles of minority protection including: *(i)* the right to existence, (ii) non-discrimination, (iii) equal rights, (iv) the right to develop autonomously within civil society, (v) affirmative action, and (vi) positive support from the State.)

[3] See *Wittman v Deutscher Schulverein, Pretoria* 1998 (4) SA 423 (T), 1999 (1) BCLR 92 (T); *Matukane v Laerskool Potgietersrus* 1996 (3) SA 223 (T), [1996] 1 All SA 468 (T); *Ex Parte Gauteng Provincial Legislature* (supra); *Minister of Education, Western Cape, & Others v Governing Body, Mikro Primary School, & Another* 2006 (1) SA 1 (SCA), 2005 (10) BCLR 973 (SCA). For a discussion of the nexus between egalitarian concerns and language policy in public schools and independent schools, see S Woolman 'Community Rights' (supra) at § 58.7.

[4] See I Currie 'Official Languages and Language Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2005) Chapter 65.

[5] *Ex Parte Gauteng Provincial Legislature* (supra) at para 71.

He went on to say that this analysis did not necessarily require language exclusivity in schooling:

> Reading these principles together with s 32*(b)* in the manner most favourable to the petitioners, would mean that the practicability of language instruction in existing Afrikaans medium schools could, applying the non-diminution principle, be assumed to exist. At the same time, there is nothing in these principles to guarantee the exclusivity of Afrikaans in any school. On the contrary, the promotion of multi-lingualism, even leaving out the factor of equal access to schools, would encourage the establishment of dual- or multiple-medium schools. Whether or not the Afrikaans language would survive better in isolation rather than, as it were, rubbing shoulders with other languages, would not be a matter of constitutionality but one of policy, on which this Court would not wish to pronounce. Similarly, it would not be for us to say whether denying Afrikaans-speaking children the right to study and play with children of other backgrounds would or would not be to their mutual educational and social detriment or advantage.[1]

(ix) *Birth*

The Constitutional Court defined discrimination on the ground of birth in the case of *Bhe*:

> The prohibition of unfair discrimination on the ground of birth in s 9(3) of our Constitution should be interpreted to include a prohibition of differentiating between children on the basis of whether a child's biological parents were married either at the time the child was conceived or when the child was born. As I have outlined, extra-marital children did, and still do, suffer from social stigma and impairment of dignity. The prohibition of unfair discrimination in our Constitution is aimed at removing such patterns of stigma from our society. Thus, when s 9(3) prohibits unfair discrimination on the ground of 'birth', it should be interpreted to include a prohibition of differentiation between children on the grounds of whether the children's parents were married at the time of conception or birth. Where differentiation is made on such grounds, it will be assumed to be unfair unless it is established that it is not.[2]

In *Petersen v Maintenance Officer, Simon's Town Maintenance Court*, the High Court found there to be unfair discrimination on the basis of birth in a case concerning differentiation between the duty of support of grandparents towards children born in wedlock and extra-marital children.[3] There may be other dimensions to birth discrimination such as a child who is treated unfairly because, for example, he or she is the child of a refugee, adopted or fostered.[4] This ground may intersect or overlap with other grounds such as race, social origin and gender.

[1] *Ex parte Gauteng Provincial Legislative* (supra) at para 74.

[2] *Bhe & Others v Magistrate, Khayelitsha & Others; Shibi v Sithole & Others; SAHRC & Another v President of the RSA & Another* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC)('*Bhe*') at para 59.

[3] 2004 (2) SA 56 (C).

[4] See Albertyn, Goldblatt & Roederer (supra) at 80-81. See *Khosa & Others v Minister of Social Development & Others; Mahlaule & Another v Minister of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) SA 569 (CC)('*Khosa*') at para 78 (The Court notes that the provisions of social security legislation that provides social assistance grants only to nationals discriminates against children on the grounds of their parents' nationality.)

The ground may also be linked to the ground of age discrimination. In *Bhe*, the minority decision of Ngcobo J discussed a challenge to the customary law rule of primogeniture on the basis that it allowed the eldest male to succeed and thus discriminated against younger children. He found that in this case, age and birth discrimination were both reasonable and justifiable.[1]

(h) Step 2: Was the discrimination unfair?

Once discrimination has been established, the FC s 9(3) test looks at whether the discrimination was unfair. If the discrimination is on a listed ground, then it is presumed to be unfair. Here is the point at which the presumption of unfairness in FC s 9(5) kicks in.[2] If discrmination occurs on an unlisted ground, then the presumption does not operate and the complainant must establish that the discrimination was unfair.

The unfairness test set out in *Harksen* looks at the following factors:

(a) the position of the complainants in society, whether they have suffered from past patterns of disadvantage, and whether the discrimination is on a listed ground;

(b) the nature of the provision or power and the purpose sought to be achieved by it. If it is aimed at achieving a worthy social goal and not at impairing the complainants it may be fair;

(c) with due regard to *(a)* and *(b)* and other relevant factors, the extent to which the complainants' rights or interests have been affected, whether this has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.

The fundamental question in the fairness test is the impact of the discrimination on the complainant. The approach to establishing unfair discrimination must be contextual. In *Van Heerden*, Moseneke J notes that this contextual approach is informed by a commitment to substantive equality:

> This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but 'situation sensitive' approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society.[3]

[1] *Bhe* (supra) at paras 179-183. For a discussion of 'fairness' in the FC s 9(3) test and its relationship to FC s 36, see § 35.5*(i)* infra.

[2] For further discussion of FC s 9(5), see § 35.5*(b)* infra.

[3] *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC), 2004 (11) BCLR 1125 (CC) at para 27.

The primary right and value upon which unfairness analysis turns is dignity. However, the infringement of other rights and values may butress a finding of unfairness. The Constitutional Court has said that the test is not a closed list of factors to be used in determining fairness and may develop further over time. The factors explored in each case have a cumulative effect and must be assessed objectively.[1] The overall purpose of the fairness enquiry is to use contextual material to establish the impact of the alleged discrimination on the complainant.

The Court refers to the text of the equality right as evidence that the drafters foresaw the possible existence of discrimination that was not unfair. Goldstone J, in *Harksen v Lane NO*, referred to the presumption of unfairness in favour of complainants of discrimination on a listed ground (in FC s 9(5)) as proof that discrimination on a listed ground can be shown to be fair.[2] In *Hugo*, for example, the granting of a presidential pardon to certain categories of prisoners and not others was regarded as fair discrimination.[3]

(i) *The position of the complainant*

In order to understand the complainant's position, a range of considerations have been used by the courts to ensure that a thoroughly contextual enquiry takes account of history, group disadvantage and harm, socio-economic factors and the many forms that inequality takes. This approach allows for a sophisticated impact enquiry.

The Group: The enquiry involves looking at the individual complainant but also his/her group and its position in society. The group may have been subjected to particular laws and practices that caused disadvantage and stigma. Often, the complainant's group will locate the claim within a clear ground of discrimination. Sometimes a person who has been discriminated against may have experienced discrimination across a number of intersecting grounds, resulting in a more specific and complex form of discrimination.[4] This focus on grounds helps to define the group involved so as to better understand its particular position in society.

History: The examination is often backward looking so as to establish the historical factors that led to 'patterns of group disadvantage and harm'.[5] South Africa's history of colonialism and apartheid created a legacy of race discrimination. Gender inequality and sexual orientation discrimination also have historical roots in unjust laws and practices. In fact, all the prohibited grounds are characterized by historical conduct that has marginalized and oppressed people and

[1] *Harksen v Lane NO* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC)('*Harksen*') at para 51.

[2] *President of the RSA & Another v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC)('*Hugo*') at para 45.

[3] For other decisions in which discrimination was found to be fair, see *Harksen* (supra); *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC)('*Walker*'); *Bel Porto School Governing Body v Premier of the Province, Western Cape* 2002 (3) SA 365 (CC), 2002 (9) BCLR 891 (CC); *Jordan & Others v S & Others* 2002 (6) SA 642 (CC), 2002 (11) BCLR 1117 (CC); *Volks NO v Robinson & Others* 2005 (5) BCLR 446 (CC)('*Volks*').

[4] For a discussion of the meaning 'one or more grounds' see § 35.5*(f)* supra.

[5] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at para 27.

groups who have (or are associated with) these attributes.[1] Understanding this history enables the Court to appreciate that alleged discrimination is not new but emerges from years of related maltreatment. Note, however, that the Court also needs to be aware of social changes that may not reflect historical practices. Thus, in *Bhe*, the Court recognized that customary law was not static and had evolved over time.[2]

Systemic inequality. The goal of substantive equality is premised on an awareness that inequality is often built into the fabric of our society, not just through laws and rules but through deeply entrenched social practices and attitudes. Children are taught prejudice and fear of 'the other' and are given fixed ideas about the natural order of things (such as fathers heading households). These value systems infuse South African and most other societies around the world and form the foundation for disadvantageous treatment of individuals and groups.[3]

The socio-economic context. The court has to look at the conditions faced by the complainant and his/her group to properly understand the impact of the discrimination. In *Khosa,* the Constitutional Court not only considered the position of the permanent resident group but also looked at the hardship caused to their families, friends and communities who were required to support them in the absence of social assistance from the state.[4]

Different forms of vulnerability. Group vulnerability and disadvantage can effect complainants in a range of ways:[5] stigmatization and marginalization;[6] material disadvantage;[7] social exclusion and stereotyping;[8] political minority status;[9] and failure to accord equal concern and respect.[10] In *Hugo*, O'Regan J held that there are degrees of vulnerability. Thus, 'the more vulnerable the group adversely affected by the discrimination, the more the discrimination will be held to be unfair'.[11] The impact enquiry may require recourse to evidence. The courts have tended to rely on secondary sources such as books and articles recording

[1] *Harksen* (supra) at para 49.
[2] *Bhe* (supra) at para 80.
[3] See § 35.1*(c)* supra.
[4] *Khosa* (supra) at para 76.
[5] See Albertyn 'Equality' (supra) at 4-54 – 4-56.
[6] See *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC)(A person infected with HIV was unfairly discriminated against.)
[7] See *Khosa* (supra)(Poverty was one of the causes of vulnerability for the group of non-citizens.)
[8] Many of the cases concerning sexual orientation discrimination considered by the Court have identified stereotyping and social exclusion as the source of the class's vulnerability. See, eg, *Minister of Home Affairs & Another v Fourie & Others; Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC)('*Fourie*') at paras 71-72 (The Court said that 'the intangible damage (was) as severe as the material deprivation'.)
[9] See *Khosa* (supra) at para 71 (The Court points to the fact that non-citizens are 'a minority in all countries, and have little political muscle'.)
[10] See *Walker* (supra)(The white residents, although not historically or systemically vulnerable, were nevertheless treated arbitrarily with regard to the selective enforcement by the municipality on the basis of race, and were thus denied equal concern and respect.)
[11] *Hugo* (supra) at para 112.

the position of disadvantaged groups. Sometimes, they have simply taken judicial notice of these issues and have at times even displayed creativity in imagining the possible effects of discrimination. The court can use primary research, briefs submitted by an amicus curiae and other factual evidence to understand properly the social issues involved.[1]

(ii) *Nature and purpose of the provision*

In *Harksen*, the Court said that if the purpose of a provision was to achieve a worthy social goal such as the furthering of equality for all, then this justification might affect the fairness of the discrimination. The Court offered *Hugo* as an example: a presidential pardon extended to certain mothers of young children was found fairly to exclude the claimant father. This factor in the fairness enquiry raises a number of troubling issues that relate to the overall coherence of the Constitutional Court's equality jurisprudence.

First, if the focus of the fairness enquiry is on the impact of the discrimination on the complainant, is it correct to consider the purpose of the provision under challenge, ie will such an enquiry actually assist in determining whether the complainant's dignity was impaired or whether such person or group was truly disadvantaged?[2] It seems that the purpose of an impugned provision may shed light on its impact on the dignity of the complainant. Thus, in *Walker*, the purpose of the flat rate and cross-subsidization was not aimed at prejudicing the residents of the white area, but was used for reasons of practicality as well as for other strategic reasons.[3] On the other hand, the selective enforcement against rates defaulters was not based on a well formulated approach and resulted in treatment of the white residents that failed to accord them equal concern and respect.[4]

Second, the purpose enquiry seems to overlap with the FC s 36 limitations enquiry since both concern the purpose of the challenged provision and the rights concerned. It has been suggested that the enquiry into purpose at the fairness stage is purely a moral or value-based enquiry and that the FC s 36 enquiry allows for issues of a financial and administrative nature to be introduced. Of course, the FC s 36 enquiry also looks at values and the balancing of rights. But the real blurring of the line between the two enquiries arises when the impugned provision is not a law of general application. Since the Constitutional Court has

[1] For more on Rule 31 of the Constitutional Court Rules, see G Budlender 'Amicus' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 8; K Hofmeyr 'Rules and Procedure in Constitutional Matters' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 5. See also *Volks* (supra) at paras 31-35.

[2] But see Woolman 'Dignity' at § 36.4*(a)* and Woolman 'Freedom of Association' at § 44.2*(b)* (Ananalyis of the fairness of discrimination must take account of countervailing interests behind the impugned law or conduct.)

[3] *Walker* (supra) at paras 67-68.

[4] Ibid at paras 79-81. See also *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC), 2004 (11) BCLR 1125 (CC) at paras 123-131 (Ngcobo J)(Discussion of the purpose of the differential Parliamentary pensions and its impact on the complainant.)

adopted a relatively restrictive approach to the meaning of 'law of general application', it has resulted in a number of equality cases reaching the courts that cannot be looked at in terms of FC s 36. The result has been that some of the broader considerations such as administrative difficulty have been looked at within the purpose component of the fairness enquiry.[1] It is suggested that this approach is likely to result in the development of two streams of jurisprudence — the one dealing with cases involving laws of general application and the other without.[2] Different tests may lead to different results.

Third, it seems possible that some of the early cases in which the Court's equality jurisprudence was first shaped should not have been FC s 9(3) enquiries into unfair discrimination, but should rather have been examined in terms of FC s 9(2) analysis of positive measures to promote those who have been unfairly discriminated against. Thus, in both *Walker* and *Hugo*, the equivalent provision of FC s 9(2) in the Interim Constitution might have been the more appropriate vehicle to use. Of course, FC s 9(2) and FC s 9 (3) are both part of the equality right and must be understood in relation to each other. Further clarification by the Court of the relationship between the sections will assist in addressing some of the thorny issues around 'purpose' in the fairness and limitations enquiries.[3]

There may also be some overlap with the purpose enquiry and the FC s 9(1) examination of rationality and a legitimate government purpose: the former is, however, a more value-based enquiry than the latter. It has been suggested that the bright lines between the various sections of the equality right unnecessarily limit the reach of FC s 9(1) and treat FC s 9(3) as a gatekeeper of the right. It may be more appropriate to look at purpose according to different standards within each section of the right. Again, the interrelationship between the sections must be borne in mind as the jurisprudence may still develop a more nuanced approach to the right as a whole.

(iii) *Impairment of the rights or interests of the complainant and dignity*

This aspect of the fairness test combines the position of the complainant with the purpose of the provision, as well as any other factors that will assist in evaluating the extent of the effect of the discrimination on the complainant's interests and rights. It is in this cumulative examination that the focus turns to the impairment of dignity or a comparably serious impairment. The court will try here to establish degrees of unfair discrimination since 'the more invasive the nature of the discrimination upon the interests of the individuals affected by the discrimination, the more likely it will be held to be unfair'.[4] In *NCGLE v Home Affairs* the

[1] See *Hugo* (supra) at para 46. See also C Albertyn & B Goldblatt (1998) 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *SAJHR* 248, 269-70 ('Facing the Challenge').

[2] Albertyn 'Equality' (supra) at 4-54 — 4-55.

[3] For further discussion of Step 3 of FC s 9(3) analysis, see § 35.5*(i)* infra. For a discussion of FC s 9(2) and its relationship to FC s 9(3), see § 35.4 supra.

[4] *Hugo* (supra) at para 112 (O'Regan J).

Constitutional Court found that the discrimination against gays and lesbians was 'severe' since 'no concern, let alone anything approaching equal concern' was shown towards this group.[1] In application, this last stage is sometimes merely repetitious of the previous two parts of the fairness test.[2] The *Harksen* test talks about 'interests and rights' of the complainant, both of which must be examined. For example, in *Hoffmann*, the complainant had an interest in being allowed to apply for a job as a cabin attendant with SAA and suffered disadvantage as a result of his application being refused.[3] His rights to not be unfairly discriminated against on the basis of his HIV status and his right to dignity were implicated here. In *Khosa*, the group of permanent residents had an interest in receiving social grants while facing poverty and desperation without these, and had rights to social security, life, equality and dignity.[4]

The emphasis on dignity in the test and as the central underlying value informing the equality right has been explored in academic writing.[5] It is important to recognize that dignity itself is open to interpretation and that such interpretations range from notions of individual affront to more collective and material conceptions of the value.[6] In addition the words 'or of a comparably serious nature' mean that it is not only dignity that is implicated in an evaluation of the impact of unfair discrimination but other values and rights as well. The ongoing engagement with these values and rights in our equality jurisprudence means that we should not view the unfair discrimination test as fixed and immutable but rather as a living and developing vehicle to achieve the goals of the Constitution. Because of its contextual nature and its comparative features, the application of equality is likely to change over time.

(i) Step 3: Can the unfair discrimination be justified?

Having engaged in the fairness enquiry and concluded that there has been unfair discrimination, the court considers whether there are any limitations of the equality right that would justify the unfair law. This stage only applies to discrimination in terms of 'law of general application' since it is only such

[1] *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC), 2000 (1) BCLR 39 (CC) at para 54. See also *Zondi v MEC for Traditional and Local Goverment Affairs & Others* 2005 (3) SA 589 (CC), 2005 (4) BCLR 347 (CC) at para 94 (The impact of discrimination on the landless was also found to be severe.)

[2] See *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* 1999 (1) SA 6 (CC), 1998 (1) BCLR 1517 (CC) at para 26.

[3] *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC).

[4] *Khosa & Others v Minister of Social Development & Others; Mahlaule & Another v Minister of Social Development & Others* 2004 (6) SA 505 (CC), 2004 (6) SA 569 (CC)('*Khosa*') para at 44.

[5] See § 35.1*(d)*(i). supra.

[6] For a discussion of the values underlying the equality right, see § 35.1*(d)* supra. See S Woolman 'Dignity' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 36; S Liebenberg 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 *SAJHR* 1.

discrimination that may be justified under FC s 36.[1] In *Harksen*, the Constitutional Court said that this final stage will 'involve a weighing of the purpose and effect of the provision in question and a determination as to the proportionality thereof in relation to the extent of its infringement of equality'.[2]

The relationship between unfairness and justification has been described as a 'paradox' since it seems impossible that something that violates the right to equality would be reasonable and justifiable in a society based on equality. The focus of the unfairness test is the impact on the complainant and is a more 'moral' enquiry concerning the infringement of the person's rights. The limitations enquiry looks more widely at the broader social interests implicated in the case and may involve a balancing of rights. It is here that administrative, financial and other considerations relevant to the pursuit of valuable public policy could be taken into account.[3] There are very few examples of decisions where unfair discrimination was found to be justified. In *Lotus River, Ottery, Grassy Park Association v South Peninsula Municipality* the Cape High Court found that the raising of rates and service charges, while unfair, was justified.[4] In the minority decision of Ngcobo J in *Khosa*, the failure to extend social assistance grants to adult permanent residents was held to be justifiable: the state had legitimate financial constraints and permanent residents were expected to be self sufficient.[5] Although he analyzed the matter as a violation of FC s 27, Ngcobo J said that treating this dispute as an equality challenge would have led to the same result.[6] In contrast, the majority decision of Mokgoro J found that the cost implications of extending grants to permanent residents could not justify the unfair discrimination or the violation of permanent residents' right to social security in FC s 27. The Court scrutinized the state's financial arguments and found that the relatively small costs involved did not justify a limitation of the rights.

There has been some overlap between the unfairness enquiry and this stage of the test.[7] The unfairness test in *(b)* looks at the nature of the provision and its purpose. Thus, while the overall focus of the unfairness test is on the impact on the complainant, it is here that the nature and the purpose of a measure will be examined. The FC s 36 enquiry also looks at the nature and purpose of the limitation.

[1] See S Woolman & H Botha 'Limitations' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 34.

[2] *Harksen v Lane NO* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 52.

[3] Ibid.

[4] 1999 (2) SA 817 (C)(Only case on record in which FC s 36 justified an unfair discrimination finding under FC s 9.).

[5] *Khosa* (supra) at paras 114-34.

[6] Ibid at para 102.

[7] But see Woolman & Botha 'Limitations' (supra) at § 34.5*(b)*(FC s 36 analysis adds nothing, in almost all equality cases, to analysis already undertaken in terms of unfair discrimination analysis under FC s 9(3) or FC s 9(4). The reason, they contend, is that the arguments in justification canvassed in terms of FC s 9 invariably exhaust the arguments that might be offered in terms in FC s 36. As the unfair discrimination test is currently constructed, FC s 36 does not offer meaningful space for the justification of unfair discrimination.)

While we believe that there can be some a conceptual separation between the two enquiries, where there is no law of general application, FC s 36 does not apply, and the *(b)* part of the fairness test sometimes leads to a merging of the 'moral' and policy considerations.[1] In *Hugo*, the Court looked at factors such as cost and administrative burden in deciding that the Presidential pardon (not a law of general application) that excluded men was not unfair. Similarly, in *Hoffmann*, SAA's commercial interests were considered but did not justify overriding the rights of the HIV-positive complainant to be considered for a job. It seems that FC s 9(3) cases fall into two categories — those where a FC s 36 enquiry follows the finding of a rights violation and those where FC s 36 is not implicated. The former will preserve the boundary between fairness and justification while the latter is likely to blur this boundary.[2]

(j) Evaluation of the application of the FC s 9(3) test

The test of unfair discrimination was developed quite early, in *Harksen*, in the Court's existence. Since then it has been followed closely by the Court in a relatively large number of cases. Most cases have resulted in a finding of unfair discrimination in favour of the complainant. The Constitutional Court has repeatedly protected the rights of marginal groups such as gays and lesbians and at times the rights of poverty-stricken non-citizens in a number of thoroughly contextual enquiries. Notable exceptions where (privileged) complainants failed include *Hugo* and *Walker*. The other important cases concerning unsuccessful claims are *Harksen, Jordan*, and *Volks*. Interestingly, all three concerned claims on the ground of indirect gender discrimination. *Harksen* and *Volks* also concerned claims of marital status discrimination. In all three cases, the Constitutional Court was very divided, with the dissents reflecting the views of the same judges (O'Regan J and Sachs J in all three cases and Mokgoro J (who did not sit in *Jordan*) in *Volks* and *Harksen*)). This division in the Court seems to reflect a difference in the contextual application of the FC s 9(3) test: the majority adopts a rather formal approach to equality analysis; the minority adopts a more substantive approach.

In *Union of Refugee Women v The Director: The Private Security Industry Regulatory Authority,* the majority (six judges), while taking care to look at the context of refugees' lives, found that discrimination against them (as opposed to permanent residents and citizens) was not unfair. Again, Mokgoro and O'Regan JJ in a minority judgment (four judges) differed in their finding that refugees had been unfairly discriminated against in relation to permanent residents and as a vulnerable group whose dignity had been impaired. Their reading of the impugned legislation was that it contained an unstated stereotype that refugees are less

[1] Albertyn & Goldblatt 'Facing the Challenge' (supra) at 269-72.
[2] Albertyn 'Equality' (supra) at 4-58 — 4-59.

trustworthy than South Africans. The consideration of impact took account of a wider range of contextual issues than did the majority and seems to have come to a deeper understanding of vulnerability.

In *Jordan,* the majority failed to appreciate the gendered nature of the sex work industry and chose to focus formalistically on the fact that the male customer and the female sex worker, as well as both male and female sex workers, were equally criminalized by the challenged legislation. The minority of five judges found that sex workers faced greater sanctions than did their clients, and that since sex workers were generally women and clients men, indirect discrimination had occurred. The minority was able to see this distinction 'matter[ed]' and explored the position of sex workers in society, ie as social outcasts and temptresses.[1]

Volks concerned a claim by a surviving domestic partner to maintenance in terms of the Maintenance of Surviving Spouses Act. The majority had little sympathy for the middle class complainant: although it did acknowledge the vulnerability of poor women who find themselves in unregulated domestic partnerships. The judgment foundered on its inability to look at the matter historically and systemically. The focus on the special place of marriage led to an unwillingness to examine conservative ideas of the family. This focus on a person's choice to marry or not is at odds with any real understanding of the constraints on women's choices within intimate relationships, particularly when they are already disadvantaged and poor.[2]

35.6 FC s 9(4): Unfair Discrimination by Private Persons

FC s 9(4) extends the prohibition against unfair discrimination in FC s 9(3) to all persons other than the state. Thus private individuals or corporations can commit acts that discriminate unfairly. Since the limitations clause (FC s 36) does not apply to conduct, the full enquiry into whether there has been a violation of the right generally takes place within the fairness test.[3] The purpose element of the fairness test will include justificatory considerations such as cost and administrative burden that might otherwise have formed part of the limitations enquiry. This section has not yet been considered by the Constitutional Court as equality cases have involved challenges to national legislation or other acts of the state. There have however been a small number of High Court cases where FC s 9(4) challenges have been considered.[4] For example, *Minister of Education v Syfrets Trust*

[1] *Jordan* (supra) at para 64.

[2] See C Albertyn 'Defending and Securing Rights through Law: Feminism, Law and the Courts in South Africa' (2005) 32 *Politikon* 217, 229-30; C Lind 'Domestic Partnerships and Marital Status Discrimination' (2005) *Acta Juridica* 108.

[3] But see Woolman & Botha 'Limitations' (supra) at § 34 (Not all private discrimination takes place in terms of unregulated conduct. If the private discrimination is supported by law, then it is not — logically — impossible to have regard to the justificatory framework offered by FC s 36.)

[4] *Radio Pretoria v Chairman, Independent Communications Authority of South Africa, & Another* 2003 (5) SA 451 (T) at para 24.4 (High Court rejected argument that the Independent Broadcasting Authority could not invoke the provisions of FC s 9(4) in assessing the discriminatory actions of a radio station.)

Ltd found that, since the provisions of FC s 9(4) apply horizontally, a charitable trust that covered 'all natural and juristic persons' fell within the ambit of the section.[1]

35.7 FC s 9(5): Presumption of Unfairness

This section creates a rebuttable presumption that discrimination on a ground listed in FC s 9(3) is unfair unless it is established that it is fair.[2] This presumption fits into the FC s 9(3) test at the beginning of step 2 (the enquiry into fairness). Thus, having moved from step 1 where discrimination on a ground has been established, it is necessary to see whether such discrimination is based on a listed ground. If it is, it is presumed to be unfair and the onus shifts to the party against whom the complaint of unfair discrimination has been made, to prove that the discrimination was not unfair. This section encourages applicants to fit their discrimination into listed categories so as to benefit from the presumption. It aims to assist those who are already part of recognized vulnerable groups. A number of vulnerable groups that have not managed to benefit from this presumption because they do not fall within a listed ground have still managed to prove unfairness.[3] The court will look at a range of evidence including statistical and sociological evidence and can also take judicial notice of discrimination as it manifests in society.

35.8 The Promotion of Equality and Prevention of Unfair Discrimination Act

FC s 9(4) requires that national legislation be enacted to prevent or prohibit unfair discrimination. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2001 (PEPUDA) provides measures for the promotion of equality in addition to preventative/prohibitory provisions.

The Act 'is intended to give substance to the constitutional commitment to equality, by providing a legal mechanism with which to confront, address and remedy past and present forms of incidental, as well as institutionalized or structural, unfair discrimination and inequality'.[4] The Act is divided into two main sections dealing, first, with measures to prevent unfair discrimination (Chapters 2 and 3) and second, with measures to promote equality (Chapter 5). It also

[1] 2006 (10) BCLR 1214 (C) at paras 27-32.

[2] *Khosa* (supra) at para 68.

[3] These successful groups include the non-citizens in *Khosa* and the HIV-positive complainant in *Hoffman*. See § 35.5*(f)* supra.

[4] C Albertyn, B Goldblatt & C Roederer (eds) *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act* (2001) 3. For a critique of PEPUPA's framework for unfair discrimination analysis, and Albertyn, Goldblatt and Roederer's gloss on this test, see S Woolman 'Freedom of Association' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) § 44.2*(b)*.

contains provisions specifically dealing with hate speech, harassment and publication and dissemination of unfairly discriminatory information (ss 10-12). It establishes Equality Courts (Chapter 4) at magistrates' court and High Court level and sets out the procedures to be followed in such courts. The wide range of remedies available to these courts is designed to encourage a creative, informal judicial approach that is sensitive to the circumstances of each case and the needs and interests of the parties.[1]

The promotion measures of the Act have barely been used. No more than a trickle of unfair discrimination cases have reached the courts, and only a small number of these cases have been reported. However, it is likely that a larger body of jurisprudence will develop as public awareness of the courts increases.

The reported Equality Court judgments include: *George v Minister of Environmental Affairs and Tourism*, dealing with the jurisdiction of the equality court;[2] *Du Preez v Minister of Justice and Constitutional Development*, concerning the shortlisting criteria for the post of a regional court magistrate (which were found to constitute unfair race and gender discrimination in terms of PEPUDA);[3] and *Pillay v KwaZulu-Natal MEC of Education & Others*, concerning an appeal from an Equality Court on the subject of a girl's right to wear a nose stud at school in pursuance of her culture and religion.[4]

[1] See N Bohler-Muller 'What the Equality Courts Can Learn from Gilligan's Ethic of Care: A Novel Approach' (2000) 16 *SAJHR* 623. See also A Kok 'Motor Vehicle Insurance, The Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act' (2002) 18 *SAJHR* 59; S Teichner 'The Hate Speech Provisions of the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000: The Good, The Bad and the Ugly' (2003) 19 *SAJHR* 349; N Bohler-Muller 'The *Promise* of Equality Courts' (2006) 22 *SAJHR* 380.

[2] 2005 (6) SA 297 (EqC). The judgment was confirmed on appeal by the Supreme Court of Appeal. See *Minister of Environmental Affairs and Tourism v George* [2006] SCA 57 (RSA). See also *Minister of Justice v Language* Durban and Coast High Court Case No 14181/2005 (Unreported judgment, 20 March 2006).

[3] 2006 (5) SA 592 (EqC).

[4] 2006 (10) BCLR 1237 (N). At the time of writing, this case was awaiting judgment from the Constitutional Court.