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# EQUALITY PROVISIONS OF THE SOUTH AFRICAN CONSTITUTION

*Pius Nkonzo Langa\**

**A**LL South African Constitutions prior to 1994 were premised on inequality and a commitment to white supremacy. It is therefore not surprising that equality has occupied a very special place in the South African Constitution since democracy was achieved.<sup>1</sup> The decisive break from the past brought with it the explicit commitment to equality.

The achievement of equality is identified as one of the founding provisions of the Constitution,<sup>2</sup> and the preamble to the Constitution acknowledges that the Constitution must, among other things, “[l]ay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law.”<sup>3</sup>

Equality is the first substantive right listed in Chapter 2 of the Constitution. What is protected is the right to equality before the law, and the provision contains a guarantee of equal protection and benefit through the law.<sup>4</sup>

With regard to the limitation of rights, the limiting provision must be “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom . . . .”<sup>5</sup>

The Bills of Rights of most nations recognize the right to equality, as do international human rights instruments.<sup>6</sup> One of the oldest of such

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1. See *Brink v. Kitshoff*, 1996 (6) BCLR 752 (SA).

2. S. AFR. CONST. ch. 1, § 1(a).

3. *Id.* pmbl.

4. *Id.* ch. 2, § 9(1).

5. *Id.* § ch.2, 36(1).

6. Article 7 of the Universal Declaration of Human Rights states: “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.” *Universal Declaration of Human Rights*, G.A. Res. 217A(III), GAOR, 3d Sess., U.N. Doc. A/810 (1948). See also *INTERNA-*

provisions is the Fourteenth Amendment of the Constitution of the United States, which provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."<sup>7</sup> This provision is widely perceived to be a precursor to equality provisions in many modern constitutions. Similarly, the extensive jurisprudence of the United States Supreme Court has influenced much of the jurisprudence on equality in other jurisdictions. A central principle has been the imposition of different levels of scrutiny on different levels of legislative classifications.

The Constitution of India also protects equality and seeks to outlaw discrimination.<sup>8</sup>

In the Canadian case of *Andrews v. Law Society of British Columbia*, it was stated that "the essential meaning of the constitutional requirement of equal protection and equal benefit is that persons who are 'similarly situated be similarly treated' and conversely, that persons who are 'differently situated be differently treated' . . . ."<sup>9</sup>

In *Dennis v. United States*, Justice Frankfurter recast the equality right in the following terms: "It was a wise man who said that there is no greater inequality than the equal treatment of unequals."<sup>10</sup>

Seen in this context, affirmative action is not an exception to the equality provision, but rather an indispensable and necessary ingredient for the effective realization of equality. It is important to note, however, that in the absence of compelling reasons justifying the distinction, laws which uniformly treat black people differently from white people on the basis of race would be a violation of the equality provision. It would be necessary to examine such a law and to give consideration to its content, "its purpose, and its impact upon those to whom it applies, and also upon those whom it excludes from its application."<sup>11</sup> The objective is to develop 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."<sup>12</sup>

The equality provision has both a procedural and a substantive dimension. Both the substance of the law and its administration must be even-handed. In the light of the deliberate policies of past governments of unequal allocation of resources, the equality provisions offer a potent positive right that can be utilized to ensure speedy governmental action to equalize the imbalances of the past.

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TIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16), art. 26 (1966).

7. U.S. CONST. amend. XIV, § 1.

8. INDIA CONST. art. 14 and 15(1).

9. [1989] 56 D.L.R. (4th) 1, 26 (dissenting opinion) (quoting with disapproval from Court of Appeal opinion).

10. 339 U.S. 162, 184 (1950) (Frankfurter, J., dissenting).

11. *Andrews*, 56 D.L.R. (4th) at 31.

12. *Id.* at 36.

## I. SECTION 9

### A. INTRODUCTION

Section 9(1) guarantees the right to be treated equally by the law, to be afforded equal protection of the law, and to equally enjoy the benefits of the law. Equality does not mean that the government can not make classifications. Persons are classified and treated differently for a variety of different reasons: people are taxed at different scales; convicted persons are sent to jail; dentists are regulated differently than engineers; producers of food are regulated differently to the manufacturers of washing machines. Thus while the government may legitimately make classifications, it may only classify people into different groups and afford different treatment to the different groups if the criteria upon which the classifications are based are permissible. Whether a classification is permissible would depend on the purpose of such classification and whether there is a sufficient link between the criteria used to make the classification and the government objectives. H.M. Seervai analyzed Indian cases and advanced the proposition as follows:

Permissible classification must satisfy two conditions, namely, (1) it must be founded on an intelligible differentia which distinguishes persons and things that are grouped together from others left out in the group, and (2) the differentia must have a rational relation to the object sought to be achieved by the statute in question.<sup>13</sup>

### B. COMPARE THE UNITED STATES POSITION

The United States Supreme Court has evolved levels of scrutiny, and the intensity of the scrutiny is dependent upon the nature of the classification.

### C. THE LOCAL CONTEXT

The equality provision of the South African Constitution in its structure and content bears a resemblance to a similar Canadian provision.<sup>14</sup>

Section 9(2) provides that the right to equality includes the right to full and equal enjoyment of all rights and freedoms. It permits legislative and other measures designed to advance persons previously disadvantaged by race discrimination.<sup>15</sup>

Section 9(3) prohibits unfair discrimination, directly or indirectly, on certain specified or enumerated grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and

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13. H.M. SEERVAI, *CONSTITUTIONAL LAW OF INDIA* (3d ed. 1983).

14. Section 15(1) of the Canadian Charter of Freedoms and Rights provides: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law. . . ." Canadian Charter Sec. 15(1) (271).

15. S. AFR. COSNT. Ch. 2, sec. 9(2).

birth.<sup>16</sup>

Section 9(4) prohibits individuals and juristic persons from unfairly discriminating directly or indirectly on any of the grounds listed in Section 9(3). National legislation must be enacted to give effect to the right. Unfair discrimination is presumed if it is proved that the person has been discriminated against directly or indirectly on any one of the grounds listed in Section 9(3).<sup>17</sup>

Unlike the position in the interim Constitution, Section 9 of the final Constitution makes the equality right horizontally applicable.

#### D. COMPONENTS OF SECTION 9

##### 1. *Equality Before the Law*

The concept is described as formal equality and is fundamental to the rule of law. The principle is that all persons must be treated in the same manner by the same law.<sup>18</sup> Compare *S v. Ntuli*<sup>19</sup> where the provisions of the Criminal Procedure Act differentiated between appellants in prison who were not legally represented and other appellants who were. The former had to obtain a certificate from a judge certifying that there are reasonable grounds for the review before the appeal can be heard. The Constitutional Court held that two rights were infringed, namely: (a) the right to have recourse to an appeal or review to a higher court, and (b) the right equally to have recourse before the law.<sup>20</sup> The guarantee of equality was violated by the fact that the provision imposed greater burdens upon unrepresented prisoners in pursuing their appeals.<sup>21</sup>

##### 2. *The Right to be Equally Protected by Law and the Right to Equally Enjoy the Benefits of the Law*

Laws which benefit people and those that prohibit or regulate activities must be equal in their application. Here the court is required to make an evaluation of the substance and content of the law and determine whether legislative choices were correctly made.

##### 3. *The Right to the Full and Equal Enjoyment of All Rights and Freedoms*

Apartheid laws entrenched and perpetuated a system that favoured a section of the population and discriminated against the other section. This left a legacy of inequality which inhibited many people in the enjoyment and exercise of their constitutional rights. The right imposes a positive obligation on the government to act so as to ensure that everyone

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16. *Id.* at ch.2, sec. 9(3).

17. *Id.* at ch. 2, sec. 9(3).

18. DAVIS, EQUALITY AND EQUAL PROTECTION: RIGHTS AND CONSTITUTIONALISM 200 (1994).

19. 1996 (1) BCLR 141 (CC).

20. *Id.*

21. *See id.*

fully and equally enjoys all rights and freedoms.<sup>22</sup>

#### 4. *Affirmative Action*

The Constitution clearly envisages that affirmative action be seen as essential and integral to the achievement of equality. Viewed in that light, it is not a limitation or an exception to the right to equality. Such measures however must: (a) promote the achievement of substantive equality, and (b) be designed to protect and advance persons disadvantaged by unfair discrimination.<sup>23</sup>

#### 5. *Unfair Discrimination*

The approach is to be found in the clear exposition of the Court in a number of cases. The leading cases are *Harksen*,<sup>24</sup> *Hugo*,<sup>25</sup> and *Walker*<sup>26</sup> which the relevant headnotes are attached. See in particular the stages set out in *Harksen*.

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22. Cf. *San Antonio Ind. School District v. Rodriguez*, 411 U.S. 1 (1973).

23. E. Mureinik, *A Bridge to Where: Introducing the Interim Bill of Rights 1994* (10) SAJHR 31; see also *Motala v. Univ. of Natal*, 1995 (3) BCLR 374 (D); C. Sheppard, *Litigating the Relationship Between Equity and Equality*, ONTARIO LAW REFORM COMMISSION 19-20 (1993); Smith, *Affirmative Action Under the New Constitution*, 1995 (2) SAJHR 84, 86. Smith points out that the decisions in the United States whether affirmative action programs are permissible have been ambivalent. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); see also *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 US 193 (1979).

24. *Harksen v. Lane* NO, 1997 (11) BCLR 1489 (CC).

25. *President of the Republic of S. Afr. v. Hugo*, 1997 (6) BCLR 708 (CC).

26. *City Council of Pretoria v. Walker*, 1998 (3) BCLR 257 (CC).



# **Comments**



