

THE DEVELOPING EQUALITY JURISPRUDENCE IN SOUTH AFRICA

*Karthy Govender** †

Apartheid was technically about separateness, but it was fundamentally about inequality. The founding premise of the ideology was to preserve the total hegemony of white South Africans. The liberation organizations opposing the apartheid regime sought to affirm that the country belonged to all those that lived in it. Thus, it is unsurprising that the commitment to equality is one of the founding values of the Constitution and an indelible thread woven throughout the fabric of the Bill of Rights. After some misstatements about certain rights being more important than others, courts have interpreted rights in the Bill of Rights to be of equal worth. However, the centrality of the right to equality cannot be gainsaid.

I. THE DEVELOPING JURISPRUDENCE

Over the last fourteen years, the courts have incrementally developed their equality jurisprudence. The drafters of the South African Constitution had the immodest directive of drafting a bill of rights that protected and entrenched all universally accepted fundamental rights and freedoms. Thus, different visions were fused into the Bill of Rights. A constraining vision prevented state action that unreasonably and unjustifiably infringed rights, while an egalitarian vision compelled calculated and measured steps by the state towards the attainment of a fairer and more compassionate society.

When the process of interpreting the Constitution started, it was uncertain which vehicle would best achieve the object of improving the quality of life of all persons. Hence, it was eminently prudent to allow each right to develop incrementally, rather than to engage prematurely in an expansive reflection that could have retarded the development of more relevant and directly applicable rights. With the growth, development, and interpretation of all of these rights, the vista became clearer, making an expansive development of principles appropriate. Apartheid unfairly discriminated based on immutable characteristics and undermined human dignity. The need to repair and remedy this became inherent in the interpretation of the right to equality.

The first decisions interpreting the right to equality involved a curious assortment of litigants—persons unhappy with presumptions of negligence

* Karthy Govender is a Professor at the University of Kwazulu-Natal and a Commissioner with the South African Human Rights Commission.

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in the Forests Act; an insolvent German fugitive seeking to prevent property in his wife's name being presumed to be purchased by the insolvent; and a convicted South African male endeavouring to be included in a general pardon for female prisoners with minor children. Out of these cases, a working formula emerged to interpret the right to equality—section 9 of the Constitution, the first substantive right in the Bill of Rights.

II. INTERPRETATION OF SECTION 9

Section 9(1) affirms the right to the equal protection and benefit of the law. However, section 9(3), the right not to be subject to unfair discrimination on the basis of listed and analogous grounds, is the centerpiece of the developing equality jurisprudence. Courts protect substantive equality and endorse affirmative measures to achieve it by defining equality to include the full, equal enjoyment of rights. The right not to be subject to unfair discrimination is also binding on private and juristic persons, and the Promotion of Equality Act and Prevention of Unfair Discrimination Act of 2000 gives legislative effect to this right. Finally, in order to reduce the demanding burden of proof that plagues applicants in other equality jurisdictions, there is a constitutional presumption that discrimination on one of the listed grounds is unfair unless a defendant establishes the contrary.

Differentiation is objectionable if it imposes burdens or grants benefits on the basis of categorizations that adversely impact the dignity of the complainant. Thus, equality jurisprudence distinguishes categorizations that impact dignity from those that do not. Courts interpret section 9(1) to mean that state differentiation is permissible if the categorization is rationally related to a legitimate state objective. Section 9(1) does not require the state to satisfy a more exacting standard of reasonableness. Courts see the imposition of burdens on some and benefits on others as integral to the process of governance. Provided that these differentiations do not adversely impact dignity and amount to discrimination, courts are content to subject them to non-exacting rationality review and afford a significant measure of latitude to the government. Given the relative ease with which the state can justify its actions under section 9(1), successful constitutional challenges using this section are unusual. This is an appropriate judicial interpretation, as requiring a developing state to establish the reasonableness of every economic choice and decision while operating within the discipline of an expansive constitution would be unduly burdensome.

Differentiation that amounts to discrimination is regulated by section 9(3) of the Constitution. Section 9(3) prohibits unfair discrimination based on race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth (this list is not exhaustive). The listed grounds represent past ways people have been marginalized and oppressed, and courts hold, per section 9(5), that differentiation on any one of them amounts to a presumption of discrimination. The party differentiating on a listed ground

must prove that the differentiation is fair and provide an explanation for its decision.

In addition to the listed grounds, differentiation on analogous grounds (immutable characteristics that have the potential to impact adversely on human dignity) may also be constitutionally illegitimate. Examples of such grounds include citizenship and HIV status. In contrast to the listed grounds of differentiation, the presumption of unfairness does not operate with analogous grounds. The complainant must prove that the ground on which the differentiation occurs qualifies as an analogous ground and that the discrimination is unfair.

III. THE UNFAIRNESS STANDARD

Unfairness has become the main area of contention in discrimination matters as a result of the way courts have interpreted the constitutional right to equality.

In determining whether discrimination is unfair, courts look at the impact the discrimination has on the complainant. Specifically, courts examine whether the complainant belongs to a category of persons that were victims of past patterns of discrimination, whether the measure impairs the dignity of the complainant, and whether the measure is designed to achieve a laudable and important societal objective. The investigation of whether a measure perpetuates systematic and entrenched patterns of discrimination and the assessment of its impact on the complainant are often set against the laudable social objective of the measure. For example, in the early decision of *President of South Africa v. Hugo*, the presidential decision to discriminate against men by pardoning and releasing women from prison who had children under the age of twelve was motivated by a genuine desire to assist those women's children. In fashioning a test, the Court noted the impact on the complainant, but could not ignore the true purpose of the measure.

In *City Council of Pretoria v. Walker*, the Court considered the right to be treated the same, the meaning of equality, and the constitutional imperatives of improving the quality of life. The residents of the predominantly white part of Pretoria were charged a consumption-based tariff, while residents of the African townships were charged a flat rate per household. The flat rate was significantly lower than the consumption-based tariff. White residents argued that they were being unfairly discriminated on the basis of race. While this was indirect discrimination, the court concluded that it was not unfair. The Council had the constitutional mandate of equalizing facilities and services to all within its region. The facilities in the townships were vastly inferior to that of 'white Pretoria.' The white residents, although a political minority, were not victims of past patterns of discrimination. In the circumstances, the Court held that it was not unfair to adopt the differential tariff scheme as an interim measure until facilities were equalized. *Walker* alerted South Africans to the possibility that, in realizing the objective of achieving substantive equality, differently situated persons might be treated

differently. *Walker* determined that this Constitution was neither blind to color, nor the legacy of apartheid.

In 2004, *Minister of Finance v. Van Heerden*, the court clarified the relationship between affirmative action, the attainment of substantive equality, and unfair discrimination. The Court held that remedial and restitutionary equality were integral to the achievement of substantive equality. In other words, “the provisions of section 9(1) and section 9(2) are complimentary; both contribute to the constitutional goal of achieving equality to ensure ‘full and equal enjoyment of all rights.’” Courts assess remedial and affirmative action measures through the criteria in *Van Heerden*: For a categorization to amount to a constitutionally permissible affirmative action measure, it must target persons, or categories of persons, who have been disadvantaged by unfair discrimination, be designed to protect or advance such persons, and promote the achievement of equality. The inherent flexibility of these criteria and the need to be context-sensitive could mean that the rigor and robustness with which these criteria are applied would depend on the extent to which the right to dignity has been affected by the categorization.

IV. CONCLUSION

In the United States, the category of differentiation determines the level of scrutiny to which the conduct or law is subject. These levels range from the rational basis test, to the intermediate level of scrutiny, and, finally, to strict scrutiny analysis. The category of differentiation is often determinative of the outcome of the matter. South Africa, however, has adopted a more nuanced approach. Categorizations that do not impact dignity fall under the mere differentiation standard, or rationality standard, of section 9(1). Categorizations that impact dignity fall under a section 9(3) analysis.

The level of scrutiny to determine whether measures fall within section 9(2) is flexible, as opposed to being an intermediate standard between the non-exacting requirements of section 9(1) and the more exacting requirements of section 9(3). As pointed out in *Van Heerden*, if a measure falls within section 9(2), it will not, in most instances, amount to unfair discrimination. Thus, if section 9(2) permits a measure, that measure is insulated from a challenge on the basis of unfair discrimination in terms of section 9(3). It would be incongruent to have a measure sanctioned in one section of the Constitution, yet prohibited in the next.

Recently, courts have more clearly connected the right to equality with that of human dignity and the realization of socio-economic rights. Denying social benefits to permanent residents is now deemed to be both unfair discrimination on the basis of citizenship and an unreasonable denial of the right to social security. After a cautious start, the Court is prepared to interpret section 9 more expansively in order to obtain substantive equality. Looking forward, it is probable that the right to equality will feature more prominently in applications claiming greater access to socio-economic rights.