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

Summary

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

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

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

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1. Introduction

Our Constitution stipulates that everyone is equal before the law and has the right to equal protection and benefit of the law.[1] It defines equality as including "the full and equal enjoyment of all rights and freedoms". To promote the attainment of equality, provision is made for legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination.[2] In addition to this the Constitution prohibits the state from unfairly discriminating 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.[3] Not only the state, but also private individuals are prohibited from unfairly discriminating against anyone on the listed grounds. For this reason the Constitution stipulates that national legislation must be enacted to prevent or prohibit such unfair discrimination.[4] Discrimination on one or more of the grounds listed in subsection (3) is presumed to be unfair unless it is proved that the discrimination is fair.[5] This section is largely based on its precursor, section 8 of the interim Constitution.[6]

This is an extremely important section in the Bill of Rights. So pervasive and resonant is its theme in the Constitution that it can be regarded as constituting a constitution within the Constitution. Equality is one of the core democratic values on which our Constitution is founded.[7] Even in the limitation clause in section 36(1), it is one of the primary factors to be considered in limiting any fundamental rights, namely, whether the limitation would be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

The reason for this is undoubtedly that the Constitution ushered in a new dispensation of freedom, equality and democracy which is a departure from the previous order characterised by injustice and inequality.[8] It therefore deals with a matter of seminal importance in the reordering of South African society. This was also the approach followed in the constitutions of most of the African states when they attained their independence.[9] It was also to be expected owing to the adverse effect racial discrimination in particular had

1 Constitution of the Republic of South Africa Act 108 of 1996: section 9(1).
2 Section 9(2) of the Constitution.
3 Section 9(3) of the Constitution.
4 Section 9(4) of the Constitution.
5 Section 9(5) of the Constitution.
6 The Republic of South Africa Constitution Act 200 of 1993; *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC). What has been added to section 9(1) is "equal protection and benefit of the law" and in section 9(3) "birth" and "marital status" have been added.
7 Constitution of the Republic of South Africa Act 108 of 1996:section 7(1)(i); *Fraser v Children's Court Pretoria North* 1997 2 BCLR 153 (CC).
8 Albertyn and Kentridge 1994:149-150.
9 Read Forsyth and Schiller 1979:163.

had on black people during the colonial era. When black political leaders had the opportunity to control the destiny of their countries, they attempted to remove even the last vestiges of racial discrimination.

Although the implications of the equality provision have been analysed and commented upon in a number of cases[10] and by various commentators,[11] it does not appear that the last word on this issue has been written. It has been correctly stated that legislation and judicial interpretations of equality constitute important sites of struggle as regards the pace, nature and extent of transformation.[12] As a result, the search for the real meaning of what equality entails and how it should be interpreted and applied in practice continues. That is why section 9 of the Constitution is revisited in this article. There is no doubt that when the full implications of this provision are considered, they could be far-reaching – depending on how it is interpreted. This provision aims to create an egalitarian society where justice and fairness prevails and where all people are treated as human beings with dignity and self-worth. It is, however, couched in words which could convey the message that there will be total equality of all persons in every respect whatever the circumstances and that all people will enjoy all the rights fully in the same way. That could be regarded as utopian.[13] But the fundamental question is whether this really can be achieved.

A constitution is both a legal and a political document. As a political document it tries to inspire hope by attempting to correct past injustices in order to create a better and more secure future. For this reason it has been characterised as "a snapshot at a moment in time, reflecting the hopes and

10 This right has been commented upon cursorily in the cases that follow, without a coherent theory being formulated; *Qozoleni v Minister of Law and Order* 1994 (1) BCLR 75(E); *Nyamakazi v President of Bophuthatswana* 1994 (1) BCLR 92 (B); *Chairman, Council of State, Ciskei v Qokose* 1994 (2) BCLR 1 (CkAD); *Besserlik v Minister of Trade and Industry and Tourism* 1996 (6) BCLR 745 (CC); *Mofolo v Minister of Education, Bophuthatswana* 1994 (1) BCLR 136(B); *Brink v Kitshoff* 1996 (6) BCLR 752 (CC); *S v Mhlungu* 1995(3) SA 867 (CC), (7) BCLR 793 (CC); *S v Ntuli* 1996 (1) SA 1208 (CC); 1996 (1) BCLR 141 (CC); *AK Entertain CC v Minister of Safety and Security* 1995 (1) SA 783 (E), 1994 (4) BCLR 31 (E); *Cherry v Minister of Safety and Security* 1995 (5) BCLR 570 (SEC); *Hans v Minister van Wet en Orde* 1995 (12) BCLR 1693 (C); *Jeeva v Receiver of Revenue, Port Elizabeth* 1995 (2) SA 433 (SEC); *Kalla v The Master* 1995 1 SA 261 (T); 1994 (4) BCLR 79 (T); *Baloro v University of Bophuthatswana* 1995 (8) BCLR 1018 (B); *Matukane v Laerskool Potgietersrust* 1996 (3) SA 223 (T); *East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council* 1996 (11) BCLR 1545 (N); *Larbi-Odam v Member of the Executive Council for Education* 1996 (12) BCLR 1612 (B); *Central Transitional Metropolitan Council v Winchester* 1997 (3) BCLR 312 (N).

11 Albertyn and Kentridge 1994:150; Cachalia *et al* 1994:25 and further; Devenish 1999:35 and further; Davis 1994:196 and further; Kentridge 1996:14 and further; Govender 1997:264; De Vos 2000:62; Fagan 1998:220 and further; Albertyn and Goldblatt 1998:248 and further; Van Merle 2000:595 and further.

12 Albertyn and Goldblatt 1998:250.

13 Dugard 1989:1.

fears of the nation at a specific moment between its misfortunes of the past and its aspirations for the future".[14] And in the words of Mahomed J in *S v Acheson*:[15]

> The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is 'a mirror reflecting the national soul', the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion.

Because of this, the provisions of a constitution may sometimes be stated in an idealistic and abstract fashion. The purpose thereof is undoubtedly to convey a clear message about the separation between the old and the new orders. And this may be necessary in order to instill confidence in the new dispensation. As a legal document it has to be interpreted in such a way that it can be applied or implemented effectively in practice. Its interpretation must not only make sense, but it must be seen to encapsulate the new values. It is for this reason that it has been accepted that a constitution has to be interpreted generously.[16] The major reason behind this, as has been said, is that the constitution creates a new dispensation. In *S v Makwanyane* [17] Mahomed J stated this in the following words:

> In some countries the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.

Its interpretation must therefore not be restricted to the way things were done in the past, but must be in conformity with the values which the new order seeks to uphold. The purpose of this article is to constitute a further contribution to the interpretation or elucidation of this section. As a point of departure, the view that is adopted is that any statutory interpretation must obviously take place within a social and historical context.[18] Outside of the social and historical context it can be meaningless or misleading. This is

14 Schwartz 1993:551.

15 1991 2 SA 805 (Nm) 813.

16 *Qozeleni v Minister of Law and Order* 1994 (1) BCLR 75 (E); *S v Zuma* 1995 2 SA 642 (CC); 1995 (4) BCLR 401 (CC); *S v Mhlungu* 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC); Albertyn and Kentridge 1994:150.

17 1995 3 SA 391 (CC):para 262.

18 Devenish 1999:37-38; *Andrews v Law Society of British Columbia* (1989) SCR 143; *Brink v Kitshoff* 1996 (6) BCLR 752 (CC).

true of the equality provision. Such a view may, however, be seen as restrictive in that it may be perceived as backward looking instead of being forward looking.[19]

2. Equality or justice?

Apart from the question whether total equality can be achieved, another fundamental question is whether the Constitution should seek to realise justice rather than simple equality. While the ideal of equality which the Constitution guarantees to realise is attractive and commendable, complete equality of all persons in all respects might be a will-o'-the-wisp. As a result it might be advisable to interpret it in a way that will accord with justice and fairness. In the words of Devenish:

> It is regrettable that of all the noble principles of democratic philosophy, equality has proved the most intractable to convert from merely an ideal to the hard world of reality. In an ostensibly egalitarian age, inordinate social and economic imbalances still continue to blight the leading political democracies of the world, notwithstanding that policies of social democracy have gradually diminished the range and extent of inequality in them. Pernicious racial inequality 'in the United States as well as some other countries throughout the world' has unfortunately proved itself to be not particularly responsive to reform within a democratic body politic.[20]

Albertyn and Goldblatt on the other hand are firmly of the view that equality can be used as an instrument to bring about radical transformation of our society. They do not regard equality to be so abstract as to be impracticable. The authors regard transformation as entailing a complete reconstruction of the state and society which includes a redistribution of power and resources along egalitarian lines. This further entails "the eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality". In addition, it comprises the development of opportunities which enable people to realise their full human potential in the context of positive social relationships. The authors further regard equality, as a value and a right, as being critical to the task of transformation. They are of the opinion that equality as a value gives substance to the vision of the Constitution, and as a right it facilitates the realisation of substantive equality, "legally entitling groups and persons to claim the promise of the fundamental value and providing the means to achieve this".[21]

This instrumentalist conceptualisation of equality as a value and a right aimed at bringing about transformation, while commendable, is not free from problems. Values are themselves not facts but are mental constructs which we place upon certain factual situations. In themselves they have no

19 De Vos 2000:65 and further; compare Cowen 2001:43; De Vos 2001(b):1 and further.

20 Devenish 1999:36.

21 Albertyn and Goldblatt 1998:249.

substance although they do influence our decision of what is right. In order to use equality for transformation we must adopt a purposive approach, the content of which is not based on equality but on something else. Moreover, creating this equality does not depend on the law alone. It depends on the availability of resources.

The reason for the argument that the Constitution should rather guarantee justice is that when one unpacks equality, as it will appear here below, it becomes all the more elusive and nebulous. Moreover, treating people equally whatever their circumstances, will not always lead to fairness or justice. But the concept of justice, while equally elusive, is easier to attain than complete equality. Sir Norman Anderson is of the opinion that justice is not just a high-sounding ideal of little or no practical significance, but that it is in fact "a concept which is active and relevant in various contexts and systems of law", and that "although it may not be precise at its edges, it can empirically be demonstrated to possess a core of substance which is tolerably clear and vitally essential to maintain both individual liberty and social cohesion which law seeks to foster."[22]

It will therefore be necessary to analyse justice and equality separately, to look at the way the Constitutional Court has interpreted the equality clause of the Constitution and to draw the appropriate conclusion. In its interpretation of the equality clause the Constitution Court has used dignity as a determinant of when discrimination will be unfair.[23] The critical question is whether this approach of the Constitutional Court is the correct one.

It could be argued that to suggest justice as the appropriate term to use rather than equality is to substitute one vague term for another equally vague one. As has already been said, that is not necessarily so. The reason for the preference of justice is that it contains fewer contradictions and qualifications than equality. Once justice is understood as fairness, it is easier to apply. Although equality may be regarded as an essential ingredient of justice and fairness,[24] equality does not always equal justice and fairness. What perhaps may be necessary is to clarify what type of equality will lead to justice and fairness.

3. The concept of justice

It will not be possible to conduct an exhaustive analysis of the concept of justice within the confines of this article, and it may be otiose.[25] Copious writings have emanated from the enterprising pens of more eminent scholars

22 Anderson 1978:8; Bodenheimer 1962:177 describes the aim of justice as the co-ordination of the diversified efforts and activities of the members of the community and the allocation of rights, powers and duties among them in a way which will satisfy the reasonable needs and aspirations of individuals while at the same time promoting the maximum productive effort and social cohesion.

23 See footnotes 118 and 119 below.

24 See more of this below.

25 For a detailed discussion of the concept of justice see Dlamini 1987:270 and further.

on the subject. Although thinking on what justice entails has occupied the minds of philosophers and lawyers alike over the centuries, no agreement has been reached on this although the weight of opinion may gravitate towards a particular direction. It is unfortunate that such a fundamental concept to organised society should still be debatable. It will therefore be appropriate to refer to the salient views of some of these thinkers. The reason for referring to these views is not only to confirm that nothing is new under the sun, but also to demonstrate that this subject has to be approached with caution, and no hasty conclusions should be drawn.

Thinkers on justice over the years may broadly be classified into two main categories, namely, those who define justice as meaning equality and those who circumscribe it as freedom. What is clear, however, is that justice may not be equated with equality or freedom; it may rather be the product of equality under certain circumstances. Freedom may also be regarded as a separate value. That the same concept could be defined in terms of two sometimes contrasting phenomena may be intriguing. Although both freedom and equality underpin the vision of democracy, and although they are generally mutually supportive and not mutually undermining, there are cases where the demands of equality may limit absolute individual liberty and instances where the dictates of freedom may inhibit the pursuit of equality.[26] The reconciliation of liberty and equality has been regarded as the dilemma of democracy.[27]

Perhaps the oldest theory of justice is that of Plato. Plato[28] regards justice as consisting of a harmonious relationship between the various parts of the state. Every individual must do his duty in his specific place and do the thing for which he is best suited without meddling with the affairs of other members. Plato's state is a class state consisting of rulers and subjects. In his view some people are born to rule, some to assist the rulers in the performance of their duties, and others are supposed to be farmers or artisans or traders. Any person who does a job for which he is not suited is, to him, not just acting inefficiently and ineffectively, but also unjustly. It is the function of the rulers of the state to see to it that each person is given his appropriate station in life, and that he properly performs the duties of his station. This theory of justice has not had significant following and impact and it is doubtful whether it contributes to the understanding of justice, although some might hold a contrary view.[29]

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26 Albertyn and Kentridge 1994:150; there is even disagreement with the old thinkers on which is more important than the other; for Hobbes equality is more important (see Leviathan (1651) in Ebenstein 1969:372) whereas for Mill and Tocqueville liberty is more important (see Alexis de Tocqueville *Democracy in America (1835-1840)* in Ebenstein 1969:547 and further; compare Mill *On Liberty* (1859) in Ebenstein 1969:564 and further.

27 Ebenstein 1969:532.

28 Plato in Lee 1974:180 and further.

29 For a comprehensive discussion of this see Domanski 1999:335 and further; Domanski 1999:475 and further.

Aristotle,[30] on the other hand, approached the problem of justice differently. Justice, in his opinion, consists in equality of treatment. It entails an equitable distribution of the goods among members of the community, which just distribution must be maintained by law against any violation. He distinguishes between distributive, commutative and retributive justice. Distributive justice involves the distribution of offices, rights, honours and goods to members of the community on the basis of geometrical equality, which takes into account the particular inequality of the subjects considered for the distribution. The criterion which should be used to determine equality is personal worth or merit. Equals must be treated equally and unequals must be treated unequally. And, in Friedmann's paraphrase "injustice arises when equals are treated unequally, and also when unequals are treated equally".[31]

The challenge has always been to establish who are equals and who are unequals, or put differently who are alike and who are unalike. This is not an easy task. Perhaps at the time when Aristotle propounded this view, it was easy to distinguish between equals and unequals. Today some of those distinctions may not be valid especially in the light of the universal acceptance of the equality of all human beings. It has been suggested that the answer to the question of who are equals consists of two components, namely, a determination that two people are alike, and a moral judgment that they ought to be treated alike. That people are alike or equal may be interpreted differently. It could mean people who are alike in every respect, which is highly doubtful, or people who though not alike in every respect are alike in some respects. This in itself is not conclusive and could lead to some absurd consequences.[32]

Commutative justice is based on arithmetical equality, which is different from geometrical equality in that it disregards subjective inequalities and requires strict equality irrespective of any subjective attributes of the parties concerned. Corrective or retributive justice, according to Aristotle, guarantees, protects and maintains the distribution against illegal attacks and restores the disturbed equilibrium. If harm has been suffered, it must be compensated. Here the equality postulated is arithmetical, being unconcerned with the subjective qualities of the persons, but merely concerned with the computation of losses suffered.

Although the Aristotelian concept of justice is not free from anomalies, equality of treatment as the central notion of justice has become the cornerstone of modern theories of justice.[33] A pertinent question is whether equality and justice are synonymous. It would appear that these are not synonymous. Equality may be an ingredient of justice, but justice does not mean equality under all circumstances. Western on the other hand feels that

30 Aristotle *The Nicomachean Ethics* translated by Ross (1971) bk v; Aristotle *The Politics* translated by Sinclair 118-119, 127-129, 189-190; Van der Vyver 1976:1 and further.

31 Friedmann 1967:21.

32 Western 1982:544-5.

33 Van der Vyver 1976:3.

they are synonymous. As he puts it: "Just as justice can be reduced to equality, equality can be reduced to a statement of justice; one simply reverses the sequence of steps".[34] This view of Western is obviously not accurate.

Justinian[35] defines justice as "the set and constant will to give every man his due". This definition is attributed to the Roman jurist Ulpian, and it is to some degree related to the Aristotelian idea although it differs in formulation.[36] It differs in that it emphasizes the element of desert rather than equality. Desert can be an element of justice, but it does not completely define justice. This definition has also been regarded as begging the question as there is no prior determination of what is man's due.[37] For this reason it has been said that "to render justice meaningful one must look beyond the proposition that every person should be given his due to the substantive moral or legal standards that determine what is one's due".[38] It could be argued that this implies equality of treatment for those in similar circumstances or that people should be treated fairly as human beings with dignity.

The test of those who are similarly situated has been trenchantly criticised as being unhelpful.[39] Although this test has been criticised, it is submitted that it nonetheless still has a role to play.[40] The criticism levelled against the "similarly situated" test, is that it is inadequate as it does not provide criteria by which to establish "(a) when a person is similarly situated and to whom; (b) when a person should be treated in the same way, or differently; and (c) what kind of different treatment is appropriate".[41] Moreover, it fails to differentiate between legitimate and illegitimate legal differentiation.[42] Notwithstanding these cogent criticisms, there will be instances where those who are similarly situated must be equally treated, and where they are differently treated, the one adversely affected by such treatment may challenge the discrimination. The reason why this test still has a role to play demonstrates that the equality provision has to be contextualised; it cannot be applied in abstract. Equality generally entails a comparison. It will therefore be denied if one category of people is entitled to benefits to which another group may not be entitled without any justification.[43]

A further complication is that equality of treatment does not mean that all people should be treated alike whatever their peculiar circumstances, because that could lead to absurd consequences. It should rather be

34 Western 1982:557.
35 Institute 1.1 pr; *D* 1 1 10: "*Iustitia est constans et perpetua voluntas ius suum cuique tribuendi*".
36 Bodenheimer 1962:181.
37 Hahlo and Kahn 1968:35; Western 1982:556.
38 Western 1982:556-7.
39 Albertyn and Kentridge 1994:153-4.
40 Tussman and tenBroek 1949:344, 346.
41 Albertyn and Kentridge 1994:153.
42 Albertyn and Kentridge 1994:153-4; compare *Andrews v Law Society of British Columbia* 56 DLR (4th) 1 at 11-13.
43 Murray and Kaganas 1991:A J 127.

interpreted to mean that if there is disparity of treatment, it should not be motivated by arbitrary or capricious considerations, but should be based on objectively justifiable and acceptable ones.[44] This is because differences in the conditions of persons may no doubt necessitate legal differentiation[45] and to summarily treat them equally would lead to unfairness. The distinction between justifiable differentiation and invidious differentiation is often expressed by the use of the terms "differentiation" which is devoid of negative undertones and "discrimination" which has some negative connotation.[46] But this distinction may be an oversimplification of the situation. The greatest weakness of the equality-of-treatment theory is that it contains this inherent contradiction of equality that may not mean real equality in all cases. Moreover, it may in some cases be difficult to decide when cases are alike and when they differ. The law itself does not always provide a yardstick to establish this. Experience has taught that it is rather the moral outlook of the people in a particular society at a specific time which is generally decisive. This accounts for the somewhat relative nature of justice,[47] although it is more one's conception of justice which is relative than justice itself.

Spencer adopted a fundamentally divergent view of justice. For him the underlying ideal of justice is not equality, but freedom. As he postulated it, every individual is entitled to acquire whatever benefits he can derive from his nature and capabilities. Although he is allowed to acquire various rights and freedoms, he is only limited by the consciousness of and respect for the unhindered activities of others who have similar claims to freedom. "The liberty of each is to be limited only by the liberties of all".[48] As he further puts it:

> Every man is free to do that which he wills, provided he infringes not the equal freedom of any other man.[49]

A similar approach to justice was adopted by Emmanuel Kant. According to Kant liberty is the only original, natural right belonging to each person in his capacity as a human being. For him therefore justice and law represent all "the conditions under which the arbitrary will of one can coexist with the arbitrary will of another under a general law of freedom".[50]

Hart,[51] on the other hand, reverted to the Aristotelian idea of justice as the treatment of like cases alike although he does not answer the question of who are alike or who are unalike. He elaborates on the idea of distributive and retributive justice. Justice, as he puts it, is the equivalent of fairness,

44 Hahlo and Kahn 1968:35; Western 1982:556-7; Tussman and tenBroek 1949:344.
45 Hahlo and Kahn 1968:35; Western 1982:570.
46 Dugard 1978:55-56; compare Albertyn and Kentridge 1994:161; Devenish 1999:45; compare Fagan 1998:225-227.
47 Hart 1961:155-158; compare Friedman 1967:346 on relativity of justice; Du Plessis 1978:24.
48 Spencer 1897:61-62; compare Bodenheimer 1962:181.
49 Spencer 1897:62.
50 Kemp 1968:85; compare Bodenheimer 1962:182.
51 Hart 1962:154 and further.

which he does not regard as necessarily co-extensive with morality in general, but as only relevant to the assessment of conduct not of a single individual, but of the manner in which classes of individuals are treated when some burden or benefit falls to be distributed among them, and when compensation or redress is claimed for injury suffered. Although the terms "justice" or "fairness" can be used in other contexts, he regards those contexts as derivative applications of the notion of justice as equality of treatment which can be adequately explained once the primary application of justice to matters of distribution and compensation is understood.

Another thinker who contributed to the elucidation of the concept of justice is Rawls.[52] Rawls, does not define justice as fairness because he does not regard the two terms as synonymous, nor does he regard it as equality. In his opinion, justice comprises principles which rational beings would rationally adopt as fair if they had to decide what is fair in general without knowledge of their own particular position in society, or, as he puts it, principles which would be chosen by an individual "situated behind a veil of ignorance". These entail, in broad outline, that every person must have the largest political liberty compatible with a like liberty for all, and that inequalities in power, wealth, income and other resources must not exist except in so far as they work to the absolute benefit of the worst-off members of society. The greatest weakness in Rawls's theory of justice is that it appears a bit complicated. The merit of any theory is that it must make complex issues simple. After all it has to apply to the ordinary affairs of people.

Rawls's theory has elicited considerable favourable and adverse comment.[53] Dworkin, however, points out that many of Rawls's critics dispute that men and women in the original position would unavoidably choose these two principles. Owing to the conservative nature of the principles, they would only be chosen by conservative people and not by those who are natural gamblers. Dworkin does not regard this criticism as valid. He assumes that the critics are wrong although he does not pursue this issue any further. He argues that his main concern is to establish why men and women in the original position would choose Rawls's two principles as being in their best interest.[54] Dworkin distinguishes between antecedent interest and actual interest.[55] He is of the opinion that Rawls's men would inevitably choose conservative principles because this would be the only rational and fair choice to make in the circumstances. He further points out that the technique of equilibrium plays an important role in Rawls's argument. This technique of equilibrium assumes that Rawls's readers have a sense of intuition that certain particular political arrangements or decisions are just and others are unjust. These intuitions and convictions are arranged by each in an order

52 Rawls 1972:12 and further, 60; compare Dworkin 1977:150.
53 See for example Barry 1973; Wolff 1977; Dworkin 1977:151 and further; Anderson 45 and further; Van Wyk 1982:49 and further.
54 Dworkin 1977:150 and further.
55 Dworkin 1977:153.

that designates some of them as more certain than others. It is the task of moral philosophy to provide a structure of principles that supports these immediate convictions.[56]

Dworkin conducts a comprehensive and complex analysis of reflective equilibrium, social contract and original position as indicators of a deeper theory of justice.[57] He concludes that justice as fairness is based "on the assumption of a natural right of all men and women to equality of concern and respect, a right they possess not by virtue of birth or characteristic or merit or excellence but simply as human beings with a capacity to make plans and give justice".[58]

Hahlo and Kahn[59] circumscribe justice as "the prevailing sense of men of goodwill as to what is fair and right — the contemporary value system". Much as this definition is commendable for its flexibility, it seems to create the impression that justice is no more than the transient views of particular persons at a particular time. Yet it does illustrate an important point, namely, that justice is influenced by the society's sense of values. Values change. As a result, what is regarded as just today may not be considered just tomorrow. Moreover, ideas of justice vary according to societies owing to the different value systems in various societies. Yet it is more correct to distinguish the concept of justice from its practical application.

From the above, it would appear that justice is sometimes more of a reconciliation of freedom and equality.[60] The greatest difficulty, however, has been the practical application of the idea of justice to the everyday affairs of people whether in the distribution of goods and benefits or in the compensation for harm suffered. History does not provide one egalitarian pattern. In the words of Bodenheimer:

> Recorded history has furnished no proof so far that one particular conception of justice in human social affairs must be looked upon as so superior to all rival conceptions that the latter are *a priori* condemned to failure or bankruptcy.[61]

What is indisputable is that justice is often identified with a certain attitude or disposition of the mind. It requires an impartial, objective and considerate attitude towards others, "a willingness to be fair, and a readiness to give or leave to others that which they are entitled to or retain". This is evident from the theory of Rawls. As Bodenheimer graphically explains:

> The just man, either in private or in public life, is a person who is able to see the legitimate interests of others and to respect them. The just father does not arbitrarily discriminate between his children. The just

56 Dworkin 1977:155.
57 Dworkin 1977:159 and further.
58 Dworkin 1977:182.
59 Hahlo and Kahn 1968:31.
60 Bodenheimer 1962:183.
61 Bodenheimer 1962:184.

> employer is willing to consider the reasonable claims of his employees. The just judge administers the law with even-handed detachment. The just lawgiver takes into account the interests of all persons and groups who he is under a duty to represent. Thus understood, justice is a principle of rectitude which requires integrity of character as a basic precondition.[62]

Justice, as a principle of rectitude is the opposite of selfishness. It militates against inconsiderate claims made with no regard for the justified claims of others. For this reason justice, although it is more limited in scope than rationality, has been regarded as synonymous with rationality, which entails the ability to abstract one's ego and place oneself in the position of the other person, and while generalizing one's sentiments and reactions, project oneself into the person of another. This capacity to think with detachment makes one realise the importance of certain legal and moral restraints in the process of adapting one's needs to the needs of others in order to make life tolerable in the community. It is this quality to think with detachment on the inevitable or most desirable conditions of social co-existence which renders human beings capable of framing generalized ethical systems and codes of law.[63]

Although the Bible does not define justice by name, certain principles in the New Testament can be equated with justice. Treating others in exactly the same manner as you would like them to treat you under similar circumstances,[64] can be regarded as an enunciation of the biblical concept of justice. It is reinforced by the commandment of loving one's neighbour as oneself. This is based on the assumption that a person will always act in his or her best interests. Acting in another's best interests is obviously the most desirable thing to do. This concept of justice eschews the problem produced by the equality-of-treatment principle. The notion of justice as equality of treatment suffers from two shortcomings, namely, firstly, that if people who are in the same circumstances are mistreated equally, it does not mean that justice has been done. Thus the fact that black people were in the past mistreated as a group and equally so, did not mean that justice was done. Secondly, it also fails to articulate that justice is not simply confined to the comparison of individuals, groups and legally relevant situations for the purpose of establishing the similarity or dissimilarity, but is much more concerned with the proper judicial treatment of peculiar situations and uncommon combinations of events which cannot easily be compared. It is for this reason that it has been suggested that the conception of justice as equality of treatment must be complemented by the other conception of justice which is that everyone should get what he or she deserves.[65]

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62 Bodenheimer 1962:185.
63 Bodenheimer 1962:185-6.
64 Matthew 7:12; Luke 6:31.
65 Bodenheimer 1962:194-195; as already pointed out, this is equally open to criticism.

From the aforegoing discussion, the preponderant view is that justice entails fairness which may imply that people should be treated on the basis of equality. But equality is not the only consideration when it comes to justice. Justice may be done by treating people differently if they are not in the same circumstances, or if it is objectively justifiable to do so. It may also entail that people, apart from their basic humanity, should be treated according to individual merit or desert. Obviously justice militates against any form of invidious discrimination. It is for this reason that it is preferred to equality. If equality is a predominant element of justice, it is therefore imperative to analyse it in some depth.

4. Equality considered

The issue of inequality of treatment is an old one. From time immemorial people have used all sorts of attributes to justify why they should be entitled to more rights and privileges than others, and why others should be discriminated against with impunity. We have had people being treated unequally and unfairly owing to race, colour, social class, birth, sex, culture, religion and many others. This has often resulted in bitterness, resentment and hardship for those discriminated against, as they perceive this as unjust and unfair. Such treatment has led to discontent and rebellion. This was in particular the situation in South Africa owing to the policy of apartheid which provided for inequality of treatment on account of race and colour. The idea of human rights was in particular evolved to deal with situations like this. That is why human rights have been defined as rights which people have by virtue of being human irrespective of race or colour, noble or ignoble birth, social class, ethnic origin, sex or gender or other idiosyncracy.[66]

It is for this reason that revolutions have erupted and wars have been fought in order to do away with real or perceived inequality. The French Revolution is a well known example. The slogan for the French revolution was: liberty, equality and fraternity.[67] It is interesting that equality featured prominently here. Equally, there is no doubt that although there have been various theories of justice, equality of treatment is the most influential.[68] Discrimination or inequality of treatment is therefore generally regarded as unjust and unfair.

The crucial question is: what do we mean by equality? This question may be regarded as redundant because over the years great political thinkers have expressed themselves on this[69] and there have been declarations which assert the equality of people. The well-known American declaration unequivocally states: “We hold these truths to be self-evident, that all men are created equal…”. The Virginia Declaration of Rights

66 Henkin 1978:2.
67 Van Wijk and Van Zyl 1984:331.
68 Van der Vyver 1976:3.
69 See for example Aristotle in Ebenstein 1969:97, 102; Hobbes in Ebenstein 1969:372-373; Tocqueville in Ebenstein 1969:551.

similarly proclaims: "That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity". Similarly, article 1 of the Universal Declaration of Human Rights of 1948 declares as follows:

> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

These are indeed solemn declarations. But what do they really mean? The problem, as has been said, is that people are both equal and in some respects unequal. As human beings, they are equal. There is no lesser human being; but all are human beings, and if one wants to add a religious touch to it, they are made in the image of God and descended from the same ancestors, Adam and Eve. That in itself is evidence of their equality. This has, however, not always been so and people have been treated differently on grounds that were unfair. And that is why these declarations had to be made. Even today, for a variety of material and non-material reasons, people are treated differently. This is so not only socially but also legally. Perhaps the reason why emphasis has been placed on equality is that in the history of humankind people were treated unequally and unfairly for spurious reasons.

The American declaration, for instance, is true but it is not the whole truth. That human beings are created equal is true, but what it does not say is that there are a variety of reasons which may lead to differentiation or inequality of treatment. The problem with this declaration is that it is a political statement which tends not only to exaggerate but also to be one-sided. It is understandable that it should exaggerate because it was a reaction to a certain situation which in many cases led to over-reaction. Any reaction tends to lead to overreaction. It needs to be qualified so that it can be a statement of the truth or should come nearer the truth.

The truth, as has been said, is that people are both equal and different in some other respects. It does not mean that in the absence of race, for instance, all black people are equal in all material and non-material respects. Similarly, even in the absence of sex or gender, it does not mean that all men are equal in every respect or that all women are completely equal in all respects. A woman will not agree that she is equal to her domestic helper in all material and non-material respects. This has nothing to do with people being regarded as not human. Admittedly there have been times in the history of humankind when some people were not regarded as human beings and this may account for the sensitivity to any suggestion of inequality. Slaves are a classical example. In various societies where slavery was practised, a slave had no rights but was regarded as an object of a right; he or she could be sold or disposed of like a chattel.[70] It is interesting to realise that when the American declaration was made, slavery was widely

70 Buckland 1963:62 and further.

practised in America and yet those who made the declaration were most probably oblivious of this fact. When they declared that all men are created equal, they did not include slaves or even women. Apart from slavery, people have also been regarded as inferior because of their race, colour, class, sex or gender and other attributes and were consequently treated unfavourably. One of the ancient examples was that of the discrimination among the Romans between patricians and plebeians.[71] The South African policy of apartheid was the most recent example. It can safely be said that the perennial problem of human beings is their failure to treat others as fellow human beings, with fairness and justice. They always find pretexts for treating others differently. Unless restrained by some rule or tradition, they tend to treat others who may differ from them unfairly, especially those who are not in a position to retaliate. Most thinkers, however, agree that most of the attributes which were used in the past for meting out unequal treatment do not qualify for treating people unequally today.

Even if you eliminate these factors which have been used to mete out discriminatory treatment, there will always be some form of inequality. It is perhaps for some of these reasons that some commentators have regarded the equality provision as meaningless or useless. In the words of Western, "(e)quality is an empty vessel with no substantive moral content of its own. Without moral standards, equality remains a meaningless formula that can have nothing to say about how we should act. With such standards, equality becomes a superfluous formula that can do nothing but repeat what we already know".[72] Similarly, in the words of Devenish:

> Regrettably, equality before the law is frequently a myth even in ostensibly democratic countries with rigid constitutions incorporating justiciable bills of rights, since affluence, race and political power inevitably influence the administration of justice to a greater or lesser extent".[73]

Should we therefore jettison equality as useless? Not necessarily. What we need is an understanding of what equality entails. This is that all people should be treated equally as human beings. Nobody should be treated as not being human or as being inferior and therefore deserving of unequal treatment owing to his or her race or colour or gender or religion or belief or other irrelevant attribute. The reason for this is that these are attributes about which a person can do little or nothing. They do not derogate from the common humanity even if they are intimately connected with a human being, or they entail certain choices that are so fundamental to self-definition as to merit protection.[74] To use them to mete out discriminatory treatment is therefore unfair and unjust. As the saying goes, the leopard cannot change its spots. These are the grounds listed in section 9(3) of the Constitution. But having accepted that all people are

71 Robinson 1932:28 and further.
72 Western 1982:543.
73 Devenish 1999:39.
74 Albertyn and Kentridge 1994:168; Tussman and tenBroek 1949:353; compare Fagan 1998:227.

human beings and therefore worthy of being treated as such, with dignity and respect, this does not mean that for all practical purposes they will be treated identically whatever their individual circumstances. This is a result of a number of social, economic, political and other factors which may necessitate differential treatment. For this reason it has been said that "the demand for equal protection cannot be a demand that laws apply universally to all persons".[75]

Although the term "equality" may generally be used, what is meant thereby differs according to circumstances. Sometimes the conceptual confusion arises from the inability to realise that equality does not mean just one thing. There is what one could call basic equality as opposed to simplistic equality or even formal equality. Basic equality entails that all people are equal as human beings with dignity and should not be discriminated against on any of the grounds mentioned in section 9(3) of the Constitution because these are not relevant to the way people should be treated, but "are irrelevant accidents in the face of our common humanity".[76] Discrimination based on these grounds detracts from basic humanity or equality and is therefore unfair, invidious and unacceptable. From there equality becomes relative and sometimes sectional and differentiation may be justified on various grounds which may include those who are similarly situated and other grounds which are not regarded as unfair.

Society, in general, accepts some of these inequalities or differentiations in treatment. It is, for instance, accepted that although a child is a human being for all practical purposes, it is not equal to its parents or other adults. A child below the age of eighteen years may not be allowed to vote.[77] Such discrimination is permissible not because it is benign; but it may be based on the ground that such a child does not possess enough knowledge to be able effectively to exercise the vote although such a generalisation may be arbitrary. There may be children who are fourteen or fifteen who may be sufficiently politically aware and informed as to be able to exercise their vote. But the law is not based on exceptional cases but on average ones.

75 Tussman and tenBroek 1949:343; Devenish 1999:43-45; as Hogg 1992:para 52.6(b) puts it: "What is meant by a guarantee of equality? It cannot mean that the law must treat everyone equally. The Criminal Code imposes punishment on persons convicted of criminal offences; no similar burdens are imposed on the innocent. Education Acts require children to attend school; no similar obligation is imposed on adults. Manufacturers of food and drugs are subject to more stringent regulations than the manufacturers of automobile parts. The legal profession is regulated differently from the accounting profession. The Wills Act prescribes a different distribution of property of a person who dies leaving a will from that of a person who dies leaving no will. The Income Tax Act imposes a higher rate of tax on those with high incomes than on those with low incomes. Indeed, every statute or regulation employs classifications of one kind or another for the imposition of burdens or the grant of benefits. Laws never provide the same treatment for everyone".

76 Tussman and tenBroek 1949:353.

77 Section 19(3)(a) of the Constitution stipulates that every adult citizen has the right to vote in elections for any legislative body established in terms of the Constitution.

The average child may not possess that competence or knowledge and may be easily influenced. Moreover, such prohibition from voting is temporary and not permanent and it does not derogate from the basic humanity of the child.[78] Children themselves may not feel they miss much if they do not vote. There are also adults who because of a lack of education may not be adequately informed about issues of government and yet they are entitled to vote.

An employee is for all practical purposes equal to his or her employer as a human being, but for other purposes is not equal to the employer. There will therefore be instances where the law treats them equally and for other purposes differently. The employer is in a superior position for certain purposes. He or she has greater wealth and therefore can acquire more things than the employee. He or she can even afford to pay the employee for the work done. But this does not mean that he or she is entitled to exploit or treat the employee in any way he or she chooses. The employee is entitled to be protected from the exploitation by the employer, and to be paid reasonable remuneration for the job.[79] But any law which says that an employee has to have the same rights and privileges as the employer would lead to absurd consequences. For this reason there is inequality which society tolerates and which it accepts. The justification for this discrimination is that the employer and the employee are not in the same position or similarly situated.

Although all citizens of the country are regarded as equal and as having equal rights, some of them have, for a variety of reasons, more rights, powers and privileges than others. The President of this country, for instance, has more powers and privileges than any other citizens of this country.[80] Those are not just social in nature, but they are also legal. While as a person he is equal to them, he or she may be treated unequally with them for other purposes. Therefore the law allows a form of permissible differentiation. Similarly judges have certain immunities which ordinary people do not have. They also have salaries and other benefits which are protected differently from those of other people.[81] This may be justified on the grounds that as judges you need competent and highly skilled people. You have to not only pay those people adequately in order to attract them to these positions but you also have to give them certain benefits and immunities to ensure that they are not susceptible to corruption and to guarantee their independence so that they can dispense justice fearlessly and with even-handedness.[82] Sometimes, they have to deal

78 Section 28 of the Constitution protects children in matters which directly affect them.

79 The Labour Relations Act 66/1995 and the Basic Conditions of Employment Act 75/1997 for instance are aimed at protecting the employees and bridging the gap between the employer and the employee.

80 Chapter 5 of the Constitution provides for the powers, functions and privileges of the President.

81 Section 176 of the Constitution provides for the terms of office and remuneration for judges.

82 The issue of judicial independence is quite relevant these days; for this see Wunsh 2000:33; Nugent 2000:37.

with complicated cases and you have to reward them for that. Certain jobs demand high skills, intellect and ability. Those who do them have to be remunerated differently from those who do "ordinary jobs". If a judge were to be paid the same salary as a clerk, or a rector of a university as a junior lecturer, why would one bother to become a judge or a rector? The implications thereof are quite obvious. Treating judges differently as a group therefore is permissible. What will not be permissible is to treat some judges differently from others because of their race, colour, sex or gender for instance.

Even at birth people may not be born with the same talents. And in many cases this will result in inequality of treatment in later life. One person may be born beautiful and another one ugly. One person may be born highly intelligent and another one dull. The beautiful person will always enjoy greater attention when she is older. She may be entitled to become a beauty model and to enter a beauty contest. The other one who has not been endowed with such beauty may not enter such a contest or even if she enters the contest stands no chance to win. And if she does not win she may not complain that she has been treated unequally and discriminated against. She cannot claim to be equally beautiful as the other models. Obviously her beauty or lack of it should not lead to her being treated as less than human.[83]

Even if these women do not become models, a more beautiful woman will attract more men for favours and for marriage than the one who is not beautiful although marriage is not the exclusive preserve of beautiful women. Beauty sometimes is more than skin-deep. There are other qualities which may make an unattractive woman attract a man to marry her. The one who is not beautiful cannot complain anywhere that because she is not as attractive as others, she is discriminated against because she does not enjoy the same favours as the more beautiful one. The law will not assist her to get a man of her choice to marry.[84]

Similarly two people are born at the same time. The one is a genius and the other is dull. They may be born of the same parents. Although these people are equal as human beings, they have unequal talents which will lead to differentiation and inequality in later life. The one will become a whizz kid in science and mathematics and will therefore be an engineer or leading scientist, but the other one will only be able to be a street-sweeper. Can they be treated equally in all respects? The answer is that if they are treated in the same way, that would be unfair. In fact, it would lead to absurd consequences. There are many other examples capable of being mentioned.[85]

What inference can be drawn from this? The inferences to be drawn from this is that there are permissible and impermissible forms of differentiation. What is necessary is that if there is a need for differentiation, this differentiation should be based on objectively justifiable criteria and not on

83 Equally, the fact that a person as a woman should lead to her being treated less favourably than other human beings is unacceptable, see Albertyn and Goldblatt 1998:251 and further.

84 As will be seen hereunder, this is a typical case which the courts will not entertain.

85 See for example examples mentioned by Hogg 1992:para 52.6(b).

capricious and arbitrary ones.[86] In the latter examples mentioned above, the justification will be individual desert. The discrimination will be based on the ground that either the one deserves what he or she gets or does not deserve what he or she does not get.[87] But these attributes or lack thereof will not mean that they are not entitled to be treated as human beings with dignity.

It could be argued that some of the examples given above are not particularly apposite. There is no one law for beautiful and intelligent people and another for ugly and dull people. While this may be so, under the guise of equality certain attributes of people affect their enjoyment of certain rights. Similarly citizens who are illiterate, uneducated or semi-literate cannot be regarded as being in the same position as those who are properly educated so as to enjoy the rights of freedom of expression or the right to participate meaningfully in the political process.[88]

The fact that forms of discrimination are permissible is based on the fact that our society encourages certain practices or values as being in the overall interest or benefit to society. These forms of discrimination cannot be regarded as unfair. Our society not only condones but also encourages and rewards hard work, industry, development in science and technology, and therefore research and invention, economic development, the creation of jobs and therefore the improvement of the quality of life of people to mention but a few. Anybody who does these things is encouraged and rewarded. This is in line with Rawls's theory that inequality in wealth, power, income and other resources should not exist except in so far as they work to the absolute benefit of the worst-off members of society.[89] Therefore what a person who does some of these things gets, apart from the ordinary person, is based on individual desert. This is so because one of the things for which people have to strive is not only to survive, but also to live life to its fullest.[90] Any person who does things which will have the effect of improving the quality of life of society is consequently not only encouraged but also rewarded therefor. Society has an interest in there being order as well as justice and fairness. That is why those who are engaged in the administration of justice or in the running of the country or institutions are not only given more powers than the ordinary person, but they are also rewarded for the difficult task of maintaining order and justice and for running the country or institutions. Although they are given power, it is also necessary that they do not have absolute power because absolute power leads to abuse.[91]

There is equally no doubt that people dislike great disparities between individuals. That is why society, while it may applaud intelligence and expertise, appreciates an intelligent person who is humble, one who (while

86 Hahlo and Kahn 1968:31.
87 Bodenheimer 1962:195; see also Van der Vyver 1979:23.
88 Govender 1997:264.
89 Rawls 1972:75.
90 Hart 1962:181 and further.
91 Lord Acton's aphorism that power tends to corrupt and absolute power corrupts absolutely remains true today.

he or she is capable of doing more than others are able to do) does not always remind them of this. Similarly, while people respect a person who is either a judge or politician of a country, they appreciate him or her all the more if he or she is humble, approachable or shows a caring attitude. The same can be said of the rich and the beautiful. That is why people will applaud a rich person who gives generously to charity, and thereby minimizes the gap between the rich and the poor. Moreover, society does not do away with rich employers, but it will always appreciate an employer who pays his or her employees well and does not exploit them.[92]

An interesting question relates to the differentiation between the rich and the poor.[93] Although the law may claim to do away with the discrimination between the poor and the rich, it cannot completely do away with this. As long as that differentiation is not based on entrenched additional grounds such as race, colour, sex or gender, it may be difficult to completely eliminate it. Chaskalson comments that "No society can promise equality of goods or wealth. Nor could it reasonably be thought that this is what our Constitution contemplates".[94] Admittedly the state has an obligation to try to bridge the gap between those who have adequate means and those who are needy by taking reasonable steps to provide for basic needs such as food, water, housing, health care and social security.[95] Apart from these steps, disparities in wealth will continue and this has legal implications.

An example will illustrate this point. A poor man has a case against a rich man. From the start the odds are against the poor man. They may both engage lawyers or if the poor man cannot afford a lawyer, he may obtain legal aid. But complete equality will not be realised that way. The lawyer who may represent the poor man may be an average lawyer whereas the rich man will employ the services of a distinguished silk because he can afford it. The poor man cannot insist on the same nor can he insist that the rich man should have a similarly average lawyer in order to conform to the dictates of equality. Although a silk will not guarantee success, the rich man has an advantage: the judicial officer will listen more carefully to what is said by a silk than by the lawyer obtained through legal aid. Apart from that, the silk may be more skilled than the ordinary attorney or junior advocate. The results may then be shaped accordingly. Thus there will be formal equality but not complete substantive equality.[96]

92 Bodenheimer 1962:185.

93 Unless riches or poverty are caused by state intervention based on some other ideological basis, it is not easy to completely do away with those disparities; the poor will always be there. This is not to condone poverty or to say that measures to do away with poverty should not be taken, but is merely to state that poverty will always be there.

94 Chaskalson 2000:202.

95 See sections 26 and 27 of the Constitution.

96 Albertyn and Kentridge 1994:152; Devenish 1999:38-39.

This means that society will never completely do away with differences and in some cases inequalities. If a rich man were to be forced to have the same calibre of lawyer as his adversary, he might regard this as being unfair and might even contemplate leaving that country to live in a place where he will be free. This will be so because he believes he can afford it. Moreover, equality is not the only consideration. Freedom is equally important. Treating lawyers differently, according to their deserts, motivates some of them to work harder and to become silks for instance. That has its own rewards. Competition may be healthy. Obviously this is a mark of a capitalist society. In a socialist society things may be different. Those who believe in communism espouse a classless society and consequently complete equality. Consequently they would want to eliminate all forms of inequality or differentiation,[97] because they regard differentiation as the source of all evil. In the words of Marx and Engels: "The history of all hitherto existing society is the history of class struggles".[98] And the purpose of Marxism has been to eliminate these classes and to produce a classless society. The challenge for communism has, however, been how to achieve this ideal of absolute equality in a way that is acceptable and upholds human freedom and equality.[99] A further challenge has been to maintain complete equality through state control of the means of production and to provide incentives for advancement. Even in socialist countries total equality in all material and non-material aspects has not materialised. In fact one of the tenets of Marxism is that "from each according to his ability, to each according to his work"[100] which in any case implies some consideration of desert and consequently inequality.

From an aesthetic point of view, if all people were therefore the same and having all attributes in equal measure, life would not only be monotonous, but it would be dull. Everyone would be self-sufficient and every person would be independent and an island. This, however, should not be regarded as support for invidious discrimination based on the listed grounds in the Constitution. It is simply to assert that complete equality in every respect is not necessarily an ideal. What is important is that people should be treated fairly whatever their position in life.

From the above discussion, it is clear that any statement relating to equality may not simply be a statement of fact, but may be aspirational. As Chaskalson puts it:

> The Constitution offers a vision of the future. A society in which there will be social justice and respect for human rights, a society in which the basic needs of all our people will be met, in which we will live together in harmony, showing respect and concern for one another".[101]

97 This does not mean that measures to remove unnecessary inequalities should not be adopted; in fact taking those measures is what life is about. What is disputed is the hope that there ever will be a time when these are completely eliminated.
98 Marx and Engels in Ebenstein 1969:723; see also Ebenstein 1969:692.
99 Ebenstein 1969:698 and further.
100 Ebenstein 1969:694.
101 Chaskalson 2000:205.

Apart from basic equality, there is no fixed content of equality; it depends on context and comparison and there are impediments to the attainment of complete equality. The suggestion therefore that it can be used as a tool to facilitate transformation,[102] while commendable, may have its limitations also. This, however, should not detract from people being treated with equal respect and equal concern. This implies that equality and dignity are clearly inseparable.[103]

The weakness of the equality principle is that it may create a false sense of complacency in that people may feel that all people are equally protected and treated equally by the Constitution and the law whereas in practice there may be many inequalities. That is why the Constitution provides that the Human Rights Commission should monitor the realisation of socio-economic rights.[104] Even if there are glaring inequalities the state may not be in a position to do away with those inequalities because doing away with them may not depend on the law, but on the availability of resources.[105] The positive aspect of the equality provision is that it draws attention to unwarranted inequality and enables those people who are unequally and adversely treated or discriminated against to challenge such discrimination, especially if it violates their basic equality. It also enables the state to take steps to eliminate such inequality. Thus it can be used as a lever to bring about more substantive equality.[106] A further weakness of the equality provision is that it promises more than it can deliver. Although it promises equal enjoyment of all the rights, it does not guarantee it. This is more glaring in the area of socio-economic rights.[107] What does equality mean for a person who is illiterate, unemployed, lacks a decent shelter, cannot afford adequate food or health services and is disabled? What does equality mean in the face of massive poverty and deprivation in our country? In the words of Chaskalson in the case of *Soobramoney v Minister of Health, KwaZulu-Natal* :[108]

> We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty… These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.

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102 Albertyn and Goldblatt 1998:249.

103 Chaskalson 2000:202-3.

104 Section 184 of the Constitution.

105 The case of *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 430 (D & CLD) illustrates this; see also *Soobramoney v the Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) 1997 (12) BCLR 1696; Moellendorf 1998:327.

106 This is what the Promotion of Equality and Prevention of Unfair Discrimination Act 4/2000 seeks to do; see also Chaskalson 2000:203 and further.

107 Pieterse 2000:51; see also De Vos 1997:67 and further; Liebenberg 2001:232 and further.

108 1998 1 SA 765 (CC):para 8.

A poor person therefore cannot enjoy those rights equally with the rich because he or she may not have the means to acquire those rights. This can also be seen from the way these rights are couched. Although in our Constitution provision is made for the Human Rights Commission to monitor the observance of socio-economic rights, that role is limited. The Commission cannot compel the government to implement those rights — it merely makes recommendations.

The importance of the equality clause, on the other hand, is that it focuses on basic equality and on the interdependence of human beings. The rich are still human beings and they are to a large extent dependant on the poor who may provide the labour to further the aims of the rich. The poor cannot completely do away with the rich because they need the rich. They need jobs which the rich can provide so that the poor can earn a livelihood and survive. The powerful need the weak and the weak need the powerful. It has been said that even the powerful need to sleep at times and when they are asleep they are as vulnerable as the weak, albeit temporarily.[109] The privileged depend on the underprivileged and vice versa. Men depend on or need women and women depend on or need men for a variety of things. No one can go it alone; no one is an island. Whites need blacks and blacks need whites. The challenge is not to do away with these differences completely, and in some cases it is not possible to do away with them, but to strike a balance which will demonstrate the interdependence of human beings. It is to prevent those who may be advantaged or powerful or rich from abusing their power, or riches or privilege because it is ultimately in their interest and that of the larger society that they be restrained. The removal of structural or systemic forms of disadvantage based on certain groups occasioned by race, gender, socio-economic status and a number of other factors which may inhibit a person's ability to compete equally with others, should also be facilitated. Democracy needs and can function well when there is this approximate equality.[110] A brief analysis of the equality provision in the Constitution is therefore appropriate.

109 Hart 1962:191.
110 Hart 1962:191.

Bibliography

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

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

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

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

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

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

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

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

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

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

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

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

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

CHASKALSON A
2000. Human dignity as a foundational value of our constitutional order. *South African Journal on Human Rights* 193-205.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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