Kentridge: 14.1 – 14.67 MEQDLW-8

In: CLOSA (rev. services, 1999).

14 Equality

Janet Kentridge

Page

14.1 Introduction 14–1
14.2 The substance of equality 14–3
14.3 The structure of IC s 8 14–6
14.4 IC section 8(1) 14–9
(a) United States equal protection jurisprudence 14–12
(b) Section 8(1) accommodates affirmative action 14–14
(c) Canadian equality jurisprudence 14–14
(d) Equality before the law and equal protection 14–14A
(e) Perplexing questions about justification 14–16
14.5 IC section 8(2) 14–17
(a) Unfair discrimination 14–18
(b) Direct and indirect discrimination 14–24B
(c) The listed grounds 14–26B
(d) Non-listed grounds 14–32A
14.6 IC section 8(3)*(a)* 14–35
(a) Exception or interpretive guide? 14–35
(b) Designed to achieve 14–37
(c) Adequate protection and advancement 14–38
(d) Disadvantaged by unfair discrimination 14–38
14.7 IC section 8(3)*(b)* 14–39
14.8 IC section 8(4) 14–40
14.9 IC section 8 and the limitation clause 14–40
(a) Relationship between s 8 and s 33(1) 14–40
(b) The function of s 33(4) 14–45
(i) A complete alternative to s 33(1) 14–46
(ii) A supplement to s 33(1) 14–46

Page

14.10 Specific questions 14–47
(a) The position of corporations 14–47
(b) Equality and the state 14–49
(c) Transitional arrangements 14–51
(d) Provincial laws 14–51
(e) Equality, customary law and freedom of religion 14–52
14.11 Introduction to equality under the final Constitution 14–55
14.12 The structure of FC s 9 14–56
14.13 FC s 9(1) 14–56
14.14 FC s 9(2) 14–59
14.15 FC s 9(3) 14–60
(a) Unfair discrimination 14–60
(b) Direct and indirect discrimination 14–61
(c) The listed grounds 14–61
14.16 FC s 9(4) 14–64
14.17 FC s 9(5) 14–65
14.18 Section 9 and the limitation clause of the final Constitution 14–65
14.19 Specific questions under the final Constitution 14–66
(a) Equality and the state 14–66
(b) Equality, customary law and freedom of religion 14–67

14.1 INTRODUCTION

The commitment to equality lies at the heart of the South African interim Constitution.[1] The Preamble speaks of the 'need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic state *in which there is equality between men and women and people of all races* so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms'. The Postscript looks toward a 'future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex'.[2] Constitutional Principles I, III and V are all directly and explicitly concerned with equality.[3]

Legal measures which curtail any of the rights set out in IC Chapter 3 must, *inter alia*, be 'justifiable in an open and democratic society based on freedom and equality' (s 33(1)*(a)*(ii)).[4] Section 35(1) enjoins courts interpreting the bill of rights to 'promote the values which underlie an open and democratic society based on freedom and equality'.[5]

The theme of 'an open and democratic society based on freedom and equality' is a leitmotif of the bill of rights. That this is so is hardly surprising. Every democratic society proclaims itself to be committed to the values of openness, democracy, freedom, and equality. In South Africa this claim has a particular resonance, for these values are the very antithesis of those features which defined apartheid.

Note that the phrase envisages freedom and equality underpinning a society which is open and democratic. Freedom and equality, then, are the foundational values of the interim Constitution. But the design thus contemplated is by no means easy to decipher. For one thing, each of these concepts has been the subject of centuries of philosophical debate and political contest.

[1] The Constitution of the Republic of South Africa, Act 200 of 1993, hereinafter referred to as the interim Constitution or 'IC'. See *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC), (1997) 2 BCLR 153 (CC) para 20 and the cases there cited; *President of Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 74 (Kriegler J, dissenting, but not on this point). The provisions of the final Constitution, the Constitution of the Republic of South Africa, Act 108 of 1996, are discussed below, §§ 14.11ff.

[2] It is an established principle of common law that reference to the Preamble to a statute is permissible as a limited guide to the meaning of that statute (*Mathebe v Regering van die Republiek van Suid-Afrika en andere* 1988 (3) SA 667 (A) at 689D–692D; *Kauesa v Minister of Home Affairs & others* 1995 (1) SA 51 (Nm) at 81C–82C; Devenish *Interpretation of Statutes* at 102–5; Steyn *Die Uitleg van Wette* 5 ed at 145–6; above, Kentridge & Spitz 'Interpretation' ch 11). Section 232(4) provides that, in interpreting the Constitution, the Afterword and the Schedules do not have less status than any other provision of the Constitution simply because they are contained in a Schedule, and 'shall for all purposes be deemed to form part of the substance of this Constitution': see below.

[3] I: 'The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.'

III: 'The Constitution shall prohibit racial, gender and other forms of discrimination and shall promote racial and gender equality and national unity.'

V: 'The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.'

[4] See also s 26(2).

[5] Cf in *S v Makwanyane & others* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at paras 155 (Ackermann J) and 321–2 (O'Regan J). See above, Kentridge & Spitz 'Interpretation' § 11.2*(c)*. Cf *Executive Council, Western Cape Legislature, & others v President of the Republic of South Africa & others* 1995 (4) SA 877 (CC), 1995 (10) BCLR 1289 (CC) at para 41 (*per* Chaskalson P).

The relative space which freedom and equality should occupy in a principled, democratic political order is similarly contested terrain. The extent to which government may legitimately intervene in the lives of its citizens to limit social inequality is the crucible of modern democratic politics. It informs debate on economic issues such as taxation as well as workplace and market regulation. It impinges on state regulation of private education, religion and custom, pornography, and abortion.

In some of these instances liberty and equality are apparently at odds. Entrepreneurial freedom is inevitably limited by legislation setting minimum terms and conditions of employment and requiring employers to bargain collectively with employees. Many feminists argue that pornography undermines the equality of women, and yet the prohibition or regulation of pornography limits freedom of expression and impinges on the autonomy of those who choose to produce and consume it.[1]

In other cases considerations of freedom and equality may conduce to a similar outcome. For example, the inability of a woman to choose to have an abortion impinges both upon her personal freedom and her social equality.[2] Apartheid, like slavery, provides a stark example of how inequality and lack of freedom are mutually reinforcing. And the converse also holds good — a minimum degree of personal freedom is a prerequisite to social equality, and freedom cannot be exercised or enjoyed without a baseline of equality.[3]

The text of the interim Constitution is a compromise between competing, indeed sometimes antithetical, visions of a just society.[4] As a result, the interim Constitution protects the right to private property, but promises the restitution of land rights.[5] Following close on the heels of the promise of freedom of economic activity is the guarantee of the right to fair labour practices, the right to bargain collectively, and the right to strike.[6]

[1] See, for example, Catherine A MacKinnon 'Anti-pornography Laws and First Amendment Values' (1984) 98 *Harvard LR* 460, Catherine A MacKinnon *Only Words* (1993) and the review of this book by Ronald Dworkin 'Women and Pornography' *New York Review of Books* (21 October 1993) 36, Eric Hoffman 'Feminism, Pornography and Law' (1985) 133 *University of Pennsylvania LR* 460, Frank I Michelman 'Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation' (1989) 56 *Tennessee LR* 303, Ronald Dworkin 'Liberty and Pornography' *New York Review of Books* (15 August 1991) 12, *R v Butler* (1992) 89 DLR (4th) 449. On the tension between the right to equality and non-discrimination and the right to freedom of speech in the context of hate speech, see *R v Keegstra* [1990] 3 SCR 697, 3 CRR (2d) 117, *Kauesa v Minister of Home Affairs & others* 1995 (1) SA 51 (Nm).

[2] *R v Morgentaler* [1988] 1 SCR 30, 44 DLR (4th) 385, Lorraine Eisenstat Weinrib 'The *Morgentaler* Judgment: Constitutional Rights, Legislative Intention, and Institutional Design' (1992) 42 *University of Toronto LJ* 22, Gwen C Mathewson 'Security of the Person, Equality and Abortion in Canada' (1989) *The University of Chicago Legal Forum* 251, Ronald Dworkin 'Unenumerated Rights: Whether and How *Roe* Should be Overruled' (1992) *University of Chicago LR* 381, especially at 411 and 425.

[3] See Ronald Dworkin 'What is Equality? Part 3: The Place of Liberty' (1988) *Iowa LR* 1 at 3–5, Ronald Dworkin 'Why Liberals Should Care About Equality' (1985) *A Matter of Principle* 205–13.

[4] See above, Klug 'Historical Background' § 2.

[5] Section 8(3)*(b)* read with s 121(2); s 28. See also Jennifer Nedelsky *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and its Legacy* (1990) on the implications for social equality of the constitutional protection of private property.

[6] Sections 26, 27.

It is nevertheless suggested that the Constitution ascribes a particularly important role to equality, both as a good in itself and as a powerful tool of national reconciliation and reconstruction [1] Thus understood, the Constitution is not neutral as between different conceptions of equality It subscribes to a particular vision of equality one which is usually called substantive equality

14 2 THE SUBSTANCE OF EQUALITY

Equality, said Aristotle, is a matter of treating like cases alike and unlike cases differently in proportion to their likeness or difference [2] Equality is not simply a matter of likeness It is, equally, a matter of difference That those who are different should be differently treated is as vital to equality as is the requirement that those who are like are treated alike In certain cases it is the very essence of equality to make distinctions between groups and individuals in order to accommodate their different needs and interests [3]

Adapting the Aristotelian adage, North American equality jurisprudence took the view that equality is denied only where those who are similarly situated are differently treated [4] The similarly situated test is, however, incomplete, for it supplies no criteria for judging which situations are similar and which are not It is insufficiently sensitive to the nature of the law impugned or to the social context in which a claim is brought It is therefore ineffective in sorting legitimate from illegitimate legal differentiation, and has now been abandoned in Canada as a formula too mechanical for the resolution of equality issues under the Canadian Charter of Rights and Freedoms [5]

[1] See in particular the Preamble Postscript and Schedule 4 cf Ackermann J in *S v Makwanyane & another* 1995 (3) SA 391 (CC) 1995 (6) BCLR 665 (CC) at paras 155 6 Mahomed J in *S v Mhlungu & others* 1995 (3) SA 867 (CC) 1995 (7) BCLR 793 (CC) at para 8 *Shabalala v Attorney General Transvaal* 1996 (1) SA 725 (CC) 1995 (12) BCLR 1593 (CC) 1995 (2) SACR 761 (CC) at para 26 *Brink v Kitshoff* 1996 (4) SA 197 (CC) 1996 (6) BCLR 752 (CC) at para 33 *Fraser v Children's Court Pretoria North* 1997 (2) SA 261 (CC) 1997 (2) BCLR 153 (CC) at para 20 *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) 1997 (6) BCLR 708 (CC) at para 74 (Kriegler J dissenting but not on this point)

[2] Aristotle *Ethica Nichomachea* Book V 3 at 1131a b quoted in Peter Westen The Empty Idea of Equality (1982) 95 *Harvard LR* 537 at 543

[3] See for example, *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 at 347 18 DLR (4th) 321 at 362 *Andrews v Law Society of British Columbia* (1989) 56 DLR (4th) 1 at 10 13 *Edmonton Journal v Alberta (Attorney General)* [1989] 2 SCR 1326 64 DLR (4th) 577 at 583–4 *R v Turpin* [1989] 1 SCR 1296 at 1331 2 39 CRR 306 *Minority Schools in Albania* Case no 182 Advisory Opinion of April 6 1935 by the Permanent Court of International Justice in *Annual Digest and Reports of Public International Cases 1935 1937* at 389 90 *The Belgian Linguistics Case* 1968 11 *Yearbook of the European Convention on Human Rights* 832 at 864 1 EHRR 252 at 284

[4] See J Tussman & J tenBroek The Equal Protection of the Laws (1949) *California LR* 341 Peter W Hogg *Constitutional Law of Canada* 3 ed (1992) pp 52 14–15 Laurence H Tribe *American Constitutional Law* 2 ed (1988) ch 16 William Black & Lynn Smith The Equality Rights in Gerald A Beaudoin & Ed Ratushny (eds) *The Canadian Charter of Rights and Freedoms* 2 ed (1989) 556 at 589

[5] The Canadian Charter of Rights and Freedoms is Part I of the Constitution Act 1982 which is Schedule B of the Canada Act 1982 c 11 (U K) On the rejection of the similarly situated test by the Canadian courts see *Mahe v The Queen in right of Alberta* (1987) 42 DLR (4th) 514 at 546 *Andrews* (1989) 56 DLR (4th) 1 at 11 13 *(per* McIntyre J) and at 32–4 *(per* Wilson J) *McKinney v University of Guelph* (1991) 76 DLR (4th) 545 at 608–9 Colleen Sheppard *Litigating the Relationship Between Equity and Equality* (1993) Ontario Law Reform Commission 7 Hogg *Constitutional Law of Canada* pp 52 14–15 In *Mahe* and *Andrews* in particular the similarly situated test is rejected as being fundamentally flawed As Hogg points out this criticism is overstated The test is not wrong in principle — it is simply incomplete in that it provides too little guidance to a reviewing court

In its stead the Canadian Supreme Court has sought an approach which directs attention to 'the content of the law, to its purpose, and its impact upon those to whom it applies, and also to those whom it excludes from its application'.[1] The Canadian Supreme Court has emphasized the importance of assessing equality claims in their social context, for

> 'it is only by examining the larger context that a court can determine whether differential treatment results in inequality, or whether, contrariwise, it would be identical treatment which would in the particular context result in inequality or foster disadvantage'.[2]

Thus stated, the value of the contextual approach is that it apprehends that formal equality of treatment may, in certain situations, reinforce rather than redress social disadvantage. Formal equality poses the question of whether individuals are to be similarly treated in broad and abstract terms. It focuses on fairly superficial *indicia* of individual similarity and thereby fails to recognize underlying patterns of group-based disadvantage which belie the appearance of equality. The existence of these deep-rooted, pervasive and self-perpetuating patterns of inequality, in other words structural inequality, means that actual social equality cannot be achieved by the application of apparently neutral standards to all.[3]

A formal approach to equality assumes that inequality is aberrant and that it can be eradicated simply by treating all individuals in exactly the same way. A substantive approach to equality, on the other hand, does not presuppose a just social order. It accepts that past patterns of discrimination have left their scars upon the present. Treating all persons in a formally equal way now is not going to change the patterns of the past, for that inequality

[1] *Andrews* (1989) 56 DLR (4th) 1 at 13. Note that these criteria for identifying inequality are not necessarily 'replacements' for the similarly situated test, but could as well be seen to give substance to that test. See above, n 4.

[2] *R v Turpin* [1989] 1 SCR 1296 at 1331–2, see also *Edmonton Journal v Alberta (Attorney General)* (1989) 64 DLR (4th) 577 at 583–4. The importance of the contextual approach has been underlined by the Canadian Supreme Court in *Thibadeau v Canada* (1995) 124 DLR (4th) 449, 29 CRR (2d) 1 at 22, *Egan v Canada* (1995) 124 DLR (4th) 609, 29 CRR (2d) 79 at 93, *Miron v Trudel* (1995) 124 DLR (4th) 693, 29 CRR (2d) 189 at 235–7 (minority judgment), cf *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 20, *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at paras 41 and 43, cf *Die Spoorbond & another v South African Railways* 1946 AD 999 at 1011–12.

[3] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 20. As Sheppard *Litigating the Relationship Between Equity and Equality* (1993) points out, formal equality is blind to the fact that standards which appear to be neutral may actually be shaped by the needs and experiences of socially privileged groups. See, for example *Symes v Canada* [1994] 4 SCR 695, 110 DLR (4th) 470. The majority of the Supreme Court decided that childcare expenses are not deductible as a business expense under the Canadian Income Tax Act of 1952, and that this did not deny to women businesswomen the equal benefit of the law. In part this decision turned on the fact that childcare expenses are allowable as a specific limited deduction under the Act, which the majority held to exclude deductions for childcare expenses elsewhere in the Act. In a powerful dissent L'Heureux-Dubé J, with whom McLachlin J concurred, noted that the existing range of deductible business expenses, while appearing to be gender neutral, actually reflected the needs and experiences of businessmen and not businesswomen. For the latter, childcare expenses were a prerequisite to gaining income from the business. L'Heureux-Dubé J therefore concluded *(a)* that such expenses were indeed deductible as a general business expense, and *(b)* that if they were not, the Act would be inconsistent with s 15(1) of the Charter (at 474–515).

needs to be redressed and not simply removed.[1] This means that those who were deprived of resources in the past are entitled to an 'unequal' share of resources at present.[2]

In truth, this is no more than an application of the Aristotelian injunction that equality requires that those who are not alike should be differently treated in proportion to their difference.[3] The value of a contextual approach to equality is that it helps us to identify those differences which require differential treatment in order to achieve actual, substantive equality.

The context which must be considered in the assessment of equality claims is both factual, textual and historical. Obviously the particular factual matrix within which equality is claimed is important.[4] So too is the place of equality in the text of the interim Constitution, as outlined above, § 14.1. The textual commitment to equality must itself be understood in the historical context in which the text was drafted, as is made explicit in both the Preamble and the Postscript to the Constitution.[5] The emphasis there placed on reparation and reconstruction suggests that a fundamental principle underlying the constitutional commitment to equality is that of anti-subordination or anti-subjugation. As Laurence Tribe explains:

> 'The core value of this principle is that all people have equal worth. When the legal order that both shapes and mirrors our society treats some people as outsiders or as though they were worth less than others, those people have been denied the equal protection of the laws . . . Mediated by the antisubjugation principle, the equal protection clause asks whether the particular conditions complained of, examined in their social and historical context, are a manifestation or a legacy of official oppression.'[6]

In Canada the Supreme Court has identified 'political, social and legal disadvantage and vulnerability' as the targets of the equality clause of the Canadian Charter of Rights and Freedoms.[7]

[1] *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 41; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC) at paras 16, 60–2; *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at paras 31, 85; *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at para 80; *Lotus River, Ottery, Grassy Park Residents Association v South Peninsula Municipality* 1999 (2) SA 817 (C) at 827J–829A, 1999 (4) BCLR 440 (C) at 449F–450F.

[2] Cf *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at paras 31, 85; *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at para 80; *Lotus River, Ottery, Grassy Park Residents Association v South Peninsula Municipality* 1999 (2) SA 817 (C) at 827J–829A, 1999 (4) BCLR 440 (C) at 449F–450F.

[3] *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 41; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC) at paras 16, 60–2; *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at paras 31, 85; *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) at para 80; *Lotus River, Ottery, Grassy Park Residents Association v South Peninsula Municipality* 1999 (2) SA 817 (C) at 827J–829A, 1999 (4) BCLR 440 (C) at 449F–450F.

[4] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 20; *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at para 26.

[5] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at para 39; *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at paras 18–21.

[6] Tribe *American Constitutional Law* 1515–16.

[7] *McKinney v University of Guelph* (1991) 76 DLR (4th) 545 at 609, *Andrews* (1989) 56 DLR (4th) 1; *R v Turpin* [1989] 1 SCR 1296; *R v Swain* [1991] 1 SCR 933, 3 CRR (2d) 1.

In the light of our history of apartheid and oppression, and the explicit constitutional acknowledgement of this history and the need to redress its effects, the centrality of the anti-subjugation principle to the South African equality clause is clear.[1]

In *President of the Republic of South Africa v Hugo* the court held:

> 'At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.'[2]

The court specifically endorsed the approach of L'Heureux-Dubé J in her minority judgment in the case of *Egan v Canada* in the Canadian Supreme Court:

> 'Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity.'[3]

14.3 THE STRUCTURE OF IC SECTION 8

How do the various subsections of IC s 8 fit together? The fact that the guarantee of equality before the law and equal protection of the law is contained in a separate subsection from the prohibition of unfair discrimination indicates that the two are not synonymous or coterminous. Each has a role to play in the protection of equality. In this, the structure of the South African equality clause differs from those of the United States and Canada. The Fourteenth Amendment to the United States Constitution, which promises that the 'equal protection of the laws' will not be denied, includes no explicit prohibition of discrimination. Constitutional discrimination jurisprudence has been judicially developed.

In Canada s 15(1) of the Charter guarantees equality before and under the law and the right to equal protection and equal benefit of the law '*without discrimination*'. The *Andrews* case established that the words 'without discrimination' in s 15(1) 'are a form of qualifier built into s 15 itself and limit those distinctions which are forbidden by the section to those which involve prejudice or disadvantage.'[4] Hence the court held that:

[1] Cf O'Regan J in *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at paras 40–2; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC) at paras 16 and 22.

[2] 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 41. Eight members of the court concurred in the majority judgment. Kriegler J (at para 66) and Mokgoro J (at para 92) endorsed the approach of the majority to the principles underlying the right to equality, but differed on the application of those principles to the facts of the case. Didcott J took the view that a detailed analysis of the right to equality was not called for in order to reach a decision on the case before the court. See also *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 32.

[3] (1995) 29 CRR (2d) 79 at 104–5, quoted with approval by the Constitutional Court in *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 41; *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at paras 32 and 33. The central value of fundamental human dignity to the protection of the right to equality is also underlined by McLachlin J in *Miron v Trudel* 29 CRR (2d) 189 at 204–7.

[4] *Andrews* (1989) 56 DLR (4th) 1 at 22–3.

'A complainant under s 15(1) must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory'[1]

In Canada, then, in order to invoke s 15(1) at all an applicant must be able to prove that she has suffered discrimination as defined by the subsection. Does s 8(2) limit s 8(1) in the same way? Unlike s 15(1) of the Canadian Charter, the equality guarantees and the promise of protection from discrimination are contained in separate subsections. Hence there is no equivalent in s 8 to the qualifying role played by the words 'without discrimination' in s 15(1). Were s 8(2) to be read to qualify s 8(1), then s 8(1) would be little more than a rhetorical flourish to s 8. This is not the case. As will be argued below, §§ 14.4 and 14.5, each aspect of s 8 has a role to play in the protection of equality — the right to equality before the law, the right to equal protection of the law, and the freedom from discrimination. In certain cases an applicant may be able to frame his or her claim under more than one of these rights. In others one will be more suitable than the others. Every instance of unfair discrimination is a denial of either (and sometimes both) equality before the law or equal protection of the law. Not every denial of equality before the law or equal protection of the law is necessarily an instance of unfair discrimination under s 8(2). It is submitted therefore that s 8(2) supplements rather than qualifies s 8(1).[2]

Similarly, s 8(3), the affirmative action clause, elucidates and elaborates the right to substantive equality contained in s 8(1). It is neither a qualification of nor an exception to the right to equality.[3] Section 8(3)*(b)* provides for another aspect of substantive equality — the restitution of land to persons who were dispossessed of such land by the policies of segregation and apartheid. Section 8(4) provides for procedural matters which assist claimants to prove the existence of certain forms of discrimination.[4]

The Constitutional Court has emphasized the complexity of the issues involved in the constitutional protection of equality, and the need to proceed slowly in developing constitutional equality jurisprudence.[5] Nevertheless, it has in a number of judgments set out a

[1] *Andrews* (1989) 56 DLR (4th) 1 at 23–4; see also *Turpin* [1989] 1 SCR 1296 at 1331; *McKinney* (1991) 76 DLR (4th) 545 at 604–5, *Miron v Trudel* (1995) 124 DLR (4th) 693, 29 CRR (2d) 189 (SCC) at 200. Black & Smith 'The Equality Rights' 596. Hogg *Constitutional Law of Canada* p 52-17

[2] See *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at paras 22–7

[3] See *S v Lawrence, S v Negal, S v Solberg* 1997 (4) SA 1176 (CC), (1997) 10 BCLR 1348 (CC) at para 46 read with para 29

[4] Those identified in the grounds listed in s 8(2)

[5] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 20, *Harksen v Lane NO & others* 1998 (1) SA 300 (CC) at para 42, 1997 (11) BCLR 1489 (CC) at para 41. The approach of the Constitutional Court to the analysis of the right to equality is discussed in Anton Fagan 'Dignity and Unfair Discrimination: A Value Misplaced and a Right Misunderstood' (1998) 14 *SAJHR* 220, Cathi Albertyn & Beth Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *SAJHR* 248, Jonathan Klaaren 'Non-Citizens and Constitutional Equality' (1998) 14 *SAJHR* 286

framework for the interpretation and application of IC s 8 [1] The approach to claims under IC s 8 is encapsulated in *Harksen v Lane NO & others*

> 'At the cost of repetition, it may be as well to tabulate the stages of enquiry which become necessary when an attack is made on a provision in reliance on s 8 of the interim Constitution They are
>
> *(a)* Does the provision differentiate between people or categories of people? If so does the differentiation bear a rational connection to a legitimate government purpose? If not then there is a violation of ss (1) Even if it does bear a rational connection, it might nevertheless amount to discrimination
>
> *(b)* Does the differentiation amount to unfair discrimination? This requires a two stage analysis
>
> (i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground then discrimination will have been established If it is not on a specified ground then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner
>
> (ii) If the differentiation in question amounts to ' discrimination", does it amount to ' unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed If on an unspecified ground, unfairness will have to be established by the complainant The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation
>
> If, at the end of this stage of the enquiry the differentiation is found not to be unfair, then there will be no violation of s 8(2)
>
> *(c)* If the discrimination is found to be unfair then a determination will have to made as to whether the provision can be justified under the limitations clause (s 33 of the interim Constitution) [2]

The elements of the approach thus set out are considered further below

In *National Coalition for Gay and Lesbian Equality v Minister of Justice* ('the Sodomy case') the court pointed out that the scheme set out above does not mean that in every case the rational connection inquiry of stage *(a)* must inevitably precede stage *(b)* [3] Ackermann J pointed out that the stage *(a)* enquiry is superfluous where the court finds that the discrimination is

[1] *Brink v Kitshoff* 1996 (4) SA 197 (CC) 1996 (6) BCLR 752 (CC) *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) 1997 (6) BCLR 752 (CC) *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) 1997 (6) BCLR 708 (CC) *Harksen v Lane NO & others* 1998 (1) SA 300 (CC) 1997 (11) BCLR 1489 (CC) *Larbi Odam & others v Members of the Executive Council for Education & another (North West Province)* 1998 (1) SA 745 CC 1997 (12) BCI R 1655 (CC) *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) 1998 (3) BCI R 257 (CC) *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) 1998 (12) BCI R 1517 (CC) 1998 (2) SACR 556 (CC) *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC) 1999 (2) BCLR 139 (CC) The developing equality jurisprudence of the Constitutional Court is analysed by Cathi Albertyn & Beth Goldblatt in Facing the Challenge of Transformation Difficulties in the Development of an Indigenous Jurisprudence of Equality (1988) 14 *SAJHR* 248 Anton Fagan Dignity and Discrimination A Value Misplaced and a Right Misunderstood (1988) 14 *SAJHR* 220 J D van der Vyver Gelykberegtiging (1998) 61 *THRHR* 367 — see also *Fraser v Children's Court Pretoria North* 1997 (2) SA 261 (CC) 1997 (2) BCLR 153 (CC) and *East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council & others* 1998 (2) SA 61 (CC) 1998 (1) BCLR (CC)

[2] 1998 (1) SA 300 (CC) at para 54 1997 (11) BCLR 1489 (CC) at para 53 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) 1998 (12) BCLR 1517 (CC) 1998 (2) SACR 556 (CC) at para 17 *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC) 1999 (2) BCLR 139 (CC) at para 11 *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 1999 (3) SA 173 (C) at 185A–E 1999 (3) BCLR 280 (C) at 291A–E

[3] 1999 (1) SA 6 (CC) 1998 (12) BCLR 1517 (CC) 1998 (2) SACR 556 (CC) at para 18

unfair and unjustifiable.[1] In the Sodomy case the court went directly to question of whether the differentiation on the ground of sexual orientation was unfair discrimination.

14.4 SECTION 8(1)

'Every person shall have the right to equality before the law and to equal protection of the law.'

Section 8(1) guarantees to every person the right to 'equality before the law' and to 'equal protection of the law'.[2]

Clearly, the right to equality before the law and to the equal protection of the law does not prohibit every conceivable legal distinction.[3] As a matter of principle equality consists as much in the different treatment of those who are not alike as it does in treating those who are alike in the same way.[4] And, as a matter of policy, the courts can 'hardly review every

[1] Cf *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC), 1999 (2) BCLR 139 (CC) at para 11 n 20; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 1999 (3) SA 173 (C) at 185E–G and 186F–G, 1999 (3) BCLR 280 (C) at 291E–G, and 292E–F.

[2] A preliminary question which arises is whether the reference to 'law' in s 8(1) has the effect of narrowing the application of s 8 so as to exclude government action that is not law, such as administrative decisions and acts performed under statutory authority. The Canadian Supreme Court has held in the past that s 15 of the Charter applies only to 'the law' — it therefore applies to enabling legislation, but not to the exercise of discretion conferred by statute (*R v S (S)* [1990] 2 SCR 254, 49 CRR 79; *R v S (G)* [1990] 2 SCR 294, 49 CRR 109). In subsequent cases, however, members of the court have said that actions taken under authority of law fall within the rubric of 'law' under s 15(1). See *McKinney v University of Guelph* (1991) 76 DLR (4th) 545 at 600–10 *per* Wilson J (with whom, on this issue, Cory J agreed) and at 644–6 *per* La Forest J (with whom Dickson CJ and Gonthier J agreed); *Douglas/Kwantlen Faculty Association v Douglas College* [1990] 3 SCR 570, 77 DLR (4th) 94, where a majority held that a collective agreement is 'law' within the meaning of s 15. These cases did not refer to the decisions cited above. The latter decisions are correct, for it 'makes no sense to say that Parliament itself lacks the power to abridge equality rights, but Parliament can confer on a delegate the power to abridge equality rights . . . Restrictions on the power of Parliament (or a Legislature) must apply to all bodies that draw their powers from Parliament (or the Legislature)' (Hogg *Constitutional Law of Canada* p 52-10). The same point is made by H M Seervai *Constitutional Law of India* (1991) vol 1 447 para 9.24. On this reasoning, the application of s 8 must be co-extensive with the application of the rest of Chapter 3. In *Motala & another v University of Natal* 1995 (3) BCLR 374 (D) at 382G–I it was held that the rights entrenched in s 8 were enforceable against private persons, both natural and juristic, as well as the state and its organs. In *Du Plessis v De Klerk* 1996 (3) SA 850 (CC), 1996 (5) BCLR 658 (CC), however, the Constitutional Court held that, in terms of s 7(1) of the Constitution, private persons are not bound by the Bill of Rights. See above, Woolman 'Application' ch 10.

[3] *S v Ntuli* 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC) at para 19; *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at paras 17, 24; *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at para 26. The Canadian Supreme Court, in *Weatherall v Canada (Attorney General)*, rejected the claim of a male prisoner that his right to equality was infringed by the fact that male prisoners were guarded and searched by female warders whereas female prisoners were not guarded and searched by male warders. The court emphasized that equality does not necessarily connote identical treatment. It took into account the historical, biological and sociological differences between men and women, the disadvantaged position of women in society, and the fact that violence perpetrated by men against women significantly exceeds violence by women against men. Hence a search of a man by a woman, such as a chest frisk, does not implicate the same concerns as, and is less threatening than, a chest frisk carried out on a woman by a man. The court considered that even if there was an element of inequality, the practices in question would be saved by the limitation clause. The presence of women warders had a humanizing effect conducive to inmate rehabilitation. In addition the employment of women in these positions was important for reasons of employment equity.

[4] See the discussion above, § 14.2. See *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC) at para 61; *President of the RSA v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 41. See *Mwellie v Ministry of Works, Transport and Communication* 1995 (9) BCLR 1118 (Nm) at 1132E–F; see also *Dennis v United States* 339 US 162 at 184, 70 SCt 519 (1950) *per* Frankfurter J, dissenting: 'It was a wise man who said that there is no greater inequality than the equal treatment of unequals.'

distinction in the statute book; that would not be a wise use of judicial resources, and would constantly involve the courts in issues of legislative policy'.[1] The right to equality is infringed only by differences in treatment which are illegitimate.[2]

As the Constitutional Court pointed out in *Prinsloo v Van der Linde*, the idea of differentiation is crucial to equality jurisprudence in general and IC s 8 in particular.[3] Section 8 is concerned with two kinds of differentiation — that which involves unfair discrimination, and that which does not. The former falls within s 8(2) and is discussed further below. But what of the countless forms and modes of differentiation which govern and regulate the affairs of the nation at every level? Differentiation of this sort is described by the court as 'mere differentiation'. In regard to 'mere differentiation' the constitutional state is simply required to act rationally:

> 'It should not regulate in an arbitrary manner or manifest "naked preferences" that serve no legitimate government purpose, for that would be inconsistent with the rule of law and the fundamental premise of the constitutional state.'[4]

[1] Hogg *Constitutional Law of Canada* p 52-16; see also *The Belgian Linguistics Case* 1968 11 *Yearbook of the European Convention on Human Rights* 832 at 864, 1 EHRR 252 at 284; *State of Gujarat v Shri Ambica Mills* AIR 1974 SC 1300 at 1314–15.

[2] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 17; *Fedsure Life Assurance Limited v Greater Johannesburg Transitional Metropolitan Council* 1997 (5) BCLR 657 (W) at 666C–E; *East London Transitional Local Council v Tax Payers Action Organisation & others* 1998 (10) BCLR 1221 (E) at 1231G–J; *S v Ntuli* 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC) at para 19. Section 309(4)*(a)* of the Criminal Procedure Act 51 of 1977, read with s 305, requires those convicted of offences in the lower courts to obtain certification from a judge of the Supreme Court that there are reasonable grounds of appeal, before they are entitled to prosecute an appeal in person. The Constitutional Court found this requirement to deny such prisoners their right to appeal to a higher court under s 25(3)*(h)* of the Constitution: *S v Ntuli* 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC); and see *Minister of Justice v Ntuli* 1997 (3) SA 722 (CC), 1997 (6) BCLR 677 (CC). The provision differentiates between prisoners without lawyers and all other persons wishing to appeal against a conviction. In effect, the requirement places an extra handicap on those already labouring under a disadvantage in prosecuting their appeals. It thereby denies such persons their right to equality before the law. On the other hand, the fact that s 316 of the Criminal Procedure Act requires persons convicted in superior courts to apply for leave to appeal such conviction was found to infringe neither s 25(3)*(h)* nor s 8 of the Constitution. The differentiation between persons convicted in lower courts (s 309) and those convicted in superior courts (s 316) did not bear scrutiny under s 8: *S v Rens* 1996 (1) SA 1218 (CC), 1996 (2) BCLR 155 (CC) at paras 28–30. See also *Besserglik v Minister of Trade, Industry and Tourism & another* 1996 (4) SA 331 (CC), 1996 (6) BCLR 745 (CC) at para 11; and *Mwellie v Ministry of Works, Transport and Communication* 1995 (9) BCLR 1118 (Nm). Naturally our conceptions of what sorts of distinctions and classifications are legitimate change and develop over time. This is typified, in the United States, by the shift in judicial attitudes which occurred between the decision in *Plessy v Ferguson* 163 US 537, 16 SCt 1138 (1896) (which endorsed the 'separate but equal' doctrine in relation to racial segregation) and that in *Brown v Board of Education* 347 US 483, 74 SCt 686 (1954) (which proclaimed that racial separation was inherently unequal). In South Africa, as in other colonies and former colonies, judicial assumptions about the acceptability of racial segregation pre-existed apartheid. Hence in *Minister of Posts and Telegraphs v Rasool* 1934 AD 167 at 175 Stratford ACJ said that a classification on the grounds of race, colour or religion is not *per se* invalid. While absurd or purposeless distinctions were clearly unreasonable, he said, 'a division of the community on differences of race or language for the purpose of postal service, seems *prima facie* to be sensible and make for the convenience and comfort of the public as a whole . . .'. See also the decision of Beyers JA, esp at 177, and that of De Villiers JA, esp at 180–2. But see the dissent of Gardiner AJA at 183–93 and the cases cited by him in support of his view that racial classifications are *per se* unreasonable.

[3] 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 23. This was confirmed in *Harksen v Lane NO & others* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 46, read with para 42.

[4] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 25; cf *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC), 1999 (2) BCLR 139 (CC) at para 17.

In other words, the first question to be asked of any form of differentiation by the state is whether such differentiation is rationally related to the government purpose which it is said to serve [1] That purpose must itself be legitimate in light of constitutional values [2] If there is no such rational relationship, IC s 8 is infringed [3]

In *East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council & others* O'Regan underlined that no more is required of the governmental action or regulation under s 8(1) than that it is rational

> 'The question is not whether the government may have achieved its purposes more effectively in a different manner, or whether its regulation or conduct could have been more closely connected to its purposes The test is simply whether there is a reason for the differentiation that is rationally connected to a legitimate government purpose '[4]

In this case O'Regan J found that IC s 8(1) was not infringed by the provisions of s 47*bis* of the Town Planning Ordinance (Natal),[5] which differentiate between the procedures for rezoning applications depending on whether the relevant property falls within the area of jurisdiction of exempted or non-exempted local authorities One of the differences complained of was that in a non-exempted local authority an applicant may appeal against the authority's refusal to proceed with a proposed amendment, whereas an objector has no right of appeal against a decision to put the matter before the Town and Regional Planning Commission In an exempted local authority both an applicant and an objector may appeal against the decision to adopt or not to adopt the proposed amendment [6] O'Regan J pointed out that the differences between applicants for and objectors to proposed amendments in non-exempted local authorities were rationally related to the different effect upon each of them of the preliminary decision to proceed or not to proceed with the proposed amendment,[7] that the distinction between exempted and non-exempted local authorities was based, inter alia, on the level of competency of planning staff or consultants available to the local authority in question, and that the differences in the application procedure between non-exempted and exempted local authorities were rationally related the objective differences between such local authorities [8] O'Regan J's reasons were supported by Ackermann J, Goldstone J and Kriegler J All four concurred with the order of the court dismissing an

[1] As long as there is a rational relationship between the means and the end sought to be achieved it is of no moment to the enquiry under s 8(1) that the same object could have been achieved differently or in a less intrusive way The question of whether the measure could have been designed to be less onerous to the interests of those adversely affected arises only at the second stage of the enquiry under IC s 33(1) *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) 1997 (6) BCLR 759 (CC) at paras 35–6 *Harksen v Lane NO & others* 1998 (1) SA 300 (CC) 1997 (11) BCLR 1489 (CC) at para 44 See further below § 14 9*(a)*

[2] See *Harksen v Lane NO & others* 1998 (1) SA 300 (CC) 1997 (11) BCLR 1489 (CC) at para 55 and the discussion which follows *East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council & others* 1998 (2) SA 61 (CC) 1998 (1) BCLR 1 (CC) at para 23

[3] The court did not specifically refer to IC s 8(1) in *Prinsloo* In *Harksen v Lane NO & others* 1998 (1) SA 300 (CC) 1997 (11) BCLR 1489 (CC) at paras 42 and 44 the court clarified that subsec (1) of s 8 is at issue when mere differentiation is subject to rationality review *East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council & others* 1998 (2) SA 61 (CC) 1998 (1) BCLR 1 (CC) at para 23

[4] 1998 (2) SA 61 (CC) 1998 (1) BCLR 1 (CC) at para 24

[5] Ord 17 of 1949

[6] At paras 18–21

[7] At para 25

[8] At paras 26–30

application for leave to appeal against the denial of consequential relief by the court below. The majority refused leave on the *assumption* that the court below was correct in finding the provision invalid.[1]

In *Municipality, City of Port Elizabeth v Rudman* the court held that the differences between the zoning regulations which applied to areas of Port Elizabeth reserved for whites in the past, and those which applied in areas which had previously been reserved for blacks, did not infringe IC s 8(1).[2]

Rationality is the minimum standard which differentiation must meet if it is not to infringe s 8. Differentiation may, however, be rational but nevertheless unfairly discriminatory and hence in breach of s 8(2), which is examined below.[3]

(a) United States equal protection jurisprudence

In the United States the courts sort legitimate from illegitimate distinctions by applying different levels of scrutiny to different types of differentiation. The highest level, strict scrutiny, is reserved for classifications based on race or nationality. Laws abridging fundamental rights, such as the right to vote or to interstate mobility, are also subject to this standard of review. Such laws are presumed not to be a reasonable means of achieving a legitimate state purpose and will be struck down unless the government justifies them as the necessary means of achieving a compelling state interest.[4] Given the difficulty of discharging this burden of proof, classifications subject to strict scrutiny are most often declared unconstitutional.[5]

The lowest level, minimal scrutiny, is applied to legislative classifications which are not suspect and do not impinge on fundamental rights. Such laws will be upheld provided that they serve a legitimate purpose and are rationally related to achieving that purpose.[6] An intermediate level of scrutiny is applied to distinctions such as those based on sex, illegitimacy, or alienage. At this level the classification must further 'important governmental objectives and must be substantially related to the achievement of those objectives'.[7]

[1] The court's approach to rationality review under IC s 8(1) was applied to FC s 9(1) in *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC), 1999 (2) BCLR 139 (CC) at para 17. This case is discussed further at § 14.13.

[2] 1999 (1) SA 665 (SE) at 673A–676D, 1998 (4) BCLR 451 (SE) at 460E–462E, esp at 461I–462E.

[3] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at paras 26 and 27; *Harksen v Lane NO & others* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 44; *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at para 27.

[4] *Korematsu v United States* 323 US 214, 65 SCt 193 (1944).

[5] See Tribe *American Constitutional Law* 1451–4.

[6] See, for example, *Dandridge v Williams* 397 US 471, 90 SCt 1153 (1970), a case of differentiation on economic grounds. See also *City of Cleburne, Texas v Cleburne Living Centre* 473 US 432 at 446, 105 SCt 3249 (1985). Note that the traditional formulation of minimal scrutiny is still more deferential — the court is prepared to uphold any differentiation for which there is a conceivable rational basis. See, for example, *Allied Stores v Bowers* 358 US 522 at 530, 79 SCt 437 (1959); *Kotch v Board of River Port Pilot Commissioners* 330 US 552, 67 SCt 910 (1947). See also Tribe *American Constitutional Law* 1439–46.

[7] *Craig v Boren* 429 US 190, 97 SCt 451 (1976), a sex discrimination case. See also *Plyler v Doe* 457 US 202, 102 SCt 2382 (1982) (discrimination against aliens) and *Levy v Louisiana* 391 US 68, 88 SCt 1509 (1968) (discrimination against illegitimate children). Arguably intermediate scrutiny is a staging post on the route from minimal to strict scrutiny. See Hogg *Constitutional Law of Canada* p 52-8; Tribe *American Constitutional Law* 1544–625; and see above, Woolman 'Limitations' ch 12.

The promise in IC s 8(1) of 'equal protection of the law' echoes the Fourteenth Amendment to the United States Constitution, s 1 of which provides, inter alia, that '[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws'.[1] Nevertheless, South African equality jurisprudence ought not to adopt the entire corpus of American equal protection jurisprudence. The Fourteenth Amendment is not amplified in the way that IC s 8 is in respect of discrimination and affirmative action;[2] nor is it subject to a general limitation clause such as our IC s 33(1). Nevertheless, a critical reading of American equality jurisprudence is instructive.[3] It illustrates the perils of the restrictive account of equal protection,[4] and supplies illuminating instances of a rich and expansive conception of equality.[5]

In this regard it is interesting to note that, even in the absence of specific provisions endorsing affirmative action, courts in the United States have held certain affirmative action programmes to be consistent with the equal protection clause of the Fourteenth Amendment or statutory anti-discrimination provisions.[6]

[1] The federal government is also bound to afford the equal protection of the laws, since the Fourteenth Amendment has been held to be incorporated into the due process clause of the Fifth Amendment.

[2] Section 8(2) and (3).

[3] This reading needs to take into account the fact that the US Supreme Court has declined to bring to the Fourteenth Amendment as expansive a conception of equality as it has brought to the interpretation of the Civil Rights Act 1964 and other statutes concerned with equality. See *Washington v Davis* 426 US 229, 96 SCt 2040 (1976); Alan David Freeman 'Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine' (1978) 62 *Minnesota LR* 1049 at 1103.

[4] See, for example, *Washington v Davis* 426 US 229, 96 SCt 2040 (1976); *Village of Arlington Heights v Metropolitan Housing Development Corporation* 429 US 252, 97 SCt 555 (1977); *Geduldig v Aiello* 417 US 484, 97 SCt 2485 (1974); *General Electric Company v Gilbert* 429 US 125, 97 SCt 401 (1976). See also Freeman 'Legitimizing Racial Discrimination through Antidiscrimination Law'.

[5] See, for example, *Griggs v Duke Power Company* 401 US 424, 91 SCt 849 (1971); *California Federal Savings and Loan Association v Guerra* 479 US 272, 107 SCt 683 (1987); Freeman 'Legitimizing Racial Discrimination through Antidiscrimination Law', especially at 1079–1102 and the cases there cited.

[6] *Regents of the University of California v Bakke* 438 US 265, 98 SCt 2733 (1978) (a majority of the court struck down a quota policy, but affirmed that race could be taken into account in the admission process to further the compelling state objective of diversity in educational institutions); *Fullilove v Klutznick (Secretary of Commerce)* 448 US 448, 100 SCt 2758 (1980) (upholding the constitutionality of a federal special programme for minority business enterprises); *United Steelworkers of America, AFL-CIO-CLC v Weber* 443 US 193, 99 SCt 2721 (1979) (upholding a racial quota system for access to employment training under Title VII of the Civil Rights Act 1964); *Local Number 93, International Association of Firefighters AFL-CIO-CLC v City of Cleveland* 478 US 501, 106 SCt 3063 (1986) (upholding a Title VII consent decree with race-conscious promotion provisions); *Johnson v Transportation Agency, Santa Clara, California* 480 US 616, 107 SCt 1442 (1987) (upholding under Title VII a voluntary affirmative action plan designed to increase the number of women in traditionally male jobs); *Local 28 of the Sheet Metal Workers' International Association v Equal Opportunities Employment Commission* 478 US 421, 106 SCt 3019 (1986) (upholding the ordering of race-conscious remedies under Title VII); *United States v Paradise* 480 US 149, 107 SCt 1053 (1987) (upholding the constitutionality of race-conscious remedies); *Metro Broadcasting Inc v Federal Communications Commission* 497 US 547, 110 SCt 2997 (1990) (upholding the constitutionality of special federal programme for minority businesses in radio broadcasting). But see *Wygant v Jackson Board of Education* 476 US 267, 106 SCt 1842 (1986) (struck down a preferential layoff provision as unconstitutional); *Richmond v J A Croson Company* 488 US 469, 109 SCt 706 (1989) (found a municipal set-aside programme for minority business enterprise to be unconstitutional).

It is important to note that in the US any differentiation on the basis of race is held to be suspect. (This was re-affirmed by the Supreme Court recently in *Adarand Constructors Inc v Pena* (1995) 63 *United States Law Week* 4523–44 and in *Miller v Johnson* (1995) 63 *United States Law Week* 4726–42.) What is interesting about the cases listed above in which race-conscious remedies were upheld by the court is that they *survived* heightened scrutiny (see Tribe *American Constitutional Law* 1521–44).

(b) IC s 8(1) accommodates affirmative action

I have argued above that the interim Constitution embraces a substantive conception of equality and that it is committed to the principle of anti-subjugation. Seen in this light, IC s 8(1) should itself be read to permit redistributive measures. On this argument, affirmative action, far from interfering with equality, actually ensures that equality can be achieved.[1]

This argument is supported by the terms of Constitutional Principle V:

> 'Equality before the law includes laws, programmes or activities that have as their object the amelioration of conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.'[2]

The terms of Constitutional Principle V suggest that IC s 8(1) is concerned with equality in fact and not simply equality in law.[3] When s 8(1) is read together with s 8(3)*(a)* it is clear that affirmative action is permissible provided that the requirements of s 8(3)*(a)* are met.[4]

(c) Canadian equality jurisprudence

As is already apparent from this chapter, Canadian equality jurisprudence is an obvious early port of call in exploring the meaning of IC s 8. The wording of s 8(1) and (2) is in large measure lifted from s 15(1) of the Canadian Charter, which reads:

> 'Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.'

The Canadian equality clause promises equality 'before and under the law', as well as 'equal protection and equal benefit of the law'. The comprehensiveness of s 15(1) of the Charter is a reaction to the peculiarly narrow interpretation which the Supreme Court of Canada had given to the phrase 'equality before the law' under the Canadian Bill of Rights.[5]

In *AG Canada v Lavell* the phrase 'equality before the law' was held to constitute a procedural guarantee which applied only to the administration of the law and not to its content.[6] As a result, a law which deprived women, but not men, of their membership of Indian bands if they married non-Indians was found not to violate equality before the law. In *Bliss v AG Canada* it was thought that the requirement of equality before the law did not render the provision of legislative benefits susceptible to equality review.[7] Hence the denial of unemployment insurance benefits to pregnant women was held not to violate equality before the law.[8]

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

[2] See above, 14-1n2 on the status of the Constitutional Principles in interpreting the Constitution.

[3] 'Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations.' *Minority Schools in Albania* — Case no 182, Advisory Opinion of April 6, 1935 by the Permanent Court of International Justice in *Annual Digest and Reports of Public International Cases* 1935–1937 at 389–90; at 389 the court said that equality in fact 'excludes the idea of a merely formal equality'.

[4] It was precisely in order to avoid the dilemmas which trouble the United States courts in the cases cited above, 14-9n6, that s 8(3)*(a)* was included in our Constitution. See the discussion of s 8(3)*(a)* below, § 14.6.

[5] Section 1*(b)* of the 1960 Canadian Bill of Rights guarantees 'the right of the individual to equality before the law and the protection of the law'. See Hogg *Constitutional Law of Canada* pp 52-3–52-5.

[6] [1974] SCR 1349, (1973) 38 DLR (3rd) 481. [7] [1979] SCR 183, (1978) 92 DLR (3rd) 417.

[8] The decision in *Bliss* was reversed by the Supreme Court in *Brooks v Canada Safeway* [1989] 1 SCR 1219, 59 DLR (4th) 321.

When s 15 of the Charter came into force it superseded s 1*(b)* of the Canadian Bill of Rights.[1] In addition the Supreme Court has held that the same phrases have a wider meaning under the Canadian Charter of Rights and Freedoms.[2]

(d) Equality before the law and equal protection

The greater economy of words in s 8(1) of Chapter 3 than in s 15(1) of the Canadian Charter ought not to translate into more parsimonious protection.[3] The interpretation of 'equality before the law' and 'equal protection of the law' must give effect to the purposes of the Constitution and the values which support it.[4] Hence it must take account of a history of inequality and oppression and the need for reparation and reconstruction.[5]

Read in this context, the minimum content of 'equality before the law' is equality of process. As the Canadian Supreme Court said in the *Turpin* case, equality before the law

> 'is designed to advance the value that all persons be subject to the equal demands of the law and not suffer any greater disability in the substance and application of the law than others. This value has historically been associated with the requirements of the rule of law that all persons be subject to the law impartially applied and administered.'[6]

[1] See Hogg *Constitutional Law of Canada* pp 52-3 and 52-5.

[2] *R v Turpin* [1989] 1 SCR 1296 at 1326: 'The guarantee of equality before the law must be interpreted in its Charter context which may involve entirely different considerations from the comparable provision in the Canadian Bill of Rights.'

[3] An early draft of the equality clause provided for 'equal protection and equal benefit of the law'. (See the Fifth Progress Report of the Technical Committee on Fundamental Rights during the Transition.) Specific reference to equal benefit was omitted from the following drafts. This omission may have been motivated by anxiety that an equal benefit provision could lead to unwelcome judicial intervention in state reconstruction and welfare provisions. Arguably, however, the reference to 'equal benefits' was omitted because it is in any event embraced within the concept of 'equal protection'. In *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC) at paras 58–9 the Constitutional Court stated that the requirement of the equal benefit of the law was implicit in s 8(1) of the IC. The court referred, by way of example, to *President of the RSA v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at paras 32 and 108. The unjustified denial of unemployment benefits to certain individuals or groups, for example, would clearly be a failure to extend the equal protection of the law to such individuals or groups. The decision to the contrary in *Bliss v AG Canada* [1979] SCR 183, (1978) 92 DLR (3rd) 417 is clearly wrong (cf *Brooks v Canada Safeway* [1989] 1 SCR 1219, 59 DLR (4th) 321). On the relevance of the drafting history of the Constitution, and the caution to be exercised in relation to it, see *S v Makwanyane & another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at paras 17–19 (*per* Chaskalson P).

[4] In *City Council of Pretoria v Walker* 1998 (2) SA 33 (CC), 1998 (3) BCLR 257 (CC) at para 27, Langa DP expressed the view that the rationality criterion adopted in *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 25 should be equally applicable to both limbs of IC s 8(1) — equality before the law and equal protection of the law.

[5] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC) at paras 16, 59–64; cf *President of the RSA v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC).

[6] *R v Turpin* [1989] 1 SCR 1296 at 1329. See *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 22; *S v Ntuli* 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC) at para 19. Cf A V Dicey *An Introduction to the Study of the Law of the Constitution* 10 ed (1959). It has for a long time been a settled principle of administrative law that, in the absence of statutory authorization, delegated legislation may be declared invalid on grounds of unreasonableness if it is 'partial and unequal in [its] operation as between different classes' (*Kruse v Johnson* [1898] 2 QB 91 at 99–100; followed in *R v Abdurahman* 1950 (3) SA 136 (A); *Feinstein v Baleta* 1930 AD 319; *Sinovich v Hercules Municipal Council* 1946 AD 783). Whether or not administrative action was

[continued on page 14–14B]

Equality before the law requires that each person is accorded equal concern and respect both in the formulation and the application of the law.[1] Hence it requires equality of representation on all law-making bodies; in other words, that each citizen over the age of 18 should have an equal say in the choice of representatives on legislative bodies. It requires that the rules of law should in principle apply equally to all persons.[2] It also requires executive organs of state and administrative bodies to be even-handed in the enforcement[3] and administration of the law, and the application of policy.[4]

The guarantee of equality 'entitles everybody, at the very least, to equal treatment by courts of law'.[5] Equality before the law means that those who come before the courts of the land are assured of fair and impartial adjudication. Another aspect of equality before the law is 'equality of arms' in litigation.[6] This applies in both criminal and civil contexts. In relation

reviewable on the same basis was an open question (*R v Lusu* 1953 (2) SA 484 (A) at 488F–489F), but it is clear that the common-law grounds of review are wide enough to include racially discriminatory administrative action (*Johannesburg Stock Exchange & another v Witwatersrand Nigel Ltd & another* 1988 (3) SA 132 (A) at 152A–E; *During NO v Boesak & another* 1990 (3) SA 661 (A) at 671I–672D; *Jacobs en 'n ander v Waks en andere* 1992 (1) SA 521 (A) at 550H–551C). Given that s 35(3) requires that the common law is developed in the light of the spirit, purport and objects of the bill of rights, racial discrimination will clearly form a ground of common-law review of administrative action.

[1] 'The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.' (*Andrews* (1989) 56 DLR (4th) 1 at 15 *per* McIntyre J). This reference to 'equal concern and respect' harks back to Ronald Dworkin's distinction between 'equal treatment', in the sense of an even distribution of burdens and entitlements, and 'treatment as an equal', whereby every person is accorded 'equal concern and respect'. Equal concern and respect involve considering the particular attributes and impediments of each person in assessing her or his entitlements. Dworkin argues that the right to be treated as an equal is fundamental. Only in certain contexts does this entail the right equal treatment. Hence the right to equal treatment is itself derivative of the fundamental right to treatment as an equal. See Ronald Dworkin *Taking Rights Seriously* (1977) 226–7. The point made here by Dworkin is that a person adversely affected by affirmative action is not necessarily denied his or her right to be treated as an equal. Dworkin's distinction between 'treatment as an equal' and 'equal treatment' was adopted by the Constitutional Court in *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 32.

[2] As discussed above, this does not preclude appropriate distinctions in legal status or capacity. In *Podlas v Cohen and Bryden NNO & others* 1994 (4) SA 662 (T) at 673F–H Spoelstra J said that the fact that an insolvent undergoes a *capitis diminutio* is not affected by the provisions of s 8(1). In *Cherry v Minister of Safety and Security & others* 1995 (3) SA 323 (SE), 1995 (5) BCLR 570 (SE) it was argued that the entire system of liquor licensing under the Liquor Act 27 of 1989 was calculated to discriminate against the disadvantaged sectors of the community, since the expense and complexity involved in acquiring a licence placed them beyond the reach of all but the wealthiest members of society. The court considered that there was some merit in these allegations. It pointed out, however, that even if the present system were found to be unconstitutional, it would inevitably be replaced by another system of regulation. In the mean time the applicant was not entitled to continue to run an unlicensed and uncontrolled shebeen.

[3] In *AK Entertainment CC v Minister of Safety and Security* 1995 (1) SA 783 (E) at 789E–G the court expressed the view, *obiter*, that, as a matter of policy, a person who admittedly contravenes a law cannot complain of unfair discrimination 'even if an organ of State selects him for special treatment but ignores all similar offenders'. It is submitted that, where law enforcement is deliberately selective, equality before the law is denied. See *Beukes v Krugersdorp Transitional Local Council* 1996 (3) SA 467 (W) at 481A–I. See also *Cherry v Minister of Safety and Security & others* 1995 (3) SA 323 (SE), 1995 (5) BCLR 570 (SE) at 578E–579C; *Batista v Commanding Officer, SANAB, SA Police, Port Elizabeth, & others* 1995 (4) SA 717 (SE) at 722H–725E, 1995 (8) BCLR 1006 (SE).

[4] Cf *Gerber v Kommissie van Waarheid en Versoening* 1988 (2) SA 559 (T).

[5] *Per* Didcott J in *S v Ntuli* 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC) at para 19. See *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 22; *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at para 27.

[6] See Pieter van Dijk & Godefridus J H van Hoof *Theory and Practice of the European Convention on Human Rights* 2 ed (1990) 320; cf *Bernstein v Bester NO* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) at para 106.

to criminal trials IC s 8(1) and IC s 25(3) (which protects the right of an accused person to a fair trial) are mutually reinforcing.[1]

In *Qozeleni v Minister of Law and Order & another* Froneman J suggests that the right of the accused to demand access to records and documents relevant to the case flows from the fact that equality before the law requires 'equality of arms' in order for a criminal trial to be fair.[2] Interestingly, the concept of 'equality of arms' in a criminal trail actually involves special *protections* for the accused person.[3] Part of the rationale for such protections is that the state is an enormously powerful adversary. Fairness therefore demands that the state should bear the full burden of proving the guilt of the accused. The right to 'equality of arms' extends equally to civil litigants,[4] but its requirements differ from those which apply in criminal context. Fairness does not require the *onus* of proof to rest only upon the plaintiff in a civil trial, but permits it to be borne by the defendant in certain instances.[5] *Prinsloo v Van der Linde*[6] concerned the imposition, by s 84 of the Forest Act,[7] of a presumption of negligence upon a defendant in cases in which a fire has occurred on land situated outside a fire control area.

[1] See *S v Ntuli* 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC) at paras 18–20

[2] 1994 (3) SA 625 (E) at 642B–D. See also *Jeeva v Receiver of Revenue, Port Elizabeth* 1995 (2) SA 433 (SE). The court considered that the right to equality before the law entitled persons faced with interrogation in the course of an enquiry in terms of ss 417 and 418 of the Companies Act 61 of 1972 to equal access to information held by the interrogator in order to prepare themselves with the subject-matter of the inquiry (at 444A–B). See, however, the decision of Ackermann J in *Bernstein v Bester NO* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) at paras 102–6, 107, 121–3.

[3] Inter alia, the presumption of innocence: cf *S v Zuma* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC), *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC), 1995 (12) BCLR 1579 (CC), *S v Mbatha; S v Prinsloo* 1996 (3) BCLR 293 (CC). In *S v Mhlungu & others* 1995 (3) SA 867 (CC), 1995 (7) BCLR 793 (CC) the Constitutional Court considered the question of whether an accused in a trial which was pending at the date when the Constitution came into effect could rely on constitutional protections in his or her defence. The answer to this question depended on the proper interpretation of s 241(8) of the Constitution. Four judges interpreted that provision to mean that constitutional protections were not available to accused persons (and others) whose trials were pending on 27 April 1994. Mahomed J (with whom the majority agreed) considered that this view denied such accused persons (and others involved in cases which were pending at the relevant time) the equal protection of the rights embodied in Chapter 3 (at para 33).

With regard to the question of equality between persons accused of crimes, both Chaskalson P and Mahomed J pointed out in *S v Makwanyane & another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) that no criminal justice system can assure perfect equality between accused persons. Contingencies such as the resources available to the accused, the quality and experience of his or her legal representatives, and the disposition of the judicial officer trying the case all concede the possibility that similarly placed persons may receive significantly different sentences. This has to be acknowledged and accepted with regard to ordinary criminal cases. Such uncertainty is, however, intolerable with respect to the death sentence, which is by its nature both irrevocable and irremediable (at paras 54 (*per* Chaskalson P) and 273–4 (*per* Mahomed J)). See below, Van Zyl Smit 'Sentencing and Punishment' ch 28.

[4] See Van Dijk & Van Hoof *Theory and Practice of the European Convention on Human Rights* 320 and the cases there cited. A difficult issue which arises here is what this implies where one of the litigants is a government department to which certain privileges and immunities attach. (Compare *Qozeleni* at 642F–H and *Khala v Minister of Safety and Security* 1994 (4) SA 218 (W); cf *Luitingh v Minister of Defence* 1996 (2) SA 909 (CC), 1996 (4) BCLR 581 (CC) at para 6.) This question is discussed further below, § 14 10*(b)*.

[5] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at paras 37–8; *Mabaso v Felix* 1981 (3) SA 865 (A) at 872G–H; *Pillay v Krishna* 1946 AD 946 at 954.

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

[7] Act 122 of 1984.

The Constitutional Court held that this presumption did not infringe s 8(1) of the Constitution. It pointed out that in any civil case one of the parties will have to bear the *onus* on each of the factual matters material to the adjudication of the dispute. As long as the imposition of the *onus* is not arbitrary, s 8(1) is not infringed.[1] The court then proceeded to

[1] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 35.

examine the rationale of s 84. The purpose of the Forest Act, the prevention of veld fires, was legitimate and important, and was pursued by means of systematic set of provisions, one of which was s 84. The Act imposed specific requirements and responsibilities upon inhabitants of fire control areas. Outside such areas s 84 provided an incentive for vigilance in relation to fire hazards and control. It also catered for the fact that the causes of a fire and its spread are often peculiarly in the knowledge of the person on whose property it starts. The court therefore found that there was a rational relationship between s 84 and the purpose which it sought to achieve. Section 8(1) was not infringed.[1] In *Harksen v Lane NO & others* the court considered whether s 21 of the Insolvency Act 24 of 1936 is inconsistent with s 8. Section 21 of the Insolvency Act enables the Master, and subsequently the trustee of an insolvent estate, to ensure that all property of the insolvent finds its way into the insolvent estate by divesting the spouse of the insolvent of all his or her property, and then placing an onus on the solvent spouse to prove that the property should not be dealt with as part of the insolvent estate. No other person is affected in the same way. The provision therefore differentiates between solvent spouses and other persons, also closely related to an insolvent, with whom the insolvent would have the opportunity to collude. The court followed its reasoning in the *Prinsloo* case. It held that '[o]ften facts necessary for the determination of the question of ownership will be peculiarly within the knowledge of the solvent spouse.'[2] It concluded that the mechanism provided by s 21 was appropriate and effective, and that there was a rational connection between the differentiation and the legitimate governmental purpose behind its enactment.[3]

Related questions are raised by the imposition of strict civil liability in certain instances.[4] It is arguable that relieving a plaintiff altogether of the need to establish fault on the part of the defendant denies the latter its equality of arms in civil litigation in respect of the plaintiff and differentiates irrationally between such a defendant and others in respect of whom fault must be established. The imposition of strict liability is clearly more invasive of a defendant's interests than the imposition of a presumption of negligence. Hence the court's reasoning in the *Prinsloo* case does not dispose of this question. It is submitted that the question cannot be answered in the abstract, but will depend on the nature, scope and context of the provision in question.

The Constitutional Court found, in *Bernstein v Bester NO*,[5] that neither the purpose nor the effect of the inquisitorial procedures under ss 417 and 418 of the Companies Act 61 of 1973 'is to place the company in a better position than its debtors or creditors. The purpose is the opposite, namely to place the company in liquidation (because of its resulting disabilities) on such a footing that it can litigate on equal terms with its debtors and creditors.' Accordingly, the court held that neither provision is inconsistent with s 8 of the Constitution.

[1] The court went on to find that s 84 was not unfairly discriminatory in breach of s 8(2).

[2] *Harksen v Lane NO & others* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 59.

[3] *Harksen v Lane NO & others* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 60.

[4] Section 108 of the Post Office Act 44 of 1958, for example, imposes strict civil liability on persons causing damage to certain property belonging to Telkom (cf *Esterhuizen v Minister van Pos- en Telekommunikasiewese* 1978 (2) SA 227 (T); *Du Toit v Minister of Posts and Telegraphs* 1936 TPD 248).

[5] 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) at paras 121–2.

Equal protection of the law embraces the substance and content of the law. It encompasses laws which afford benefits as well as laws which prohibit or regulate certain activities. It also opposes subordination and disadvantage in and through the law.[1] The promise of equal protection may require the state to foster equality by protecting vulnerable persons and groups from domination by more powerful individuals and groups, whether within the public or the private domain.[2]

(e) Perplexing questions about justification

It has been argued in this section that the right to equality is impaired only by illegitimate differentiation.[3] Differentiation may be illegitimate either because its objective is illegitimate or because it is an unduly onerous means of achieving a legitimate objective or because it is arbitrary.[4] It is a peculiar feature of the right to equality that questions of justification are germane in determining whether there has been any infraction of the right to equality at all. Hence they arise at the first stage of equality analysis. Where other rights are at issue, questions of justification are deferred to the second stage, the s 33(1) inquiry, which is concerned, inter alia, with whether a limitation of a right is reasonable and justifiable in an open and democratic society based on freedom and equality.[5] Because inequality means

[1] The entire garnut of apartheid law entrenched the disadvantage and subordination of black people in and through law. Important aspects of the common law, such as the laws regulating the legal status of married women, the marital rape exemption, and aspects of the law of evidence in relation to sexual offences, contributed to the disadvantage and subordination of women in and through law. The legal inequality of women has to some extent been addressed by legislation such as the Matrimonial Property Act 88 of 1984, as amended, the General Law Fourth Amendment Act 132 of 1993, and the Prevention of Family Violence Act 133 of 1993 (s 5 of which abolished the marital rape exemption). Nevertheless, many remaining rules of common law, customary law and legislation perpetuate the inequality of women. Laws which criminalize homosexual activity, or which otherwise penalize homosexuality, exemplify the subordination and disadvantage of gay people in and through law; see Edwin Cameron 'Sexual Orientation and the Constitution: A Test Case for Human Rights' (1993) 110 *SALJ* 450.

[2] For example, the state may be required to take steps to protect women and children from domestic violence. See, for example, the Prevention of Family Violence Act 133 of 1993.

[3] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at paras 17 and 24.

[4] Cf *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 at para 25; *S v Makwanyane & another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at paras 48–56 (*per* Chaskalson P), para 156 (*per* Ackermann J), para 185 (*per* Didcott J), paras 273–4 (*per* Mahomed J). In the Indian case of *E P Royappa v State of Tamil Nadu* AIR 1974 SC 555 at 583–4 arbitrariness is said to be the very antithesis of equality; see also *Ajay Hasia v Khalid Mujib* 1981 ASC 487 at 499. The preoccupation with arbitrariness which these cases articulate is criticized by Seervai *Constitutional Law of India* vol I 436–42. Seervai points out that evils other than arbitrariness may threaten equality, and that it is insufficiently precise simply to conflate inequality and arbitrariness. He prefers the 'doctrine of classification' developed by the courts in the 1950s and 1960s, whereby classifications founded on intelligible differentia having a rational relation to the object sought to be achieved by the law were held to be legitimate (cf *Makhan Lal Malhorta v Union* (1961) 2 SCR 120 at 130). This doctrine accommodates, but is not confined to, the principle of non-arbitrariness. The influence of American equal protection jurisprudence on the Indian doctrine of classification is clear, although there remain significant differences between the two. For example, the Indian Supreme Court has declined to follow the US Supreme Court in finding that equality is only denied in cases of intentional discrimination (see Seervai *Constitutional Law of India* 447–8).

[5] For a discussion of the two major stages of constitutional analysis, see above, Kentridge & Spitz 'Interpretation' ch 11 and Woolman 'Limitation' ch 12.

differentiation without reason or justification, the first stage of equality analysis closely resembles a limitation inquiry, rather than specific rights analysis.[1]

This raises perplexing questions about the relationship between s 8(1) and s 33(1). Similar difficulties arise in relation to s 8(2), where the specific prohibition of 'unfair discrimination' makes it clear that lack of justification is bound up in the very definition of the prohibited conduct.[2] The relationship between the two types of justification inquiry is considered below, § 14.9.

14.5 IC SECTION 8(2)

> 'No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.'[3]

The prohibition of discrimination under IC s 8(2) is not simply a negative formulation of the positive right to equality expressed in s 8(1). Doubtless, there is overlap between the two sections — but not to the extent that their meanings are indistinguishable.[4] Certain forms of inequality may not result from unfair discrimination as defined in s 8(2), and may be more appropriately addressed as instances of inequality before the law or denials of the equal

[1] See, for example, *The Belgian Linguistics Case* 1968 11 *Yearbook of the European Convention on Human Rights* at 866, 1 EHRR 252 at 284: '... [T]he principle of equality of treatment is violated if a distinction is applied which has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. Not only must the aim be legitimate — there is a violation if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized.'

[2] In Canada a similar problem arises as to the relationship between s 15 and s 1, the Canadian limitation clause. The Canadian solution has been to defer all questions of justification to s 1 analysis. See, for example, *Andrews* (1989) 56 DLR (4th) 1 at 23; *R v Turpin* [1989] 1 SCR 1296 at 1328. To avoid a plethora of claims based on any distinction whatsoever, the Canadian courts have said that 'discrimination' is the turnstile through which any claim of inequality must pass. 'Discrimination' has been narrowly interpreted by the Canadian courts to refer to distinctions which perpetuate or exacerbate the types of disadvantage which s 15 was specifically designed to remedy. For a summary of Canadian equality analysis, see *R v Swain* [1991] 1 SCR 933, 3 CRR (2d) 1.

[3] In *Baloro & others v University of Bophuthatswana & others* 1995 (4) SA 197 (B) at 247A, 1995 (8) BCLR 1018 (B), Friedman JP held that the words 'no person' did not apply only to South African citizens but also to aliens.

[4] In *AK Entertainment CC v Minister of Safety and Security & others* 1995 (1) SA 783 (E) the applicant, a close corporation which conducted a casino, alleged that the respondents had applied a policy of 'selective non-interference' in taking action against only certain persons who contravened the Gambling Act 23 of 1982 (Ck). This policy, alleged the applicant, infringed s 8(1) and (2) of the Constitution. The court considered that, for the purpose of the application before it, there was no reason to distinguish between inequality and unfair discrimination (at 789C–D). The court took the view that, on questions of the application of the law, 'a transgression of s 8(1) or (2) will arise only if the organ of State intends to apply the law unequally or if the law is enforced according to a principle which has a discriminatory effect due to some particular characteristic of the discriminatee' (at 789I–J). It is submitted, however, that the selective enforcement of a law might in certain cases amount to a denial of equality before the law even if the basis of selection is not itself unfairly discriminatory. See also *Cherry v Minister of Safety and Security & others* 1995 (3) SA 323 (SE), 1995 (5) BCLR 570 (SE) at 578E–579C; *Batista v Commanding Officer, SANAB, SA Police, Port Elizabeth, & others* 1995 (4) SA 717 (SE) at 722H–725E, 1995 (8) BCLR 1006 (SE).

protection of the law.[1] Section 8(2) provides a mechanism whereby specific denials of equality arising from unfair discrimination may be challenged.

(a) Unfair discrimination

Most constitutional and legislative instruments which outlaw discrimination have left the pejorative connotation of the word 'discrimination' to speak unaided to those who interpret them. The drafters of the South African Constitution considered it necessary to include the word 'unfairly'. How does this affect the meaning of IC s 8?

In Canada discrimination has been interpreted to mean

> 'a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.'[2]

In IC s 8(2) the word 'unfairly' does not simply distinguish between different kinds of differentiation. It actually sorts permissible from impermissible discrimination, where discrimination itself bears a pejorative meaning. One of the problems of a simple prohibition of discrimination is that it knows no distinction between discrimination against members of subordinate groups and discrimination against the privileged.[3] But while the discrimination may take the same form in both instances, and will doubtless cause harm in each case, the kind of harm is different in important ways. The harm caused by measures which disadvantage vulnerable and subordinate groups goes beyond the evil of discrimination. Such treatment is unfair in that it perpetuates and exacerbates existing disadvantage.[4] Measures which disadvantage powerful and privileged groups, on the other hand, may be discriminatory, but are *not necessarily* unfair in the same way.[5] The words 'not necessarily' are deliberately used here to make it clear that the argument is not that the Constitution always permits discrimination against privileged groups or their members. Rather, the argument is that the word 'unfairly' indicates that IC s 8(2) accommodates the view that discrimination may have a different quality in different contexts, and requires that the specific context is taken into account. The Constitutional Court has confirmed that a particular and distinct

[1] For example, the fact that a prisoner needs a judge's certificate in order to prosecute in person a review or appeal against conviction in a lower court (ss 305 and 309(4)*(a)* of the Criminal Procedure Act 51 of 1977) is better characterized as an instance of inequality before the law, or a denial of equal protection of the law, than an example of unfair discrimination against prisoners. Cf *S v Ntuli* 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC) at para 18; cf *Bernstein v Bester NO* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC). The relationship between s 8(1) and s 8(2) is discussed above, § 14.3.

[2] *Andrews* (1989) 56 DLR (4th) 1 at 18; *cf R v Turpin* [1989] 1 SCR 1296 at 1332 *per* Wilson J: 'A finding that there is discrimination will, I think, in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged.'

[3] See Denise Meyerson 'Sexual Equality and the Law' (1993) 9 *SAJHR* 237, esp at 250–4.

[4] See *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at para 42; and *Larbi Odam & others v Member of the Executive Council for Education (North West Province) & others* 1998 (1) SA 745 (CC), 1997 (12) BCLR 1655 (CC) at para 19.

[5] As Sheppard *Litigating the Relationship Between Equity and Equality* (1993) 9 points out: 'Many legal distinctions cause individual harm. But not all individual harms track larger patterns of group disadvantage'.

meaning is to be attributed to the specific prohibition of '*unfair* discrimination' in IC s 8(2). It has emphasized the pejorative connotation of the word 'discrimination' itself:

> 'The proscribed activity is not stated to be "unfair *differentiation*" but is stated to be "unfair *discrimination*". Given the history of this country we are of the view that "discrimination" has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them.'[1]

In interpreting the term '*unfair* discrimination' the court adverted to the historical context in which the prohibition was formulated:

> 'We are emerging from a period in our history during which the humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth: as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short they were denied their inherent dignity.'[2]

Discriminatory measures which adversely affect vulnerable and subordinated groups are more likely to be found to be unfair than those which adversely affect groups who are relatively powerful or advantaged.[3] Nevertheless, IC s 8(2) does not protect only those who historically have been disadvantaged.[4] In the context of IC s 8 as a whole, said the court, unfair discrimination 'principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity'.[5] The court suggested that other forms of differentiation, the adverse effect of which is comparably serious to an injury to dignity, may well also infringe IC s 8(2). There was no need, however, on the issue before it in the *Prinsloo* case, to decide that question.[6]

In *President of the Republic of South Africa v Hugo* the Constitutional Court stated that the prohibition of unfair discrimination in IC s 8(2) recognized that the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups is a core purpose of the constitutional enterprise.[7] The court endorsed the approach of L'Heureux-Dubé J in her minority judgment in the case

[1] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 31; cf *Harksen v Lane NO & others* 1998 (1) SA 300 (CC) at para 48, 1997 (11) BCLR 1489 (CC) at para 47

[2] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 31; *Harksen v Lane NO & others* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 45–6.

[3] See *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 39 (Goldstone J) and at paras 112–14 (O'Regan J).

[4] *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 41; and see *Harksen v Lane NO & others* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 63 (Goldstone J), paras 94–5 (O'Regan J dissenting, but not on this point) and para 124 (Sachs J); *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at para 73.

[5] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 31; *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 41 (Goldstone J). The court's identification of fundamental human dignity as lying at the core of the right to equality is consistent with the importance it attributes to the right to dignity in the Constitution as a whole — cf *S v Makwanyane* 1995 (3) SA 391 (CC) at paras 262 and 328–30.

[6] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 33.

[7] 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 41; see also *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 32; see above, § 14.2.

of *Egan v Canada* in the Canadian Supreme Court, which identified the protection of fundamental human dignity as the defining purpose of the constitutional right to equality.[1]

In the *Hugo* case the Constitutional Court gave careful consideration to the factors which render discrimination unfair in the particular sense intended by IC s 8(2). Here, a contextual analysis is particularly important.

> 'We need . . . to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.'[2]

In evaluating whether discrimination is unfair in any given context a court must have regard to the group that is disadvantaged, the nature of the power in terms of which the discrimination was effected, and the nature of the interests affected by the discrimination.[3]

O'Regan J described the enquiry as follows:

> 'There are at least two factors relevant to the determination of unfairness: it is necessary to look at the group or groups which have suffered discrimination in the particular case and at the effect of the discrimination on the interests of those concerned. The more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair. Similarly, the more invasive the nature of the discrimination, the more likely it will be held to be unfair. In determining the effect of the discrimination, the reasons given by the agency responsible for the discrimination will be only of indirect relevance. However, should the discrimination in any particular case be held to be unfair, the reason for the discriminatory act may well be central to an investigation into whether the discrimination is nevertheless justified in terms of section 33 of the interim Constitution.'[4]

In *Harksen v Lane NO & others* the Constitutional Court was called upon to consider whether s 21 of the Insolvency Act 24 of 1936 infringes IC s 8.[5] As set out above, § 14.3, the court took the opportunity to tabulate its approach to the analysis of equality claims.[6]

[1] (1995) 29 CRR (2d) 79 at 104–5, quoted with approval by the Constitutional Court in *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 41; *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at paras 32 and 33. The central value of fundamental human dignity to the protection of the right to equality is also underlined by McLachlin J in *Miron v Trudel* 29 CRR (2d) 189 at 204–7; see above, § 14.2.

[2] *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 41; *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at para 46. Cf *Beukes v Krugersdorp Transitional Local Council* 1996 (3) SA 467 (W) at 480H–482D; *Chirach Tyre Company (Pty) Ltd t/a Falcon Tyre Centre v Minister of Trade and Industry* 1997 (3) BCLR 319 (T) at 325G–J.

[3] *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at paras 43 (Goldstone J) and 92 (Mokgoro J); *Harksen v Lane NO & others* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 51 and para 62–7; *Larbi Odam & others v Member of the Executive Council for Education (North West Province) & others* 1998 (1) SA 745 (CC), 1997 (12) BCLR 1655 (CC) at para 23; *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at paras 37–38; cf *Chirach Tyre Company (Pty) Ltd t/a Falcon Tyre Centre v Minister of Trade and Industry* 1997 (3) BCLR 319 (T) at 325G–327C.

[4] *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 112 (O'Regan J); *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at para 45.

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

[6] *Harksen v Lane NO & others* 1998 (1) SA 300 (CC) at para 54, 1997 (11) BCLR 1489 (CC) at para 53.

The effect of s 21 of the Insolvency Act, and the court's conclusion that the provision did not infringe IC s 8(1), is discussed above, § 14.4*(d)*. The court held that the enquiry as to whether differentiation amounts to unfair discrimination proceeds in two stages.[1] The first question is whether the distinction in question is discriminatory. Differentiation on a ground listed in IC s 8(2)[2] amounts to discrimination. If the differentiation is based on a ground other than those listed, discrimination will be found only if the basis of the differentiation is potentially destructive of fundamental human dignity or is potentially harmful in a comparably serious way. If discrimination is established, its unfairness is presumed if it is based on one of the grounds listed in IC s 8(2).[3] If it is not so based, the complainant must establish unfairness, which will turn largely on the impact of the discrimination on the complainant and others in his or her situation.[4]

It seems somewhat strange that Goldstone J said that differentiation on a listed ground amounts to discrimination and did not state that the differentiation at issue must affect the complainant adversely in some way. Fundamental as this point is, it ought to have been made explicit in the analysis set out by the court.[5]

Another curious feature of the tabulation set out in the *Harksen* case is this. Although the discrimination stage of the analysis and the unfairness stage of the analysis are said to be distinct,[6] they overlap in two important ways. First, the question of whether the differentiation at issue is based on a listed ground features in both the discrimination and the unfairness enquiry. Secondly, the effect of the differentiation at issue on the dignity of the complainant, or some comparably serious effect, is said in *Harksen* to determine whether differentiation on a ground other than one listed amounts to discrimination. Yet that is the very enquiry which determines whether the discrimination at issue is unfair.

Read together with IC s 8(2), the effect of IC s 8(4) is that *unfairness* is presumed where *discrimination* on a listed ground is proved. Nothing in the text of IC s 8(2) dictates that differentiation on a listed ground necessarily amounts to discrimination. This is a gloss which emanates from the *Harksen* decision (and not from the decisions which preceded it).[7]

[1] 1998 (1) SA 300 (CC) at para 54, 1997 (11) BCLR 1489 (CC) at para 53; see above, § 14.3; cf *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at para 29.

[2] See further below, § 14.5*(c)*.

[3] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC) at para 18. The court pointed out that even where it is not contended by one of the parties that the discrimination is fair, the court must be satisfied that fairness has not been established in the circumstances.

[4] *Harksen v Lane NO & others* 1998 (1) SA 300 (CC) at para 54, 1997 (11) BCLR 1489 (CC) at para 53. In *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC) at para 19 Ackermann J said that, although in the final analysis it is the impact of the discrimination on the complainant or members of the affected group that is the determining factor as to whether the discrimination in question is unfair, the approach to be adopted is complex and nuanced.

[5] Cf *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 708 (CC) at para 31.

[6] *Harksen v Lane NO & others* 1998 (1) SA 300 (CC) at para 46, 1997 (11) BCLR 1489 (CC) at para 45.

[7] In *National Coalition for Gay and Lesbian Equality v Minister of Justice* ('the Sodomy case') 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC) at para 18 the court stated that differentiation on the ground of sexual orientation is presumed to be unfair discrimination unless it is established that the discrimination is fair (cf *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 1999 (3) SA 173 (C) at 185G–I, 1999 (3) BCLR 280 (C) at 291G–H). In effect, the discrimination enquiry and the unfair discrimination are thus collapsed into one, this despite the court's interpretation of the word 'discrimination' as being pejorative in its own right — see, for example, *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 31, and see *Harksen v Lane NO* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 47.

Another innovation of the *Harksen* decision is the statement that differentiation on a ground other than one which is listed will amount to discrimination where that differentiation has the potential to impair the fundamental human dignity of the complainant or to affect the complainant in a comparably serious way. In the *Prinsloo* decision the issue of injury to dignity or some comparably serious injury was said to go to the question of whether discrimination was unfair — and not whether differentiation amounted to discrimination.[1] In *Harksen* the court underlined the importance of dignity to the unfairness enquiry.[2] It said that the question of unfairness turns largely on the impact of the discrimination on the complainants, 'and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature' with due regard to the group which is disadvantaged, the nature of the power in terms of which the discrimination was effected, and the nature of the interests affected by the discrimination.[3]

It seems then that both the question of whether or not the differentiation is on a listed ground and the question of injury to dignity or something comparably serious may feature at both stages of the discrimination enquiry.[4]

The court described the inquiry as to whether discrimination is unfair in a particular case in the following terms:

> 'In order to determine whether the discriminatory provision has impacted on complainants unfairly, various factors must be considered. These would include:
> *(a)* the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;
> *(b)* the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question . . .
> *(c)* with due regard to *(a)* and *(b)* above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.

[1] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 708 (CC) at para 33.

[2] *Harksen v Lane NO & others* 1998 (1) SA 300 (CC) at para 51, 1997 (11) BCLR 1489 (CC) at para 50, invoking *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), (1997) 6 BCLR 708 (CC) at para 41.

[3] *Harksen v Lane NO & others* 1998 (1) SA 300 (CC) at para 52, 1997 (11) BCLR 1489 (CC) at para 51 — cf *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), (1997) 6 BCLR 708 (CC) at para 43; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC) at para 19.

[4] In *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) the court did not need to enter the question of dignity at the discrimination stage since the conclusion of discrimination flowed from the fact that there was indirect racial differentiation, but turned to the dignity analysis with regard to the question of unfairness.

> These factors, assessed objectively, will assist in giving "precision and elaboration" to the constitutional test of unfairness. They do not constitute a closed list. Others may emerge as our equality jurisprudence continues to develop. In any event it is the cumulative effect of these factors that must be examined and in respect of which a determination must be made as to whether the discrimination is unfair.'[1]

In its analysis of unfair discrimination, the Constitutional Court has assigned a crucial role to the question of whether or not the dignity of the complainant has been impaired. Davis J has remarked that:

> 'The difficulty with much of this jurisprudence is that it makes the foundational value of equality derivative of some other value. A breach of equality takes place because there is a breach of dignity or some other principle and equality thus becomes an "empty idea": Peter Westen "The Empty Idea of Equality" (1982) 95 *Harvard Law Review* 537.'[2]

The majority of the court in *Harksen* concluded that s 21 of the Insolvency Act does not infringe IC s 8(2). Section 21 differentiates between the solvent spouse of an insolvent and all other persons. This, said the majority, is not a distinction based on a specified ground, but does have the potential to demean the fundamental human dignity of a solvent spouse. The court therefore found s 21 to be discriminatory. Because the discrimination was not based on a listed ground, it was for the complainant to persuade the court of its unfairness. After considering the position of the complainant in society, the nature of the provision and the effect of the discrimination on solvent spouses, the court held that the complainant had failed to establish that the discrimination was unfair.[3]

O'Regan J agreed with the method of analysis adopted by the majority, but dissented on the application of the test for unfair discrimination. She found that the differentiation effected by s 21 of the Insolvency Act was based on marital status. Although marital status is not listed in IC s 8(2),[4] O'Regan J concluded that differentiation based on marital status is discriminatory.[5] Applying the same approach to the determination of unfairness as that applied by the majority, O'Regan J came to the contrary conclusion that the discrimination was in fact unfair,[6] and further, that it was not permissible in terms of IC s 33(1).[7]

Sachs J also endorsed the approach taken by the majority, but differed on its application, finding that s 21 of the Insolvency Act discriminated unfairly against solvent spouses.[8]

[1] *Harksen v Lane NO* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at paras 51–2, cf *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC) at para 19; *Lotus River, Ottery, Grassy Park Residents Association v South Peninsula Municipality* 1999 (2) SA 817 (C) at 826I–827D and 830C–G, 1999 (4) BCLR 440 (C) at 448F–J and 451G–J.

[2] *Lotus River, Ottery, Grassy Park Residents Association v South Peninsula Municipality* 1999 (2) SA 817 (C) at 827C–F, 1999 (4) BCLR 440 (C) at 448I–449B; and see Anton Fagan 'Dignity and Unfair Discrimination: A Value Misplaced and a Right Misunderstood' (1998) 14 *SAJHR* 220.

[3] *Harksen v Lane NO & others* 1998 (1) SA 300 (CC) at paras 63–69, 1997 (11) BCLR 1489 (CC) at paras 62–68.

[4] It is listed in FC s 9(3) — see below, § 14.15*(c)*.

[5] *Harksen v Lane NO & others* 1998 (1) SA 300 (CC) at paras 89–93, 1997 (11) BCLR 1489 (CC) at paras 88–92.

[6] *Harksen v Lane NO & others* 1998 (1) SA 300 (CC) at paras 94–101, 1997 (11) BCLR 1489 (CC) at paras 93–100.

[7] *Harksen v Lane NO & others* 1998 (1) SA 300 (CC) at paras 102–112, 1997 (11) BCLR 1489 (CC) at paras 101–11.

[8] *Harksen v Lane NO & others* 1998 (1) SA 300 (CC) at paras 119–126, 1997 (11) BCLR 1489 (CC) at paras 118–25.

At issue in *City Council of Pretoria v Walker* was the imposition of a 'flat rate' for municipal services in the former black townships within the jurisdiction of the council, as opposed to a consumption-based rate in areas previously reserved for whites.[1] The respondent also challenged the selective enforcement of debts arising from the provision of municipal services only against residents of former 'white areas'. Applying the approach tabulated in the *Harksen* case,[2] the court concluded that the imposition of the flat rate on some, and a consumption-based rate on others, although indirectly discriminatory,[3] was not unfair.[4] The court found that the discrimination in question did not impact adversely on the respondent in any material way. His dignity was not infringed, nor was he harmed in any comparably serious way.[5]

The selective enforcement of claims against residents was, however, found to constitute unfair discrimination. The court found on the evidence that the selective enforcement of claims, in effect against white people only, gave rise to the grievance that the law was likely to be more harshly used against white people than against black people. This was an injury at least comparably serious to an invasion of dignity.[6]

In *National Coalition for Gay and Lesbian Equality v Minister of Justice*[7] the common-law offence of sodomy, the offence of contravention of s 20A of the Sexual Offences Act,[8]

[1] 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC).

[2] *Harksen v Lane NO & others* 1998 (1) SA 300 (CC) at para 54, 1997 (11) BCLR 1489 (CC) at para 53.

[3] As to which, see further below, § 14.5(*b*).

[4] *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at paras 45–68.

[5] *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at para 68.

[6] *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at para 81. Compare *Beukes v Krugersdorp Transitional Local Council* 1996 (3) SA 467 (W) at 480H–482D, where Cameron J held that the selective non-collection and waiver of amounts owing to a local authority fell within the latitude which must be allowed to a local authority in enforcing the payment of debts due to it by those subject to its jurisdiction. In contrast, 'a sustained locality-directed policy of non-collection or waiver which has a direct or indirect racially discriminatory impact' would doubtless be unfair, but no such case was made out. Cameron J found too that to the extent that such selective non-collection constituted indirect racial discrimination, it was warranted by historical, social and economic circumstances and hence was not unfair. See also *Municipality of the City of Port Elizabeth v Prut* 1997 (6) BCLR 828 (SE) at 836C–838E, in which the court found that the fact that the municipality had not written off arrear rates in localities previously reserved for whites, but had written off arrears on service charges throughout its jurisdiction, was not discriminatory at all. There was a logical distinction to be drawn between rates and service charges. The reasons for writing off the latter did not apply to rates arrears since there had in the past been no legal basis for the assessment or collection of rates in areas reserved for blacks. In *East London Transitional Local Council v Tax Payers Action Organisation & others* 1998 (10) BCLR 1221 (E) the court found that the imposition of a flat rate for municipal services in areas previously reserved for blacks as opposed to a consumption-based rate in areas previously reserved for whites, the writing off of arrear rentals in some geographical areas but not others, and the selective enforcement of debts arising from arrear rates and service charges did not discriminate unfairly against the members of the respondent. Importantly, the court rejected the respondents' attack on the cross-subsidization entailed by the measures taken by the applicant. The court pointed out that a finding that cross-subsidization infringed IC s 8(2) 'would defeat the very spirit and essence of the Constitution' (at 1233E–H).

[7] 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC).

[8] Act 23 of 1957. Section 20A of the Act criminalized acts calculated to stimulate sexual passion or to give sexual gratification committed between men at 'a party'.

the inclusion of the common-law offence of sodomy in Schedule 1 of the Criminal Procedure Act[1] and the inclusion of the common-law offence of sodomy in Schedule 1 of the Security Officers Act[2] were declared to be unconstitutional. Each of these laws was found to discriminate unfairly against gay men on the ground of their sexual orientation. The court, which decided the case under FC s 9, made it clear that the equality jurisprudence and analysis developed in deciding cases under s 8 of the Constitution was equally applicable to FC s 9.[3]

In considering whether the criminal prohibition of sodomy constituted unfair discrimination on the ground of sexual orientation, the court applied the analysis described by Goldstone J in *Harksen v Lane NO*.[4]

The term 'unfair discrimination' makes it plain that a lack of justification is bound up in the very definition of the prohibited conduct. Hence questions of justification emerge within the clause itself and are not confined to IC s 33(1), the limitation clause. In this, the structure of the equality clause differs from that of Canada, where it has been established that the stage of justification is reached only under s 1, the limitation clause, and not under s 15.[5]

It is suggested that questions of justification arise naturally in the definition of the right to equality, and that the Canadian attempt to confine these questions to the s 1 inquiry is artificial. Where IC s 8(2) is engaged, the need to consider questions of justification at the outset is made explicit in the use of the term 'unfair discrimination'.[6] Admittedly this raises difficult questions as to the relationship between the inquiry under IC s 8(2) and that under IC s 33(1). This is discussed further below, § 14.9.

[1] Act 51 of 1977

[2] Act 92 of 1987

[3] *National Coalition for Gay and Lesbian Equality v Minister of Justice* ('the Sodomy case') 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC) at para 64, and see para 15

[4] 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 51; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC) at paras 20–7 esp at paras 26–7. The detailed analysis of this question is discussed further below, § 14.5(*c*) and § 14.15(*c*)

[5] *Andrews* (1989) 56 DLR (4th) 1 at 21 and 23, *Turpin* [1989] 1 SCR 1296 at 1326 and 1328 *per* Wilson J, *Miron v Trudel* (1995) 124 DLR (4th) 693, 29 CRR (2d) 189 (SCC) at 198–9, 204

[6] This may facilitate a more nuanced approach to the issue of justification than is taken in Canadian jurisprudence — see Ruth Colker 'Section 1, Contextuality and the Anti-disadvantage Principle' (1992) 42 *University of Toronto LJ* 77. Colker argues that different justificatory frameworks should be applied to different kinds of discrimination. For example, an approach which is suitable to age discrimination may be inappropriate to sex discrimination. She argues that the American approach, which subjects different kinds of discrimination to different standards of justification, is 'more contextual than the Canadian framework, because it is more sensitive to the substantive right that has been infringed' (at 100). Nevertheless, she points out that the *particular* contextual approach used in the United States would be inappropriate to Canada in the light of 'the different histories of discrimination in the United States and Canada, and the different conceptions of the nature of inequality embedded in the constitutions of the two countries' (at 103). A similar argument is apposite to the approach taken to the grounds of discrimination prohibited by s 8(2). Arguably, what sorts of conduct may amount to unfair discrimination should differ between one category and the next. So too should the standard of justification under s 33(1). Naturally, whether this is so, and to what extent, would depend both on the basis of the alleged discrimination and its context. This underlines the vital importance of contextual analysis (cf *Turpin* [1989] 1 SCR 1296 at 1331–2, *Edmonton Journal v Alberta (Attorney General)* [1989] 2 SCR 1326, 64 DLR (4th) 577 at 583–4)

(b) Direct and indirect discrimination

The idea that discrimination may take two forms, direct and indirect, has developed largely in legislative rather than constitutional jurisprudence. In the United States, for example, the Supreme Court first acknowledged the existence of indirect or adverse impact discrimination in *Griggs v Duke Power Co*, a case under Title VII of the Civil Rights Act, which prohibits discrimination in employment.[1] This understanding of discrimination was adopted in the English legislation prohibiting race and sex discrimination[2] and by Canadian courts interpreting both federal and provincial human rights legislation.[3] In interpreting s 15(1) of the Charter the Canadian Supreme Court has drawn on the understanding of discrimination developed under the various human rights codes.[4] The European Court of Justice has also adopted the view that discrimination may be direct or indirect.[5] The account of direct and indirect discrimination which follows draws on all these sources.[6]

Direct discrimination occurs where a person is disadvantaged simply on the ground of her or his race, sex, ethnicity, religion, or whatever the distinguishing feature(s) may be, or on the basis of some characteristic(s) specific to members of that group.[7] Neither motive nor

[1] 401 US 424, 91 SCt 849 (1971). The Supreme Court has held, however, that facially neutral government action will not be struck down under the Fourteenth Amendment unless it is discriminatory both in impact and in purpose. See *Washington v Davis* 426 US 229, 96 SCt 2040 (1976); *Village of Arlington Heights v Metropolitan Housing Development Corp* 429 US 252, 97 SCt 555 (1977).

[2] Section 1 of the English Sex Discrimination Act 1975; s 1 of the Race Relations Act 1976. Although these Acts do not actually use the terms 'direct' and 'indirect discrimination', each sets out the elements of what have come to be known as direct discrimination (s 1(1)(*a*)) and indirect discrimination (s 1(1)(*b*)).

[3] *Re Ontario Human Rights Commission v Simpson Sears Ltd* [1985] 2 SCR 536 at 547, 551, 23 DLR (4th) 321 at 329, 332; *Re Bhinder et al and Canadian National Railway Co* [1985] 2 SCR 561 at 586, 23 DLR (4th) 481 at 498; *Action Travail des Femmes v Canadian National Railway Company* 40 DLR (4th) 193 at 208–10; *Andrews* (1989) 56 DLR (4th) 1 at 16–19.

[4] See *Andrews* (1989) 56 DLR (4th) 1 at 17.

[5] See Evelyn Ellis *European Community Sex Equality Law* (1991) 68–9. Article 2(1) of the European Economic Community Council Directive 207 of 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions provides that 'the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly . . .'.

[6] For a fuller discussion of judicial treatment of direct and indirect discrimination, see Janet Kentridge 'Measure for Measure — Weighing up the Costs of a Feminist Standard of Equality in the Workplace' (1994) *Acta Juridica* 84.

[7] See *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at para 43; *R v Birmingham City Council, Ex parte Equal Opportunities Commission* [1989] AC 1155, 2 WLR 520, 1 All ER 769 (HL); *James v Eastleigh Borough Council* [1990] 2 AC 751, 3 WLR 55, ICR 554 (HL).

intention is relevant to the question of whether the detrimental treatment constitutes direct discrimination.[1] What is relevant is the application of, for example, a race- or gender-based criterion.[2]

Discrimination on the grounds of pregnancy is an example of direct sex discrimination. As the House of Lords recognized in *Webb v EMO Air Cargo (UK) Ltd*, '[c]hild-bearing and the capacity for child-bearing are characteristics of the female sex. So to apply these characteristics as the criterion for dismissal or refusal to employ is to apply a gender-based criterion . . .'.[3] In *Brooks v Canada Safeway* the Supreme Court of Canada held that '[d]iscrimination on the basis of pregnancy is a form of sex discrimination because of the basic biological fact that only women have the capacity to become pregnant'.[4] The European Court of Justice has held that because refusal to appoint the best applicant on the ground of pregnancy can apply only to women, it therefore constitutes direct discrimination — even if all the other applicants for a post happen to be women.[5]

Indirect discrimination occurs when policies are applied which appear to be neutral, but which adversely affect a disproportionate number of a certain group. For example, a pension scheme may be open to full-time workers only. On its face there is nothing sexually discriminatory about a distinction between full- and part-time workers. It is frequently the case, however, that a disproportionate number of part-time workers are women who are attempting to combine formal employment with childcare. Hence, a disproportionate number of women are ineligible for pension benefits and these women are therefore victims of indirect discrimination. Like direct discrimination, indirect discrimination may be either intentional or unintentional.[6] The facially neutral criterion may be adopted with the intention of screening out members of a particular group; or it may be adopted in good faith and nevertheless have a disproportionate adverse effect on a particular group.[7]

[1] That there is no need to show intention to discriminate in a complaint of direct discrimination was accepted by the House of Lords in *R v Birmingham City Council, Ex Parte Equal Opportunities Commission* [1989] AC 1155, 2 WLR 520, 1 All ER 769 (HL); and confirmed in *James v Eastleigh Borough Council* [1990] 2 AC 751, 3 WLR 55, ICR 554 (HL). The House of Lords was here concerned with claims under s 1 of the English Sex Discrimination Act. The same point was accepted by the European Court of Justice in *Dekker v Stichting Vorminscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1992] ICR 325, [1990] ECR I-3941 at 330. See also *Andrews* (1989) 56 DLR (4th) 1 at 18; *Brooks v Canada Safeway Ltd* (1989) 59 DLR (4th) 321 at 336.

[2] It was held in *R v Birmingham City Council, Ex Parte Equal Opportunities Commission* [1989] AC 1155, 2 WLR 520, 1 All ER 769 (HL) and confirmed in *James v Eastleigh Borough Council* [1990] 2 AC 751, 3 WLR 55, ICR 554 (HL) that the application of any gender-based criterion constitutes unlawful direct discrimination

[3] [1993] 1 WLR 49 at 53H, ICR 175, [1992] 4 All ER 929 (HL), see also the decision of the ECJ in the *Webb* case at [1994] IRLR 482.

[4] (1989) 59 DLR (4th) 321 at 338.

[5] *Dekker v Stichting Vorminscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1992] ICR 325 at 329B and 330A–B, [1990] ECR I-3941 (ECJ). See, however, the views expressed by Denise Meyerson 'Sexual Equality and the Law' (1993) 9 *SAJHR* 237.

[6] *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at para 43.

[7] Obviously, then, the distinction between direct and indirect discrimination is not a simple distinction between intentional and unintentional discrimination; cf *Benkes v Krugersdorp Transitional Local Council* 1996 (3) SA 467 (W) at 480B–H.

City Council of Pretoria v Walker is the first case in which the Constitutional Court has pronounced upon the question of indirect discrimination.[1] As discussed above,[2] Walker argued that the council had unfairly discriminated against him by imposing a 'flat rate' for municipal services in the former black townships within the jurisdiction of the council, as opposed to a consumption-based rate in areas previously reserved for whites. He also challenged the selective enforcement of debts arising from the provision of municipal services against residents of former 'white areas' only. The court noted that the prohibition, in IC s 8(2), of both direct and indirect discrimination

> 'evinces a concern for the consequences rather than the form of conduct. It recognizes that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination, and if it does, that it falls within the purview of section 8(2).'[3]

Consistent with this concern is the importance which the court has attributed to the impact of discrimination in deciding whether the discrimination in question infringes IC s 8(2). The court did not consider it necessary for the purposes of the case to formulate a precise definition of indirect discrimination. It pointed out that differentiation between townships historically reserved for blacks, the vast majority of whose residents are still black, and urban areas previously reserved for whites, the vast majority of whose inhabitants are still white, is indirect race discrimination. Whilst the explicit criterion adopted — geographical area — is not related to race, the effect of applying such a criterion, in the context of South African local government history, is to differentiate on racial grounds:

> '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 geographic 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.'[4]

The court confirmed that indirect discrimination on one of the specified grounds gives rise to the presumption of unfairness under IC s 8(4) just as it would in the case of direct discrimination on the ground in question.[5]

In *Beukes v Krugersdorp Transitional Local Council* the respondent assessed and collected service charges on different bases in different localities.[6] In consequence of past policies of urban racial segregation, the localities were largely, although not exclusively racially divided. The differential charges had 'an undeniable, though indirect, racial impact', and the complaint against such charges was a claim of indirect unfair discrimination on the

[1] 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at para 30; cf *Harksen v Lane NO & others* 1998 (1) SA 300 (CC) at paras 95–6 (O'Regan J), 1997 (11) BCLR 1489 (CC) at paras 94–95.

[2] § 14.5*(a)*

[3] 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at para 31.

[4] *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at para 32.

[5] *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at para 35. Hence the approach to claims of unfair discrimination set out in *Harksen v Lane NO & others* 1998 (1) SA 300 (CC) at para 54, 1997 (11) BCLR 1489 (CC) at para 53 applies equally to claims of indirect discrimination. See above, § 14.5*(a)*.

[6] 1996 (3) SA 467 (W).

ground of race.[1] Cameron J found, however, that the discrimination in question was historically, socially and economically justified and consequently was not unfair.[2]

In *Nyangane v Stadsraad van Potchefstroom* the high court rejected an argument that the imposition by a local authority of a minimum floor area for residential dwellings built on erven in a particular township discriminated against lower-income groups and hence, indirectly, against black people.[3]

In *Municipality City of Port Elizabeth v Rudman* the High Court held that the differences between the zoning regulations which applied to areas of Port Elizabeth reserved for whites in the past, and those which applied in areas which had previously been reserved for blacks, did not infringe IC s 8(2).[4]

The case of *R v Secretary of State for Employment, Ex parte Equal Opportunities Commission & another* provides an interesting recent example of an indirectly discriminatory statutory provision.[5] The English Employment Protection (Consolidation) Act of 1978 required that an employee should have worked a specified number of hours per week during a specified period of continuous employment in order to qualify for statutory protection from unfair dismissal, the right to compensation for unfair dismissal, and the right to statutory redundancy pay. The great majority of employees who are unable to pass these thresholds are women. The House of Lords found that the Secretary of State for Employment had failed to establish an objective justification for the thresholds laid down by the Act. It therefore found the provisions in question to be indirectly discriminatory.[6]

In reading comparative jurisprudence on direct and indirect discrimination it is important to bear in mind the structure of the provisions under consideration and the ways in which such provisions may differ from IC s 8(2).[7] In England, for example, the conduct impugned *must* be classified as either direct or indirect discrimination.[8] Direct discrimination is unlawful unless the attribute in question is of essence to the job in question, in which case race or sex (or whatever the criterion is) may be a 'genuine occupational qualification'.[9] There is no other defence for *direct* discrimination. Policies or practices which are *prima facie indirectly* discriminatory may, however, be justified legally by commercial factors —

[1] *Beukes v Krugersdorp Transitional Local Council* 1996 (3) SA 467 (W) at 480B–H.

[2] See *Beukes v Krugersdorp Transitional Local Council* 1996 (3) SA 467 (W) at 480–2. Cf above, § 14 5*(a)*

[3] 1998 (2) BCLR 148 (T).

[4] 1998 (4) BCLR 451 (SE) at 460E–462E, esp at 462C–J.

[5] [1994] 1 All ER 910, 2 WLR 409.

[6] The provisions were declared to be incompatible with the requirements of European Community laws which bind member states to uphold the principle of equality between men and women at work — art 119 of the Treaty of Rome of 1957, the Equal Pay Directive (75/117/EEC) and the Equal Treatment Directive (76/207/EEC). See also *Rinner-Kuhn v FVW Spezial-Gebäudereinigung* [1989] ECR 2743.

[7] Or any legislation to similar effect.

[8] Section 1 of the English Sex Discrimination Act 1975; s 1 of the English Race Relations Act 1976.

[9] See s 7 of the Sex Discrimination Act 1975; s 5 of the Race Relations Act 1976. For example, being female would be a genuine occupational qualification for an attendant in a ladies underwear store, being black and male would be a genuine occupational qualification for the role of Othello.

in which case they will not be held to constitute discrimination.[1] In England, then, much may turn on whether the conduct is shown to be directly or indirectly discriminatory.[2]

In Canada, on the other hand, the Charter and the various Human Rights Acts simply prohibit discrimination. The courts have interpreted this prohibition to include intentional and unintentional, direct and adverse impact as well as systemic discrimination — that is forms of institutionalized discrimination (whether direct or indirect) which are so entrenched as to be invisible.[3] The types of discrimination identified by the courts serve simply to describe the forms which discrimination may take — they are not rigid categories into which particular instances of alleged discrimination must be classified.

The explicit prohibition of direct and indirect discrimination in IC s 8(2) is to be welcomed since it ensures that our courts do not adopt too narrow an approach to what constitutes discrimination. The purpose of the inclusion of both terms is to provide comprehensive protection against unfair discrimination. Hence the words 'directly or indirectly' should be not be read as defining two mutually exclusive analytical categories into which a claim must fit or fail. Rather, they should be read as descriptive of the various forms which discrimination may take.

(c) The listed grounds

Section 8(2) of the interim Constitution distinguishes between two forms of unfair discrimination — that which is based on the specified grounds and that which is not.[4] By virtue of IC s 8(4) *prima facie* proof of discrimination on any of the listed grounds gives rise to a presumption of unfair discrimination unless the contrary is proved. The prohibition of unfair

[1] The prohibition of indirect discrimination in the English Race and Sex Discrimination Acts has no equivalent to the word 'unfairly' in s 8(2), nor to s 33(1). In South Africa it is arguable that a practice which impacts adversely on a disproportionate number of a relevant group constitutes indirect discrimination whether it is justified or not. If it is justified in terms of the political morality underlying s 8, then it will not constitute *unfair* indirect discrimination, and if it meets the criteria of s 33(1), then it is a permissible limitation of the freedom from unfair indirect discrimination. See the discussion of the relationship between s 8 and s 33 below, § 14.9.

[2] The 'classification' of the discrimination also affects the way in which cases are argued. In cases of direct discrimination, for example, it is not open to the employer to prove that its actions are justifiable. Arguments about economic imperatives nevertheless feature prominently in the reasoning of the courts. This is well illustrated in cases which are concerned with pregnancy and its consequences. Since there is no legal justification for adverse treatment based on pregnancy (which has been held to constitute direct sex discrimination), the dominant question in these cases is when a state of affairs which is *in fact* a consequence of pregnancy is treated as separate from the pregnancy in law. See *Dekker v Stichting Vormingscentrum Voor Jong Volwassenen (VJV) Centrum) Plus* [1992] ICR 325, [1990] ECR I-3941 (ECJ); *Handels-og Kontorfunktionaerernes Forbund i Danmark (acting for Hertz) v Dansk Arbejdsgiverforening (acting for Aldi)* [1992] ICR 332, [1990] ECR I-3979 (ECJ); *Webb v EMO Air Cargo (UK) Ltd* [1993] 1 WLR 49, ICR 175, [1992] 4 All ER 929 (HL).

[3] See *Action Travail Des Femmes v Canadian National Railway Company* [1987] 1 SCR 1114, 40 DLR (4th) 193 at 210; *Andrews* (1989) 56 DLR (4th) 1 at 16–21; Sheppard *Litigating the Relationship Between Equity and Equality* 7–9.

[4] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at paras 27–8; cf Kriegler J at paras 75–6 of *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC); *Harksen v Lane NO & others* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at paras 46–7; *Larbi Odam & others v Member of the Executive Council for Education (North West Cape) & others* 1998 (1) SA 745 (CC), 1997 (12) BCLR 1655 (CC) at para 16.

discrimination extends to grounds other than those specifically listed.[1] In respect of discrimination on the unlisted grounds, there is no presumption of unfairness.[2]

In *Harksen v Lane NO & others*[3] Goldstone said:

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

The list of grounds upon which unfair discrimination is prohibited is extensive, but not exhaustive.[4] The following features are of interest:

Race is the first ground of discrimination prohibited under IC s 8(2). Blatant and entrenched discrimination on grounds of race was the defining feature of apartheid.[5] As the court observes in *City Council of Pretoria v Walker*, racial discrimination was a central feature of the deep divisions of apartheid society, and was 'a source of grave assaults on the dignity of black people in particular'.[6] The legacy of racial discrimination is apparent in many aspects of South African life, including its urban geography and the differential provision of infrastructure and services to residential areas previously divided along racial lines. Far from being disadvantaged by apartheid policy and practices, white people, in general, benefited from such policies and practices. Nevertheless, they are a racial minority which could be regarded as being politically vulnerable:

> 'It is precisely individuals who are members of such minorities who are vulnerable to discriminatory treatment and who, in a very special sense, must look to the Bill of Rights for protection. When that happens a court has a clear duty to come to the assistance of the person affected. Courts should, however, always be astute to distinguish between genuine attempts to promote and protect equality on the one had and actions calculated to protect pockets of privilege at a price which amounts to the perpetuation of inequality and disadvantage to others on the other.'[7]

[1] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at paras 41 and 43. *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 28.

[2] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 28; *Harksen v Lane NO & others* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 45

[3] 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) (at para 49)

[4] Cf *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at paras 41 and 43. *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 28

[5] As O'Regan J points out in *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at para 42, other forms of discrimination, though less visible than racial discrimination, have also resulted in deep patterns of disadvantage in South African society.

[6] 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at para 46.

[7] *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at para 48; cf para 80

The list covers both 'sex' and 'gender'. A distinction is commonly drawn in feminist writing between sex, a biological identity, and gender, a social identity which derives from the social meaning attributed to biological sex. In other words, ' "sex" is a biological term: "gender" a psychological and cultural one'.[1] Hence we might say that a person is female or male according to her or his sex, but man or woman according to his or her gender. Classic sex-based features would be physical strength or procreative roles, whereas typical gender-based features would be aggression or parenting roles.

The value of the distinction between sex and gender is that it highlights the point that not all the differences between men and women are reducible to the biological differences between them. The problem, though, is that it is a matter of great controversy, even among feminists, whether many behavioural differences between men and women are 'natural' or 'social'. This makes it difficult to draw the line between sex and gender, with the result that the terms are often used interchangeably.[2] It is often difficult to state with certainty whether a particular instance of discrimination against women should be classified as sex or gender discrimination.[3] This limits the usefulness of the distinction between sex and gender. It is nevertheless a good thing that IC s 8(2) covers both sex and gender.[4] The inclusion of both terms makes it absolutely clear that it is impermissible unfairly to discriminate against men or women whether on the basis of biological features or patterns of behaviour.[5] Given how very porous are the boundaries between the concepts of sex and gender, however, it ought not to be necessary to show that any particular instance of alleged discrimination fits neatly into a clear category called sex or gender. The purpose of including both terms is to optimize the protection afforded by the subsection, not to introduce rigid definitions of sex and gender.

Thus far, there have been few Constitutional Court decisions dealing with sex/gender discrimination. The first is *Brink v Kitshoff NO*.[6] In that case the Constitutional Court unanimously held s 44(1) and (2) of the Insurance Act 27 of 1943 to be unconstitutional. By virtue of s 44(1), where a life insurance policy had been ceded to a woman or effected in her favour by her husband more than two years before the sequestration of the husband's estate, she would receive a maximum of R30 000 from the policy. The rest would be deemed to belong to the insolvent estate. If the policy was ceded or effected less than two years from the date of the sequestration, the entire policy would be deemed to belong to the insolvent estate, and the woman would receive no benefit whatsoever. Similarly, s 44(2) provided that

[1] A Oakley *Sex, Gender and Society* (1972) 158.

[2] In American, English and European law, laws and practices which disadvantage either men or women are broadly designated 'sex discrimination'; cf Christine A Littleton 'Restructuring Sexual Equality' (1987) 75 *California LR* 1279 at 1283–4 n 26.

[3] Discrimination on grounds of pregnancy would amount to sex discrimination, whereas discrimination against part-timers may be better classified as gender discrimination — the majority of part-time workers are women who are combining work with childcare or other family responsibilites. The fact that it is women who fulfil this role in the family is not dictated by biology, and is therefore seen to relate to gender, rather than sex.

[4] See Denise Meyerson 'Sex and Gender' (1993) 9 *SAJHR* 291.

[5] See the brief discussion of sex/gender discrimination by O'Regan J in *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at para 44; see also *Hugo v State President of the RSA* 1996 (6) BCLR 876 (D); *Association of Professional Teachers & another v Minister of Education & others* (1995) 16 *ILJ* 1048 (IC) at 1078A–1084C; *Collins v Volkskas Bank* (1994) 15 *ILJ* 1398 (IC).

[6] 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC).

(i) *A complete alternative to s 33(1)*

Section 33(4) could function as an alternative limitation to s 33(1) where anti-discrimination is concerned. Take the example of legislation proscribing racially insulting speech in public fora. If such legislation is found to infringe freedom of expression as defined in s 15 of Chapter 3, it may nevertheless be justified under s 33(4) as a measure 'designed to prohibit unfair discrimination by persons and bodies other than those bound in terms of s 7(1)'. The word 'designed' here, as in s 8(3), would be read to require that the legislation is rationally constructed to achieve its object. The object, of course, is the prohibition of 'unfair discrimination'. Hence the meaning given to 'unfair discrimination' will be just as important here as under s 8(3).[1]

If s 33(4) is read as an alternative limitation clause for anti-discrimination legislation, then, provided that such legislation meets the requirements of s 33(4), the legislation will be justified and there will be no need to meet the additional requirements of s 33(1). Conversely, if the legislation does not meet the s 33(4) requirements, it cannot be justified at all, with the result that the legislation will be found to be unconstitutional.

(ii) *A supplement to s 33(1)*

It could conceivably be argued that s 33(4) simply supplements rather than replaces s 33(1). On this argument measures 'designed to prohibit unfair discrimination' which appeared to infringe a Chapter 3 right would still need to meet the requirements of s 33(1). Conversely, anti-discrimination legislation which fell short of s 33(4), perhaps because it employed means which were not rationally related to the end sought to be achieved, could still be saved under s 33(1). On this reading s 33(4) supplements rather than replaces s 33(1) where anti-discrimination legislation is under review.

The reading which says that anti-discrimination legislation must meet the requirements of both s 33(4) and s 33(1) is unsatisfactory. Such a reading does not make sense because it seems to make it harder, rather than easier, for the respondent to justify the limitations which anti-discrimination legislation may impose on other rights. There is no doubt that s 33(4) provides a constitutional endorsement of anti-discrimination policies.[2] The subsection makes it plain that the values of the bill of rights are served by measures which prohibit unfair discrimination.

On the other hand, it does make sense to say that anti-discrimination legislation which somehow fails to meet the requirements of s 33(4) could still be saved under s 33(1). Of course there will be relatively few instances where anti-discrimination legislation would be shown not to be adequately tailored to meet the end of prohibiting unfair discrimination and yet be justified under s 33(1). Nevertheless, other grounds of justification are not inconceivable and there is no reason why such legislation should not be given the second chance afforded by s 33(1).

[1] See above, § 14 6(*d*)

[2] Note that s 33(4) refers to 'measures designed to prohibit unfair discrimination' — hence it is possible to justify, under s 33(4), an anti-discrimination policy which is not 'a law of general application'. This aspect, the purpose of which was no doubt to give a freer reign to anti-discrimination policies, would be frustrated if s 33(4) and s 33(1) were read to be cumulative.

On this reading the state need do no more than show that the measures which infringe the right in question are 'designed to prohibit unfair discrimination'. Having done so, it need not in addition show that it meets the strictures of s 33(1). If, however, it cannot show that the measures in question are designed to prohibit unfair discrimination, then it can still fall back on s 33(1) in the attempt to justify those measures.

The last interpretation is preferable because it confers a special status on measures prohibiting unfair discrimination.[1] This coheres with an interpretation which sees the achievement of equality as one of the primary objectives of the constitutional enterprise.

14.10 Specific Questions

(a) The position of corporations

Section 8(1) promises the right to equality to 'every person' and s 8(2) provides that 'no person' shall suffer unfair discrimination.

Section 7(3) tells us that:

> 'Juristic persons shall be entitled to the rights contained in this Chapter where, and to the extent that, the nature of the rights permits.'

The question, then, is whether, and to what extent, a corporation can claim a right to equality and to non-discrimination.

Can a corporation claim that it has suffered 'unfair discrimination' under s 8(2)? The Constitutional Court has made it clear that the prohibition of unfair discrimination extends to grounds other than those listed in s 8(2) but without the presumption of unfairness which s 8(4) attaches to the listed grounds.[2] In the analysis of s 8(2) thus far articulated by the Constitutional Court there is no intimation that other grounds of discrimination must be analogous to those listed in order to fall within the ambit of the prohibition.[3] The court's interpretation of what is meant by 'unfair discrimination' indicates that the most important question to be asked of any form of discrimination is whether it is unfair in that it undermines the fundamental human dignity of the discriminated group or affects it adversely in some comparably serious way.[4]

Self-evidently, the 'fundamental human dignity' of a corporation cannot be impaired. Arguably, however, a corporation may be adversely affected in some comparably serious way by discrimination. The Constitutional Court has deliberately left open the question of what adverse effects are comparably serious to an infringement of fundamental

[1] By virtue of the fact that such measures are not subject to the strictures of s 33(1) but only to the requirements of s 33(4).

[2] *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) at paras 41 and 43; *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 28.

[3] Cf above, § 14.5*(c)*.

[4] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 33. See the incisive analysis by L'Heureux-Dubé J in her dissent in *Egan v Canada* (1995) 124 DLR (4th) 609, 29 CRR (2d) 79 at 109–13 as to the conceptual flaws of the analogous grounds approach, and the reasons for favouring an analysis focused on fundamental human dignity.

human dignity.[1] It is submitted that corporations will rarely be found to suffer unfair discrimination, but that the possibility of such a finding is not precluded.

If, for example, a statute adversely affected corporations with black members, individual members would be able to claim that they thereby suffer racial discrimination. If the measure hits directly at the corporation itself, the corporation should be able to claim racial discrimination under its own name. Affirmative action programmes may take the form of subsidies, set-asides (or tender quotas) and contract compliance measures favouring corporations owned by black people. It would be incongruous, then, if corporations could not claim unfair discrimination in appropriate circumstances. It seems also to be unduly formalistic 'to deny to a business proprietor a right that he or she enjoyed before incorporation'.[2]

The ends of substantive equality are not necessarily served by excluding corporations as legitimate claimants of freedom from discrimination. The courts ought rather to adopt a more subtle approach which looks at the merits of the claim itself in the light of the values which the equality clause seeks to advance. Hence it seems that corporations are not precluded from seeking the protection of s 8(2), but will only find it in a limited range of circumstances.[3]

Under s 8(1) of the Constitution the right to equality before the law and to equal protection of the law is held by 'every person'. In the United States the word 'person', which appears in the Fifth and Fourteenth Amendments, has been held to include a corporation.[4] Corporations, however, generally assert equality rights in challenging distinctions drawn by economic regulation. Such distinctions attract the lowest level of judicial scrutiny under United States equality jurisprudence. This means that they will be upheld provided that they serve a legitimate purpose and are rationally related to achieving that purpose.[5]

In Canada the rights set out in s 15(1) of the Charter vest in 'every individual' and are thought to apply to natural persons only.[6] As we have seen, discrimination is a necessary element of any claim under s 15(1)[7] and the Supreme Court has adopted an interpretation of

[1] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 33.

[2] Hogg *Constitutional Law of Canada* p 34-4.

[3] See H J Erasmus *Superior Court Practice* (1994) at A2-9.

[4] *Covington and Lexington Turnpike Road Company v Sandford* 164 US 578, 17 SCt 198 (1896); *Smyth v Ames* 169 US 466, 18 SCt 418 (1898); *First National Bank v Bellotti* 435 US 765, 98 SCt 1407 (1978).

[5] See, for example, *Dandridge v Williams* 397 US 471, 90 SCt 1153 (1970), a case of differentiation on economic grounds. See also *City of Cleburne, Texas v Cleburne Living Centre* 473 US 432 at 446, 105 SCt 3249 (1985). Note that the traditional formulation of minimal scrutiny is still more deferential — the court is prepared to uphold any differentiation for which there is a conceivable rational basis. See, for example, *Allied Stores of Ohio v Bowers* 358 US 522 at 530, 79 SCt 437 (1959); *Kotch v Board of River Port Pilot Commissioners* 330 US 552, 67 SCt 910 (1947). See also Tribe *American Constitutional Law* 1439–46; Colker 'Section 1, Contextuality and the Anti-disadvantage Principle' (1992) 42 *University of Toronto LJ* 77 at 103; Black & Smith 'The Equality Rights' 607–11.

[6] In the course of drafting s 15 the word 'everyone' was replaced by 'every individual' in order to make it clear that the right applied exclusively to natural persons (Hogg *Constitutional Law of Canada* p 34-3).

[7] *Andrews* (1989) 56 DLR (4th) 1 at 23–4; *Turpin* [1989] 1 SCR 1296 at 1331; *McKinney* (1991) 76 DLR (4th) 545 at 604–5; Black & Smith 'The Equality Rights' 596; Hogg *Constitutional Law of Canada* p 52-17

discrimination which is inimical to corporate claimants.[1] The structure of the South African equality clause is different from Canada's, however, and a claim of unfair discrimination does not provide the only access to the s 8 equality rights. This means that even if s 8(2) is restrictively interpreted to exclude corporations from its protection, a corporation should, in appropriate circumstances, be able to bring an action founded on an infringement of its rights to equality before the law and equal protection of the law under s 8(1).[2] The Constitutional Court has acknowledged the importance of classification and differentiation in governing the affairs of the nation. 'Mere differentiation' of this sort infringes s 8(1) if it is irrational, arbitrary or partial, devoid of a legitimate governmental purpose.[3] There can be little doubt that these are grounds upon which a corporation may attack the constitutional validity of measures which affect it adversely. In judging such claims, however, the courts should be astute to protect and affirm the core values of the right to equality in the South African context. They should be vigilant against allowing South African equality jurisprudence to become the domain the rich and powerful.

(b) Equality and the state

It has been held in Canada, both in relation to questions of Crown privilege (with respect to evidence) and in relation to Crown liability, that special treatment of the Crown does not contravene s 15(1) of the Charter:

> '. . . [T]he Crown cannot be equated with an individual. The Crown represents the state. It constitutes the means by which the federal aspect our Canadian society functions. It must represent the interests of all members of Canadian society in court claims brought against the Crown in right of Canada. The interests and obligations of the Crown are vastly different from those of private litigants making claims against the federal government.'[4]

Significantly, however, the court refused to go further and to hold that the Crown can never be compared with individuals under s 15(1) of the Charter in the context of any statute governing the relationship of the subject and the Crown in civil proceedings:

[1] *Andrews* (1989) 56 DLR (4th) 1 at 18. See also *Turpin* [1989] 1 SCR 1296 at 1333, *McKinney* (1991) 76 DLR (4th) 545 at 605 and 608. Nevertheless, there are indications that the question is not quite settled. In two cases in which corporations have invoked s 15 the Supreme Court has denied the claim on other grounds (*Rudolf Wolff & Co v Canada* [1990] 1 SCR 695 at 703, *Dywidag Systems v Zuphen Brothers* [1999] 1 SCR 705 at 709; see Hogg *Constitutional Law of Canada* p 34-4). Hogg suggests that the court's failure squarely to address this issue may indicate uncertainty as to whether corporations are able to claim equality rights or not (Hogg *Constitutional Law of Canada* p 34-4; see Black & Smith 'The Equality Rights' 605–11). In any event, it is clear that a corporation charged with a criminal offence can attack the constitutional validity of the law under which it is charged even if it cannot directly claim the right upon which it bases its attack (*R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 at 336; see also Hogg *Constitutional Law of Canada* pp 56-9–14).

[2] See *AK Entertainment CC v Minister of Safety and Security* 1995 (1) SA 783 (D) at 790A–E.

[3] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at paras 24–5.

[4] *Per* Cory J (Supreme Court of Canada) in *Rudolph Wolff & Co v Canada* [1990] 1 SCR 695, 69 DLR (4th) 392 at 397, cited with approval by the Federal Court of Appeal in *Re Attorney General of Canada v Central Cartage Co* (1990) 71 DLR (4th) 253 at 266–7. (One of the reasons for concluding that special provisions relating to the Crown did not infringe s 15(1) was that the Crown was not an 'individual' under s 15(1).) To similar effect, see Seervai *Constitutional Law of India* vol 1 470 para 9.62, and further, 470–4 paras 9.62–9.65.

'There could conceivably be instances in which the Crown's activities are indistinguishable from those of any other litigant engaged in a commercial activity. It might be that in those circumstances a s 15(1) comparison would be just and appropriate . . ..'[1]

In the case before it the court was satisfied that the Crown was acting 'clearly and exclusively in its governmental capacity'.[2]

The distinction drawn by the court as to whether the Crown is acting in its governmental capacity or in some other capacity is significant. It shows that the question of whether the state can be compared with other persons for the purposes of s 8(1) cannot be decided in the abstract, but must be evaluated in the light of the context in which the right is claimed. This shows that even where claims involving the state itself are concerned the capacity in which the state is acting is important.[3]

It has been argued above that equality of arms in litigation is an aspect of equality before the law.[4] It was suggested that, because the state is such a powerful adversary, the concept of equality of arms in a criminal trial requires that the accused be afforded special protections.[5] The European Court of Human Rights has held that the requirement of equality of arms between civil litigants is equally applicable where one of the litigants is the state. This principle applies whether the state acts in its sovereign or its private capacity.[6]

In *Zantsi v The Chairman of the Council of State & another* it was found that s 71 of the Ciskei Defence Act 17 of 1986, which provided that civil actions against the Defence Force or any member of it had to be instituted within six months of the cause of action arising, infringed the right of all persons to equality before the law.[7] The court rejected the argument that the time limit was reasonable and justifiable in the light of the administrative difficulties

[1] *Rudolph Wolff & Co v Canada* [1990] 1 SCR 695, 69 DLR (4th) 392 at 397.

[2] *Rudolph Wolff & Co v Canada* [1990] 1 SCR 695, 69 DLR (4th) 392 at 397. The distinction between the governmental and trading capacities of the state is rejected by Seervai as having lost its force now that the ambit of 'essential activities of the State' is very much wider than it once was (Seervai *Constitutional Law of India* vol 1 470 para 9.62).

[3] Similar criteria would apply where the body concerned is not the state itself, but is a public corporation. Cf *Die Spoorbond & another v South African Railways* 1946 AD 999 *per* Schreiner JA. The court held that the Crown could not sue one of its subjects for defamation (at 1011–12): 'It is no doubt convenient for certain purposes to treat the Crown as a corporation or artificial person. But it is obviously a very different kind of person from the rest of the persons, natural and artificial, that make up the community. In many respects its relationship to those other persons is unique and there is no reason in common sense or logic for concluding that wherever a subject would have a right of action there the Crown must have one too.' On the question of special treatment of the state and its agents, see generally Hogg *Constitutional Law of Canada* 10.7–10.17; Hogg *Liability of the Crown* 2 ed (1989); Wade *Administrative Law* 7 ed (1994) 26, 34–6, 163, 796–856; Baxter *Administrative Law* (1984) 621–36.

[4] Above, § 14.4*(d)*.

[5] This is an example of substantive equality.

[6] *Feldbrugge v The Netherlands* (1986) 8 EHRR 425 at 431 para 26; *König v Federal Republic of Germany* (1978) 2 EHRR 170 at 193 para 90.

[7] 1994 (6) BCLR 136 (Ck) at 167–70. A similar finding by Heath J in respect of the equivalent provision of the Ciskei Police Act 32 of 1983 (*Qokose v Chairman, Ciskei Council of State, & others* 1994 (2) SA 198 (Ck)) was overturned on appeal by the Ciskei Appellate Division in *The Chairman of the Council of State v Qokose* (1994) 2 BCLR 1 (CkA). The question of the constitutionality of s 32(1) of the Police Act 7 of 1958 was referred to the Constitutional Court in *Hans v Minister van Wet en Orde* 1995 (12) BCLR 1693 (C) at 1700A–1701A. The provision imposes a six-month limit upon claims arising from acts in pursuance of the statute.

faced by departments of state in dealing with such claims. The court considered that similar difficulties were faced by companies and other corporations, who enjoyed no similar protection. If anything, said the court, in the light of the general level of education and experience of individual citizens in such matters, it is they who should be afforded special protection.

In *Mwellie v Ministry of Works, Transport and Communication*[1] the Namibian High Court upheld a provision of the Public Service Act 2 of 1980 imposing a 12-month limitation period on claims arising from acts and omissions under that Act. In considering whether the provision infringed article 10, the equality clause of the Namibian Constitution, the court undertook a useful survey on international and comparative equality jurisprudence.[2] In particular, the court reviewed the approach of courts in other countries to the question of whether it is permissible to impose different limitation periods in respect of different kinds of legal claims.[3] The court concluded that this does not *per se* infringe the right to equality, provided that the classification in question is reasonable and rationally connected to a legitimate object on an assessment of the evidence, the provision in question was reasonable and rationally connected to a legitimate objective.

(c) Transitional arrangements

Section 229 of the Constitution provides that, subject to the Constitution, all laws in force in any part of the national territory are to remain in force until they are repealed or amended by a competent authority. It was held in *S v Makwanyane* that the laws of each of the geographic areas falling within the Republic are therefore required to comply with the Constitution.[4] As a result, consistency and parity of laws within the boundaries of each different geographical area are required. Such consistency and parity are not, however, required *between* the laws of the different geographical areas. Such a requirement would defeat the object of s 229, which is to allow the different legal orders to co-exist until the process of rationalization of laws is complete. It would also 'inappropriately expose a substantial part if not the entire body of our statutory law to challenges under s 8 of the Constitution'.[5] Hence mere disparities between the laws of different regions resulting from the provisions of s 229 do not, without more, infringe the s 8 requirement of equal protection of the law.[6]

(d) Provincial laws

Under the interim Constitution the nine provinces of South Africa have the power to make law within certain spheres of competence designated in Schedule 6 to the Constitution.[7] Clearly the scheme of government contemplated by the Constitution is one where, within certain designated spheres, laws can differ from province to province.[8] Hence it cannot be

[1] 1995 (9) BCLR 1118 (Nm).
[2] At 1125A–1135H9
[3] At 1132H–1133I
[4] 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 32 (*per* Chaskalson P)
[5] *S v Makwanyane* at para 32
[6] See also *AK Entertainment CC v Minister of Safety and Security & others* 1995 (1) SA 783 (E) at 794H–795B, to which passage Chaskalson P referred with approval in *S v Makwanyane* at para 32
[7] See s 126 as amended by the Constitution Amendment Act 2 of 1994; above, Klaaren 'Federalism' ch 5
[8] Cf s 125(3)

the case that all such differences are open to challenge under s 8.[1] Even in the spheres of national legislative and executive competence there may in certain instances be a rational basis for national government to differentiate between provinces or areas.[2] Such differentiation is not *per se* reviewable. On general principles it will infringe s 8 only if it is arbitrary, irrational or unfair, and cannot be justified under s 33(1).

(e) Equality, customary law and freedom of religion

One of the intractable problems which arises in a heterogeneous society is that of reconciling respect for cultural diversity with the commitment to uphold human rights. For example, many religions assign particular social and religious roles to men and women. The elimination of such distinctions is regarded as inimical to the religion itself. The need for sensitivity in considering such questions is acknowledged. It is nevertheless submitted that, in cases of conflict, equality trumps religious freedom and culture.[3]

In *Matukane v Laerskool Potgietersrus* black children were, over a period of time, refused admission to the primary school.[4] Despite the respondents' denials the court found that the applicants had established a *prima facie* case of racial discrimination.[5] By virtue of the presumption of unfairness in s 8(4) the respondents were then required to establish that the discrimination was not unfair. This they sought to do by claiming that the discrimination was justified as an exercise of the rights of Afrikaner people to self-determination, and to the cultural life of their choice in terms of s 17, s 31 and s 32*(c)* of the Constitution. This argument was rejected by the court. In the first instance, the argument ignored the fact that the school was in any event a dual-medium school and not exclusively Afrikaans. It also ignored the unambiguous terms of s 32*(c)*, which confers a right to *establish*, where practicable, educational institutions based on a common culture, language or religion. Accordingly, the non-admission of the applicants' children was held to constitute unfair discrimination.

In *Mtehmbu v Letsela* the applicant had allegedly entered into a customary-law union with a man who subsequently died intestate, leaving her with a minor child.[6] The respondent, the

[1] Obviously, provincial laws are subject to challenge if they themselves infringe Chapter 3 Rights (s 7(1)). But a provincial law competently enacted cannot be challenged simply because it differs from an equivalent law in a different province: *R v S (S)* [1990] 2 SCR 254 at 288, 49 CRR 79; *S v Turpin* [1989] 1 SCR 1296 at 1333; Hogg *Constitutional Law of Canada* pp 52-24, 52-37, and 52-46.1–49. See also *Soundprop 1239 t/a '777 Casino' v Minister of Safety and Security* 1996 (9) BCLR 1177 (C) at 1183B–D.

[2] *R v S (S)* [1990] 2 SCR 254 at 289, 49 CRR 79.

[3] In *Kalla & another v The Master & others* 1995 (1) SA 261 at 270G–H the court suggested that the principle of gender equality could mean that 'polygamous (and potentially polygamous) marriages are as unacceptable to the *mores* of the new South Africa as they were to the old' (cf *Ismail v Ismail* 1983 (1) SA 1006 (A)). In *The Attorney-General v Dow* 1994 (6) BCLR 1 the Botswana Appeal Court held that, although sex was not specified as a forbidden ground of discrimination by s 15 of the Botswana Constitution, the Constitution did indeed prohibit sex discrimination. In reaching this conclusion the majority rejected the argument that the Constitution should be interpreted in the light of the traditional customs and culture of Botswana society, which was patrilineal and male-oriented. The majority considered that such traditions could not prevail over constitutional provisions prohibiting discrimination. This case, and the issues it raises, is considered at greater length below. Currie 'Indigenous Law' § 36.5*(c)*.

[4] 1996 (3) SA 223 (T).

[5] The court found, at 232J–233A, that if the facts did not establish discrimination on racial grounds only, there was clear proof of discrimination on the basis of social origin, culture and language.

[6] 1997 (2) SA 936 (T).

deceased's father, claimed that the deceased's estate devolved upon him by virtue of the customary-law rule of succession, recognized by s 23 of the Black Administration Act 38 of 1927 ('the Black Administration Act') and the regulations thereunder, reg 2 in particular. The principle underlying the law was that of male primogeniture. The applicant argued that the rule of African customary law which generally excludes African women and younger children from intestate succession is unfairly discriminatory and hence infringes IC s 8(2). She contended further that s 23 of the Black Administration Act and reg 2 are similarly unconstitutional in so far as they require application of the customary-law rule.

The court accepted that the rule discriminates against women and younger children. It found, however, that, viewed in the social context in which it is applied, the rule is not unfairly discriminatory. This was because the devolution of the deceased's property on his male heir carried with it an obligation to maintain and protect the customary law wife/wives and children of the deceased. Given the constitutional imprimatur to customary law,[1] the court rejected the submission that the rule necessarily infringed IC s 8.

The court accepted that the situation would be different were there no concomitant customary-law duty of support. If, for example, the child were born out of customary wedlock, he would have no claim on his natural father or his father's family, whereas under the Intestate Succession Act 81 of 1987 he could inherit from his father. Because it was disputed whether the applicant had in fact concluded a valid customary union with the deceased, the matter was referred to oral evidence on this question.

Both parties decided, however, not to adduce oral evidence. In consequence, when the matter came before Mynhardt J, it was to be decided on the basis that the applicant and the deceased were not married to each other and that their child was born out of wedlock. One of the applicant's contentions at this stage of the proceedings was that the customary rule of succession which excludes all women from participation in intestate succession is at odds with the core value of equality in the interim Constitution. The rule ought therefore to be developed with regard to the spirit, purport and object of the interim Constitution, in accordance with IC s 35(3), so as to allow female descendants to participate equally with males in intestacy. The court declined to do so. It said that the rule could not be seen in isolation but in the context of other relevant rules of the customary law of the family. According to these rules, said the judge, the child's inability to inherit did not flow from her gender, but from the fact that, as an illegitimate child, she had no claims against her natural father or his family, but fell into the guardianship of her mother's guardian. Because the rule at issue between the parties affected the customary law of succession and the family, its development or amendment was more appropriately handled by Parliament than the courts.[2]

Mthembu v Letsela illustrates the difficulties posed by the attempt to reconcile the constitutional recognition of customary law with the principle of gender equality. In *Ismail v Ismail* the Appellate Division refused to enforce the claims of a woman married according to Muslim rites for maintenance and deferred dowry from her husband.[3] The claims derived from their Muslim union, which, being potentially polygamous, was regarded as against

[1] Cf ss 31, 33(3) and 181(1)
[2] *Mthembu v Letsela* 1998 (2) SA 675 (T) at 684B–687C.
[3] 1983 (1) SA 1006 (A)

public policy and not legally recognized. Hence the claims themselves were held to be unenforceable. In *Ryland v Edros* the court accepted the argument that the *ratio* of the *Ismail* decision was inconsistent with the spirit, purport and objects of Chapter 3 of the Constitution, to which the Court was enjoined by s 35(3) to have regard in the application and development of the common law.[1] The principles of equality and accommodation of cultural diversity were held to be fundamental to Chapter 3. It was inimical to these principles for one group in a heterogeneous society to impose its values upon another. Hence it was found that the *Ismail* decision no longer precluded the court from enforcing contractual claims deriving from a union which was potentially, but not actually, polygamous.[2]

The court emphasized that the same may not apply to a union which is in fact polygamous. Doubtless the concern underlying this reservation is that a polygamous marriage could itself be inimical to gender equality. The facts in *Ryland v Edros* allowed a decision conducive both to gender equality and cultural accommodation. Where cultural accommodation leads to the denial of equality, the question of the imposition of values by one group upon another will be more starkly posed.

In *Amod v Multilateral Motor Vehicle Accident Fund*[3] the court agreed wholeheartedly with Farlam J's conclusion in *Ryland v Edros*[4] that the *ratio* in the *Ismail*[5] decision was out of kilter with the spirit, purport and objects of the Constitution. Hence the contract engendered between a man and a woman married by Islamic law is enforceable between the two of them.[6] This, said the court in the *Amod* case, did not entail a finding that marriage according to Muslim rites was a lawful marriage or that it generated a legal duty to support the wife. In the absence of such a duty, a third party could not be held liable for the loss of support caused by the death of the husband.[7]

In *Prior v Battle & others* the court declared unconstitutional certain provisions of the Transkei Marriage Act 21 of 1978 which entrenched the marital power of the husband in civil marriages and the common-law rule that, in the absence of an antenuptial contract providing to the contrary, the husband acquires the marital power over his wife.[8] The marital power was found to constitute a glaring example of inequality in the law, which discriminated unfairly against women on the ground of gender. The rules entrenching it were found to violate both IC s 8(1) and s 8(2), the right to dignity enshrined in IC s 10, as well as the rights protected by IC ss 22, 26 and 28(1).

The court refused, however, to enter into the constitutionality of the entrenchment of the marital power in customary-law marriages, since the applicant before the court was not married by customary law. The applicant's case, said the court, was based on the effect of the disputed rules in a civil-law marriage, and she had not canvassed the intricacies and complexities of the effect of the marital power in customary-law marriages. The court noted that the effect of IC s 31, dealing with the right of every person to participate in the cultural life of his or her choice, would also have to be considered in regard to the marital power in customary marriages.[9]

[1] 1997 (1) BCLR 77 (C).
[2] *Ryland v Edros* 1997 (1) BCLR 77 (C) at 90E–92E, 94A–B.
[3] 1997 (12) BCLR 1716 (D)
[4] 1997(2) SA 690 (C), 1997 (1) BCLR 77 (C)
[5] 1983 (1) SA 1006 (A)
[6] At 1726C–E
[7] At 1726E–G
[8] 1998 (8) BCLR 1013 (Tk), esp at 1019A–1020E
[9] *Prior v Battle & others* 1998 (8) BCLR 1013 (Tk), esp at 1020E–1021G

14.11 INTRODUCTION TO EQUALITY UNDER THE FINAL CONSTITUTION

Equality is a core value of the final Constitution (FC),[1] just as it is a core value of the interim Constitution (IC).[2] The preamble to the final Constitution articulates the ideal of a democratic and open society in which every citizen is equally protected by law. Explicitly recognizing the injustices of the past, the final Constitution seeks to found a society based on democratic values, social justice, and fundamental human rights.

The fundamental importance of equality is manifest too in FC Chapter 1, which sets out its founding provisions. Section 1 states that the Republic of South Africa is one, sovereign, democratic state which is founded, in the first instance, on 'human dignity, the achievement of equality and the advancement of human rights and freedoms', as well as 'non-racialism and non-sexism'.[3]

Significantly, the very first provision of the final Constitution presents equality as a goal to be achieved. It is clearly contemplated that measures to achieve equality are consistent with the value of equality and not a departure from it. This is borne out by the structure and formulation of the right to equality in FC Chapter 2.[4] Like the interim Constitution, the final Constitution embraces and promotes a substantive conception of equality.[5]

The importance of equality in relation to the rights and duties of citizenship is clear from the terms of FC s 3.

FC Chapter 2 contains the Bill of Rights. Section 7 proclaims the Bill of Rights, which affirms the democratic values of 'human dignity, equality and freedom', to be the cornerstone of South African democracy.[6] Equality is the first substantive right set out in the Bill of Rights, as it was in the interim Constitution.

FC s 9(4) puts it beyond question that the prohibition of unfair discrimination binds not only the state and its organs but applies to all persons. In this it differs from the other rights contained in Chapter 2. FC s 8 provides that the question of whether these rights bind natural and juristic persons other than the state and its organs is to be determined with reference to the nature of the right and its correlative duty. No such enquiry is needed in regard to the prohibition of discrimination, which is explicitly stated to extend to all persons. This illustrates that the principle of non-discrimination is a fundamental premise of the social and political order wrought by the final Constitution.

[1] The Constitution of the Republic of South Africa, Act 108 of 1996 ('the final Constitution'), which came into effect on 4 February 1997.

[2] See above, § 14.1.

[3] Section 1*(a)* and *(b)*. Section 74(1) lays down a special procedure for the amendment of s 1.

[4] In particular s 9(2). See below, § 14.14.

[5] That the final Constitution is concerned with actual social equality and not simply formal legal equality is demonstrated too by the fact that social and economic rights such as education, environmental rights, housing, health care, food, water and social security are included in the Bill of Rights alongside the traditional civil and political rights such as freedom of assembly and freedom and security of the person. Note further the terms of s 25, the right to property, in particular subsecs (5), (6), (7) and (8). See also s 29, the right to education, especially subsecs (2) and (3). Note too that the final Constitution was required to comply with the Constitutional Principles set out in Schedule 4 to the interim Constitution. Constitutional Principles I, III and V make it clear that the commitment to equality must have a crucial place in the final Constitution. Constitutional Principle V, in particular, articulates a substantive conception of equality. It explains that equality before the law 'includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on grounds of race, colour or gender'.

[6] Section 7(1).

The rights enshrined in FC Chapter 2 may be limited only in terms of law of general application which is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[1] Any court, tribunal or forum interpreting the Bill of Rights must promote the values of an open and democratic society based on human dignity, equality and freedom.[2]

14.12 The Structure of FC Section 9

In its essence and basic contours the right to equality set out in FC s 9 is very similar to that set out in IC s 8.

Like IC s 8, FC s 9 devotes one subsection to the right to equality before the law and to the equal protection of the law, and another to the prohibition of unfair discrimination. The significance of this separation is discussed above, § 14.3.

FC s 9(2) is the equivalent of IC s 8(3)*(a)*. It is argued above, §§ 14.3 and 14.6*(a)*, that IC s 8(3)*(a)* is an elucidation and elaboration of the right to equality and not an exception to it. That this is true of FC s 9(2) is even clearer from the wording of the subsection and the structure of the clause as a whole. This is discussed further below, § 14.14.

14.13 FC Section 9(1)

> 'Everyone is equal before the law and has the right to equal protection and equal benefit of the law.'

In so far as FC s 9(1) guarantees equality before the law and equal protection of the law it has the same effect as IC s 8(1). See the discussion above, § 14.4.

Unlike IC s 8(1), however, FC s 9(1) refers also to the 'equal benefit' of the law. It is argued above[3] that the fact that IC s 8(1) did not refer to the 'equal benefit' of the law should not translate into more parsimonious protection under that section. The Constitutional Court has been at pains to make it clear that the constitutional guarantee of equality is not to serve as a weapon for attacking the numerous legislative provisions which achieve their objects by differentiating between classes of persons. It therefore construed IC s 8(1) narrowly.[4] This limited the potential of IC s 8(1) to wreak legislative and regulative havoc — and, arguably, its capacity to afford the equal protection it promised.

In *National Coalition for Gay and Lesbian Equality v Minister of Justice* the Constitutional Court considered an argument that, by virtue of the inclusion of the words 'and equal benefit' in FC s 9(1), which did not figure in IC s 8(1), FC s 9(1) should be interpreted to afford broader substantive protection than did IC s 8(1).[5] The court rejected this argument.

[1] Section 36(1).

[2] Section 39(1). The spirit, purport and objects of the Bill of Rights are also to inform the interpretation of legislation and the development of the common law and customary law.

[3] § 14.4*(d)*.

[4] See the Constitutional Court cases discussed above, § 14.4*(d)*.

[5] 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC) at paras 58–64.

It stated that the requirement of equal benefit of the law already formed part of the equality jurisprudence developed under IC s 8, as illustrated by the case of *President of the RSA v Hugo*.[1] The court held that IC s 8, like FC s 9, embodied a substantive and remedial conception of equality which took into account the actual circumstances of the persons affected by any particular measure and the need for remedial measures in order to achieve actual, substantive equality. There was no need, therefore, to fashion a new understanding of FC s 9(1).[2]

There is no question that the equality jurisprudence developed by the Constitutional Court in analysing s 8 as a whole does embrace a substantive, contextual approach to equality. Such an approach has infused the analysis of IC s 8(2). The question remains, however, as to whether the court's conception of the role and function of IC s 8(1) in particular was not unduly restrictive, with the result that aspects of equality analysis which could be more comfortably accommodated under IC s 8(1)/FC s 9(1) are instead squeezed into the unfair discrimination enquiry, where they may not readily fit. For example, the selective enforcement of claims against residents in the case of *City Council of Pretoria v Walker* would have been more appropriately considered as a possible failure of equality before the law or the equal protection of the law, rather than as an instance of indirect unfair racial discrimination.[3] The same could be said of the increase in municipal rates in the case of *Lotus River, Ottery, Grassy Park Residents Association v South Peninsula Municipality*.[4]

Such was not the case in *National Coalition for Gay and Lesbian Equality v Minister of Justice*, where the court was dealing with a clear instance of direct unfair discrimination on a listed ground.[5] It is perhaps unfortunate that the possibility of a broader interpretation of FC s 9(1) was argued before and considered by the court in the Sodomy case where it was not directly in issue and where there was no need to adopt a less restrictive approach to FC s 9(1). A richer and more nuanced approach to FC s 9(1) may well be called for in future cases.

The Compensation for Occupational Injuries and Diseases Act[6] ('the Compensation Act') creates a scheme whereby, in the case of occupational injuries and diseases, employees may claim compensation from a fund established by statute to which employers are obliged to contribute. The employee is entitled to compensation under the Act regardless of whether or not the negligence of the employer or the employee brought about the injury or the disease. The extent of compensation available is often less than the employee would obtain if it could establish that the employer was liable in delict for his or her injury or disease. Section 35(1) of the Compensation Act precludes the employee from pursuing a common-law claim for damages. Hence the scheme of compensation established by the Compensation Act supplants that which exists at common law.

[1] 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC), esp at paras 32 and 108

[2] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC) at paras 60–4

[3] 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC). Cf the dissenting judgment of Sachs J and see Saras Jagwanth 'What is the Difference? Group Categorisation in *Pretoria City Council v Walker*' (1998) 15 *SAJHR* 200

[4] 1999 (2) SA 817 (C) at 825G–830G and in particular the comment of Davis J at 827E–H, 1999 (4) BCLR 440 (C) at 447D–452B, esp at 449B–F

[5] 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC)

[6] Act 130 of 1993

At issue in *Jooste v Score Supermarket Trading (Pty) Ltd* was whether s 35(1) of the Compensation Act infringes FC s 9.[1] The court held that it does not. It was contended on behalf of Ms Jooste, the injured employee, that s 35(1) was not an integral part of the scheme of the Compensation Act. The provision was therefore to be viewed in isolation in considering whether it was rationally connected to a legitimate government purpose. This contention was firmly rejected by the court:

> 'But that argument fundamentally misconceives the nature and purpose of rationality review and artificially and somewhat forcibly attempts an analysis of the import of the impugned section without reference to the Compensation Act as a whole. It is clear that the only purpose of rationality review is an inquiry into whether the differentiation is arbitrary or irrational, or manifests naked preference and it is irrelevant to this inquiry whether the scheme chosen by the Legislature could be improved in one respect or another. Whether an employee ought to have retained the common-law right to claim damages, either over and above or as an alternative to the advantages conferred by the Compensation Act, represents a highly debatable, controversial and complex matter of policy. It involves as policy choice which the Legislature and not a court must make. The contention represents an invitation to this Court to make a policy choice under the guise of rationality review; an invitation which is firmly declined.'[2]

Van Rensburg v South African Post Office Ltd was an appeal against a finding at first instance that s 7(1)*(a)* of the Post Office Act[3] was not unconstitutional.[4] The provision gives the South African Post Office the exclusive power to conduct a postal service, subject to certain exemptions and exclusions. One of the appellant's arguments was that such exclusivity infringed its right to equality. The court below had assumed, without deciding, that the exclusivity provision infringed FC s 9(1), but accepted that it was justified under FC s 36(1).[5] In Revision Service 3 it was submitted that, were the equality jurisprudence of the Constitutional Court to be applied, s 7 of the Post Office Act would be found not to infringe the right to equality. Such was the finding of the Full Bench of the Eastern Cape Provincial Division on appeal. With careful reference to the equality jurisprudence of the Constitutional Court, the court found that the exclusivity conferred on the Post Office by s 7 of the Post Office Act was neither discriminatory nor unfair. The court accepted, moreover that there was

> 'a reasonable and defensible connection between giving the Post Office an exclusive privilege at the expense of operators like the appellant on the one hand, and the legitimate government purpose of providing for a postal service to cater for the needs of the public as a whole on the other'.[6]

[1] 1999 (2) SA 1 (CC), 1999 (2) BCLR 139 (CC)

[2] *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC), 1999 (2) BCLR 139 (CC) at para 17; cf *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 25; *East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council* 1998 (2) SA 61 (CC), 1998 (1) BCLR 1 (CC) at para 24. These cases are discussed above § 14.4.

[3] Act 44 of 1958.

[4] 1998 (10) BCLR 1307 (E) (Full Bench).

[5] *South African Post Office Ltd v Van Rensburg* 1998 (1) SA 796 (E), 1997 (11) BCLR 1608 (E).

[6] *Van Rensburg v South African Post Office Ltd* 1998 (10) BCLR 1307 (E) at 1319H–1320D. In reaching this conclusion the court referred to cases directly in point decided by the European Court of Justice — *Paul Corbeau* (Case C-320/91) [1995] 4 CMLR 621, discussed at 1998 (10) BCLR 1307 (E) at 1318J–F — and the superior court of the Province of Quebec (District of Montreal) — *Société Canadienne des Postes v Postpar Inc and Pospar Montreal Inc* (Case No 500-05-00947-885; 9 September 1988), discussed at 1319F–I.

In *Gerber v Kommissie van Waarheid en Versoening*[1] the applicant contended that the amnesty committee of the Truth and Reconciliation Commission had, in its first hearing, the Makgale and Diale case, set out and applied certain principles regarding the interpretation and application of the Promotion of National Unity and Reconciliation Act.[2] The applicant claimed that his case was the same as the Makgale and Diale case, but that the principles there set out had been ignored in his case. The committee had thereby discriminated unfairly against him and had denied him the equal protection and benefit of the law. The High Court said that where the application of the Act required judgment and discretion, it was impossible to lay down rigid rules. The relevant guidelines were set out in the Act, and these were to be applied to the individual instances before the committee. Were the applicant's approach correct, every applicant whose conviction was not set aside by the committee could complain that his rights under FC s 9 had been infringed.[3]

14.14 FC SECTION 9(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.'

In the final Constitution the provision dealing with measures to redress the inequalities of the past follows immediately upon the positive guarantee of equality in s 9(1). This, together with the wording of s 9(2), puts it beyond question that positive measures to counteract patterns of inequality persisting from the past into the present are integral to the conception of equality embraced by the Constitution, and are not seen as an exception to the requirement of equality before the law and equal protection of the law. This is consistent with the requirements of Constitutional Principle V contained in IC Schedule 4.

The statement that '[e]quality *includes* the full and equal *enjoyment* of *all* rights and freedoms' underlines the constitutional commitment to substantive and not merely formal equality.[4] Section 9(2) makes explicit the fact that it is in order to achieve equality that it permits remedial measures to be taken. It is clear from the reference to 'the achievement of equality' that the final Constitution acknowledges that our society is still riven by the inequalities of the past and that the ideal of equality is yet to be achieved.

Section 9(2) refers to 'legislative and other measures' designed to protect and advance those disadvantaged by unfair discrimination, whereas IC s 8(3)*(a)* refers simply to 'measures'. No substantive change is effected by the addition of the word 'legislative'. It simply clarifies the range of measures which may be taken.

The use of the word 'designed' in s 9(2), like its use in IC s 8(3)*(a)*, imposes the requirement that there be a rational relationship between the measures adopted and the end sought to be achieved. That end is described in s 9(2) as the protection and advancement of those disadvantaged by unfair discrimination. The qualification 'adequate' is omitted here.

[1] 1988 (2) SA 559 (T)
[2] Act 34 of 1995
[3] See above, § 14.4*(d)*.
[4] See above, § 14.2.

Arguably, this removes a constraint on remedial measures which existed under IC s 8(3)*(a)*. It is submitted, however, that given the indeterminacy of the word 'adequate', the omission is not material.

Another word omitted from s 9(2) of the final Constitution which was present in IC s 8(3)*(a)* of the interim Constitution is 'groups'. It is submitted that the words 'categories of persons' means that specific reference to groups was superfluous, and that the scope of the provisions is not affected by the absence of the word.

The requirement that the beneficiaries of the measures described in s 9(2) be 'disadvantaged by discrimination' is important. It is discussed in detail above, § 14.4*(d)*.

The president assented to the Employment Equity Act[1] on 19 October 1998. The Act comes into effect on a date to be determined by the President by proclamation in the *Government Gazette*.[2] The Employment Equity Act sets out a comprehensive set of measures, the objects of which include promoting the constitutional right of equality, eliminating unfair discrimination in employment, and ensuring the implementation of employment equity to redress the effects of discrimination. It is likely that some of the more controversial measures included in the Act, in particular those imposing duties upon employers with regard to affirmative action, and certain of the enforcement provisions, will be the subject of constitutional litigation. A critical question will be the extent to which particular measures comply with the requirements of FC s 9(2).

14.15 FC SECTION 9(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.'

Section 9(3) is the equivalent of IC s 8(2), the components of which are fully discussed above, § 14.5.

(a) Unfair discrimination

See above, § 14.5*(a)*.

In *National Coalition for Gay and Lesbian Equality v Minister of Justice*[3] the common-law offence of sodomy, the offence of sodomy under s 20A of the Sexual Offences Act 1957, the inclusion of the common-law offence of sodomy in Schedule 1 of the Criminal Procedure Act 1997 and the inclusion of the common-law offence of sodomy in Schedule 1 of the Security Officers Act 92 of 1987 were found to discriminate unfairly on the ground of sexual orientation.[4]

In considering whether differentiation on the ground of sexual orientation was unfair discrimination, the court applied the analysis of the question of unfairness set out by

[1] Act 55 of 1998
[2] Section 65(2)
[3] 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC).
[4] See also above, § 14.5*(a)* and below, § 14.15*(c)*

Goldstone J in *Harksen v Lane NO.*[1] The court outlined the ways in which, apart from the direct harm it inflicted, the criminal prohibition of sodomy reinforced the prejudice and subordination to which gay men are subject.[2] The court then applied the *Harksen* analysis as follows:

> '[26] . . .
> *(a)* The discrimination is on a specified ground. Gay men are a permanent minority in society and have suffered in the past from patterns of disadvantage. The impact is severe, affecting the dignity, personhood and identity of gay men at a deep level. It occurs at many levels and in many ways and is often difficult to eradicate.
> *(b)* The nature of the power and its purpose is to criminalise private conduct of consenting adults which causes no harm to anyone else. It has no other purpose than to criminalise conduct which fails to conform with the moral or religious views of a section of society.
> *(c)* The discrimination has, for the reasons already mentioned, gravely affected the rights and interests of gay men and deeply impaired their fundamental dignity.
> [27] The above analysis confirms that the discrimination is unfair. There is nothing which can be placed in the other balance of the scale. The inevitable conclusion is that the discrimination in question is unfair and therefore in breach of section 9 of the 1996 Constitution.'[3]

The *Harksen* approach to the unfairness enquiry under FC s 9(3) was also followed by Davis J in *Lotus River, Ottery, Grassy Park Residents Association v South Peninsula Municipality.*[4] The question in that case was whether the respondent had discriminated unfairly against the applicants by raising property rates, tariffs and service charges. The court concluded that the respondents had discriminated unfairly against the applicants, but that its actions were justified under FC s 36(1).[5]

(b) Direct and indirect discrimination

See above, § 14.5*(b)*.

(c) The listed grounds

The list of grounds contained in s 9(3), like that set out in IC s 8(2) is comprehensive but not complete, as is indicated by the word 'including'.[6] The two lists are almost the same, but new grounds have been added in s 9(3). These are pregnancy, marital status and birth. The addition of pregnancy as a ground means that South African jurisprudence on discrimination based on pregnancy need not traverse the tortuous debates in the courts of the United States, Canada, England and the European Community as to whether and why such discrimination is also sex or gender discrimination.[7]

[1] 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 53; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC) at paras 19 and 26

[2] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC) at paras 19–27.

[3] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC) at paras 26–7.

[4] 1999 (2) SA 817 (C) at 826D–827D and 829I–830G, 1999 (4) BCLR 440 (C) at 448B–J and 451D–452B

[5] See further below, § 14.18.

[6] See the discussion above, § 14.5*(c)*.

[7] Discussed above, § 14.5*(b)*.

The explicit prohibition of discrimination on the basis of marital status is similarly helpful.[1] Discrimination based on marital status often accompanies sex or gender discrimination.[2] It often leads to discrimination on grounds of sexual orientation, particularly in the absence of a legally recognized means of solemnizing homosexual relationships.[3]

The prohibition of discrimination on grounds of marital status protects unwedded parents from discrimination, while the prohibition of discrimination on grounds of birth protects the children of unwedded parents from discrimination.[4]

Section 9(3), like IC s 8(2), makes it clear that discrimination which is based on a combination of the listed grounds is prohibited, as is discrimination which may be based partly on listed grounds and partly on others.[5]

Sex/gender

In *S v J* the Supreme Court of Appeal abolished the cautionary rule in respect of the evidence of complainants in sexual assault cases.[6] The court found the rule to be underpinned by long-standing but unfounded sexist assumptions about the propensity of women to lie about being raped.[7] In fact, said the court, empirical studies showed that women were no more likely to lie or give unreliable evidence than were men. Empirical studies also belied the myth that the evidence of complainants in sexual assault cases was less reliable than that of complainants in any other type of case. If anything, it was particularly difficult and painful for a woman to bring a rape charge.[8] The court referred to the abolition of the cautionary rule in sexual assault cases in comparable legal systems, including Namibia, England, New Zealand and California. It concluded that the rule

> 'is based on an irrational and out-dated perception. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable. In our system of law, the burden is on the state to prove the fault of an accused beyond reasonable doubt — no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule.'[9]

The court reached this conclusion without reference to the Constitution. There can be no doubt, however, that the abolition of the cautionary rule in sexual assault cases accords with the requirements of FC s 9 and with the spirit, purport and object of the Bill of Rights.

[1] Cf *Miron v Trudel* (1995) 124 DLR (4th) 693, 29 CRR (2d) 189 at 235–7; cf *Harksen v Lane NO & others* 1998 (1) SA 300 (CC) at paras 93–112, 1997 (11) BCLR 1489 (CC) at paras 92–111.

[2] Cf *Harksen v Lane NO & others* 1998 (1) SA 300 (CC) at paras 95–6, 1997 (11) BCLR 1489 (CC) at paras 94–5

[3] Cf *Egan v Canada* (1995) 124 DLR (4th) 609, 29 CRR (2d) 79

[4] See *Fraser v Children's Court, Pretoria North* 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC)

[5] See above, § 14.5(*c*).

[6] 1998 (2) SA 984 (SCA), 1998 (4) BCLR 424 (SCA), 1998 (1) SACR 470 (SCA).

[7] At 1007F–H (SA)

[8] At 1008A–G (SA).

[9] At 1009F (SA).

Sexual orientation

In *National Coalition for Gay and Lesbian Equality v Minister of Justice*[1] the common-law offence of sodomy, the offence of contravention of s 20A of the Sexual Offences Act,[2] the inclusion of the common-law offence of sodomy in Schedule 1 of the Criminal Procedure Act[3] and the inclusion of the common-law offence of sodomy in Schedule 1 of the Security Officers Act[4] were declared to be unconstitutional. Each of these laws was found to discriminate unfairly against gay men on the ground of their sexual orientation.[5]

In *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* a Full Bench of the Cape Provincial Division of the High Court declared s 25(5) of the Aliens Control Act[6] to be inconsistent with the Constitution.[7] The provision allows spouses of citizens and permanent residents of South Africa to apply for immigration permits from within South Africa. All other persons, including long-term partners of the same or the opposite sex, are required to apply for such permits from outside South Africa. The court found that the word 'spouse' as used in the Aliens Control Act applies only to persons who are married by law or a recognized customary union.[8] The court pointed out that this provision imposed a particular hardship on same-sex couples who, unlike partner of opposite sexes, are not permitted by law to marry.[9] The court found that s 25(5) of the Aliens Control Act thereby prefers certain forms of life partnership over others. The provision therefore discriminates on the grounds of sexual discrimination in a way which is both unfair and unjustifiable.[10]

The applicant in *Langemaat v Minister of Safety and Security & others* was a member of the South African Police Services (SAPS).[11] She applied to register the woman with whom she had co-habited for some eight years as her dependant in terms of the SAPS medical aid scheme. She was unable to do so because the SAPS regulations which set up the medical aid scheme and the rules of the scheme limited the definition of dependant to legal spouses, widows/widowers and dependent children. The court held that the definition excluded a large number of *de facto* dependants of members of the scheme, and that this was discriminatory.

[1] 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC)

[2] Act 23 of 1957. Section 20A of the Act criminalized acts calculated to stimulate sexual passion or to give sexual gratification committed between men at 'a party'.

[3] Act 51 of 1977

[4] Act 92 of 1987

[5] The case is discussed further above, § 14.5(*a*) and § 14.15(*a*). See also Cathi Albertyn & Beth Goldblatt 'The Decriminalisation of Gay Sexual Offences: *National Coalition for Gay and Lesbian Equality v Minister of Justice*' (1998) 14 *SAJHR* 461; Angelo Pantazis 'How to Decriminalise Gay Sex: *National Coalition for Gay and Lesbian Equality v Minister of Justice*' (1988) 15 *SAJHR* 188. Richard Cameron Blake 'The Frequent Irrelevance of US Judicial Decisions in South Africa: *National Coalition for Gay and Lesbian Equality v Minister of Justice*' (1998) 15 *SAJHR* 192.

[6] Act 96 of 1991

[7] 1999 (3) SA 173 (C), 1999 (3) BCLR 280 (C)

[8] *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 1999 (3) SA 173 (C) at 183I–184G, 1999 (3) BCLR 280 (C) at 289I–290G.

[9] *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 1999 (3) SA 173 (C) at 185G–H, 1999 (3) BCLR 280 (C) at 290G–H.

[10] *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 1999 (3) SA 173 (C) at 186C–G, 1999 (3) BCLR 280 (C) at 292C–G.

[11] 1988 (3) SA 312 (T), 1998 (4) BCLR 444 (T).

It declared the relevant regulation and the rule containing the definition to be unconstitutional and invalid. The court commented that it was time for the law to afford equal respect and protection to the unions of couples of the same sex as to the unions of couples of different sexes.[1]

In *V v V*, the High Court pointed out that, as a matter of law, it was wrong to describe homosexuality as abnormal.[2] The court therefore declined to regard the fact that Mrs V was in a lesbian relationship as abnormal, and made an order for the joint custody of the children.

FC s 37 sets out the requirements for a lawful state of emergency. It includes a table of non-derogable rights which includes the prohibition of unfair discrimination on the grounds of race, colour, ethnic or social origin, sex, religion and language. It is not clear why the exigencies of a state of emergency would ever legitimately demand unfair discrimination on any of the other listed grounds.[3] The Constitutional Court has confirmed, however, that the distinctions drawn between rights in FC s 37 does not in itself mean that, outside of an emergency, any such hierarchical distinction should be drawn between the rights in question.

The need for special steps to promote gender equality is recognized by the establishment of a Commission for Gender Equality.[4]

14.16 FC SECTION 9(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.'

Item 23(1) of FC Schedule 6 provides that the national legislation envisaged in s 9(4) must be enacted within three years of the date on which the final Constitution took effect. It has been suggested that only when such legislation is enacted will individual persons, as opposed to the state, be bound by s 9. There is no warrant for such an interpretation. It is submitted that the purpose of the legislation required by s 9(4) is to provide further detail on the prohibition of discrimination that a Constitution can supply. It is also necessary to develop in detail the remedies and sanctions for breach of the prohibition. Even in the absence of such legislation, however, s 9(4) is operative. It extends the prohibition of discrimination by the state to all persons. Hence it is clear that s 9(4) operates between private parties and not simply between the state and other persons.

FC s 8, which deals with the application of the Bill of Rights, states that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.[5] Section 8(2) provides that a particular provision of the Bill of Rights

[1] At 316F–H (SA).

[2] 1998 (4) SA 169 (C) at 189A–B and generally at 188D–189B. See further below, Bronstein 'Family Law' § 34.9.

[3] Cf *Certification of the Amended Text of the Constitution of the RSA, 1996* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC) at paras 32–8.

[4] Section 187. IC s 119 provided for the establishment of a Commission for Gender Equality. The Commission was established by the Commission on Gender Equality Act 39 of 1996. Item 20 of FC Schedule 6 provides that the Commission for Gender Equality continues to function and commissioners continue to hold office subject to any amendment or repeal of the Act and consistency with the final Constitution.

[5] Section 8(1).

'binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'.

This provision appears to contemplate that, in deciding whether any particular right contained in the Bill or Rights may be asserted against a person other than the state or one of its organs, a court must carefully examine the character of the right in question and its correlative duty. Such an inquiry is rendered unnecessary by s 9(4), which makes it clear that the duty not to discriminate is borne by all persons. As a result, the prohibition against discrimination permeates every legal relationship. That the duty not to discriminate is singled out in this way underlines the importance of the principle of non-discrimination in the final Constitution and the legal dispensation which it brings into being.

14.17 FC SECTION 9(5)

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

Although the wording used is different, s 9(5) is the same in effect as IC s 8(4). It facilitates proof of unfair discrimination in respect of the listed grounds. In *National Coalition for Gay and Lesbian Equality v Minister of Justice* the court thus considered whether differentiation on the ground of sexual orientation is unfair discrimination:

'Being a ground listed in section 9(3) it is presumed, in terms of section 9(5), that the differentiation constitutes unfair discrimination "unless it is established that the discrimination is fair". Although nobody in this case contended that the discrimination was fair, the Court must still be satisfied, on a consideration of all the circumstances, that fairness has not been established.'[1]

While a person may rely on s 9(3) to attack discrimination on grounds other than those listed in the section, s 9(5) offers no assistance in proving that such discrimination is unfair. Section 9(5) also clarifies the fact that the equality clause draws a deliberate distinction between discrimination and unfair discrimination.

14.18 SECTION 9 AND THE LIMITATION CLAUSE OF THE FINAL CONSTITUTION

The relationship between FC ss 9 and 36, the limitation clause, is the same as that between IC ss 8 and 33, discussed above, § 14.9*(a)*. Unlike IC s 33(1), however, FC s 36(1) details five factors which, together will all other relevant factors, must be taken into account in determining whether the limitation under scrutiny is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.

In *National Coalition for Gay and Lesbian Equality v Minister of Justice* the court considered whether there was a constitutional justification for the unfair discrimination against gay males inherent in the criminal prohibition of sodomy.[2] It found that there was not. In describing the nature of the test to be applied under FC s 36(1), the court stated that

[1] 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC) at para 18
[2] 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC) at paras 33–57

the process remained one of weighing up competing values and an assessment based on proportionality requiring the balancing of different interests.[1] The court expressed the view that the listing in FC s 36(1) of the elements to be considered in this balancing process does not materially alter the approach to questions of limitation espoused by the court in *S v Makwanyane*.[2] Applying this analysis, the court found that there was no justification for the limitation.[3] This approach was borne out by the approach adopted to the criminalization of consensual homosexual activity in other open and democratic societies.[4]

In *Lotus River, Ottery, Grassy Park Residents Association v South Peninsula Municipality* the court found that the respondent had discriminated unfairly against the applicants by raising property rates, tariffs and service charges. The court concluded, however, that the respondent's actions were justified under FC s 36(1).[5] Davis J emphasized that a court should be extremely cautious before finding a limitation of one of the three foundational rights of the Constitution to be justified.[6] Nevertheless, Davis J pointed out:

> 'It is not for a Court to "second guess" the legislature, but to assess whether a limitation of an entrenched right is justified in terms of the limitation formula contained in s 36(1). On the evidence placed before the Court, I am satisfied that the respondent has discharged the *onus* of justification and has put up a plausible explanation as to the purpose of the rates increase. It did consider alternatives to such an increase in order to adopt the least restrictive means to achieve its purpose. In the circumstances, it has shown that it has a limited range of viable options and chose to increase rates only after careful consideration.'[7]

The court therefore found that the limitation was justified in the circumstances.[8]

14.19 Specific Questions under the Final Constitution

(a) Equality and the state

In *Minister of Water Affairs v Swissborough Diamond Mines*[9] the court found that the state was not bound by the provisions of s 7 of the Foreign Courts Evidence Act.[10] By virtue of

[1] At para 33, citing *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 104.

[2] 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at para 104.

[3] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC) at paras 35–7.

[4] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC) at paras 39–57.

[5] 1999 (2) SA 817 (C) at 830H–833E, 1999 (4) BCLR 440 (C) at 452B–454I.

[6] *Lotus River, Ottery, Grassy Park Residents Association v South Peninsula Municipality* 1999 (2) SA 817 (C) at 831A–C and 833B–C, 1999 (4) BCLR 440 (C) at 452E–G and 454E–G. In *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 1999 (3) SA 173 (C) at 186I–187A, 1999 (3) BCLR 280 (C) at 292H–J Davis J underlined that the inquiry into whether a limitation of the right to equality is constitutionally justified must pay due regard to the foundational nature of the constitutional value of equality.

[7] *Lotus River, Ottery, Grassy Park Residents Association v South Peninsula Municipality* 1999 (2) SA 817 (C) at 833A–B, 1999 (4) BCLR 440 (C) at 454C–E.

[8] *Lotus River, Ottery, Grassy Park Residents Association v South Peninsula Municipality* 1999 (2) SA 817 (C) at 833A–C, 1999 (4) BCLR 440 (C) at 454C–G.

[9] 1999 (2) SA 345 (T).

[10] Act 80 of 1962.

the provision, a person in South Africa may be subpoenaed to appear in a competent court of certain jurisdictions included in the Second Schedule to the Act. The court held that s 7 of the Foreign Courts Evidence Act does not apply to the state. In reaching this conclusion the court said that the purpose of the Act was to provide for the obtaining of the evidence of persons in South Africa by courts of law outside South Africa. In doing so, the Act always used the word 'witness' together with the word 'person'. The latter word did not ordinarily include the state.[1] Moreover, non-compliance with the provision is made an offence by s 7(3). Since the state does not subject itself to criminal penalties, this was taken as an indication that the state did not intend to bind itself by the provision.[2] The consequence, if the state were held to be bound by the provision, would be that the Republic of South Africa 'would subject itself to the authority of the courts of foreign States at the behest of subjects of that foreign State or of the foreign State itself to hand over its official documentation'.[3] With regard to these considerations, the court concluded that the state was not bound by s 7 of the Act.[4]

The question of whether the provision, thus interpreted, was consistent with FC s 9 appears not to have been raised before the court and forms no part of the decision. It seems likely that the considerations underlying the court's decision would probably result in the same conclusion if the equality jurisprudence of the Constitutional Court were applied. Nevertheless, certain premises upon which the decision was based raise questions which impact upon the issue of 'equality of arms' in litigation, and hence the question of equality before the law.[5] These questions will require more careful scrutiny in the future.

See further above, § 14.10*(b)*.

(b) Equality, customary law and freedom of religion

In *National Coalition for Gay and Lesbian Equality v Minister of Justice* the Constitutional Court pointed out that the religious or moral views of certain sections of the population, however generally held, and however deeply and sincerely, could not justify the unfair discrimination against gay males constituted by the criminal prohibition of sodomy.[6] See further above, § 14.10*(e)*.[7]

[1] *Minister of Water Affairs & Forestry v Swissborough Diamond Mines* 1999 (2) SA 345 (T) at 353B–C, citing *Union Government v Rosenberg (Pty) Ltd* 1946 AD 120.

[2] At 353D, citing Steyn *Die Uitleg van Wette* 5 ed at 76 and the decisions there mentioned.

[3] At 353E–F.

[4] At 353F–G.

[5] See further above, § 14.10*(b)*.

[6] 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC) at paras 37–8.

[7] See Victoria Bronstein 'Reconceptualising the Customary Law Debate in South Africa' (1998) 14 *SAJHR* 338.