14

Equality

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Equality

14.1 Introduction

The commitment to equality lies at the heart of the South African interim Constitution. 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’. Constitutional Principles I, III and V are all directly and explicitly concerned with equality.

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)). 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’.

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.

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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).

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


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. 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. 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.

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. 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.

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 M黄河 & 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 706 (CC) at para 74 (Kriegler J, dissenting, but not on this point).


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 (UK). On the rejection of the similarly situated test by the Canadian courts, see Mohe 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 Mohe 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’.

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 M黄河 & 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 706 (CC) at para 74 (Kriegler J, dissenting, but not on this point).


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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’. 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’.

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.

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

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1 Andrews (1989) 56 DLR (4th) 1 at 13. Note that these criteria for identifying inequality are not necessarily ‘placements’ for the similarly situated test, but could as well be seen to give substance to that test. See above, n 4.
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 anti-subjugation 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 827–829A, 1999 (4) BCLR 440 (C) at 449F–450E.

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 827–829A, 1999 (4) BCLR 440 (C) at 449F–450E.

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 827–829A, 1999 (4) BCLR 440 (C) at 449F–450E.

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.

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:

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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.
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

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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).

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 be 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

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\(^1\) 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) BCLR 1655 (CC); City Council of Pretoria v Walker 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC); 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); 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 ‘Gelykberegting’ (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/Ngwelezame 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.\footnote{1} In the Sodomy case the court went directly to question of whether the differentiation on the ground of sexual orientation was unfair discrimination.

\section*{14.4 Section 8(1)\protect\footnote{2} \protect\footnote{3}}

‘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’.\footnote{2} Clearly, the right to equality before the law and to the equal protection of the law does not prohibit every conceivable legal distinction.\footnote{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.\footnote{4} And, as a matter of policy, the courts can ‘hardly review every

\footnote{1} Cf Josote 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.

\footnote{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 (\textit{R v S (S) 1990} 2 SCR 254, 49 CRR 79; \textit{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 \textit{Constitutional Law of Canada} p 52-10). The same point is made by H M Seervai \textit{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 Motata \& 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.

\footnote{3} \textit{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 \textit{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.\footnote{4} See the discussion above, § 14.2. See \textit{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 SCi 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.’}
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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. The right to equality is infringed only by differences in treatment which are illegitimate.

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. 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.’

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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 1231F–I; 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) of the Constitution.

3 S v Rens 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 631 (1896) and its later extension to the idea of ‘separate but equal’ doctrine in relation to racial segregation and 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 Rassool 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 IA, esp at 177, and that of De Villiers IA, 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.

4 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.

5 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.

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[REVISION SERVICE 5, 1999]
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. That purpose must itself be legitimate in light of constitutional values. If there is no such rational relationship, IC s 8 is infringed.

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.’

In this case O’Regan J found that IC s 8(1) was not infringed by the provisions of s 47bis of the Town Planning Ordinance (Natal), 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. 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; 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. 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
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 Municipalities, 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 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 reasonable basis. See, for example, Allied Stores v Bowers 358 US 522 at 530, 79 SCt 437 (1959); Potch v Board of River Port Pilot Commissioners 330 US 552, 67 SCt 910 (1947). See also Tribe American Constitutional Law 1439–46.

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 . . . the equal protection of the laws’. 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; 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. It illustrates the perils of the restrictive account of equal protection, and supplies illuminating instances of a rich and expansive conception of equality.

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.

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 Fourth 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.


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 Crosson 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 Peru (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.
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. In addition the Supreme Court has held that the same phrases have a wider meaning under the Canadian Charter of Rights and Freedoms.

(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. 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. Hence it must take account of a history of inequality and oppression and the need for reparation and reconstruction.

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.’

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.
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 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).
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 Bafeta 1930 AD 319; Sinovich v Hercules Municipal Council 1946 AD 783). Whether or not administrative action was
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 to reviewable on the same basis was an open question (\(R \text{ v} \text{ Lussu}\) 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 (\(Johannesburg \text{ Stock} \text{ Exchange} \text{ & another} \text{ v} \text{ Witwatersrand \text{ Nigel} \text{ Ltd} \text{ & another}\) 1988 (3) SA 132 (A) at 152A–E; \(During \text{ NO} \text{ v} \text{ Boesak} \& \text{ another} \text{ 1990} (3) SA 661 (A) at 671I–672D; Jacobs en 'n ander \text{ v} \text{ Waks en andere}\) 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 \textit{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 \(Prinsloo \text{ v} \text{ Van der Linde}\) 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 \(Podlas \text{ v} \text{ Cohen \&} \text{ Bryden} \text{ NNO} \& \text{ others}\) 1994 (4) SA 662 (T) at 673F–H Spoelstra J said that the fact that an insolvent undergoes a \textit{capitis diminutio} is not affected by the provisions of s 8(1). In \(Cherry \text{ v} \text{ Minister of Safety \& Security \&} \text{ others}\) 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 \(AK \text{ Entertainment} \text{ CC} \text{ v} \text{ Minister of Safety \& Security}\) 1995 (1) SA 783 (E) at 789E–G the court expressed the view, \textit{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 \(Beukes \text{ v} \text{ Krugersdorp \text{ Transitional} \text{ Local Council}\) 1996 (3) SA 467 (W) at 481A–I. See also \(Cherry \text{ v} \text{ Minister of Safety \& Security} \& \text{ others}\) 1995 (3) SA 323 (SE), 1995 (5) BCLR 570 (SE) at 578E–579C; \(Batista \text{ v} \text{ Commanding} \text{ Officer,} \text{ SANAB,} \text{ SA Police,} \text{ Port Elizabeth,} \& \text{ others}\) 1995 (4) SA 717 (SE) at 722H–725E, 1995 (6) BCLR 1006 (SE).

\(^4\) Cf \(Gerber \text{ v} \text{ Kommissie van Waarheid \& Versoening}\) 1988 (2) SA 559 (T).

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

\(^6\) See Pieter van Dyk & Godefrieds J H \text{ van Hoof Theory \& Practice of the European Convention on Human Rights} 2 ed (1990) 320; \(cf\) \(Bernstein \text{ v} \text{ Bester NO}\) 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 trial 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 Linde⁶ 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.

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 Mbuta; S v Prinsloo 1996 (3) BCLR 293 (CC). In S v Mhlonga & 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).
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

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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 \textit{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 \textit{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 \textit{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 \textit{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.

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

\(^2\) \textit{Harksen v Lane NO \\& others} 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at para 59.

\(^3\) \textit{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 \textit{Esterhuizen v Minister van Pos- en Telekommunikasiewese} 1978 (2) SA 227 (T); \textit{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. 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.

(e) Perplexing questions about justification

It has been argued in this section that the right to equality is impaired only by illegitimate differentiation. 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. 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. Because inequality means

1 The entire gamut 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 Malwane & 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 Majib 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 Makan 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.\footnote{See, for example, \textit{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.’}

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.\footnote{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, \textit{Andrews} (1989) 56 DLR (4th) 1 at 23; \textit{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 \textit{R v Swain} [1991] 1 SCR 933, 3 CRR (2d) 1.}

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.’\footnote{In \textit{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.}

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.\footnote{In \textit{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 789F–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 \textit{Cherry v Minister of Safety and Security & others} 1995 (5) SA 323 (SE), 1995 (5) BCLR 570 (SE) at 578E–579C; \textit{Batista v Commanding Officer, SANAB, SA Police, Port Elizabeth, & others} 1995 (4) SA 717 (SE) at 722H–725E, 1995 (8) BCLR 1006 (SE).}

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
protection of the law. 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.’

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. 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. Measures which disadvantage powerful and privileged groups, on the other hand, may be discriminatory, but are not necessarily unfair in the same way.

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

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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.’


4 See Brink v Kitshoff NO 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at para 42; and Larbi Odum & 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

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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.\(^6\)

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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 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; and 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.

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; and 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. 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC).

5. 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

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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 or not the 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 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 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 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.\(^8\)

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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 826F–827D and 830C–G, 1999 (4) BCLR 440 (C) at 448F–J and 451G–J.
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.

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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. 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, the court concluded that the imposition of the flat rate on some, and a consumption-based rate on others, although indirectly discriminatory, was not unfair. 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.

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.

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

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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 Prat* 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 Taxpayers 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.

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\(^1\) 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).


\(^6\) 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).

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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)).


\(^5\) 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 . . .’.


\(^7\) 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* [1988] 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.\(^\text{1}\) What is relevant is the application of, for example, a race- or gender-based criterion.\(^\text{2}\)

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 . . .'.\(^\text{3}\) In *Brooks v Canada Safeway* the Supreme Court of Canada held that 'discrimination 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'.\(^\text{4}\) 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.\(^\text{5}\)

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.\(^\text{6}\) 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.\(^\text{7}\)

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\(^\text{1}\) 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 (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.

\(^\text{2}\) 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.

\(^\text{3}\) [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.


\(^\text{6}\) *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at para 43.

\(^\text{7}\) Obviously, then, the distinction between direct and indirect discrimination is not a simple distinction between intentional and unintentional discrimination; cf Beukes 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

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\(^1\) 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. Cameron J found, however, that the discrimination in question was historically, socially and economically justified and consequently was not unfair.

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.

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).

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. 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.

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). In England, for example, the conduct impugned must be classified as either direct or indirect discrimination. 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’. 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 —

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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 Röger-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.\textsuperscript{1} In England, then, much may turn on whether the conduct is shown to be directly or indirectly discriminatory.\textsuperscript{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.\textsuperscript{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.

\textbf{(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.\textsuperscript{4} By virtue of IC s 8(4) \textit{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

\begin{itemize}
\item \textsuperscript{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.
\item \textsuperscript{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 \textit{in fact} a consequence of pregnancy is treated as separate from the pregnancy in law. See Dekker \textit{v Stichting Vormingscentrum Voor Jong Volwassenen (VJV) Centrum} Plus [1992] ICR 325, [1990] ECR I-3941 (ECJ); \textit{Handels- og Kontorfunktionærernes Forbund i Danmark (acting for Aldi)} v \textit{Dansk Arbejdsgiverforbning (acting for Aldi)} [1992] ICR 332, [1990] ECR I-3979 (ECJ); Webb \textit{v EMO Air Cargo (UK) Ltd} [1993] 1 WLR 49, ICR 175, [1992] 4 All ER 929 (HL).
\item \textsuperscript{4} \textit{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 \textit{President of the Republic of South Africa v Hugo} 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC); \textit{Harksen v Lane NO} & others 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at paras 46–7; \textit{Larbi Odam} & others v \textit{Member of the Executive Council for Education (North West Cape) & others} 1998 (1) SA 745 (CC), 1997 (12) BCLR 1655 (CC) at para 16.
\end{itemize}
discrimination extends to grounds other than those specifically listed. In respect of discrimination on the unlisted grounds, there is no presumption of unfairness.

In *Harksen v Lane NO & others* 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. 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. 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’. 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 hand and actions calculated to protect pockets of privilege at a price which amounts to the perpetuation of inequality and disadvantage to others on the other.’

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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, 1 “sex” is a biological term; “gender” a psychological and cultural one. 2 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

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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 responsibilities. 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).
within two years of a husband effecting a life insurance policy in favour of his wife or ceding such a policy to her the entire proceeds of such policy would, as against the husband’s creditors, be deemed to be part of his estate. Once two years had elapsed, any amount over R30 000 would, as against any creditor of the husband, be deemed to be part of the husband’s estate. The Insurance Act contained no similar provisions limiting a husband’s benefits deriving from life insurance policies taken out by his wife. In reaching its conclusion that s 44(1) and (2) of the Insurance Act were unconstitutional the court emphasized the importance of the constitutional right to equality and provided a preliminary analysis of IC s 8(2).

O’Regan J emphasized the need to analyse IC s 8 in the historical context of past systemic and entrenched discrimination in South Africa. She pointed out that although sex discrimination had been less visible than race discrimination in South Africa, it too had resulted in deep patterns of disadvantage. The constitutional commitment to eradicating sex discrimination was clear from the Preamble to the Constitution and the creation of a Commission for Gender Equality.

That the provisions in question violated IC s 8(2) was agreed by all parties before the court. Hence the judgment of the court was concerned primarily with whether the infringement was permissible in terms of IC s 33(1). Interestingly, the provisions, when enacted, provided married women with a benefit of which they would otherwise have been deprived by the common-law rule prohibiting donations between spouses. Following the abolition of that rule the provisions no longer served this protective function but in fact deprived married women of an economic advantage. The second object of the provisions was to prevent collusion between spouses in frustrating the legitimate claims of the husband’s creditors. The court pointed out that there was no reasonable basis to draw a distinction between married men and women in order to achieve this objective. Nor was the court satisfied that this — legitimate — purpose of the legislation could not be achieved by different and less invasive means. It referred in particular to ss 26, 29, 30, 31 and s 21 of the Insolvency Act 24 of 1936.

The court therefore found s 44(1) and (2) to be unconstitutional.

Questions of discrimination on the grounds of gender and marital status featured, although to a lesser extent than one might have expected, in the judgment of the Constitutional Court in Fraser v Children’s Court, Pretoria North. Section 18(4)(d) of the Child Care Act 74 of 1983 (‘the Child Care Act’) requires the consent of both parents to the adoption of a child unless the father of the child is not married to the mother, in which case his consent is not required. The Constitutional Court found the provision to infringe the right to equality. Writing for a unanimous court, Mahomed J pointed out that the section impermissibly discriminated against fathers in matrimonial unions not recognized by law as legal marriages — such as Islamic unions.

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1 Brink v Kitshoff NO 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at para 42.
2 Cf Krieger J in President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 73.
3 At para 48.
4 At para 49.
5 At para 50.
6 1997 (2) SA 261 (CC), 1997 (2) BCLR 153 (CC).
7 At paras 21–3.
The court also considered whether the provision discriminated unfairly on the ground of gender. It expressed the view that the biological and emotional bond between a mother and a new-born child is not comparable to that of a father. This difference could justify a distinction between mothers and fathers of new-born children, but could lead to anomalies and unfairness in regard to older children. It was therefore strongly arguable that it was constitutionally impermissible.\(^1\) Similarly, the distinction between married and unmarried fathers could lead to unfair anomalies.\(^2\) Such anomalies exposed the undesirability of a blanket rule which arbitrarily denies the right of all fathers not married to the mother of the child in question to veto the adoption of that child.\(^3\) What was needed was a more nuanced and balanced law which could take into account the range of relationships and degrees of responsibility of both parents.\(^4\) The need for such a law would not be met by simply striking down s 18(4)(d), nor by judicial reading in or reading down of the provision. The court therefore invoked s 98(5) of the Constitution to require Parliament to correct the defects of s 18(4)(d) within a period of two years.

\(^1\) At para 25.
\(^2\) At para 26.
\(^3\) At para 28.
\(^4\) At para 30.
The difficulty of dealing with gendered patterns of behaviour and responsibility which both reflect and perpetuate entrenched inequalities between men and women was a core concern of the court in the case of President of the Republic of South Africa v Hugo.\footnote{1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC).} Soon after his election in 1994 President Mandela issued Presidential Act No 17, which granted a special remission of sentence to certain categories of prisoner. One such category comprised ‘all mothers in prison on 10 May 1994, with minor children under the age of twelve (12) years’.\footnote{The category excluded women who had committed certain offences.}

The Presidential Act gave rise to two cases in which male prisoners with children under 12 alleged that, in affording the remission of sentence to mothers, but not fathers, of children under 12, the Presidential Act discriminated against them unfairly on the ground of sex.

In the case of Kruger v Minister of Correctional Services\footnote{1995 (2) SA 803 (T).} Van Schalkwyk J held that the presidential power in terms of IC s 82(1)(k) could be reviewed by the courts only on the basis of bad faith or irrationality so extreme that no reasonable executive authority could have come to that decision. He therefore declined to enter upon the question of whether the Act was unfairly discriminatory.

In Hugo v State President of the Republic of South Africa\footnote{1996 (6) BCLR 876 (D).} Magid J disagreed with the decisions of Van Schalkwyk J. He concluded that the Presidential Act was reviewable, and that it discriminated against fathers of children under 12 of the basis of gender.

In President of the Republic of South Africa v Hugo\footnote{1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC).} the Constitutional Court found that the presidential pardon power is indeed reviewable, and must comply with the strictures of the Bill of Rights. It was therefore necessary to consider whether the Presidential Act infringed the prohibition of unfair discrimination in IC s 8(2).

The court found that \textit{prima facie} sex discrimination was established by the fact that the Presidential Act denied to fathers a benefit which it afforded to mothers of children under 12.\footnote{The court noted that the definition of the category also constituted \textit{prima facie} discrimination on the basis of parenthood of children below the age of 12. As it did in Kitshoff v Brink 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at para 43, the court, at para 33, noted that it is sufficient that the impugned discrimination is substantially based on one of the grounds listed in s 8(2).} Hence, it found, IC s 8(4) required that the discrimination be presumed to be unfair until the contrary was proved.

In defending the exercise of his discretion the President said that the special remission of sentence granted to mothers of children under 12 was motivated by a concern for the children involved. He referred to an affidavit by the National Director of the South African National Council for Child and Family Welfare. She deposed that, in her experience, only a minority of fathers were involved in the care of pre-adolescent children and that mothers were the primary care-givers of such children.

Despite the absence of statistical or survey evidence to this effect, the court was prepared to accept as a general proposition that, as a matter of fact, mothers in our society bear more
responsibility for child-rearing than do fathers. This did not mean, however, that it would ordinarily be fair to discriminate between men and women on that basis. Very often, the contrary is true. Historically, women’s disproportionate responsibility for child-rearing has been one of the most important causes of their labour market and workplace inequality. The court considered that it would clearly be unfair to deprive women of benefits, or to impose disadvantages on them, on the basis of a generalization about their role as child-rearers.

This was the point at which the majority and concurring judgments parted company with those of Kriegler J and Mokgoro J. Kriegler J, who emphasized the importance which the Constitution attributes to gender equality, considered that the generalization that women were in general the primary care-givers of children was itself both a cause and a result of the inequality of women in society. Regardless of the accuracy of such a stereotype, it was therefore unacceptable to rely on that generalization in distinguishing between men and women in all but the narrowest circumstances. These would exist only where the benefits to be gained were likely to outweigh the harm of perpetuating the stereotype and where the benefits afforded on the basis of the discriminatory stereotype were apposite to the harm resulting from the stereotype. In this case, the benefit derived by the limited number of women gaining a remission of sentence did not outweigh the harm of reinforcing the stereotype. Apart from the fact that the measure was not even designed to redress the disadvantages of women — since it was avowedly for the benefit of the children affected and not their mothers — the measure was one relating only to women prisoners and it was no part of the President’s case that women had suffered particular disadvantages in the penal system.

It was no part of Kriegler J’s judgment that gender distinctions were themselves impermissible — he emphasized that such distinctions were permissible and even necessary under certain circumstances. However, distinctions which discriminated on the ground of sex or gender could only be fair in the narrowest of circumstances. Mokgoro J found that the Presidential Act was unfairly discriminatory because it was based on a stereotype which undermined the fundamental dignity of men in failing to recognize their equal worth as parents of young children and which perpetuated the inequality of women in public life and in the economic sphere. Like Kriegler J, Mokgoro J considered that discriminatory measures which aimed to alleviate the hardship of a particular group should in some way correlate to the disadvantage in question, and pointed out that there was no evidence that women were disadvantaged in the penal system in particular. Mokgoro J nevertheless upheld the measure as one which was permissible in terms of IC s 33(1). This aspect of Mokgoro J’s judgment is examined further below.

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2 At paras 38–9 (Goldstone J). Cf Kriegler J at para 80, Mokgoro J at para 93, O’Regan J at para 110.
3 At para 73 (Kriegler J).
4 At paras 80–2 (Kriegler J).
5 At paras 83–4 (Kriegler J).
6 At paras 85–6 (Kriegler J).
7 At paras 92–3.
8 At para 94.
9 See below, § 14.9.
O’Regan J, in a separate concurring judgment, considered the objections raised by Kreigler J and Mokgoro J to the President’s reliance on a gender stereotype regarding child-rearing roles. O’Regan J considered the approach of Kreigler J as to when such a generalization would be permissible to be too restrictive.¹ No doubt a fairer allocation of child-care responsibilities between men and women would be conducive to the constitutional aspiration of gender equality. But that is not the case at present, nor is it likely to be so for some time to come. This reality cannot be ignored in determining whether the discrimination under scrutiny is unfair. In the view of O’Regan J, therefore, the rigid approach advocated by Kreigler J did not take sufficient account of present social realities, and could indeed hinder rather than facilitate achieving the constitutional goal of equality.² O’Regan J considered that the determination of unfairness required a consideration of the group against which the measure in question discriminated and the impact of the discrimination on the interests of the group concerned.³ In the present case O’Regan J considered that the early remission of the sentences of mothers of children under 12 caused no significant harm to mothers and no severe harm to fathers. In this regard it was relevant that the fathers affected were imprisoned as a result of their conviction of criminal offences and not because of their exclusion from the special remission of sentence. Furthermore, they had the right to apply for individual special remissions based on personal circumstances. O’Regan J therefore agreed that the discrimination was not unfair.⁴

The Hugo case is important in establishing that measures which differentiate between men and women based on the actual differences in their positions in society are not necessarily constitutionally unacceptable. Further, it establishes that while discriminatory measures which disadvantage women are likely to be unlawful, those which accord them certain advantages which take into account their social inequality may be upheld (provided that the measures in question do not thereby infringe their fundamental dignity or that of men). A striking feature of the Hugo decision is the court’s awareness of the pervasive nature of gender inequality in South Africa and the paradoxes inherent in addressing such inequality.⁵

One such paradox is the need to strike a balance between the protection of gender equality and the constitutional recognition of customary law. This issue arose in the case of Mthembu v Letsela, which is discussed further below, § 14.10(e).⁶

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.⁷ 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), as well as the right to dignity enshrined in IC s 10, as well as the rights protected by IC ss 22, 26 and 28(1).

¹ At para 111. ² At para 113. ³ At para 112; cf above, § 14.5(a). ⁴ At paras 114–15; cf Goldstone J at para 47. ⁵ See Harksen v Lane NO & others 1998 (1) SA 300 (CC) at paras 95–6 (O’Regan J) and paras 121–2 (Sachs J), 1997 (11) BCLR 1489 (CC) at paras 94–5 and 120–1. ⁶ 1997 (2) SA 936 (T). ⁷ 1998 (8) BCLR 1013 (Tk), esp at 1019A–1020E.
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.\(^1\)

Also specified as a forbidden basis of discrimination is sexual orientation. In *National Coalition for Gay and Lesbian Equality v Minister of Justice*\(^2\) the common-law offence of sodomy, the offence of contravention of s 20A of the Sexual Offences Act,\(^3\) the inclusion of the common-law offence of sodomy in Schedule 1 of the Criminal Procedure Act\(^4\) and the inclusion of the common-law offence of sodomy in Schedule 1 of the Security Officers Act\(^5\) were declared to be unconstitutional. Each of these laws was found to discriminate unfairly against gay men on the ground of their sexual orientation.\(^6\)

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\(^7\) to be inconsistent with the Constitution.\(^8\) 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.\(^9\) The court pointed out that this provision imposed a particular hardship on same-sex couples who, unlike partners of opposite sexes, are not permitted by law to marry.\(^10\) The court found that s 25(5) of the Aliens Control Act thereby prefers certain forms of life partnership over others. The court found

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1. Prior *v* Battle & others 1998 (8) BCLR 1013 (Tk), esp at 1020E–1021G.
2. 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC), 1998 (2) SACR 556 (CC).
3. 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’.
6. See also *S v K* 1997 (9) BCLR 1283 (C).
8. 1999 (3) SA 173 (C), 1999 (3) BCLR 280 (C).
9. *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.
10. *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 1999 (3) SA 171 (C) at 185G–H, 1999 (3) BCLR 280 (C) at 290G–H.
11. *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.
that the provision discriminated on the grounds of sexual discrimination in a way which was both unfair and unjustifiable.\(^1\)

In *Langemaat v Minister of Safety and Security* the High Court found the definition of ‘dependant’ for the purposes of a medical scheme for members of the SAPS to infringe FC s 9 because it prevented the registration of same-sex partners on the same terms as legal spouses.\(^1\)

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 Mrs V was in a lesbian relationship as abnormal, and made an order for the joint custody of the children.\(^3\)

In the United States laws discriminating on the basis of sexual orientation have been repeatedly upheld.\(^4\) In Canada sexual orientation has been held to be a ground analogous to those listed in s 15(1), with the result that it is prohibited as a basis of discrimination.\(^5\) Religion, conscience and belief are each specified. This covers examples of belief systems which may not be classified as religions in the strict sense.\(^6\)

IC s 8(2) prohibits discrimination on ‘one or more’ of the listed grounds. This means that an applicant need not prove that the alleged discrimination is solely on the basis of any one of the listed features — it is open to an applicant to prove that the discrimination was based on a combination of grounds.\(^7\) For example, a rule or practice may adversely affect black women in a way which is distinct from the way in which it affects black men or white women. Here the discrimination is suffered on the grounds of race and sex.\(^8\)

\(^1\) 1998 (3) SA 312 (T), 1998 (4) BCLR 444 (T).
\(^2\) 1998 (4) SA 169 (C) at 189A–B. See further below, Bronstein ‘Family Law’ § 34.9.
\(^3\) These cases are discussed further at 14.15(c) below. See also *S v H* 1995 (1) SA 120 (C), a case decided by Ackermann J (Tebbut J concurring) in 1993. Ackermann J took notice of the fact that discrimination on the ground of sexual orientation was likely to be prohibited by the constitution, and expressed the view that common law and statutes proscribing private, consensual homosexual activity were unlikely to survive challenge in the face of such a constitutional prohibition. In *S v A* 1995 (2) BCLR 153 (C) a prisoner charged with sodomy raised a special plea that the common-law crime of sodomy was inconsistent with the prohibition of unfair discrimination under s 8(2). The court declined to decide this issue, however, since the state’s version was that the act had been committed without the complainant’s consent, whereas the accused denied that it had occurred at all. The court took the view that the issue under s 8(2) would arise only if the charge arose from a sexual act between consenting adults. See also Edwin Cameron ‘Sexual Orientation and the Constitution’ (1993) 110 SALJ 450.
\(^6\) The list also includes the somewhat obscure term ‘social origin’. The Tenth Report of the Technical Committee on Fundamental Rights during the Transition comments that ‘[s]ocial origin is deemed to encompass “birth”, “class” and “status”’. This assertion does not begin to do justice to the complexities of any of these concepts.
\(^7\) Cf Tenth Report of the Technical Committee on Fundamental Rights 5 October 1993; *Brink v Kitshoff* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at para 43; *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 33.
(d) Non-listed grounds

The listing of certain grounds on which discrimination is clearly forbidden is said not to derogate from the generality of the provision. Certain commentators have nevertheless suggested that the prohibition is limited to the listed grounds and others which are analogous to those specifically mentioned.\(^1\) The ‘listed and analogous grounds’ approach has been adopted in interpreting the meaning of discrimination in s 15(1) of the Canadian Charter.\(^2\) It has been argued that the grounds listed all involve personal characteristics that are immutable ‘at least in the sense that they cannot be changed by the choice of the individual’.\(^3\) This reading of the section is too narrow. Religion, conscience and belief, for example, need to be squeezed into the notion of immutability or even inherency. Culture, sexual orientation, gender and even sex are not necessarily immutable. Rather than extending protection only to immutable human features, it should be recognized that certain choices are so important to self-definition that these too should be protected.\(^3\)

Even on the ‘listed and analogous grounds’ approach, then, the better reading is that the listed grounds all pertain to elements which are constitutive of human identity.\(^5\) On this view, in order to be brought within the ambit of IC s 8(2), any additional ground need not necessarily be an immutable personal characteristic, but must be a valuable aspect of human identity.

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\(^1\) See Cachalia et al *Fundamental Rights in the New Constitution* 30.


\(^4\) Cited with approval 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 21 n 25.

\(^5\) Cf National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 1999 (3) SA 173 (C) at 186C--D, 1999 (3) BCLR 280 (C) at 292C.
The common theme, of course, is that the grounds describe human attributes. If additional grounds must share this feature, corporations could be excluded as claimants of the right under IC s 8(2).

The problem with the argument that grounds additional to those specified are covered only if they are analogous to the listed grounds is that it disregards the force of the words ‘without derogating from the generality of this provision, on one or more of the following grounds in particular’. The import of this non-derogation clause is surely that the listed classifications do not limit the ambit of IC s 8(2) — they simply exemplify the most commonly recognized forms of discrimination. Hence the protection of IC s 8(2) can be extended to cover distinctions which are neither named nor analogous to those named.

The Constitutional Court has confirmed that the prohibition of unfair discrimination in s 8(2) extends to grounds other than those listed, but that the presumption of unfairness introduced by IC s 8(4) applies only to the specified grounds. In the analysis of IC’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. On the contrary, 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.

Etienne Mureinik argues that the point of the bill of rights is to foster a culture of justification; one in which ‘every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command’. As we have seen, the requirement of justification lies at the heart of the prohibition of ‘unfair discrimination’

Wilson J has said of the developing jurisprudence of s 15 that its purpose is the promotion of human dignity (McKinney v University of Guelph (1991) 76 DLR (4th) 545 at 608).

2 This is discussed further below, § 14.10(a).

3 The Canadian Supreme Court has described the grounds listed in s 15(1) as the ‘most common and probably the most socially destructive and historically practised bases of discrimination’ (Andrews (1989) 56 DLR (4th) 1 at 18). See also Turpin [1989] 1 SCR 1296 at 1333; McKinney (1991) 76 DLR (4th) 554 at 605.

4 Judicial enforcement of constitutional equality rights is commonly justified as a necessary corrective to political processes which fail adequately to represent ‘discrete and insular minorities’ (United States v Carolene Products Company 304 US 144, 58 SCt 778 (1938) at 153n4 per Stone J). See John Hart Ely Democracy and Distrust (1982) ch 6; Ruth Colker ‘Section 1, Contextuality and the Anti-disadvantage Principle’ (1992) 42 University of Toronto LJ 77 at 84; Andrews (1989) 56 DLR (4th) 1 at 32–3. This approach is criticized in Laurence H Tribe ‘The Puzzling Persistence of Process-based Constitutional Theories’ (1980) 89 Yale LJ 1063 and Peter W Hogg ‘The Charter of Rights and American Theories of Interpretation’ (1987) 25 Osgoode Hall LJ 87. See too above, Kentridge & Spitz ‘Interpretation’ ch 11, which makes the argument that a theory of constitutional interpretation based on substantive values is to be preferred to interpretation based on political process theory. Sensitivity to the South African context requires us to take into account that whereas the demise of apartheid has politically empowered the black majority, it has left a legacy of extreme social and economic disadvantage; cf Turpin [1989] 1 SCR 1296 at 1332–3.

5 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.

6 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.

in s 8(2). That exercise of justification requires a point of reference in terms of which justification is meaningful. Justification is not simply a matter of demonstrating a rational connection between means and ends — its quality depends on the substantive value it embodies. Section 8(2), read in the context of the section, the Chapter and the Constitution as a whole, upholds the principle of fundamental human dignity.\(^1\) It seeks to destroy entrenched patterns of inequality — patterns which typically, but not exclusively, take shape around the listed characteristics. For as surely as the Constitution is a bridge from a culture of authority to a culture of justification, it is a bridge from a society of oppression and degradation to a community of equals, in which ‘all human beings will be accorded equal dignity and respect regardless of their membership of particular groups’.\(^2\)

The Constitutional Court has been called upon to decide several cases in which the grounds of discrimination identified were not ones listed in IC s 8(2).\(^3\) In *Harksen v Lane NO & others* the court held:

‘There will be discrimination based on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner’.\(^4\)

This is an objective enquiry. The majority of the court found that the differentiation arising out of s 21 of the Insolvency Act did have the potential to demean persons in their inherent humanity and dignity. O'Regan J, who dissented in the case, but not on this point, went a bit further and held that the ground of discrimination was ‘marital status’, which is not specified in IC s 8(2).\(^5\)

In *Larbi Odam & others v The Member of the Executive Council for Education & others* the Constitutional Court held that discrimination on the grounds of citizenship had been established. The court had regard to the fact that non-citizens are a minority with little political influence, and that citizenship is a personal attribute over which one has relatively little control.\(^6\)

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\(^1\) Compare Colker ‘Section 1, Contextuality and the Anti-disadvantage Principle’ (1992) 42 *University of Toronto LJ* 77 at 81–7 on the anti-disadvantage principle; Tribe *American Constitutional Law* 1514–21 on the anti-subjugation principle. Tribe’s formulation of the anti-subjugation principle, and its relevance to South Africa, is outlined above, § 14.2. What sort of conduct amounts to unfair discrimination may differ depending on the alleged basis of discrimination whether or not it is listed in s 8(2); so too may the type of considerations which justify a limitation of the right. See Colker ‘Section 1, Contextuality and the Anti-disadvantage Principle’ 104–5, and the discussion above, § 14.5(a).

\(^2\) President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 41.

\(^3\) Prinsloo v Van der Linde 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC); Harksen v Lane NO & others 1998(1) SA 300 (CC), 1997(11) BCLR 1489 (CC); Larbi Odam & others v The Member of the Executive Council for Education & others 1997 (12) BCLR 1655 (CC).

\(^4\) Harksen v Lane NO & others 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at paras 46, 53 and 61.

\(^5\) Harksen v Lane NO & others 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC) at paras 87–92. ‘Marital status’ is specified in s 9(3) of the final Constitution; see below s 14.15.

\(^6\) Larbi Odam & others v The Member of the Executive Council for Education & others 1997 (12) BCLR 1655 (CC) at para 19.
14.6 IC SECTION 8(3)(a)

'This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.'

The prohibition of unfair discrimination is not in itself sufficient for the achievement of equality. IC s 8(3)(a) explicitly acknowledges that the achievement of equality will require remedial measures which are geared to redressing both individual and group disadvantage created by a history of oppression and apartheid.¹

(a) Exception or interpretive guide?

An important question about IC s 8(3)(a) is whether it is a guide to the interpretation of IC s 8(1) and (2) or an exception to them.² If we understand these subsections to entail a commitment to substantive equality, then it seems that IC s 8(3)(a) simply makes explicit the fact that substantive equality permits treatment which is differentiated according to the needs of the recipient. As I have argued above, the Constitution is best understood as subscribing to a substantive conception of equality.³ Hence the legality of measures designed

¹ Compare s 15(2) of the Charter: ‘Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.’ See also art 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination (1969) 660 UNTS 195; art 4(1) of the International Convention on the Elimination of All Forms of Discrimination Against Women UNGA Res 34/180, GOAR 34th Sess, Supplement 46, p 193, 19 ILM 33; Anne F Bayefsky ‘The Principle of Equality or Non-Discrimination in International Law’ (1990) 11 Human Rights LJ 1 at 24–8.


³ See above, §§ 14.1 and 14.2; cf City Council of Pretoria v Walker 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at para 46: ‘Section 8 is premised on a recognition that the ideal of equality will not be achieved if the consequences of those inequalities and disparities caused by discriminatory laws and practices in the past are not recognized and dealt with.’

to undo inequality is implicit in the very notion of equal protection of the law.\(^1\) On this reading it was not strictly necessary to include IC s 8(3)(a), but it was included for the avoidance of doubt, as a cautionary measure.\(^2\) By stating in advance that measures designed to redress inequality are permissible the clause is designed to obviate litigation on the question of whether affirmative action is consonant with the promise in IC s 8(1) of equality before the law and equal protection of the law as well as the prohibition of unfair discrimination in IC s 8(2).

Understanding IC s 8(3)(a) as a guide to the interpretation of IC s 8(2) accords with the meaning attributed to the word ‘unfair’ in IC s 8(2).\(^3\) On this interpretation IC s 8(3)(a) lays down the conditions on which positive discrimination is not unfair under the interim Constitution. In many situations affirmative action policies will benefit some individuals and groups and affect others adversely. The wording of IC s 8(2) facilitates the argument that a person thus adversely affected (let us call him the relatively privileged person) experiences discrimination, but not unfair discrimination, provided that the policy meets the requirements of IC s 8(3)(a). In other words, it is not the case that a relatively privileged person who is harmed by affirmative action suffers unfair discrimination which is nevertheless permissible by virtue of IC s 8(3). Instead, IC s 8(2) is read together with IC s 8(3)(a) where affirmative measures are challenged under IC s 8(2). If the requirements of IC s 8(3)(a) are met, then the discrimination at issue is found not to be unfair because it is justified as a fair and rational means of achieving the object of full equality.

The type of justification for discrimination supplied by IC s 8(3)(a) falls within the realm of political morality. It is concerned with issues of fairness and rationality and not with prudential considerations. Say that a law is passed whereby former Department of Education and Training matriculants are given relatively more points for marks obtained in certain courses for the purposes of university entrance than are Joint Matriculation Board students. As a result of this policy, a young white man fails to get a place in the course of his choice. He claims to have been a victim of unfair discrimination under IC s 8(2). The state manages to show that the measure which has harmed the claimant is designed to achieve the adequate protection and advancement of those disadvantaged by unfair discrimination. The discrimination against the claimant will be found not to be unfair: it is justified as a matter of fairness.

\(^1\) See above, § 14.4(b).

\(^2\) But see Swart J’s comments on this argument in Public Servants’ Association of SA v Minister of Justice 1997 (5) BCLR 577 (T) at 629–30; see also Nicholas Smith ‘Affirmative Action under the New Constitution’ (1995) 2 SAJHR 84 at 89.

\(^3\) See above, § 14.5(a); and see President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) esp at paras 41, 43 and 112.

\(^4\) In Motala & another v University of Natal 1995 (3) BCLR 374 (D) a young woman who had obtained excellent high school marks was denied admission to the medical faculty of the University of Natal. The University had adopted an affirmative action programme according to which procedures for selecting students for admission took into account the extent of educational disadvantage to which students had been subjected. Accordingly, the selection criteria applied to African students were different from those applied to Indian students. The court accepted that the Indian community had been significantly disadvantaged by apartheid, but that the educational disadvantage suffered by African pupils had been decidedly worse. A selection system which compensated for the discrepancy between the two was held to fall within the terms of s 8(3)(a) and accordingly was found to be consistent with s 8(1) and (2).
and not simply as a matter of prudence. In other words, it is justified in relation to the purposes underlying the value of equality itself — it is not considered to be a diminution of equality which must be justified with reference to competing considerations.

It is submitted that IC's 8(3)(a) should be read as a guide to the interpretation of IC's 8(1) and (2) rather than an exception to them. This reading makes sense of the inclusion of IC's 8(3)(b), the restitution of land rights clause, immediately following IC's 8(3)(a). It is the interpretation of IC's 8(3)(a) which is the most coherent in principle with the values underpinning the commitment to equality of this Constitution.

(b) Designed to achieve

While IC's 8(3)(a) makes it clear that measures to redress and repair past discrimination are permissible, it also defines the lawful ambit of such measures. As Mureinik points out, however, the subsection is not unambiguous. The word ‘designed’ could be taken to mean ‘intended’, with the result that the appropriateness of the methods used would not be reviewable provided that they were intended to achieve equality for those disadvantaged by unfair discrimination. Mureinik argues, however, that the use of the word ‘designed’ as opposed to ‘aimed’ imports the requirement of a rational relationship between means and ends. In other words, it is not sufficient that the purpose of the measures in question is to redress past discrimination — the means selected to effect that purpose must be reasonably capable of doing so. The latter reading is preferable because it is more likely to ensure that affirmative action programmes are carefully constructed in ways which are best able to accomplish what they set out to achieve.

While it is not sufficient that the measure be intended to remedy existing inequalities, it is necessary that its purpose is to remedy inequality. It is important to note that IC's 8(3)(a) does not explicitly permit affirmative action policies designed to achieve workplace diversity or commercial objectives. Hence the objective of redressing disadvantage is a prerequisite to the validity of an affirmative action programme. This need not, however, be the exclusive goal of the programme. Provided that redressing inequality is the prime object of the programme, and that the programme is constructed so as to reach this goal, additional objectives, such as commercial effectiveness and diversity, are also permissible.

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1 Section 8(3)(b), considered further below, is also concerned with redressing inequality created by unfair discrimination.
2 See Lawrence, Negal and Solberg v The State 1997 (4) SA 1176 (CC), 1997 (10) BCLR 1348 (CC) at para 29 (Chaskalson P, commenting on the similarly constructed s 26).
3 Mureinik ‘A Bridge to Where? Introducing the Interim Bill of Rights’ (1994) 10 SAJHR 31 at 47–8; and see Public Servants’ Association of SA v Minister of Justice 1997 (5) BCLR 577 (T) at 639.
4 See the comments of Chaskalson P on Mureinik’s argument in Lawrence, Negal and Solberg v The State 1997 (4) SA 1176 (CC), 1997 (10) BCLR 1348 (CC) at para 38–44; and see para 46 where the Court alluded to s 8(3), but refrained from commenting on the proper interpretation to be given to that section. See the discussion of this point in the Eleventh Report of the Technical Committee on Fundamental Rights (11 November 1993).
(c) Adequate protection and advancement

The words ‘the adequate protection and advancement’ indicate that the end envisaged as well as the means employed is reviewable; that the measures adopted are not permitted to go beyond what is adequate. Naturally, what is considered to be adequate is open to interpretation.  

(d) Disadvantaged by unfair discrimination

The legitimate beneficiaries of affirmative action are those ‘disadvantaged by unfair discrimination’, that is those who are or have been disadvantaged by measures which impair their fundamental human dignity or adversely affect them in a comparably serious way.  

The possibility exists that the words ‘disadvantaged by unfair discrimination’ could be very restrictively interpreted. For example, they could be taken to mean that the beneficiaries of an affirmative action policy must themselves have been subject to discrimination on the part of the body whose affirmative action policy is under scrutiny. If this is the case, a body defending its affirmative action policy will have to show that it has in the past perpetrated unfair discrimination, whether direct or indirect, against the individuals or groups who are now the beneficiaries of the policy.  

Hence respondents needing to justify an affirmative action policy would be required to lead evidence of their own past ‘sins of discrimination’. Apart from being counterproductive, such an interpretation is inconsistent with the substantive conception of equality embraced by the Constitution. It is born of a perception that inequality is an aberration which results from isolated instances of discrimination. On this approach, if there is no evidence that some person or institution has ‘perpetrated’ discrimination, then there is no discrimination. This view, which critics have dubbed the ‘perpetrator perspective’ on discrimination, is fundamentally at odds with the conception of equality espoused by the Constitution. There is no room in the perpetrator perspective for the acknowledgement that discrimination may be unintentional, indirect or systemic. The interim Constitution, however, appreciates the systemic and self-perpetuating nature of discrimination and the need to redress such discrimination through positive measures.

It must therefore be adequate to show that the beneficiaries of the policy have been disadvantaged by general societal discrimination, whether direct or indirect.  

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1 See Public Servants’ Association of SA v Minister of Justice 1997 (5) BCLR 577 (T) at 631H–J and 641A–C.  
2 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 31 and 33; cf above, § 14.5(a).  
3 See, for example, the opinions of Powell J, Burger CJ and Rehnquist J in Wygant v Jackson Board of Education 476 US 267, 106 SCt 1842 (1986).  
'disadvantaged by unfair discrimination' make it clear that there is no need to prove present unfair discrimination against the beneficiaries of the policy. Past unfair discrimination, the effects of which are felt in the present, is sufficient.\(^1\) Even this requirement should not be construed unduly narrowly. ‘Measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination’ are not merely compensatory in their object. Hence it is not necessary that each individual benefited by such measures is shown to have been disadvantaged by unfair discrimination and therefore entitled to compensation. Indeed, the words ‘persons or groups or categories of persons’ indicate that the measures may be designed to protect and advance groups as well as individuals. The goal of these measures is to give their beneficiaries access to ‘full and equal enjoyment of all rights and freedoms’. The subsection, then, is forward-looking and not simply backward-looking. In this it is consistent with the rationale underlying affirmative action, as identified by the Canadian Supreme Court in *Action Travail des Femmes v Canadian National Railway Company*:\(^2\)

‘An employment equity programme . . . is designed to break a continuing cycle of systemic discrimination. The goal is not to compensate past victims or even to provide new opportunities for specific individuals who have been unfairly refused jobs or promotion in the past, although some such individuals may be beneficiaries of an employment equity scheme. Rather, an employment equity programme is an attempt to ensure that future applicants and workers from the affected group will not face the same insidious barriers that blocked their forebears.’

As noted above, while IC s 8(3)(a) makes it clear that affirmative action is permissible under s 8, it also lays down the limits of such measures.\(^3\) These limitations on the scope of affirmative action policies should be interpreted in a way which is sensitive to the social, economic and political context of disadvantage,\(^4\) and is true to the constitutional commitment to substantive equality.

14.7 IC SECTION 8(3)(b)

‘Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with section 121, 122 and 123.’

IC s 8(3)(b) gives effect to the constitutional commitment, articulated in the Preamble and the Postscript, to redress the injustices of the past. The right to restitution created by the section is discussed elsewhere in this volume.\(^5\)

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1 In *Motala & another v University of Natal* 1995 (3) BCLR 374 (D) at 383C–E the court took into account the different degrees of educational disadvantage suffered by Indians and Africans under apartheid.

2 [1987] 1 SCR 1114, 40 DLR (4th) 193 at 213. At 213–14 the court usefully sums up the three ways in which employment equity programmes are designed to work. For an overview of the approach taken to affirmative action in a number of countries, including Australia, India, Malaysia and Namibia, see *South African Law Commission Project 58 on Group and Human Rights* (1991) at 287–304.

3 Cf Eleventh Report of the Technical Committee on Fundamental Rights (11 November 1993).


5 See below, Eisenberg ‘Land’ § 40.2.
14.8 IC Section 8(4)

‘Prima facie’ proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.’

This clause establishes a rebuttable presumption that discrimination on any of the grounds listed in IC s 8(2) constitutes unfair discrimination.\(^1\)

The primary function of IC s 8(4) is to make it clear that the respondent is required to justify any form of discrimination on any of the listed grounds.\(^2\) It is notoriously difficult for claimants to establish both that there is \textit{prima facie} discrimination and that the discrimination is unjustified. By casting the burden of justification on the respondent the subsection makes it easier for claimants to establish unfair discrimination — provided that the discrimination impugned is on the basis of a listed ground.\(^3\)

IC s 8(4) refers only to the grounds specified in IC s 8(2). The IC s 8(4) presumption operates only to facilitate proof of unfair discrimination on the grounds which are actually named in IC s 8(2). While IC s 8(2) leaves space for claims of unfair discrimination on other grounds, a claimant relying on an unlisted classification gets no help from IC s 8(4). S/he is therefore required to prove that s/he is adversely affected by the particular distinction and that the distinction is unfair.\(^4\)

14.9 IC Section 8 and the Limitation Clause

(a) Relationship between IC s 8 and IC s 33(1)

The respondent may be able to show, under IC s 8(1), that there has been no denial of equality because the distinction under review is not irrational or arbitrary. It may be able to show, under IC s 8(2), that the impugned discrimination is not unfair. If the respondent is unable to make either showing, and a \textit{prima facie} infringement is found, the respondent has a second chance to save the measure in question under IC s 33(1).\(^5\) In order to do so the respondent must prove that although the distinction is apparently arbitrary or irrational, or, although the discrimination is unfair, it is reasonable and justifiable in an open and democratic society based on freedom and equality and does not negate the essential content of the right to equality. The paradox inherent in the notion of justifying irrationality or unfairness is apparent. It is difficult to think of situations in which an arbitrary distinction or an example

\[\text{[continued on page 14--43]}\]

\(^1\) Cf Sixth Report of the Technical Committee on Fundamental Rights (15 July 1993).
\(^2\) See, for example, \textit{Matshane v Laerskool Potgietersrus} 1996 (3) SA 223 (T) at 232–3 and 235B–C.
\(^3\) See below, § 14.9 for a discussion of questions of justification arising under the limitation clause.
\(^4\) See \textit{Prinsloo v Van der Linde} 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 28.
\(^5\) \textit{Harksen v Lane NO & others} 1998 (1) SA 300 (CC) at para 54, 1997 (11) BCLR 1489 (CC) at para 53. It is also clear from the majority, concurring and dissenting decisions in \textit{President of the Republic of South Africa v Hugo} 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) that the court accepts that measures which fall foul of s 8 may be saved by s 33(1). See esp para 112 (O’Regan J, concurring), paras 94–106 (Mokgoro J, concurring in the order, but not the reasoning of the majority), paras 77–8 (Kriegler J, dissenting).
of unfair discrimination will be held to be justifiable in a democratic society based on freedom and equality.\(^1\) This suggests that measures which fall foul of IC’s 8 will rarely be saved under IC’s 33(1).

At this point we revisit the question of the division of justification between IC’s 8 and IC’s 33(1). One way to understand the two levels of justification is to say that each level is occupied by different kinds of justification. The first stage, under IC’s 8(1), is concerned with deciding whether the conduct in question denies equality before the law or equal protection of the law. Where IC’s 8(2) is at issue the first stage considers whether the conduct under review is a form of unfair discrimination. The inquiry here is geared to identifying discrimination which is arbitrary or unfair because it finds no justification in the political morality underpinning the right to equality itself. It is concerned with the substance and content of equality of treatment or the freedom from discrimination.

The inquiry under IC’s 33 considers whether incursions into treatment as an equal or freedom from discrimination are permissible because they serve a legitimate social purpose in a way which is proportionate to the end which they seek to achieve.\(^2\) So, for example, a measure which limits the availability of redundancy payments to those who have worked full time for a minimum of two years may be found to constitute unfair indirect discrimination against women under IC’s 8(2). The measure is discriminatory if it operates as a barrier against many more women than men. It is unfair if it cannot be justified in terms of the particular values underlying IC’s 8. It may nevertheless be justifiable under IC’s 33(1) as a permissible departure from the principle of equality — the state may demonstrate, for example, that the system of redundancy pay is dependent on some sort of threshold, and that this particular threshold impinges as little as possible on the principle of non-discrimination.\(^3\)

At the centre of the notion of ‘unfair’ discrimination in IC’s 8(2) is the holder of the right, the position of that person in society, and the kind of harm suffered by that rights claimant. In contrast, the limitation on rights imposed by IC’s 33(1) is focused on the purposes, actions and reasons of government, and not on the rights holder. The shift in perspective is critical.\(^4\)

IC’s 8 and 33(1) involve different kinds of justification of the impugned distinction. The justification inquiry internal to IC’s 8 assesses questions of fairness and rationality in relation to the values underlying the right to equality itself. The justification inquiry under IC’s 33(1) focuses on the issue of balancing the right to equality against other rights and against other aspects of public policy,\(^5\) such as the distribution of limited resources.

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1. See *S v Ntuli* 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC) at para 25, where Didcott J found that the infringement of the right to equality (and the right to a fair trial) by s 309(a) of the Criminal Procedure Act 51 of 1977 was unreasonable and unjustifiable in a society based on equality. See above, § 14.4(d).
2. See *S v Ntuli* 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC) at paras 21–5; *Brink v Kitshoff* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at paras 46–50.
3. Cf *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC) at para 77 (Kriegler J).
4. Cf *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), para 77 (Kriegler J).
5. Cf *S v Ntuli* 1996 (1) SA 1207 (CC), 1996 (1) BCLR 141 (CC) at paras 21–5; *Brink v Kitshoff* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at paras 46–50.
The difficulty posed by this question is demonstrated, although not fully explored, in President of the Republic of South Africa v Hugo. The majority judgment did not need to express a view on what sorts of factors are to be considered under the inquiry under IC s 33(1) as opposed to the unfairness inquiry in IC s 8(2). Having found that the discrimination effected by the Presidential Act was not unfair, it had no need to consider IC s 33(1). As considered above, the majority judgment and the separate concurring judgment of O’Regan J indicate that the factors to be considered in assessing whether the discrimination in question is unfair are: the group which is disadvantaged by the measure, the nature of the power in terms of which the discrimination is effected and the nature of the interests affected by the discrimination, and the severity of the effect of the discrimination upon such interests.

O’Regan J pointed out that the reasons given by the agency responsible for the discrimination will be of only indirect relevance in evaluating the unfairness of the discrimination, but could be central to an investigation as to whether the unfair discrimination is nevertheless justified under IC s 33(1).

It is unfortunate that the majority did not say more about the type of factors which would feature in the IC s 33(1) analysis as opposed to the IC s 8 inquiry. It is respectfully submitted that the court has accurately identified the factors to be analysed in the unfairness inquiry. In applying the analysis to the facts of the case, however, the court arguably went beyond the factors which it had itself identified and took into account factors which belong more properly to the IC s 33(1) inquiry. The majority referred, for example, to the fact that, because male prisoners outnumber female prisoners almost fifty-fold, the release of fathers on the same basis as mothers would have been politically impossible.

Kriegler J found that the distinction drawn by the Presidential Act between mothers and fathers of children under 12 infringed IC s 8(2). Kriegler J’s reasons for his conclusion that the discrimination in question was unfair are carefully developed and set out in his dissenting judgment. Unfortunately, no similar explanation is provided for his finding that the infringement of IC s 8(2) was not justifiable in terms of IC s 33(1).

Like Kriegler J, Mokgoro J considered the discrimination effected by the measure to be unfair. She, however, concluded that the measure was justified under IC s 33(1) by factors such as the political impossibility of releasing fathers on the same basis as mothers, the administrative inconvenience of assessing individually whether each imprisoned parent of children under 12 was the primary child care-giver, and the fact that although fathers of children under 12 did not benefit as a group, they were still entitled to apply for remission on an individual basis.

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1 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC).
2 At para 50.
3 See section 14.5(a) above.
4 At para 43 (Goldstone J) and para 112 (O’Regan J).
5 At para 112.
6 At para 46.
7 At paras 77–8. See also City Council of Pretoria v Walker 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) at para 34, which also confuses the criteria relevant to the fairness enquiry under IC s 8(2) and those which properly belong to the justification enquiry under IC s 33(1).
8 At para 94.
9 At para 106.

14–44 [REVISION SERVICE 3, 1998]
Equality falls into the lowest order of protection supplied by IC s 33 (1). This seems odd in the light of the fact that equality is a value foundational to the entire Constitution. It is of course arguable that the very fact that equality is placed in the lowest order of protection under IC s 33(1) tends to show that it is not in fact as fundamental as I have argued. A more likely explanation is that in the limitations clause, as in the equality clause itself, the drafters were unclear about the meaning of equality. On the one hand, they embraced a substantive conception of equality which encompasses measures to redress existing inequality within the definition of equality. On the other hand, they were fearful of judicial perceptions that affirmative action legislation trenches upon the right to equality. Looking over their shoulders to American decisions limiting affirmative action programmes by strict scrutiny analysis, the drafters relegated the whole of IC s 8 to the lowest level of judicial scrutiny under IC s 33. In South Africa, however, space for affirmative action is explicitly preserved by IC s 8(3). The omission of the equality clause from the highest level of protection in the limitations clause is a hangover from a preoccupation with the American jurisprudence.

The right to equality is not even entrenched to the extent that it ‘relates to free and fair political activity’. Yet it is of the essence of free and fair political activity that each political actor should be counted as one. Surely any possible abridgement of the right to be counted as one should be subject to the very highest level of judicial protection? This lacuna in the interim Constitution ought to be remedied in the final Constitution.

(b) The function of IC s 33(4)

Section 33(4) provides:

‘This Chapter shall not preclude measures designed to prohibit unfair discrimination by bodies and persons other than those bound in terms of section 7(1).’

This provision is concerned with legislation prohibiting discrimination by bodies and persons other than ‘all legislative and executive organs of state at all levels of government’; in other words, legislation which extends the reach of IC s 8 to those who are not directly bound by Chapter 3. The provision affords a measure of protection to legislation prohibiting discrimination by private persons and institutions from attacks launched from the territories of other rights enshrined in Chapter 3. For example, legislation prohibiting racially exclusive sports clubs could be challenged as an invasion of freedom of association. Legislation banning certain forms of racist speech or regulating pornography could be impugned as infringing freedom of expression. Employment equity legislation could be challenged as an incursion on the right freely to engage in economic activity.

Section 33(4) does not pre-empt such challenges altogether, but it shows that to the extent that aspects of the other rights are inimical to equality the state is entitled to regulate the exercise of those rights. There are several ways in which IC s 33(4) might operate.


2 See above, Woolman ‘Application’ ch 10.
(i) **A complete alternative to IC s 33(1)**

Section 33(4) could function as an alternative limitation to IC 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 IC 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 IC 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 IC s 8(3).¹

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

It could conceivably be argued that IC s 33(4) simply supplements rather than replaces IC 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 IC s 33(1). Conversely, anti-discrimination legislation which fell short of IC 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 IC s 33(1). On this reading IC s 33(4) supplements rather than replaces IC s 33(1) where anti-discrimination legislation is under review.

The reading which says that anti-discrimination legislation must meet the requirements of both IC s 33(4) and IC 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 IC 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 IC s 33(4) could still be saved under IC 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 IC 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 IC s 33(1).

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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 IC 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 IC 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. 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 IC 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 IC s 8(2)? The Constitutional Court has made it clear that the prohibition of unfair discrimination extends to grounds other than those listed in IC s 8(2) but without the presumption of unfairness which IC s 8(4) attaches to the listed grounds. In the analysis of IC 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. 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.

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

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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), 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.
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. 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'.

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 IC s 8(2), but will only find it in a limited range of circumstances.

Under IC s 8(1) 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. 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.

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. As we have seen, discrimination is a necessary element of any claim under s 15(1) and the Supreme Court has adopted an interpretation of

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1 Prinsloo v Van der Linde 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC) at para 33.
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); Ketch 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).
discrimination which is inimical to corporate claimants. 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 IC’s 8 equality rights. This means that even if IC’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 IC’s 8(1). The Constitutional Court has acknowledged the importance of classification and differentiation in governing the affairs of the nation. ‘Mere differentiation’ of this sort infringes IC’s 8(1) if it is irrational, arbitrary or partial, devoid of a legitimate governmental purpose. 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 of 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.’

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 Zutphen Brothers [1990] 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 (E) 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 . . ..

In the case before it the court was satisfied that the Crown was acting ‘clearly and exclusively in its governmental capacity’.

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 IC 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.

It has been argued above that equality of arms in litigation is an aspect of equality before the law. 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. 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.

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. The court rejected the argument that the time limit was reasonable and justifiable in the light of the administrative difficulties

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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 Spoorbund & 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 relations 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.
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 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. 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. 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.

(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. 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 IC s 8 of the Constitution’. Hence mere disparities between the laws of different regions resulting from the provisions of s 229 do not, without more, infringe the IC s 8 requirement of equal protection of the law.

(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. Clearly the scheme of government contemplated by the Constitution is one where, within certain designated spheres, laws can differ from province to province. Hence it cannot be

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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 IC s 8. 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. Such differentiation is not per se reviewable. On general principles it will infringe IC s 8 only if it is arbitrary, irrational or unfair, and cannot be justified under IC 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.

In Matukane v Laerskool Potgietersrus black children were, over a period of time, refused admission to the primary school. Despite the respondents’ denials the court found that the applicants had established a prima facie case of racial discrimination. By virtue of the presumption of unfairness in IC 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 IC s 17, s 31 and s 32(c). 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 Mthembu 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. The respondent, the

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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, 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.

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. The claims derived from their Muslim union, which, being potentially polygamous, was regarded as against

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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. 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.

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* the court agreed wholeheartedly with Farlam J’s conclusion in *Ryland v Edros* that the *ratio* in the *Ismail* 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. 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.

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. 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’s 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.

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), just as it is a core value of the interim Constitution (IC). 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’.

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. Like the interim Constitution, the final Constitution embraces and promotes a substantive conception of equality.

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. 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.

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.
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.

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\(^1\) 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 Act⁶ ("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.

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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.
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’.\(^6\)

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\(^1\) 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 Postpar 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.

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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 Act¹ 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 Justice³ 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*. 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. The court then applied the *Harksen* analysis as follows:

1. 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.
2. 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.
3. The discrimination has, for the reasons already mentioned, gravely affected the rights and interests of gay men and deeply impaired their fundamental dignity.

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*. 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).

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

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.

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.

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. 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. 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. 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.

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.

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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.
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).
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 Act³ and the inclusion of the common-law offence of sodomy in Schedule 1 of the Security Officers Act⁴ 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 Act⁶ 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.
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 1831–184G, 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

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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 with 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 Municipality5 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 Mines9 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

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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–I 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.

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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. 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. 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’. With regard to these considerations, the court concluded that the state was not bound by s 7 of the Act.

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. 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.

See further above, § 14.10(e).

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