CHAPTER NINE
THE CONSTITUTIONAL DIMENSIONS OF AFFIRMATIVE ACTION IN SA

9.1 Affirmative Action and the Equality Principle in SA

Inequality is often cited as the biggest challenge facing development and transformation in post-apartheid SA. In light of the history of systematic discrimination, the importance of the principle of equality in SA is reflected in the very first section of its' Constitution.[1] To ensure the protection of this and other fundamental rights the South African Constitution provides for a Bill of Rights.[2]

The theme of "an open and democratic society based on human dignity, equality and freedom" runs like a golden thread through the Constitution and has particular importance because of the historical context in which it arose.[3] The reason for the importance of these values is because they are considered to be the very "antithesis of those features which defined apartheid".[4] It has been stated that —

> "The South African Constitution is primarily and emphatically an egalitarian Constitution. The supreme laws of comparable constitutional states may underscore other principles and rights. But in light of our own particular history, and our vision for the future, a Constitution was written with equality at its centre. Equality is our Constitution's focus and its organising principle."[5]

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1 The Preamble to the Constitution of South Africa states that "the achievement of equality is one of the founding values of the Republic". The Preamble further speaks of "the need to create a new order in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms".

2 Section 7(1) of the South African Constitution.

3 Van Reenen T Equality, Discrimination and Affirmative Action — Section 9 of the Constitution (1997) SAPR 12.

4 Chaskalson M (ed) Constitutional law of South Africa (1999) at ch 14 (Chaskalson).

5 Judge Kriegler *President of the Republic of South Africa v Hugo* (1997) 6 BCLR 708 (CC) at para 74.

This Constitutional commitment to equality emerges directly from the inequalities and injustices of the past.[6] Policies of segregation and apartheid, as discussed in Part I, has led to the deliberate exclusion of black people in all aspects of social, political and economic life.[7]

The right to equality is therefore central to the Bill of Rights and it is established as the first substantive right. Given its pivotal importance, "equality", is to be pursued in the building of a democratic and just society.[8] In the workplace, affirmative action has become the drive to materialise this value of equality. As has been shown in Part III above, it seeks to achieve this through the removal of any conditions that violate the right to equality. In Part II of this thesis it was discussed how equality is a broad term that invokes the concepts of impartiality, equitability, equity, fairness and justice. Embodied in the concept of equality, as enshrined in the Constitution,[9] is both formal and substantive equality.

9.2 How the CC Justifies Affirmative Action

In SA, the repeal of discriminatory legislation has created formal conditions for the equality of all South Africans. However, recognising that injustices of the past has led to inequalities and that these inequalities cannot be addressed by treating all persons equally at all times,[10] the Constitution has provided for a substantive approach to equality.[11]

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6 Albertyn C, Goldblatt B and Roederer C Introduction to the Prevention of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (2001) (Albertyn *et al*).

7 The President of the CC has said that "the socio-economic rights in our Bill of Rights represents a commitment to addressing conditions of poverty and inequality in our society" in *Soobramoney v Minister of Health, Kwa-Zulu Natal* (1997)12 BCLR 1996 (CC) at para 8-9.

8 Department of Public Service and Administration — Ministry For Public Service and Administration Green Paper — A Conceptual Framework For Affirmative Action And The Management of Diversity in The Public Service Notice 851 (1997) (Department of Public Service and Administration).

9 Constitution of the Republic of South Africa Act No 108 of 1996 (The South African Constitution).

10 *President of the Republic of South Africa v Hugo* (1997) 6 BCLR 708 (CC).

Formal equality is based on the Aristotelian concept of equality which means to treat like persons alike and unlike persons unlike.[12] Formal equality assumes that a just legal order has provided all persons with equal rights and all persons are able to compete on an equal footing. Formal equality ignores actual social and economic disparities between individuals and groups in society.[13] Its underlying logic is that by extending equal rights to all, inequality has been eliminated. Of significance is that formal equality is blind to socio-economic disparities left behind once formal equality declares that all persons are "equal before the law".

The task of interpreting the Bill of Rights will fall primarily on the Constitutional Court (CC). Given the importance and pre-eminence of the right to equality it becomes important to look at how the CC has interpreted and given meaning to it. In one of the first cases dealing with equality under the South African Constitution, *Brink v Kitshoff* (1996), Judge O'Regan described the right to equality in the following terms —

> "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 ninety percent of the landmass of South Africa; senior jobs and access to 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 light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted."

This early decision was important in that it was made clear that the right to equality had to be understood in the context of South Africa's own history. This conception of equality sees the primary purpose of the provision being that of eradicating past patterns of disadvantage. As such, the court signaled its intention to move beyond the narrow

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[11] Section 9 of the South African Constitution.

[12] Scales A C The emergence of feminist jurisprudence — an essay in Smith P (ed) Feminist jurisprudence (1993).

[13] For example, affirmative action measures would not be acceptable under this approach.

meaning of equality (for e.g., formal equality) to a wider meaning of equality (substantive equality).

The formal law thus treats all individuals the same regardless of their specific circumstances. In the *National Coalition for Gay and Lesbian Equality*[14] case Sachs J held that —

> "[E]quality should not be confused with uniformity; in fact, uniformity can be the enemy of equality. [Equality] does not presuppose the elimination or suppression of difference."[15]

This case struck down section 25(5) of South Africa's Aliens Control Act 96 of 1991 as unconstitutional. That subsection did not give partners in permanent same-sex life partnerships the same benefits it extended to "spouses" (for e.g., persons married to each other). The CC decided that gays and lesbians who are permanent South African residents and who have foreign national same-sex life partners should receive similar benefits of easier access to permanent residence as married heterosexual couples. Using the rights of equality and dignity of the permanent South African residents, the CC held that this section of the Aliens Control Act conveyed the message that gays and lesbians lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected and constituted an invasion of their dignity.

It has been argued that sometimes it is the very essence of equality to make distinctions between groups and individuals in order to accommodate their different needs and interests.[16] It would therefore seem that equality is not simply a matter of likeness but also a matter of difference.[17] A substantive approach to equality does not presuppose a just social order. It requires that actual social and economic conditions that have led to

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14 *National Coalition for Gay & Lesbian Equality & Another v Minister of Justice & Others* (1999) 1 SA 6 (CC).

15 *Ibid* at para 132.

16 *R v Big Drug Mart Ltd* (1985) ISCR 295.

17 Chaskalson *op cit* 4 at ch 14.

inequalities between groups and individuals be considered. This can be done by accepting firstly, that past patterns of discrimination have led to inequalities between groups and individuals, and secondly, that by treating all persons alike equality will not be achieved, a substantive concept of equality is therefore condoned. A substantive interpretation of the right to equality recognises the inequalities of past discrimination and therefore makes allowances for positive discrimination or affirmative action measures so as to achieve equality.

Sheppard notes that whether one sees affirmative action clauses as exceptions to or interpretive of the equality provisions, it can affect two legal issues.[18] She argues that if we see such clauses as exceptions to human rights we might be inclined to interpret them narrowly in line with the notion that legislation conferring human rights should be interpreted broadly and in favour of those rights.[19] If equality is restrained by the affirmative action clause then section 9 of the Constitution should be strictly construed.

Affirmative action in SA has constitutional backing and is therefore, not an issue to be decided by the courts.[20] However, the constitutionality of the EEA depends on how the affirmative action provision as contained in section 9(2) of the Constitution is viewed in relation to the right not to be unfairly discriminated against.[21] The CC has specifically stated in the *Brink*[22] case that the equality provision could be used not only to prohibit discrimination but also to remedy the effects of past discriminatory practices. Further, there can be no affirmative action if a formal interpretation of the right to equality is adopted, since the positive discrimination against a particular person would lead to the

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18 Sheppard C Litigating the Relationship between Equity and Equality (1993) at 19-20.

19 Smith N Affirmative Action Under the New Constitution (1995) South African Journal on Human Rights at 84-101.

20 See Part III of this thesis.

21 Van Eck B P S Some Thoughts on the Constitutionality of the Employment Equity Act 55 of 1998 (1999) *De Jure* V(32) No.1 at 160–168.

22 *Brink v Kitshoff NO* (1996) 4 SA 197 (CC).

unequal treatment of that person.[23] On the contrary, a substantive interpretation of the right to equality recognises the inequalities of past discrimination and therefore makes allowances for positive discrimination so as to achieve equality.

If affirmative action is seen as an exception to the right to equality then this concept of equality, which does not require affirmative action, cannot be justified in terms of the principles that the Constitution is based on. In short therefore, SA with its legacy of unequal distribution along race, gender and disability lines has created an unequal playing field very largely through its discriminatory public spending policies. Thus affirmative action can be seen as a means to enable the disadvantaged to compete competitively with the advantaged of society. Its significance is to give real meaning to employment equity for the disadvantaged through the pursuit of substantive equality.[24]

9.3 Understanding the Relationship Between Equality and Discrimination

An understanding into the relationship between the equality right and the right not to be unfairly discriminated against is essential to a broader understanding of the right to equality. Section 9 of the Constitution provides a detailed equality provision which includes the right to equality before the law and equal protection and benefit of the law; freedom from unfair discrimination; the provision for affirmative action measures; the elimination of unfair discrimination; and the enactment of national legislation to prohibit unfair discrimination. This provision is an indication of the Governments commitment to transformation and rebuilding of the South African society.

The development of the South African constitutional equality jurisprudence, with the anti-discrimination provision at the very heart of the fundamental right to equality, has been a task, which has been undertaken by the CC, with the assistance of the various High Courts of SA.[25] The CC continued by interpreting the right to equality and the

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[23] Maxwell Solomon Regulation of Affirmative Action by the EEA 55 of 1998 (1992) SAMLJ V(II) 231 at 237.

[24] Department of Public Service and Administration *op cit* 8.

[25] This is including the LC of SA.

prohibition of unfair discrimination in a largely South African context, without relying extensively on foreign comparative jurisprudence. South African law recognises that not every differentiation will be discriminatory in the sense that it will be prohibited.

(9.3.1) The Meaning of Discrimination

In looking at this relationship, the first question is what is meant by the term "discrimination". It should be noted that differentiation among employees is not synonymous with discrimination in the legal sense. In a landmark decision concerning pay inequity in the context of benefit funds, the LC held that discrimination is unfair "if it is reprehensible in terms of society's prevailing norms. Whether or not society will tolerate the discrimination depends on what the object of the discrimination is and the means used to achieve it. The object must be legitimate and the means proportional and rational."[26]

In *Prinsloo v Van der Linde and Another*,[27] the CC interpreted "discrimination" as incorporating a "pejorative meaning relating to the unequal treatment of people based on attributes or characteristics attaching to them".

A similar approach was followed in PEPUDA, where "discrimination" is defined as —

> "any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly —
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> (a) imposes burdens, obligations or disadvantage on; or
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> (b) withholds benefits, opportunities or advantages from,
>
> any person on one or more of the prohibited grounds".[28]

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[26] *Leonard Dingler Employee Representative Council & Others v Leonard Dingler (Pty) Ltd & Others* (1997) 11 BLLR 1438 (LC).

[27] *Prinsloo v Van der Linde and Another* (1997) 3 SA 1012 (CC) at par 31.

[28] See section 1(i)(viii) of PEPUDA and see *City Council of Pretoria v Walker* (1998) 2 SA 363 (CC); 1998(3) BCLR 257 (CC). It should be noted that PEPUDA does not apply to "any person to whom and to the extent to which the EEA applies. The EEA applies to "all employees" (with limited exceptions in the military and security services) and in respect of all "employment policies and practices", as defined, and will therefore be the primary point of reference for purposes of this paper.

McIntyre J in *Andrews v The Law Society of British Columbia*,[29] held that for a distinction to amount to a discrimination against an individual or group, the distinction must be one "which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed on others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society".[30]

Section 9 of the Constitution provides that the State may not unfairly discriminate directly or indirectly against anyone on one or more of listed grounds including, but not limited to race, gender and sex.[31] It has been held that unfair discrimination is any type of unjustified differentiation on one or more of the grounds as listed in section 6 of the EEA, i.e., "unfair discrimination will have been established where the "differentiation" is not based on an objective ground and such differentiation has the effect of nullifying or impairing the recognition, enjoyment or exercise by all persons on an equal footing of all rights and freedoms".[32] From the definition of discrimination, one can see that discrimination can be either direct or indirect.[33]

Direct discrimination is easily recognisable and consists of unfavourable or differential treatment on the basis of one or more of the prohibitory grounds listed in section 6. Indirect discrimination is a more veiled form and is present where a rule exists and on the face of it seems totally neutral, but upon application of the rule it has an adverse impact

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29 *Andrews v The Law Society of British Columbia* (1989) 1 SCR 143.

30 *Ibid* at 174.

31 Section 9(3) of the South African Constitution.

32 *Association of Professional Teachers & Another v Minister of Education and Others* (1995) 16 ILJ 1048 (IC).

33 For a more involved discussion on the test that the court uses in deciding whether or not an instance of discrimination is unfair or not look at the case of *Harksen v Lane and Others* (1998) 1 SA 300 (CC). The *Harksen* test requires the Court, in its determination of the unfair discrimination enquiry to consider first whether there has been discrimination at all. The CC has said that if the differentiation in question is based on a specified or additional ground, it is presumed to be discrimination.

on certain individuals or groups of people.[34] The prohibitive grounds listed in section 6(1) should not be regarded as the only grounds of discrimination that exist and any other arbitrary ground, provided that the complainant establishes its arbitrariness, may be declared discriminatory.[35]

It should also be noted that a claim for unfair discrimination may be based on one or more of the prohibitive grounds.[36] The word unfair does not simply distinguish between different kinds of differentiation. It actually sorts permissible discrimination from impermissible discrimination, where discrimination itself bears a pejorative meaning.[37] The courts have not adopted a neutral meaning of discrimination.[38] Discrimination is used in its pejorative sense because of its historical baggage.

The equality provision does not prevent a government from making a classification. The *reasons* for these classifications must however be legitimate. The equality clause seeks to prevent the unequal treatment of people "based on such criteria which may result in the constructions of patterns of disadvantage such as has occurred only too visibly in our history".[39] Discrimination will therefore be unfair if it impairs or is likely to impair a fundamental human dignity of any individual or adversely affects them in any comparably serious manner.[40] The prohibition of unfair discrimination is based on the premise that all persons will be accorded equal dignity and respect regardless of their

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34 *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd & Others* (1998) 19 ILJ 285 (LC).

35 See the case of *Larbi-Odam & Others v Member of the Executive Council for Education (North-West Province) & Another* (1998) 1 SA 745 (CC) where the CC regarded citizenship as an arbitrary ground for discrimination.

36 Basson A C Regulation of Unfair Discrimination by the Employment Equity Act 55 of 1998 (1999) SMLJ V(II) No.2 at 240-249.

37 Thompson & Benjamin South African Labour Law (2002) V(1) No. 42 at Part CC1.

38 *Prinsloo v Van der Linde* (1997) 6 BCLR 759 (CC).

39 *Harksen v Lane No and Others* (1997) 11 BCLR 1489 (CC) at para 49.

40 *Ibid* at para 50.

membership of particular groups.[41] The CC then overturned the decision of the court *a quo* in the *Larbi-Odams* case, which held that a certain regulation which unfairly discriminated against the appellants on the grounds of citizenship was justified in terms of section 33(1) of the Interim Constitution.[42]

Further, SA was the first country in the world to include sexual orientation in its constitution as a protected category. The equality clause in the Constitution bans private-sector discrimination, specifying that "no other person may unfairly discriminate directly or indirectly against anyone on one or more of the [above] grounds". In October, 1998 the CC, declared sodomy laws unconstitutional on the basis of the equality clause, finding them to violate basic rights to dignity and equality as well as privacy. For equality to exist, discrimination must not be unfair.

(9.3.2) Problems with Proving Discrimination

To qualify as discrimination on one or more of the listed grounds, it is furthermore necessary to establish a link between the prejudicial treatment complained of and the alleged reason for such treatment. It has been argued that the application of a causation test "misconstrues the nature of the constitutional and legislative approach to unfair discrimination" embodied in PEPUDA and in the approach of the CC.[43] A causal link, however, is implicit in the words "on one or more of the prohibited grounds" used in PEPUDA and the similar requirements of the Constitution and the EEA.[44]

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41 *Prinsloo v Van der Linde* (1997) 6 BCLR 759 (CC) at para 32.

42 *Larbi-Odam & Others v Member of the Executive Council for Education (North-West Province) & Another* (1997) 12 BCLR 1655 (CC).

43 De Villiers C Addressing Systemic Sex Discrimination — Employer Defences to Discrimination in Canada and South Africa (2001, January 18-20) at http://www.uct.ac.za/depts/lrgru/equality.html last visited 30/06/05.

44 In *Woolworths (Pty) Ltd v Whitehead* (2000) 3 SA 529 (LAC) at par 24.
In a controversial decision, the LAC accepted the principle that there must be a connection between the alleged ground of discrimination and the prejudice suffered by the applicant.

The underlying difficulty in this context has been one of proof. Most of the existing case law arose in terms of the prohibition of unfair discrimination previously contained in the LRA[45] which required the applicant to prove both the existence of a discriminatory act and its unfairness. Given the notorious difficulty of proving facts to which the applicant may have no access, various claims of unfair discrimination brought in terms of the LRA have failed for lack of evidence.[46]

Unfair discrimination is particularly difficult to prove and it is for this reason that courts and legislators have grappled with the incidence of the burden of proof and established structures of proof different from those in the ordinary course in order to ensure that justice is done in discrimination claims.[47] Bearing in mind that the reasons for discrimination fall within the special and exclusive knowledge of the employer, it has been held that this is a permissible factor in the determination of where the onus should lies in circumstances when the onus is not fixed or certain.[48]

The Constitution provided some assistance to applicants by providing that, where discrimination is shown to have taken place on one of the prohibited grounds, unfairness

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45 Item 2(1)(a), schedule 7 to the LRA.

46 In general, the South African courts have shown what many regard as excessive deference to employers' operational decisions. In the present context see *Swanepoel v Western Region District Council & Another* (1998) 9 BLLR 987 (SE); *Walters v Transitional Local Council of Port Elizabeth & another* (2001) 1 BLLR 98 (LC) at pars 35-39, as but two instances where the difficulty of proving discrimination on the part of an employer is demonstrated. However, there have been exceptions. In *Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd & others* (1997) 11 BLLR 1438 (LC), it is submitted, the approach to the question of proof was more consistent with the purpose of the legislation and the Constitution. See also *Ntai & Others v South African Breweries Ltd* (2001) 2 BLLR 186 (LC); *Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 3 BLLR 311 (LC) at para 40-58.

47 Section 13 of PEPUDA and section 11 of the EEA.

48 *Eskom v First National Bank of Southern Africa* (1995) 2 SA 386 (A).

will be presumed unless the contrary is proven.[49] "Sex", "pregnancy" and "gender" are all included among the so-called listed grounds.[50]

Perhaps the clearest illustration of the problem was provided by the decision of the LAC in *Woolworths (Pty) Ltd v Whitehead*[51] where the refusal of an employer to offer more than a temporary position to a well-qualified applicant upon learning of her pregnancy was upheld on the grounds that the applicant had failed to prove that the employer's decision was a result of her pregnancy.

It was left to the EEA to address the problem by providing that whenever unfair discrimination on one of the listed grounds is alleged, "the employer against whom the allegation is made must establish that it is fair".[52] It has been argued that "whilst the wording of the section is less than clear, the onus placed on the applicant appears to be reduced from having to prove "discrimination" on a balance of probabilities to establishing a set of facts from which an inference of discrimination on one or more of the prohibited grounds can be drawn".[53]

This thesis will now look at the three most important cases and examine how the CC has interpreted and applied the substantive equality right thereby justifying affirmative action programmes.

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49 Section 8(4) of the Interim Constitution and s 9(5) of the South African Constitution.

50 The remaining "listed grounds" are race, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. In the case of an unlisted ground the onus is on the applicant to establish the unfairness of such ground, which must have "the potential to impair fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner" as in the case of a listed ground. See the case of *Harksen v Lane NO* 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) at par 53.

51 *Woolworths (Pty) Ltd v Whitehead* (2000) 3 SA 529 (LAC).

52 Section 11 of the EEA.

53 Garbers C F C Proof and Evidence of Employment Discrimination under the Employment Equity Act 55 of 1998 (2000) SA Mercantile Law Journal No. 12 136. Similarly, PEPUDA requires the applicant to make out a *prima facie* case of discrimination in order to reverse the burden of proof (see section 13 of PEPUDA).

9.4 The Development of the South African Constitutional Equality Jurisprudence

It wasn't until the following year (1997) when the full test for equality, and the circumstances under which different treatment may constitute unfair discrimination was finally articulated by the CC. In the case of *Harksen v Lane*,[54] the CC laid down the test for determining whether or not a certain act or legislative provision is unconstitutional for want of compliance with the equality clause. In October 1997, the Court decided on the constitutionality of section 21 of the Insolvency Act 24 of 1936.[55] Jeanette Harksen challenged the sheriff's attachment of her clothes, jewellery and other property as being part of her husband's insolvent estate on two grounds.

The first ground was that section 21 violated the right to equality before the law and the right not to be unfairly discriminated against as protected by the Constitution. Secondly, that the attachment infringed on the right not to have ones property expropriated without compensation in terms of section 28(3) of the Constitution. The matter was decided in terms of the Interim Constitution.

When determining the fairness or otherwise of a legislative provision or act that is challenged on the basis of it being in conflict with the constitutional right to equality, the CC has adopted a three stage approach —

(i) It will firstly seek to establish discrimination;

(ii) Once discrimination has been established, the unfairness thereof will then have to be established;

(iii) Thirdly, even if the discrimination is found to be unfair, the next step will seek to justify it in terms of the limitations clause.[56]

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54 *Harksen v Lane No & Others* (1997) 11 BCLR 1489 (CC).

55 *Ibid*. In terms of section 21, on the sequestration of an insolvent's estate, temporary ownership of the solvent spouse's assets vests with the Master or with the trustee of the insolvent spouse's estate. In order to have the assets returned, the onus rests on the solvent spouse to prove his/her right to the assets.

56 *Harksen v Lane No and Others* (1998) 1 SA 300 (CC) at para 54; (1997) 11 BCLR 1489 (CC) at para 53.

(i) Establishing differentiation with a rational connection to its aim

The first question is whether or not the act or legislative provision in question differentiates or distinguishes between people or categories of people. In other words, one has to look at whether or not the measures taken make a difference in its application between people or groups of people.[57] If it does then there must be a rational connection between the differentiation and a legitimate government purpose.[58] In the absence of a rational connection, the differentiation falls foul of section 9(1) of the Constitution and the measure is unconstitutional.[59] For example, if a local authority increases the sewage levies in one of its areas because it wants to create room in its budget for the organisation of the annual municipal fair, there is no rational connection between the measure and its aim. If a rational connection between the differentiation and its purpose is established, the enquiry proceeds to the next question.[60]

The CC judgment in S *v Ntuli*[61] is an example of a categorisation not being rationally linked to a governmental objective. The CC had to consider the validity of sections of the Criminal Procedure Act, 1977[62] which differentiated between appellants in prison who were not represented and other appellants. Only appellants in prison had to obtain a certificate from a judge certifying that there are reasonable grounds for the review, prior to pursuing an appeal. The court held that these provisions infringed both the right to have recourse by way of appeal or review to a higher court [63] and the right to equality before the law.[64]

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57 *Prinsloo v Van der Linde* (1997) 6 CLR 759 (CC) at para 25.

58 *Harksen v Lane No and Others* (1997) 11 BCLR 1489 (CC) at para 55.

59 *Ibid* at para 42 and 44.

60 De Visser Jaap Equality and differentiated electricity rates and selective debt collection — *City Council of Pretoria v Walker Local Government Law Bulletin* (1999) V(1) No. 3 at 1-5.

61 S *v Ntuli* (1996) 1 SA 1207 (CC).

62 Section 309 read with section 305 of the Criminal Procedure Act of 1977.

63 Section 25(3)(h) of the Interim Constitution of the RSA.

64 Section 8(1) of the Interim Constitution of the RSA.

The effect of requiring prisoners who were unrepresented to obtain a certificate and not requiring others to do so, meant that prisoners who were represented or persons who had been fined or who had received suspended sentences were treated more favourably by the law. Justice Didcott found that this violated the right to equality rather than the prohibition against unfair discrimination. The court held that the right to equality, at the very least, guarantees to everybody equal treatment by our courts of law. This guarantee was violated by the act which imposed greater burdens upon unrepresented prisoners in pursuing appeals.

The CC[65] in the *Harksen* case has held that the provision in the Interim Constitution [66] envisaged two categories of differentiation. The first is differentiation on one of the specified grounds and the second is differentiation on a ground that is analogous to the specified grounds. The court has held that discrimination in SA means "treating people differently in a way which impairs their fundamental dignity as human beings".[67] All that the applicant is required to do in order to prove discrimination is to objectively establish that the differentiation is either on the specified grounds or on analogous grounds. An analogous ground has been defined as one which is "based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them seriously in a comparably serious manner".[68]

However, the prohibition is against *unfair* discrimination. Only discrimination that is unfair will be proscribed in terms of anti-discrimination law. Therefore unfair discrimination is envisaged as that differentiation which is based on immutable personal characteristics and such differentiation is made arbitrarily and without any justification.

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65 *Prinsloo v Van der Linde* (1997) 6 BCLR 759 (CC) at para 31 and *Harksen v Lane* (1997) 11 BCLR 1489 (CC) at para 46.

66 Section 8(2) of the Interim Constitution of the RSA.

67 *Prinsloo v Van der Linde* (1997) 6 BCLR 759 (CC) at para 31.

68 *Harksen v Lane No and Others* (1997) 11 BCLR 1489 (CC) at para 46.

(ii) Establishing Unfair Discrimination

The determination whether or not a legislative provision or act amounts to unfair discrimination can be divided in two steps.

Firstly, one has to determine whether the differentiation amounts to discrimination. If the differentiation is based on one of the grounds listed in section 9(3), such as race, gender, sex, pregnancy etc., then discrimination has been established. If the differentiation is based on a ground not listed in section 9(3), the court will examine whether or not the ground for differentiation has to do with attributes and characteristics which, when manipulated, have the potential to degrade or dehumanise people.[69] These grounds are often based on biological attributes or characteristics which are outside of a person's control, or with ways in which people associate, express or practice religion or culture. It is important that section 9(3) prohibits the state from discriminating directly or indirectly.

Indirect discrimination occurs when a differentiation is being made on the basis of a ground that is neutral at first sight. The result of the use of that particular ground however is that persons belonging to a particular group are disproportionately affected.

Secondly, whether or not the discrimination is unfair has to be determined. If the discrimination, directly or indirectly, is based on one of the listed grounds, the court will presume that it is unfair. It is then up to the party defending the provision to prove that it was in fact not unfair. In the determination of whether or not the discrimination is unfair the courts look at the impact of the discrimination on the complainant and others in his or her situation, i.e., they look at the position of the persons affected and whether or not they belong to a "vulnerable" group, which, for example, has suffered from unfair discrimination in the past.[70]

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69 *Ibid* at para 53.

70 *President of the Republic of South Africa v Hugo* (1997) 6 BCLR 708 (CC) at para 41.

Other important factors that need to be taken into account in the question of unfairness relates to what the nature of the measure in question is and what is sought to be achieved by it. In other words, the court questions whether or not there is a good reason for the discrimination?[71] Further, one has to look at to what extent does the measure affect the rights or interests of the complainants and if it affects their human dignity.[72] The CC has affirmed that the complainant need not establish an intention to discriminate.[73] Therefore, the complainant need only show that the discrimination was unfair, whether presumed[74] proved, and not that the discrimination was intentional.

(iii) Is the unfair discrimination justified?

When it is concluded that a legislative provision amounts to unfair discrimination, it can still be saved by section 36 of the Constitution. Section 36 allows the limitation of the constitutional rights under certain conditions. In other words, even though the legislative provision violates the right to equality, it is still constitutional if it passes the test laid down in section 36. To pass constitutional scrutiny the person wanting to uphold the discriminatory section must prove that the legislative provision, which discriminates unfairly, is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". Section 36 then lists the factors that need to be taken into account. These include the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and any less restrictive means to achieve the purpose. Many of these considerations overlap with the considerations as to whether or not there is unfair discrimination.

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71 *Harksen v Lane No and Others* (1997) 11 BCLR 1489 (CC) at para 51.

72 *President of the Republic of South Africa v Hugo* (1997) 6 BCLR 708 (CC) at para 43.

73 1998 (2) SA 1 (CC) at para.43.

74 If the complainant establishes that the respondent did in fact discriminate on one of the listed grounds, the discrimination is presumed to be unfair until rebutted. The listed grounds in the Constitution [section 9(3)], the LRA [Schedule 7, Item 2(1)(a)] and the EEA [section 6(1)] includes race, culture, sexual orientation, sex, gender, pregnancy, marital status, ethnic or social origin, colour, conscience, belief, language and birth. The LRA and the EEA expand the listed grounds to include HIV/AIDS and family responsibility.

The purpose and effect of the provision in question will be weighed.[75] However, section 36 explicitly requires proportionality. Therefore, the law should impair the right to equality no more than is necessary to accomplish the desired objective.[76] If there were other, less restrictive measures possible to achieve the same objective, section 36 does not save the violation of the equality clause.[77] The question of whether or not an infringement of a right is a legitimate limitation of that right involves a factual enquiry. The determination whether the violation is justified requires factual evidence. Unless the discriminatory legislation was justifiable in terms of section 36, the court will conclude that it is unconstitutional and therefore invalid.

Therefore, although the Court is unlikely to find a blanket exemption for all affirmative action programmes, affirmative action programmes that meet the criteria of section 36 will be permissible.

With regard to the right to equality, the court in *Harksen* reasoned that although section 21 differentiated between the solvent spouse and other persons who had dealings with the insolvent, section 21 had a rational and legitimate purpose — namely to prevent an insolvent potentially defrauding creditors by hiding assets in the solvent spouse's estate. Thus, section 21 did not amount to an infringement of the right to equal protection before the law.[78] Although the section did discriminate against the solvent spouse, the discrimination was not unfair because it was not aimed at a vulnerable group which had suffered in the past, since the values underlying it were consistent with the values protected by the equality clause itself. Further the burden imposed by the provision did

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75 *S v Ntuli* (1996) 1 BCLR 141 (CC) at para 21-25.

76 *Brink v Kitshoff* (1996) 6 BCLR 752 (CC) at para 46-50.

77 *President of the Republic of South Africa v Hugo* (1997) 6 BCLR 708 (CC) Kriegler J at para 77.

78 *Harksen v Lane No and Others* (1997) 11 BCLR 1489 (CC) at para 62-68.

not lead to an impairment of the solvent spouse's dignity nor did it constitute an impairment of a comparably serious nature.[79]

In interpreting and applying a substantive equality in its judgments, the CC adopts a contextual approach. In the *Hugo* case, the CC began to set out its understanding of a substantive equality right and the test for determining whether there has been a violation of that right. The Court considered the argument that the Act violated the right against unfair discrimination.[80] The majority of the Court held that while the Act discriminated against the respondent on the basis of sex this discrimination was not unfair.[81] In deciding whether or not the discrimination was unfair regard had to be had to the impact of the discrimination on the people affected. In assessing whether the impact was unfair it was necessary to look at the group who had been disadvantaged, the nature of the power used and the nature of the interest which had been affected by the discrimination.[82]

A contextual approach was adopted by looking at the disadvantages faced by women in society.[83] They looked at the position of mothers of young children firmly within the specifics of the South African context and stress that women's disproportionate child care responsibilities is one of the root causes of women's inequality in society.[84] The court considered that it would clearly be unfair to deprive women of benefits on the basis of a

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79 *Ibid* at para 62. The court added that the law relating to impeachable transactions was inadequate to protect creditors and section 21 was therefore necessary to ensure that "all the property of the insolvent spouse found its way into the insolvent estate".

80 *President of the Republic of South Africa v Hugo* (1997) 6 BCLR 708 (CC) at para 92-93.

81 The judgment of the majority of the CC was delivered by Goldstone J and was concurred with by Chaskalson P, Mahomed DP, Ackermann J, Langa J, Madala J, and Sachs J. Mokgoro J and O'Regan J delivered separate concurring judgments. Didcott J and Kriegler J delivered dissenting judgments.

82 *President of the Republic of South Africa v Hugo* (1997) 6 BCLR 708 (CC) at para 43 (Goldstone J) and 92 (Mokgoro J).

83 *Ibid* at 711-734.

84 *Ibid* at para 38.

generalisation about their role as child bearers.[85] Regarding the impact upon fathers of young children who were not released the majority of the Court held that, although the pardon may have denied men an opportunity it afforded women, it could not be said that it fundamentally impaired their sense of dignity and equal worth.

Moreover, the pardon merely deprived them of an early release to which they, in any event, had no legal entitlement to. This is so since the grant of a pardon is a matter purely within the discretion of the President. It was held that the pardon did not preclude fathers from applying directly to the President for remission of sentence on an individual basis in the light of their special circumstances. The pardon was therefore, not unfairly discriminatory.[86]

The *Hugo* case is important in establishing that measures which differentiate between men and women based on the actual differences in their positions in society are not necessarily constitutionally unacceptable.[87] It further establishes that while discriminatory measures which disadvantage women are likely to be unlawful, those which accord them certain advantages which take into account their social inequality may be upheld, provided that a fundamental human dignity is not impaired.[88] The *Hugo* decision is also important because it shows that the court is aware of the pervasive nature of gender inequality in SA and the problems that can be experienced in addressing such inequality.[89]

The anti-discrimination provision in section 9 of the Constitution has been correctly interpreted as being central to the right to substantive equality. However, the implementation of the concept of equality has proved more difficult. Indeed, defining

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85 *Ibid at* para 38-39 (Goldstone J) and at 110 (O'Reagan J).

86 *Ibid at* para 114-115.

87 Chaskalson *op cit* 4 at ch 14 (Equality).

88 *Ibid.*

89 *Harksen v Lane No and Others* (1997) 11 BCLR 1489 (CC) at para 94-95 and 120-121.

groups is a complex question, especially because they can comprise persons who are simultaneously privileged and disadvantaged, and individuals who suffer more than one form of disadvantage.

(9.4.1) Equality and Differentiation

Race has been a primary source of inequality and subordination in SA. The apartheid era saw the culmination of this in a legal system that entrenched racial inequality in every aspect of political, economic and social life.[90] Looking at the apartheid era laws in Chapter Two of this thesis, the legal ordering of society both reflected and reinforced racial biases and prejudices as well as material disadvantage. These values and stereotypes still persist in society today.[91]

In *City Council of Pretoria v Walker*[92] among several separate local councils, amalgamated in terms of the LGTA into the Pretoria City Council were two formerly black areas, Mamelodi and Atteridgeville and formerly white suburbs, referred to as old Pretoria. Residents of Mamelodi and Atteridgeville paid for their electricity on the basis of a "flat rate", which is a fixed amount, based on the average usage of electricity in their area. Residents of old Pretoria paid for their electricity on a "metered rate", an individual amount based on the actual usage of electricity by the consumer. The metered rate was higher than the flat rate. The council had started to install meters in Mamelodi and Atteridgeville but continued to use the flat rate in those areas until all the meters were installed.

In terms of the recovery of arrears, legal action was instituted against residents of old Pretoria only, whereas the municipality endorsed a compassionate attitude towards the residents of Mamelodi and Atteridgeville, which resulted in them not being sued to

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90 For example according to the Population Registration Act 30 of 1950 (repealed in 1991) and proclamation 123 of 1967, South Africans were classified as belonging to one of four racial groups; Blacks (Africans), coloureds (mixed race), Asian or white.

91 Albertyn *et al op cit* 6 at 57.

92 *City Council of Pretoria v Walker* (1998) 3 BCLR 257 (CC).

enforce payment of arrears in those areas. Walker, a resident of old Pretoria was sued for arrears in respect of charges for electricity provided by the municipality. He challenged the constitutionality of the municipality's actions in respect to its policy on the delivery of electricity services. He was of the opinion that the council had infringed his right to equality and that he was being discriminated against.

In this case the courts looked at whether the imposition of a flat rate for municipal services in the former black townships, as opposed to a consumption-based rate in areas previously reserved for whites, amounted to unfair discrimination. The majority of the Court held that the council differentiated between Walker and other residents of old Pretoria and those of Atteridgeville and Mamelodi by levying charges on a differential basis and by selectively suing non-paying residents of old Pretoria alone. This differentiation was held to amount to indirect discrimination on the basis of race. What then needed to be determined was whether the discrimination was unfair. This required an examination of the impact of the discrimination on Walker.

With regard to the cross-subsidisation and council's failure to apply metered rates uniformly, the Court concluded that the discrimination was not unfair.[93] In relation to selective recovery of debts, the majority held that as the impact of the policy affected Walker in a manner comparably serious to an invasion of his dignity the discrimination was unfair.[94] In adopting a substantive approach to equality, the CC looked at the evidence presented, the history involved and the unique transitional context of local government.[95] Specifically, they looked at the following factors.

(i) The position of the complainants in society

The Court held that the persons affected by the measure belonged to a group, i.e., the white community of old Pretoria that has not been disadvantaged by past discrimination

93 *Ibid* at para 45-68.

94 *Ibid* at para 81.

95 Albertyn C and Goldblatt B Facing the challenge of transformation — difficulties in the development of an indigenous jurisprudence of equality (1998) SAJHR 248-276.

but rather benefited from it. They could be viewed as a racial minority, and therefore vulnerable, but the Court observed that it must be careful "to distinguish between genuine attempts to promote and protect equality on the one hand and actions calculated to protect pockets of privilege at a price which amounts to the perpetuation of inequality and disadvantage to others on the other". Thus, in this case, the factor of the position in society weighed against Walker.

(ii) The nature and purpose of the power

The Court considered that the council had a responsibility to eliminate the disparities that resulted from past policies. This meant that the council's efforts not only had to be directed towards the elimination of the flat rates and the institution of metered rates, but also towards the upgrading and development of the previously disadvantaged areas. It was also taken into account that there was no other reasonable choice for the council but to allow the differentiation to continue to exist. There were no meters in the townships and a flat rate throughout would have been unscientific as well as more harmful than the present situation. The decision not to activate the existing meters in Mamelodi and Atteridgeville was not intended to prejudice residents of old Pretoria, but was taken on the basis of strategic and practical considerations.

The fact that the residents of old Pretoria were in actual fact "subsidising" Mamelodi and Atteridgeville did not render the measure unfair. The Court asserted that cross-subsidisation is integral to the pricing of electricity and that it is unavoidable between different categories of consumers.

(iii) The impact on the complainants

The Court found that the differential rates was properly framed and applied within a context of inherited, racially based inequality that saw black people being materially disadvantaged —

> "Differentiation made on the basis of race was a central feature to these divisions and this was a source of great assaults on the dignity of black people in particular. It was however not human dignity alone that suffered. White areas in general were affluent and black

> areas were in the main impoverished. Many privileges were dispensed by the government on the basis of race, with white people being the primary beneficiaries. The legacy of this is all too obvious in many spheres, including the disparities that exist in the provision of services and the infrastructure for them in residential areas."[96]

The court therefore held that the differentiation in rates did not have an adverse impact on Walker to the extent that he could feel his dignity violated. The high standard of service delivery in old Pretoria had not deteriorated, while delivery in the townships was still unsatisfactory. The continued use of the flat rate on properties where meters had been installed and the delay in the installation of meters did not change this. Thus, the Court concluded that the differentiation in rates did not amount to unfair discrimination.

(iv) The nature and purpose of the measure

The Court acknowledged that the council faced the problem of trying to prevent a culture of non-payment taking root in old Pretoria, while at the same time trying to convert such an existing attitude, which was rooted in the history of resistance against apartheid structures in the townships. It was even of the opinion that a carefully formulated and implemented policy of selective enforcement, openly adopted by the council, might have been consistent with the goal of furthering equality for all. However, the municipality's selective enforcement fell flat because it was not based on a rational and coherent policy adopted openly by the council. On the contrary, it was a confusing and incoherent myriad of decisions taken by officials without council approval, and in conflict with the council's public resolutions. The lack of council authority, the confusion and incoherence made the presumption of unfairness more difficult to rebut.

(v) The impact on the complainants

The actions of the municipal officials did not conform to official council policy, but the council failed to deal with them, leaving it to its officials to weather the storm. The complainants were misinformed and misled by the council. The informality of the policy deprived the residents of old Pretoria and the Court of an opportunity to scrutinise it.

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[96] *City Council of Pretoria v Walker* (1998) 3 BCLR 257 (CC) at para 46.

This behaviour by the municipality's officials grieved the residents of old Pretoria and made them feel that they were not deserving of equal concern, respect and consideration, thereby seriously affecting them. This led the Court to the conclusion that the selective enforcement amounted to unfair discrimination of the residents of old Pretoria.

(vi) Justification

The CC held that the violation of the right to equality could not be salvaged by the limitations clause, because the challenge was directed at conduct of the council, not at a legislative provision, which rendered the limitations clause inapplicable.

In *Beukes v Krugersdorp Transitional Local Council and Another*,[97] the council levied a flat rate of charges in respect of services in townships such as Kagiso and Munsieville whilst the residents of Krugersdorp paid a higher user-based levy for services. They argued that they were being discriminated against on the basis of race. The TLC argued that the distinctions were not based on colour but on practical considerations. The court held that while the TLC did not expressly levy higher charges on whites it did so indirectly. It stated that due to the history of racially exclusive areas in this country, people resident in the townships were almost all black while people resident in Krugersdorp were almost all white. The difference in charges therefore had an indirect racial impact. However, the court held that the discrimination was not unfair as it was a temporary interim measure that had to be implemented for practical reasons such as inadequate metering facilities and the long standing boycott by residents of townships.

In developing the jurisprudence on equality, the courts have drawn a distinction between cases of differentiation based on grounds that affect a persons dignity as a human being and those based on grounds that do not have this effect.[98] Further, unfair discrimination does not mean identical treatment in all circumstances. The court will closely examine

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97 *Beukes v Krugersdorp Transitional Local Council and Another* (1996) 3 SA 467 at 480.

98 *Prinsloo v Van der Linde* (1997) 6 BCLR 759 (CC).

the impact of the discriminatory provision on the complainant in order to ascertain whether it is in fact unfair.

Of particular importance is the extent to which a measure entrenches or deepens patterns of disadvantaged experienced by groups in our society.[99] On this view, then it seems that affirmative action as a rational means used to achieve equality cannot amount to unfair discrimination[100] and that affirmative action certainly is a valid means of achieving equality.[101]

(9.4.2) Non-Citizens Rights under the Equality Clause

The most important legal development in the field of migration is the South African CC's decision in the *Larbi-Odam* case, which confirms and expands the rights of non-citizens, especially permanent residents. In this case, the CC applied the equality protections of the Constitution to non-South African citizens and struck down a regulation prohibiting foreign citizens from being permanently employed as teachers in state schools. The regulation had provided that, subject to certain exceptions, only South African citizens may be appointed to permanent teaching posts in state schools. In terms of the regulation, eight teachers temporarily employed in the North-West Province were issued with notices of termination.

The teachers were foreign citizens some of whom had permanent residence and some with temporary residence, sued against the regulation.

The CC's analysis went in three steps —

(i) The Court noted that citizenship was not a listed ground of prohibited discrimination in the Constitution but still found that discrimination on the basis of citizenship could be discriminatory. The Court noted three

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99 *Brink v Kitshoff NO* (1996) 6 BCLR 752 CC at para 44.

100 *Soobramoney v Minister of Health, Kwa-Zulu Natal* (1998) 1 SA 765 (CC).

101 In this regard see the case of *George v Liberty Life association of Africa Ltd* (1996) 8 BLLR 985 (IC).

reasons for this — that foreign citizens are a minority in SA, with little political muscle; that citizenship is a personal attribute which is difficult to change; and that there were specific threats and intimidation that these foreign teachers faced. All of these reasons made the foreign citizens a vulnerable group.

(ii) The discrimination was unfair to permanent residents, as distinguished from temporary residents. Denying permanent residents' job security when they are allowed to live and work in SA indefinitely was unfair discrimination.

(iii) The regulation could not be justified in terms of the general limitations clause. Unless a post requires citizenship, for example because of its particular political sensitivity, employment opportunities should be available to permanent residents and South African citizens on an equal basis.[102]

Accordingly, all of these reasons made the foreign citizens a vulnerable group that should be protected in terms of the equality clause. The CC further held that denying permanent residents job security when they are allowed to live and work in SA indefinitely (and to apply in due course for citizenship) was unfair discrimination. The court noted that there were some jobs that might be constitutionally limited because of particular political sensitivity (for e.g., a Judge of the CC). However, in the general course of events, employment opportunities should be available to permanent residents and South African citizens on an equal basis.

So, although the CC issued an order striking down the regulation, the CC did not come to a final conclusion as to whether the regulation was unfair discrimination with respect to temporary residents. The CC noted that irrespective of the regulation, the position of temporary residents in SA was precarious. They cannot stay for longer than specified in their residence permit and cannot be employed for longer than that period.

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[102] Klaaren Jonathan Crossings (February 1998) Legal Watch V(2) No. 1 at http://www.queensu.ca/samp/sampresources/samppublications/crossings/issue2/artic8htm last visited 30/05/05.

However, the CC also noted that the regulation at issue allowed these temporary residents to be disadvantaged to a greater degree than was required by their residence permits with respect to job security and other employment benefits.

However, the CC did confirm its previous jurisprudence that where discrimination results in treating persons differently in a way which impairs their fundamental dignity as human beings, it will clearly be a breach of section 8(2). Other forms of differentiation, which in some other way affect persons adversely in a comparably serious manner, may also, constitute a breach of section 8(2). In determining whether discrimination is unfair, it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination.[103]

The *Larbi-Odam* case is an important application of the Court's equality jurisprudence which has been developed earlier during the course of the year and which draws upon the underlying value of dignity. It also shows that the Constitution does apply to non-citizens. Further, the case says that the Court will not accept generalised governmental justifications for the violation of rights and will protect the rights of at least some classes of non-citizens such as permanent residents.

9.5 Analysing the CC's Approach to the Equality Jurisprudence

According to the CC's judgment on equality, it is evident that the state has a right to discriminate in favour of certain persons in order to promote the achievement of equality. However, the cases indicate that each act of state discrimination would then have to be tested against certain criteria for example; the court will look at whether the discrimination in question is arbitrary in nature; it will look at whether or not the said discriminatory conduct does in fact promote equality. Further, the courts will examine whether the beneficiaries are persons or categories of persons who have been disadvantaged by unfair discrimination; the courts will look at whether the discriminatory

[103] See *President of the Republic of South Africa and Another v Hugo* (1997) 6 BCLR 708 (CC) at para 43.

conduct promotes representivity, and whether this conduct is based on ability, objectivity and fairness. Most importantly, the discrimination must not adversely impact on that persons' dignity.

The CC has further held that if the provision intends on achieving a worthwhile societal goal, thus furthering the right to equality, it will, in all probability, be upheld as constitutional. Discrimination is fair if it does not adversely impact upon the fundamental human dignity of the complainant or if it intends to achieve some worthy societal goal, thus furthering the right to achieving substantive equality. The CC has accepted that discrimination is fair if it does not adversely impact upon the fundamental human dignity of the complainant or if it intends to achieve some worthy societal goal, thus furthering the right to achieving substantive equality. The accepted forms of discrimination in South African law are statutory basis for affirmative action measures.

What is conclusive from the above discussion on the CC's approach to equality is that it would seem that dignity is guiding South Africa's jurisprudence on equality. It seems that dignity is at the heart of achieving equality as the value of dignity lies at the heart of the CC's equality right analysis. The CC has recognised that pervasive discrimination in society and particularly in South Africa's workplaces is a significant hindrance to the fulfilment of the Constitutional values of freedom, equality and human dignity. Affirmative action is therefore needed to restore the dignity and worth of the citizens of SA.

The CC justifies the use of affirmative action by confirming that that not every differentiation will be discriminatory in the sense that it will be prohibited. It has stated that whether or not society will tolerate the discrimination depends on what the object of the discrimination is and the means used to achieve it. It is less likely that discrimination that further burdens persons or categories of persons who were victims of apartheid would be upheld as fair. As affirmative action does not seek to do this it will not be unfair discrimination.

These factors highlight the Court's correct interpretation of the anti-discrimination clause as demanding substantive, rather than formal equality. Formal equality presupposes that all South Africans are equal bearers of rights. As such, all discriminatory laws are unconstitutional and unenforceable. Of significance is that formal equality is blind to the socio-economic disparities left behind by the apartheid era. Further, formal equality ignores the existence of the lack of equality once it declares that all persons are "equal before the law". The formal law thus treats all individuals the same regardless of their specific circumstances.

In subscribing to a substantive approach to equality, the CC has stated that substantive equality is equality that necessarily takes into account the specific circumstances of individuals or categories of persons, thus ensuring equality of outcome. Substantive equality would therefore require a court or the State to examine the actual socio-economic conditions of the category or persons or individual so as to evaluate whether the equality right is being upheld.

It is now settled that any action that discriminates, but its promoters claim is fair discrimination on the basis of it being affirmative action, must not be irrational, excessive or overboard and the beneficiaries of the action must be persons who were previously disadvantaged by unfair discrimination and who continue to suffer substantive inequality in relation to those privileged under apartheid. The judiciary is therefore entitled to investigate the constitutionality of any measure that purports to be an affirmative action measure. This emphasis on substance instead of form was expressly stated by the CC in *City of Pretoria v Walker* as being vital in the process of determining the validity of any remedial action. Further, the South African courts have generally accepted that affirmative action measures must be read as giving further content to the equality right and not as an exception to the right.

Affirmative action measures are justified because of their intended consequences; the eventual attainment of substantive equality for all the members of that society, regardless of race, gender, disability or any other inherent personal characteristic. As can be seen

from this chapter and Chapter Six, the South African courts have attempted to grapple with the concept of affirmative action. The result has been a general acceptance that affirmative action is a necessary remedy for the ills of the past and that, if read substantively, it will give effect to the full right to equality for those previously denied the right. The anti-discrimination provision in section 9 of the Constitution has therefore been correctly interpreted by the CC as being central to the right to substantive equality.

The next chapter looks at the US Supreme Court's approach to affirmative action.