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p. 229 - 272

Chapter Nine

Equality

9.1 The constitutional commitment to equality 230
(a) The idea of equality 230
(b) The historical and social context of the right to equality . . . 231
(c) Formal and substantive equality 232
9.2 Interpreting section 9 234
(a) Section 9 compared to section 8 of the interim Constitution. 234
(b) The stages of enquiry 235
(c) The relationship between section 9 and section 36. 237
9.3 'Mere differentiation' 239
(a) Differentiation and discrimination distinguished 239
(b) Rationality 239
(c) Section 9(1) and 'rule of law rationality'. 243
9.4 Discrimination 243
(a) Discrimination defined 243
(b) Fair discrimination. 245
(c) Unfair discrimination 246
(d) The listed grounds 248
(i) Race, colour, ethnic origin. 249
(ii) Gender, sex, pregnancy 250
(iii) Sexual orientation. 251
(iv) Marital status. 254
(v) Age 256
(vi) Disability 256
(vii) Religion, conscience and belief, culture and language. . 256
(viii) Birth and social origin. 256
(e) The analogous grounds. 257
(f) Direct and indirect discrimination 260
(g) Discrimination need not be intentional. 263
9.5 Affirmative action. 264
9.6 The Promotion of Equality and Prevention of Unfair Discrimination Act 267
(a) Prevention of unfair discrimination 268

(b) Access to justice 270
(c) Promotion of equality 271

Equality

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

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

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

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

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

9.1 The Constitutional Commitment to Equality

(a) The idea of equality

Equality is a difficult and deeply controversial social ideal. At its most basic and abstract, the formal idea of equality is that people who are similarly situated in relevant ways should be treated similarly. Its logical correlative is the idea that people who are not similarly situated should not be treated alike. For example, it is generally thought wrong to deny women the vote. This is because, when it comes to voting, men and women are in all relevant respects in the same position; they are equally capable of exercising political choices. So, if men and women are alike, they should be treated alike. At the same time, it is generally not thought wrong to deny children the vote. This is because children and adults are not in the same position when it comes to their ability to exercise political choices. Because adults and children are not alike, a law restricting the franchise to adults is therefore usually thought to be justifiable.

But it is not the basic and abstract idea of equality that is so difficult and controversial. Instead, it is two issues ancillary to the idea of similar treatment for similar people that prove so taxing. The first is the issue of what counts as relevant when it comes to determining the similarity of peoples' situation. For example, is it relevant that men tend, on the whole, to be physically stronger than women when deciding whether or not to conscript only men into the army? In other words, when it comes to the ability to perform military service, are men and women similarly situated (in which case we must treat them the same) or dissimilarly situated (in which case conscripting men and not women is

justified).[1] The second issue is what constitutes similar treatment of people who are similarly situated. For example, we might think it wrong to deny education to blind children. Blind and sighted children are in all relevant respects in the same position and should be treated the same when it comes to access to education. But is it sufficient simply to give blind children a right of access to the same schools as sighted children? Or does our commitment to equality (which includes the idea that people who are different in significant ways should not be treated the same as everyone else) require us to create special schools or special programmes which take into account the particular educational needs of blind children?

The Constitution requires us to grapple with these difficult issues. It commits the state to the goal of achieving equality.[2] It tells us that the type of society that it wishes to create is one based on equality, dignity and freedom. Section 9, the first right listed in the Bill of Rights, protects a right to equality. This comprises a guarantee that the law will protect and benefit people equally and a prohibition on unfair discrimination. 'Equality', we are told by s 9(2), 'includes the full and equal enjoyment of rights and freedoms'. To this end, special measures may be taken to ensure the protection or advancement of people who have been disadvantaged by discrimination in the past.

(b) The historical and social context of the right to equality

The constitutional guarantee of equality must be interpreted contextually. This entails a historical understanding of the type of society that South Africa once was and against which the new Constitution has set itself. The importance of the equality right to the post-apartheid constitutional order is obvious. The apartheid political and legal system was squarely based on inequality and discrimination. It dealt with the problem of scarce resources by promoting the socio-economic development of the white population at the expense of the rest of South African society. As the Constitutional Court has pointed out, apartheid

> systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as 'white', which constituted nearly 90 per cent of the land mass of South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society.[3]

The 'deep scars' of decades of systematic racial discrimination can be seen in all the key measures of quality of life in South Africa. White South Africans are significantly healthier and better nourished than their black fellow-citizens. They

[1] This issue was considered by the US Supreme Court in *Rostker v Goldberg* 453 US 57 (1981) (conscription of men only is not a denial of equal protection; women are excluded from combat by military policy and therefore are not similarly situated to men when it comes to conscription)

[2] Section 1(*a*)

[3] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) para 40 (O'Regan J)

the trustee of the insolvent estate. The trustee may deal with the solvent spouse's property as if it were the property of the sequestrated estate, subject to certain safeguards allowing the solvent spouse to reclaim his or her property, basically on proof that it is his or her own property and not the property of the insolvent spouse. The law therefore differentiates between solvent spouses and any other person who had dealings with the insolvent, imposing a burden on the former group that it does not on the latter. Does this differentiation discriminate? The differentiation arises from certain attributes or characteristics possessed by solvent spouses, namely their usually close relationship with the insolvent spouse and the fact that they usually live together in a common household. These attributes have the potential to demean the inherent humanity and dignity of persons and differentiation grounded on these attributes is discriminatory.

The next aspect of the enquiry is into whether the discrimination has an unfair impact on those affected by it. A number of factors must be taken into account in determining whether discrimination has an unfair impact. The first is the position of the complainants in society and whether they have been victims of past patterns of discrimination. According to the court, solvent spouses have not suffered discrimination in the past and cannot be called a vulnerable group. The second factor in assessing unfairness is the nature of the discriminating law or action and the purpose sought to be achieved by it. Does the law seek to achieve a worthy and important societal goal? Section 21 is intended to protect the rights of the creditors of insolvent estates, an important purpose that is not, according to the Constitutional Court, inconsistent with the underlying values of the equality clause.

The third factor in assessing unfairness is the extent to which the rights of the complainant have been impaired and whether there has been an impairment of his or her fundamental dignity. In this regard, the court stressed that the statutory vesting of the property of the solvent spouse does not have the consequence that such property is necessarily removed from the possession of the solvent spouse. It is attached by the sheriff of the magistrate's court or by a deputy sheriff and is presumed to have been owned by the insolvent spouse until the solvent spouse adduces evidence to establish the contrary on a balance of probabilities. The effect is thus that the solvent spouse has not been divested of what was her or his property. In the event that the solvent spouse has to resort to litigation to reclaim the property, there is inconvenience and a degree of potential embarrassment to the extent that the litigation may become public. There is also inconvenience and a burden in that the solvent spouse will usually require legal assistance. Some solvent spouses may not have the funds to employ a lawyer and in that way may suffer further potential prejudice. But that is an inevitable consequence of a dispute between a trustee of an insolvent estate and a solvent spouse as to ownership of property.

The court concluded as follows:

> [t]he cumulative effect of these criteria, and in particular the impact of the inconvenience or prejudice on solvent spouses in the context of the Act, and having regard to the underlying values protected by s 8(2), does not justify the conclusion that s 21 of the Act constitutes unfair discrimination. Looked at from the perspective of solvent spouses, it is the kind of inconvenience and burden that any citizen may face when resort to litigation becomes necessary. Indeed it could arise whenever a vindicatory claim (whether justified or not) is brought against a person in possession of property. Again, the inconvenience and burden of having to resist such a claim does not lead to an impairment of fundamental dignity or constitute an impairment of a comparably serious nature.[117]

Accordingly, the applicant had not established that s 21 was unfairly discriminatory.

In *Larbi-Odam v MEC for Education (North-West Province)*,[118] the Constitutional Court found that a provincial regulation that prevented all non-citizens (and therefore the subcategory of permanent residents) from being appointed into permanent teaching posts, was unfair discrimination. The ground of unfair discrimination in this case is citizenship, or, from the perspective of the appellants, 'non-citizenship'. Citizenship, though not a listed ground, is suspect because it is based on attributes and characteristics which had the potential to impair the fundamental human dignity of non-citizens hit by the regulation. The court noted that foreign citizens are a minority in all countries, and have little political muscle and that they are therefore vulnerable to having their interests overlooked and their rights to equal concern and respect violated. Second, citizenship is a personal attribute which is difficult to change. 'In addition', the court noted, 'the overall imputation seems to be that because persons are not citizens of South Africa they are for that reason alone not worthy of filling a permanent post'. As for unfairness, the measure was overbroad and its impact on non-citizens who were permanent residents could not be justified.

It is not always obvious whether a particular basis of discrimination can be categorised as being one of the listed grounds. In such cases, it is possible for a court to decide that law or conduct is unfair discrimination on an analogous ground. *Hoffmann v South African Airways*[119] dealt with an airline's policy of not employing HIV-positive persons as cabin attendants. It was argued that the policy amounted to unfair discrimination on the listed ground of disability. The Constitutional Court avoided the controversy over classification of HIV as a disability, preferring to deal with HIV-status discrimination as an analogous ground.[120] The determining factor in deciding whether discrimination is unfair is its impact on the people affected. For people to be denied employment because of their HIV-positive status without regard to their ability to perform the duties of the position from which they have been excluded is a violation of dignity. The court noted a 'prevailing prejudice' against HIV-positive people. In such a

[117] *Harksen* (note 21 above) para 67.

[118] *Larbi-Odam v MEC for Education (North-West Province)* 1998 (1) SA 745 (CC).

[119] Note 26 above. See also the discussion of *Mahaso v Law Society, Northern Provinces* in note 15 above.

[120] *Hoffmann* (note 26 above) para 40 (unnecessary to consider whether the appellant was discriminated against on a listed ground of disability . . . as [the appellant] contended or whether people who are living with HIV ought not to be regarded as having a disability, as contended by the *amicus* [the Aids Law Project]). The Equality Act includes, in s 34, a 'directive principle' requiring the Minister of Justice to give consideration to the inclusion of HIV/AIDS status in the definition of 'prohibited grounds' of discrimination in the Act. The Employment Equity Act includes 'HIV status' as a listed ground of unfair discrimination. See *Irvin & Johnson (Ltd) v Trawler and Line Fishing Union* 2003 (3) SA 212 (LC) (prohibition of HIV-status discrimination in Employment Equity Act not violated by an anonymous and voluntary testing programme of an employer).

context, any further discrimination against them was 'a fresh instance of stigmatisation' and an assault on their dignity [121] The discrimination could not be justified as fair, because it was based on ill-informed prejudice against people with HIV The fact that some people with HIV would not be healthy enough to work as cabin attendants did not justify a blanket policy of refusing employment to anyone with HIV [122] 'Prejudice', according to the court, can never justify unfair discrimination [123]

(f) Direct and indirect discrimination

The prohibition against both direct and indirect discrimination is intended to cover all possible forms of discrimination on the listed or analogous grounds The prohibition of indirect unfair discrimination is based on the realisation that, though the basis of differentiation may, on the face of it, be innocent, the impact or effect of the differentiation is discriminatory A good example is provided by the US case of *Griggs v Duke Power Co*,[124] in which black employees successfully challenged the power company's hiring and promotion requirements which required a high school diploma Directly, the requirement was not discriminatory Indirectly, it had the effect of keeping black people out of the job since disproportionately few were able to meet this requirement A law may also be neutral on its face and in its impact but be administered unfairly

The phrase 'directly or indirectly' covers all three possible forms of discrimination Any law which has an unfairly discriminatory effect or consequences or which is unfairly administered may amount to prohibited discrimination even if the law appears on its face to be neutral and non-discriminatory [125] Section 9(5) which presumes discrimination on one or other of the listed grounds to be unfair discrimination applies both to direct and indirect discrimination [126]

The importance of prohibiting indirect discrimination in addition to direct discrimination is illustrated by the series of 'ratepayers' cases' The cases deal with a particularly controversial issue in modern South Africa New non-racial local authorities have looked to relatively well-serviced and wealthier formerly all-white areas to subsidise the improvement of the dire state of public facilities and services in black townships The resultant increase in rates has led to protests and rate boycotts in white areas

[121] Ibid para 28

[122] Had the applicant been refused employment because he was too ill to work this would not be unfairly discriminatory This point is further illustrated by *Master of the High Court v Deedat* (note 110 above) which involved an application for removal of one of the trustees of a trust who had suffered a stroke and was bed ridden paralysed from the neck down and unable to speak It was argued that it would be unconstitutional to have the trustee removed on the ground of his physical disability According to the court it would be unfairly discriminatory to remove a trustee solely on the grounds of physical incapacity without any reference to his or her ability to perform the duties of a trustee A finding that he or she be removed on the grounds of physical incapacity to perform the duties of a trustee would not be disability discrimination and not unfairly discriminatory

[123] *Hoffmann* (note 26 above) para 37

[124] *Griggs v Duke Power Co* 401 US 424 (1971)

[125] *Walker* (note 34 above) para 31

[126] Ibid para 35

A series of court challenges attacked as racial discrimination practices such as differentiated methods of charging for local government services (consumption-based tariffs in white suburbs and flat rates in the townships), the practice of cross-subsidisation (charging the residents of the white suburbs more and channelling the funds to upgrade services in the townships) and the selective writing-off of service charge arrears [127] The difficulty with this argument was that on the face of it, the differential treatment appeared to be geographical rather than racial Depending on whether you lived in a former whites-only area or a township you would be subject to different treatment by the local government However for historical and social reasons, placing a burden on the suburbs and not on the townships will have an indirect racial impact This is because the suburbs remain predominantly white and the townships predominantly black

In *Pretoria City Council v Walker* the applicant's complaint was that the council's actions discriminated on grounds of race On its face, the Council's policy was neutral on the subject of race It did not expressly differentiate between white and black ratepayers but imposed more burdensome tariff structures and debt-collection policies on the suburbs of Pretoria than it did on the townships However, its effect, according to the applicant, was to target white residents and subject them to a burden that black residents did not suffer The majority of the Constitutional Court agreed

> It is sufficient for the purposes of this judgment to say that this conduct which differentiated between the treatment of residents of townships which were historically black areas and whose residents are still overwhelmingly black and residents in municipalities which were historically white areas and whose residents are still overwhelmingly white constituted indirect discrimination on the grounds of race The fact that the differential treatment was made applicable to geographical areas rather than to persons of a particular race may mean that the discrimination was not direct but it does not in my view alter the fact that in the circumstances of the present case it constituted discrimination albeit indirect on the grounds of race It would be artificial to make a comparison between an area known to be overwhelmingly a 'black area' and another known to be overwhelmingly a white area on the grounds of geography alone The effect of apartheid laws was that race and geography were inextricably linked and the application of a geographical standard although seemingly neutral, may in fact be racially discriminatory In this case its impact was clearly one which differentiated in substance between black residents and white residents The fact that there may have been a few black residents in old Pretoria does not detract from this [128]

[127] See inter alia *Beukes v Krugersdorp Transitional Local Council* 1996 (3) SA 467 (W) (flat rate in townships have indirect racial impact not unfair discrimination because economically and socially justifiable) *Walker v Stadsraad van Pretoria* 1997 (4) SA 189 (T) (flat rate in townships and selective enforcement of arrear debts unfair discrimination on basis of area of residence) *East London Transitional Local Council v Tax Payers Action Organisation* 1998 (10) BCLR 1221 (E) (flat rate in black areas and writing-off of unpaid service charges but not property assessment rates not unfair racial discrimination based on historical social economic and practical consideration and intended as an interim measure)

[128] Sachs J dissented holding that the differential treatment was neither directly nor indirectly grounded on race Instead the policy was based on the identification of objectively determinable characteristics of different geographical areas and not on race There was no direct discrimination on grounds of race Nor in my view was there indirect discrimination on the grounds of race simply because whites lived in one area and blacks in another *Walker* (note 34 above) para 105

Whereas direct discrimination appears on the face of a law or conduct if an applicant seeks to rely on indirect discrimination it will often be necessary to adduce evidence to show that a particular law or conduct has discriminatory effect or is administered in a discriminatory manner For example in *Democratic Party v Minister of Home Affairs* [129] provisions of the Electoral Act 73 of 1998 requiring voters to identify themselves using a particular bar-coded identity document were challenged on the grounds that they were indirectly discriminatory On their face, the provisions were neutral it was argued but their effect was to discriminate on amongst others the grounds of race, age and residence This argument was based on a survey showing that most of the potential voters without the requisite identity document were whites, rural dwellers and young people The Constitutional Court held that there was insufficient evidence to sustain an indirect discrimination challenge to the Act There was nothing to show that voters in the identified categories had in fact registered in smaller numbers than those outside the categories Even if they had, this may well have been the result of voter education drives directed at voters outside the categories, rather than the effect of the Electoral Act

S v Jordan[130] saw an interesting dissensus among the members of the Constitutional Court on an allegation of indirect discrimination A number of challenges were made against legislation prohibiting prostitution The essence of the equality challenge was that the legislation criminalises only one side of the transaction the prostitute and not the client This differentiation amounts, so the argument went to indirect gender discrimination, since most prostitutes are women But according to the majority of the Constitutional Court the objection had to be dismissed

> In my view a gender-neutral provision which differentiates between the dealer and the customer a distinction that is commonly made by statutes and which is justifiable having regard to the qualitative difference between the conduct of the dealer and that of the customer and which operates in the legal framework that punishes both the customer and the dealer and makes them liable to the same punishment cannot be said to be discriminating on the basis of gender simply because the majority of those who happen to violate such a statute happen to be women [131]

The 'legal framework' referred to is the general criminal law which treats a client of a prostitute as a socius criminis and, in terms of s 18 of the Riotous Assemblies Act 17 of 1956, as a conspirator The fact that in practice no client is ever charged as a socius or conspirator is not a defect in the law but rather in its enforcement Deficient enforcement is immaterial in confirmation proceedings arising out of a declaration of invalidity of legislation [132]

The minority of the court saw it differently It was no answer to the charge of unfair discrimination to say that a client could be charged as an accomplice or conspirator These are forms of indirect criminal liability The primary crime and

[129] *Democratic Party v Minister of Home Affairs* 1999 (3) SA 254 (CC)
[130] *S v Jordan* (note 31 above)
[131] Ibid para 18 (Ngcobo J)
[132] Ibid para 19

the primary stigma of being a criminal lies in offering sexual intercourse for reward not in purchasing it [133] The express criminalisation of only one side of the transaction reflected negative stereotypes of women s sexuality of the sexual double standards' prevalent in society

> the stigma is prejudicial to women and runs along the fault lines of archetypal presuppositions about male and female behaviour thereby fostering gender inequality To the extent therefore that prostitutes are directly criminally liable while customers if liable at all are only indirectly criminally liable as accomplices or co conspirators the harmful social prejudices against women are reflected and reinforced Although the difference may on its face appear to be a difference of form it is in our view a difference of substance that stems from and perpetuates gender stereotypes in a manner which causes discrimination The inference is that the primary cause of the problem is not the man who creates the demand but the woman who responds to it she is fallen he is at best virile at worst weak Such discrimination therefore has the potential to impair the fundamental human dignity and personhood of women [134]

(h) Discrimination need not be intentional

There is no need for an applicant to show that a law or conduct which has a discriminatory effect was intended to discriminate [135] Thus the applicants have to show only that they were unfairly discriminated against but not that the unfair discrimination was intentional To require the second showing would place an onerous burden of proof on an applicant, particularly in cases where indirect discrimination is alleged [136]

While an intention to discriminate s not necessary to prove discrimination intention to discriminate is relevant to the enquiry whether the discrimination has been unfair As we have seen, one of the factors determining whether discrimination has an unfair impact is the purpose of the conduct or action, whether 'its purpose is manifestly not directed, in the first instance, at impairing the complainants but is aimed at achieving a worthy and important societal goal' [137] Obviously conduct or action that is intended to be discriminatory is

[133] Ibid para 63 (O Regan J and Sachs J)
[134] Ibid para 65
[135] *Walker* (note 34 above) para 43 Note however the apparently contrary remarks of the Constitutional Court in *Harksen* (note 21 above) n46 When in 1926 the provision was inserted into the 1916 [Insolvency] Act there can be no doubt that it was directed at property ostensibly owned by women married out of community of property *It could hardly have been otherwise as there were relatively* few women at that time who had an independent income Its purpose was not aimed at disadvantaging or prejudicing women as such Its language was gender neutral and as more women began to have their own income its effect applied more frequently to husbands Counsel for Mrs Harksen correctly in my view did not suggest that s 21 resulted in gender discrimination
[136] See for example the provisions of the Aliens Control Act that were considered in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* (note 30 above) The provisions in question granted a benefit to married persons In doing so it excluded homosexual partners from the benefit It is unlikely that the exclusion was intentional but the legislature s discriminatory intention or lack of it is irrelevant
[137] Ibid para 52

more likely to be considered unfair than conduct or action that is unintentionally discriminatory [138]

9 5 Affirmative Action

Affirmative action means preferential treatment for disadvantaged groups of people Typically, an affirmative action programme will require a member of a disadvantaged group to be preferred for the distribution of some benefit over someone who is not a member of that group The grounds of preference are usually race or gender [139]

Affirmative action programmes can be seen either as an exception to the right to equality or as part of the right to equality The former view sees affirmative action as 'reverse discrimination', a practice of favouring those discriminated against in the past and discriminating against those favoured in the past The latter view sees affirmative action as a means to the end of a more equal society This view treats equality as a long-term goal, to be achieved through measures and programmes aimed at reducing current inequality

The Constitution favours the latter view Affirmative action is not an exception to equality, but is a means of achieving equality understood in its substantive or restitutionary sense Section 9(2) states that 'equality includes the full and equal enjoyment of all rights and freedoms' and that to 'promote the achievement of equality' affirmative action measures may be undertaken [140] Segregation and apartheid created a political and economic system that favoured some people and unfairly discriminated against others This system left a legacy of inequality which inhibits the enjoyment and exercise of the constitutional rights of a large number of people in South Africa A person who is illiterate, uneducated or undereducated is not in the same position to enjoy the right of freedom of expression or political right as a person who is educated The right to equality therefore does more than simply prohibit discrimination or unequal treatment by the state or by private individuals It also imposes a positive obligation on the government to act so as to ensure that everyone fully and equally enjoys all rights and freedoms

Affirmative action programmes must therefore be seen not as a derogation from, but a substantive and composite part of the right to equality [141] Differentiation aimed at protecting or advancing persons disadvantaged by unfair

[138] *Walker* (note 34 above) para 44 This is illustrated by *Moseneke* (note 69 above) (segregation era legislation intentionally discriminating on ground of race is unfair notwithstanding that the legislation may have unintended beneficial consequences)

[139] For example the Employment Equity Act 55 of 1998 aims to redress inequalities in the public and private sector labour markets The Act obliges employers to take steps to increase the representation of members of so called designated groups in their workforce The designated groups are black people women and people with disabilities A more recent example is the Broad Based Black Economic Empowerment Act 53 of 2003 which aims to rebalance the country's racially skewed division of economic power by promoting the economic empowerment of all black people including women workers youth people with disabilities and people living in rural areas (s 1)

[140] Section 8(3) of the interim Constitution was less unequivocal about whether affirmative action was part of or an exception to the equality right

[141] *Minister of Finance v Van Heerden* (note 13 above) para 32

discrimination is therefore warranted provided the measures are shown to conform to the internal test of s 9(2) [142] Practically this means that when a measure has been challenged as a violation of the equality right the state or the institution responsible for the measure can defend it by showing that the measure (1) targets persons or categories of persons who have been disadvantaged by unfair discrimination [143] (2) is designed to protect and advance such persons or categories of persons and (3) promotes the achievement of equality [144] Once shown to be an affirmative action measure it is not unfairly discriminatory even if the basis of differentiation is a listed ground [145]

Affirmative action is justified by its consequences A measure that favours relatively disadvantaged groups at the expense of those who are relatively well off is not unfairly discriminatory because the consequences of such a measure are in the long run, a more equal society But this means that the measure chosen must be intended to achieve these desirable consequences Though it is not possible to predict the future, the measure should at least be more likely to achieve the goal of equality than not

Etienne Mureinik pointed out that two different interpretations could be attached to the phrase 'designed to achieve' in s 8(3) of the interim Constitution [146] On the one hand it could mean 'intended', with the result that affirmative action measures would not be reviewable provided that the state can show an intention to achieve equality for persons or groups 'disadvantaged by unfair discrimination' Mureinik argued that the better view is that the use of the word 'designed' suggests that there should be a rational relationship between ends and means In other words it is necessary to show both the purpose of the programme in question and that the means selected are reasonably capable of meeting that purpose This requires affirmative action programmes to be carefully constructed to achieve equality

Mureinik's view was supported in *Public Servants Association of South Africa v Minister of Justice*[147] where the High Court held that the words 'design' and 'achieve' denotes a causal connection between the designed measures and the objectives [148] In *Van Heerden*, the Constitutional Court overruled this interpretation, holding that

[142] Ibid

[143] Ibid para 37 The fact that a small number of people who do not qualify as affirmative action beneficiaries nevertheless receive benefits from a scheme does not affect the scheme's validity The efficacy of the scheme should be judged by whether an overwhelming majority of members of the favoured class are persons designated as disadvantaged by unfair exclusion Ibid para 40 In *Van Heerden* the court upheld a differentiated Parliamentary pension scheme that favoured post 1994 members of Parliament and was relatively disadvantageous to pre 1994 MPs who remained members after 1994 The principal basis of differentiation was race since Africans could not have been MPs prior to 1994 However since not all post 1994 MPs were Africans the scheme ended up benefiting some people not eligible for affirmative action

[144] Ibid para 37

[145] Ibid paras 33 36

[146] E Mureinik A Bridge to Where? Introducing the Interim Bill of Rights (1994) 10 *SAJHR* 31

[147] *Public Servants Association of South Africa v Minister of Justice* 1997 (5) BCLR 577 (T)

[148] In the *Public Servants Association* case (ibid) none of the white males (all of whom had considerable work experience) who had applied for senior posts in the Department of Justice was interviewed for the vacant positions The evidence was that the Department was oversupplied with white males and to

> Section 9(2) of the Constitution does not postulate a standard of necessity between the legislative choice and the governmental objective The text requires only that the means should be designed to protect or advance It is sufficient if the measure carries a reasonable likelihood of meeting the end To require a sponsor of a remedial measure to establish a precise prediction of a future outcome is to set a standard not required by section 9(2) Such a test would render the remedial measure stillborn and defeat the objective of section 9(2) [149]

A litigant defending remedial measures does not therefore need to show that is necessary to disfavour one class in order to uplift another The remedial measures must be constructed to protect or advance a disadvantaged group and are not predicated on a necessity or purpose to prejudice or penalise others It is therefore unnecessary to establish that there is no less onerous way in which the remedial objective may be achieved [150]

An affirmative action programme must be designed to protect and advance persons disadvantaged by unfair discrimination in the past In *Motala v University of Natal*,[151] an Indian student who had obtained five distinctions in matric was refused admission into medical school The medical school had decided to limit to 40 the number of Indian students admitted to its programme This was because the poor standards of education available to African students meant that a merit-based entrance programme would result in very few African applicants being accepted into medical school It was argued that because the Indian community had also been disadvantaged by apartheid, a measure favouring African students over Indian students amounted to unfair discrimination The court held that the admission policy was a measure designed to achieve the adequate protection and advancement of a group disadvantaged by unfair discrimination

address this situation a policy had apparently been adopted of not considering white males for certain posts when they became vacant According to the court these actions though forming part of an affirmative action programme were haphazard random and overhasty They therefore could not in any sense be said to be designed to or constructed to achieve affirmative action goals The actions therefore did not constitute measures designed to achieve affirmative action and consequently were invalidated as unfair discrimination based on race and gender

[149] Note 13 above para 42

[150] Ibid para 43 See also *Stoman v Minister of Safety and Security* 2002 (3) SA 468 (T) in which Van der Westhuizen J held that an employment policy or practice that was haphazard random or overhasty would lack rationality and would not qualify as a affirmative action measure for purposes of s 9(2) While s 9(2) of the 1996 Constitution did require rational and well planned measures to protect or advance individuals who had been disadvantaged by unfair discrimination the aim of such measures (to promote the achievement of equality) was stated in somewhat vaguer terms than the emphatic achievement of adequate protection and advancement of the interim Constitution (480H I) These differences (and the enactment of the Promotion of Equality and Prevention of Unfair Discrimination Act) allowed Van der Westhuizen J to distinguish *Public Servants Association* (note 147 above) and to some extent part ways from it The applicant a white policeman had applied for a more senior post He was the best qualified candidate but the best qualified African candidate had been appointed instead of him The decision not to appoint the applicant was unobjectionable according to Van der Westhuizen J because the SAPS was complying with the requirements of the Constitution and the Employment Equity Act 55 of 1998 in appointing an individual from a group under represented at a particular level in the Service rather than an individual from a group that was over represented

[151] *Motala v University of Natal* 1995 (3) BCLR 374 (D)

> While there is no doubt whatsoever that the Indian group was decidedly disadvantaged by the apartheid system the evidence before me establishes clearly that the degree of disadvantage to which the African pupils were subjected under the four tier system of education was significantly greater than that suffered by their Indian counterparts I do not consider that a selection system which compensates for this discrepancy runs counter to the provisions of s 8(1) and 8(2)[of the Interim Constitution] [152]

This aspect of the judgment is clearly correct Apartheid society had a distinct hierarchy of races Whites were at the top, Africans at the bottom and the coloured and Indian communities were situated in between It is perfectly legitimate, therefore to apply affirmative action measures in proportion to the degree of disadvantage suffered in the past However, when the effect of a programme is to disadvantage, on the basis of race, people who had also been victims of discrimination in the past, the court ought to focus on the second requirement of the affirmative action clause and satisfy itself that the programme is rational and carefully constructed so as to achieve equality This the court in *Motala* failed to do, accepting the programme as valid simply on the basis that Africans were more disadvantaged than Indians

9 6 The Promotion of Equality and Prevention of Unfair Discrimination Act

Section 9(4) requires the enactment of national legislation to prohibit or prevent unfair discrimination, particularly what can be described as 'private discrimination' — practiced by individuals or institutions other than the state and taking the form of conduct rather than law Item 23(1) of Schedule 6 of the Constitution provided that the legislation must be enacted within three years of the commencement of the Constitution, that is, by 3 February 2000

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 is aimed at fulfilling this requirement The Act was passed by Parliament and assented to by the President on 2 February 2000 It was brought partially into operation with effect from 1 September 2000 [153] The remaining sections of the Act were brought into effect from 16 June 2003 [154]

The Equality Act is an extremely ambitious piece of legislation, aiming at nothing less than the 'the eradication of social and economic inequalities, especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people' [155] It hopes to achieve this aim by (1) prohibiting unfair discrimination, (2) providing remedies for the victims of unfair discrimination and (3) by promoting the achievement of substantive equality

[152] Ibid 383

[153] Proclamation R54 of 30 August 2000 The sections brought into operation were 1 2 3 4(2) 5 6 and 29 (with the exception of subsection (2)) 32 33 and 34(1)

[154] Proclamation R49 of 13 June 2003

[155] Preamble to the Act

(a) Prevention of unfair discrimination

As far as the Act's objective of prohibiting unfair discrimination is concerned the Act has horizontal application in that it binds the state and all persons [156] It does not apply to workplace discrimination to the extent that this is covered by the Employment Equity Act 55 of 1998 [157] Chapter 2 of the Bill contains a general prohibition on unfair discrimination by the state and private persons In general, the interpretation of 'unfair discrimination' in the Act is likely to track the jurisprudence of the Constitutional Court dealing with s 9 of the Constitution [158] However now that the Act is operational, its rights, duties, procedures and remedies must be relied on to challenge conduct, in preference to relying directly on s 9 of the Constitution [159]

Compared to a challenge based on s 9, the Act offers some significant procedural advantages for a complainant First, in so far as state or private conduct is challenged,[160] the Act shifts the burden of proof once the complainant makes out a prima facie case of discrimination [161] The establishment of a prima facie case requires more than a mere allegation of discrimination The complainant must, to the extent reasonable, produce evidence of discrimination and that evidence must call for an answer Or, as it is sometimes put, the complainant must produce evidence of such a character that, if unanswered, it would justify a reasonable and fair person to find in the complainant's favour [162] Much will of course depend on the circumstances of the case and particularly on the knowledge and information at the disposal of the respective parties The crucial point, however is that once a prima facie case is made out by the complainant the respondent is saddled with a full onus It will not be sufficient for a respondent faced with a

[156] Section 5 Person is defined to include a *juristic person a non juristic entity a group or a category* of persons

[157] Section 5(3) of the Equality Act provides that it does not apply to any person to whom and to the extent that the Employment Equity Act 55 of 1998 applies A complainant will therefore not be able to choose to proceed under one or the other statute Where the Employment Equity Act applies it excludes the operation of the Equality Act

[158] The Act follows the Constitutional Court jurisprudence by separating the enquiry into the existence of discrimination from the enquiry into whether the discrimination is unfair

[159] See on the similar relationship between s 33 of the Constitution and the Promotion of Administrative Justice Act 3 of 2000 Chapter 29 below

[160] Section 13 This section does not apply to challenges to the validity of *law* Conflicts between the Equality Act and other laws are dealt with in s 5(2) which provides that the Equality Act prevails over provisions of laws other than the Constitution or Acts of Parliament which expressly amend it This subsection needs some explanation It cannot disturb the division of legislative competence entrenched in the Constitution In other words the Equality Act is an ordinary Act of Parliament and not a semi supreme law For example the Equality Act cannot prevail over a provincial law that falls within a Schedule 5 area of exclusive provincial competence unless the requirements of s 44(2) of the Constitution are met However in accordance with the ordinary rules of statutory interpretation the Act impliedly repeals earlier laws (common law and all forms of legislation) which cannot be reconciled with it Later original legislation that seek to amend the Equality Act must do so expressly (ie the specific provision of the Equality Act that is being amended must be mentioned) in order to prevail over it

[161] Discrimination is defined in the Act as an omission or conduct that directly or indirectly imposes burdens obligations or disadvantages on or withholds benefits opportunities or advantages from a person on a prohibited ground The prohibited grounds are the same as the listed grounds in the Constitution

[162] See CWH Schmidt & H Rademeyer *Bewysreg* 4ed (2000) 97 and the authorities referred to there

prima facie case simply to rebut the evidence and the argument presented by the complainant The respondent must persuade the court that discrimination did not take place or that the differentiation did not take place on a prohibited ground [163]

A second advantage of the Act is that it presumes discrimination on a prohibited and an analogous ground to be unfair The Act therefore goes further than s 9(5) of the Constitution in that it also presumes discrimination on an *analogous* ground to be unfair [164] However, before the reverse onus on such a ground is triggered it must be shown that the discrimination causes or perpetuates systemic disadvantage, or undermines human dignity, or adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a prohibited ground The complainant will therefore have to go some way towards establishing unfairness in order to show discrimination on an analogous ground In principle though, the Act differs from s 9 of the Constitution in that the respondent always bears the burden as far as the question of unfairness is concerned [165] The Act sets out in some detail how this burden may be discharged The factors listed include the considerations that are taken into account to determine unfairness under s 9(3) of the Constitution and the criteria in the limitation clause of the Bill of Rights [166] In our view it is sensible to combine the factors It avoids the kind of piecemeal reasoning that occurs when the enquiry into unfairness is divorced from the limitations analysis

Thirdly, the Act specifies several instances of unfair discrimination on grounds of race gender and disability These are merely examples of unfair discrimination[167] but they do assist a complainant in that it cannot be argued that a specified practice can never amount to unfair discrimination For example, the lists prevent one from arguing that a 'system of preventing women from inheriting family property , or 'female genital mutilation' do not amount to unfair discrimination

[163] The provision will be extremely difficult to apply In our view the provision means that an assessment should be made after all the evidence is presented If the complainant has made out a prima facie case and the probabilities are evenly balanced a court should find in his or her favour If no such case was made and the probabilities are even the court should order absolution from the instance as is usually the case

[164] Section 13(2)

[165] Section 6 of the Equality Act prohibits unfair discrimination Discrimination is defined as differentiation on prohibited grounds The prohibited grounds are listed in the Act There appears to be no room for developing further grounds of discrimination If the challenged conduct falls outside the prohibited grounds (which is highly unlikely) the complainant will have to proceed under the Constitution and he or she will then bear the burden to show unfairness

[166] See s 14 of the Equality Act The list includes the *Harksen* factors (note 21 above) the criteria of s 36 of the Constitution and some new factors such as whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria intrinsic to the activity concerned whether the discrimination is systemic in nature and whether and to what extent the respondent has taken reasonable steps in the circumstances to address the disadvantage which arises from or is related to one or more of the prohibited grounds or to accommodate diversity The importance of context is further stressed and it is made clear that affirmative action measures should not considered to be unfair discrimination

[167] The lists of practices are subject to the general prohibition against unfair discrimination in s 6 of the Act This means that the lists do not limit the scope of the general prohibition

Fourthly, hate speech harassment[168] and the dissemination of information that unfairly discriminates are specifically outlawed.[169] Unlike the listed instances of discrimination on grounds of race, gender and disability these prohibitions are not made subject to the general prohibition of unfair discrimination. In other words, for purposes of the Equality Act it is not necessary to show, for example, that harassment amounts to unfair discrimination. It is separately and specifically prohibited. The Equality Act's prohibition of hate speech is wider than the categories of expression which are excluded from constitutional protection by s 16(2).[170] In this regard the provisions of the Equality Act will have to be justified under the general limitations clause.

(b) Access to justice

The second objective of the Act is to provide access to justice and effective remedies for the victims of unfair discrimination, hate speech and harassment.[171] All Magistrates' and High Courts are equality courts for their areas of jurisdiction and within the monetary limits of their jurisdiction.[172] However, this does not mean that any magistrate or judge may hear a dispute that arises under the Act. The intention is to create special equality courts for the various magisterial areas with experienced or trained staff to deal with equality disputes.[173] A particular magistrate or judge will therefore be designated as the presiding officer of the equality court and a clerk will be appointed for such a court.[174] Before the presiding officer is designated no proceedings may be instituted.[175]

Broadly formulated categories of persons are afforded standing to enforce the provisions of the Act. These correspond to s 38 of the Constitution and the jurisprudence outlined in Chapter 4 above will therefore also apply to legal proceedings under the Equality Act. It should be noted that the presiding officer

[168] Harassment in the employment context is dealt with in the Employment Equity Act and, to this extent, the operation of the Equality Act is excluded.

[169] Sections 10, 11 and 12 respectively.

[170] Section 10(1) provides that: no person may publish, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to: *(a)* be hurtful; *(b)* be harmful or to incite harm; *(c)* promote or propagate hatred. Compare this with the far narrower hate speech exemption in s 16(2) of the Constitution: incitement of imminent violence and advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. See further 16.4*(d)* in Chapter 16 below.

[171] Chapter 4 of the Equality Act.

[172] Section 16(1) of the Equality Act.

[173] See GN878 of 13 June 2003 designating certain magistrates' courts as equality courts and defining their areas of jurisdiction.

[174] Sections 16(1)*(b)*. Procedures for the appointment of clerks and the conduct of equality court proceedings are detailed in the Promotion of Equality and Prevention of Unfair Discrimination Act Regulations (GN R764 of 13 June 2003). A Magistrates' court sitting as an Equality Court has the additional remedial jurisdiction provided for in s 21(2) of the Act, including the power to make an award of compensation which exceeds its normal jurisdiction, provided that the order must be confirmed by a judge of the High Court. An appeal from an equality court is to the High Court and thereafter to the Supreme Court of Appeal or directly to the Constitutional Court. Section 23(3) makes provision for a direct appeal from an equality court (including a lower equality court) to the Constitutional Court.

[175] Section 31.

of an Equality Court may refer a complainant to another forum, if it can deal more appropriately with the matter.[176]

Wide ranging powers of enforcement are afforded to the Equality Courts, including the power to grant interdicts and to award damages, to order that an unconditional apology be made, to order the respondent to undergo an audit of specific policies or practices, or to direct the respondent to make regular progress reports to the court regarding the implementation of the court's order.[177] Various remedies may be combined in order to ensure effective relief to a successful complainant. While the Act does not create any criminal offences, the presiding officer may direct the clerk of the Equality Court to refer a matter to the Director of Public Prosecutions for the institution of criminal proceedings.[178] This may be done, for example, when hate speech amounts to crimen injuria or harrassment amounts to indecent assault.[179]

(c) Promotion of equality

The third objective of the Act, the promotion of equality, is dealt with in Chapter 5. The chapter sets out a list of positive duties placed on the state to develop substantive equality and address unfair discrimination. The development of action plans, codes of practice, internal mechanisms and information campaigns are foreseen.[180] Similar sorts of responsibilities are placed on private persons who directly or indirectly contract with the state or who exercise a public power.[181] Even companies, partnerships, clubs and other associations may be required by regulations to prepare 'equality plans' or to abide by prescribed codes of practice or to report to a body on measures to promote equality.

Ten lists of practices are annexed to the Act in a Schedule, relating to discrimination in labour and employment, education, health care services and benefits, housing, accommodation, land and property, insurance services, pensions, partnerships, professions and bodies, provision of goods, services and facilities and clubs, sport and associations. These lists are intended to illustrate and emphasise some practices which may be unfair and the state is called upon to pass legislation and other measures to address them.[183] The lists merely seem to confirm that the general principle (the prohibition against unfair discrimination) is applicable to conduct of private persons in the sectors mentioned above, but some specific practices such as 'red-lining'[184] and the refusal of membership of a private club on a prohibited ground, are specified.

[176] Section 20(3).

[177] Section 21(2).

[178] Section 21(2)*(n)*.

[179] See further s 28(1). If unfair discrimination on grounds of race, gender or disability played a part in the commission of an offence this must be regarded as an aggravating circumstance for purposes of sentence.

[180] Section 25.

[181] Section 26.

[182] Section 27(2).

[183] Section 29(2).

[184] Red lining is the refusal by financial institutions to lend money for the purchase of property in particular neighbourhoods. Legislation to combat the problem of red lining and to require the provision of housing finance to low and medium income earners has been introduced. See the Home Loan and Mortgage Disclosure Act 63 of 2000.