

CHAPTER 8: EQUALITY

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1. INTRODUCTION

*'There is a language particular to the modern state, including its colonial version. That is the language of law. Legal distinctions are different from all other in that they are enforced by the state, and then are in turn reproduced by institutions that structure citizen participation within the state'*¹

Mahmood Mamdani (Citizens & Subject)

Inequality in South Africa during the colonial and apartheid era rested on socially constructed identities. Arbitrary as one's skin pigmentation or gender may be, benign characteristics such as race, gender, ethnicity, or sexual orientation, remain relevant because they are social identifiers of relationships which are historically predicated on relationships of inequality.²

The law is an instrument that regulates human behaviour because it influences and structures the way we interact with the world and others in it. In South Africa, this regulatory and social function of the law was abused by both the apartheid and colonial state to construct and label identities to entrench systemic inequality and discrimination along racial lines.³ Indeed, the law itself was (ab)used to create a status of non-citizenship for all but 17% of the nation's inhabitants. Choices concerning one's vocation, who one married, where one lived, went to school or whether one could acquire property and begin a family – depended on the whims of the apartheid government's objectives. The persisting socio-economic inequality experienced today is undoubtedly a direct consequence of racially discriminatory legislation and the active role played by the law in enforcing arbitrary distinctions and

¹ Mahmood Mamdani *Citizens and Subject*, (1996) Princeton Press.

² Anye Nyamjoh 'The Phenomenology of Rhodes Must Fall: Student Activism and the Experience of Alienation at the University of Cape Town', 39(1) (2017) *Strategic Review for Southern Africa*.

³ See Sampie Terreblanche *A History of Inequality in South Africa: 1652-2002* (2003) and *Brink v Kitshoff* NO 1996 (4) SA 197; 1996 (6) BCLR 752 (CC) para 40-1.

discrimination based on socially constructed identities. The Constitution⁴ recognises that for constitutional democracy to work properly, ongoing patterns of inequality need to be addressed. This is why the Constitution recognises that equality is an indispensable component of transformative constitutionalism – one which seeks to break down these historical barriers to ensure that equality permeates all social interactions.⁵ Equality is also connected to dignity which is set out in section 1(a) of the Constitution as a foundational constitutional value that influences the interpretation of all constitutional rights.⁶ Section 9 of the Bill of Rights, which protects the right to equality, reads as follows:

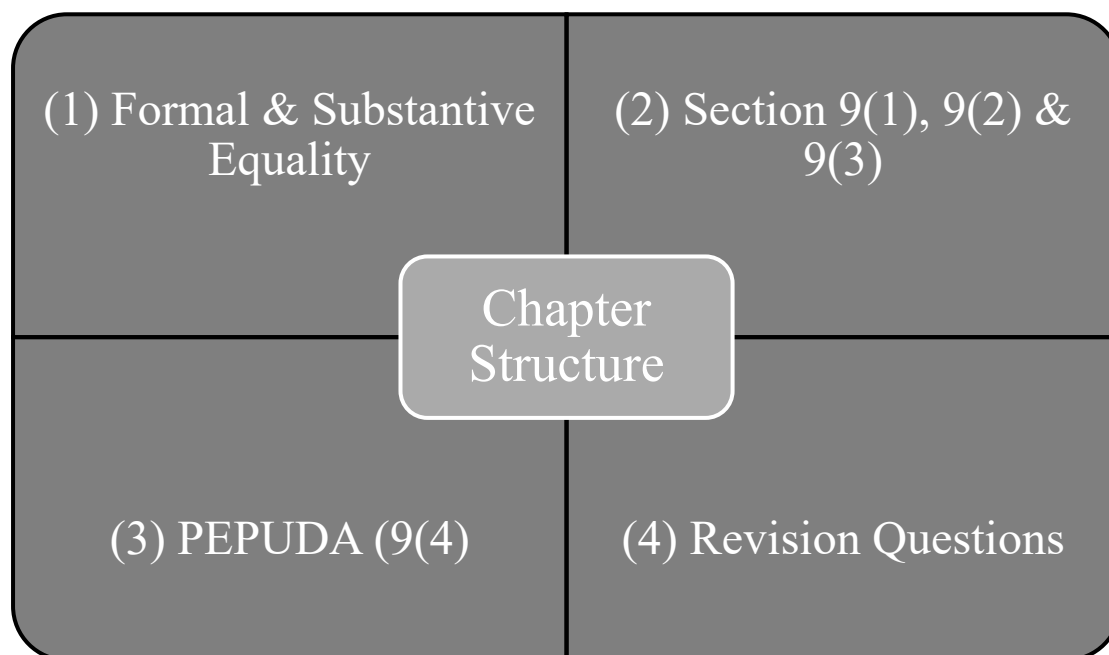
- 1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- 2) Equality includes full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- 3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- 4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- 5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair

⁴ Constitution of the Republic of South Africa, 1996 ('the Constitution')

⁵ See Pius Langa 'Transformative Constitutionalism' (2006) 17 *Stell LR* 351 and *Minister of Home Affairs v Fourie* [2005] ZACC 19; 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC) para 60.

⁶ See James Fowkes 'Founding Provisions' in Michael Bishop & Stuart Woolman (eds) *Constitutional Law of South Africa 2 ed* (2013) (Revision Service 5) 13:1 and *S v Makwanyane* 1995 (6) BCLR 665; 1995 (3) SA 391 (CC) para 144 which explains how inherent human dignity affects the interpretation of all constitutional rights. Also see *UDM v President RSA* 2003 (1) SA 495; 2002 (11) BCLR 1179 (CC) para 18-9.

The Constitution demands the achievement of equality by protecting it as a justiciable constitutional right and foundational value which underpins the nation's constitutional democracy. However, the more pressing question is, what does the constitutional right to equality entail and how should society go about realising it? This question is unpacked in this chapter which explains what the constitutional right to equality means and how the courts have interpreted it in practice. First, it begins by discussing different jurisprudential and philosophical conceptions of what the right to equality means and should mean. Secondly, it discusses the structure of section 9 of the Constitution, hereinafter referred to as the 'equality clause'. Finally, it discusses the Promotion of Equality and Prevention of Unfair Discrimination Act ('PEPUDA')⁷ and how it relates to the equality clause in practice.



⁷ Act 4 of 2000.

2. TWO DIFFERENT CONCEPTS OF EQUALITY AND THE VALUES WHICH INFORM ITS INTERPRETATION

Equality is not easy to define.⁸ It is therefore unsurprising that it can mean different things to different people. To properly understand how the courts have interpreted the right to equality, it is first necessary to discuss two conceptions of equality: (a) 'formal equality' and (b) 'substantive equality'.⁹ Both variants, and their implications, are discussed below.

(a) Formal Equality

The essence of formal equality is that 'people who are similarly situated in relevant ways should be treated similarly'.¹⁰ Formal equality is often traced back to the Greek philosopher Aristotle, who in the *Nicomachean Ethics*, defined formal equality as follows: 'When two persons have equal status in at least one normatively relevant aspect, they must be treated equally in this respect'.¹¹

Formal equality therefore requires that similarly situated people are treated the same¹² on the basis that people are equal to the extent the law treats similarly situated people the same way and does not make arbitrary distinctions between them.¹³ Differences in treatment between people are therefore viewed as violations of the right to equality, such as different treatment according to a redress or

⁸ See Iain Currie & Johan de Waal *The Bill of Rights Handbook* 6 ed (2013) 210-11.

⁹ See A Sen *Inequality Re-examined* (1992) 23-26 and Catherine Albertyn & Beth Goldblatt 'Equality' in Michael Bishop & Stuart Woolman (eds) *Constitutional Law of South Africa* 2 ed 2013 (Revision Service 5) 35:3-35:8.

¹⁰ Currie & de Waal op cit note 8 at 210 explain further that a 'logical correlative [of formal equality] is the idea that people who are not similarly situated should be treated dissimilarly'

¹¹ Albertyn and Goldblatt op cit note 9 at 35:12.

¹² Currie & de Waal op cit note 8.

¹³ Ibid

affirmative action programmes.¹⁴ This means formal equality, for the most part, simply requires that the law act neutrally between different groups.¹⁵ This has resulted in some authors arguing that ‘formal equality’ is therefore nothing more than an extension of the rule of law.¹⁶ This is because, so the argument goes, any law that treats similarly situated people differently would be irrational, and therefore unlawful, because it would violate the rule that all public power must be rationally exercised for a proper and legitimate purpose.¹⁷ However, formal equality does not – and does not purport to – explain *how* we should determine when two people/groups are equal in a ‘normative respect’ or how we should determine when, if ever, it would morally or legally permissible to distinguish between them’.

This shortfall of formal equality can be illustrated by the following example. The Minister of Sports introduces new regulations and to regulate chess and rugby in South Africa. One regulation states that, ‘all registered rugby union players must undergo concussion testing twice a year to be eligible for Olympic selection’ (you can assume rugby and chess will represent South Africa at the Olympics). Notice that this rule does not require chess players to undergo compulsory concussion testing twice a year to be eligible for Olympic selection. There are two ways someone who subscribes to formal equality could respond to this scenario: (a) that the rule violates the right to equality because it treats rugby players and chess players differently or (b) that the rule does not violate the right to equality because rugby and chess players are not similarly situated. However, regardless of the position the subscriber

¹⁴ See Albertyn & Goldblatt op cit note 9 at 35:7 who explain ‘. . . formal equality cannot tolerate differences: affirmative action measures are seen as forms of discrimination, rather than as efforts to further a commitment to equality’. Also see *Minister of Finance v van Heerden* 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) para 30. The *Van Heerden* case is discussed in more detail below where section 9(2) of the Constitution is discussed.

¹⁵ See Pierre de Vos ‘Equality, Human Dignity and Privacy Rights’ in Pierre de Vos & Warren *Freedman* (eds) *South African Constitutional Law in Context* (2014) 420-2.

¹⁶ See Cathi Albertyn ‘Equality’ MH Cheadle, DM Davis & NRL Haysom *South African Constitutional Law: The Bill of Rights* (2018) 4:20-4:21 and Currie & de Waal op cit note 8 at 222.

¹⁷ See *Pharmaceutical Manufacturers Association of SA: in re ex parte President RSA* 2000 (2) SA 674; 2000 (3) BCLR 241 (CC) para 85 and *President RSA v SARFU* 2000 (1) SA 1; 1999 (10) BCLR 1059 (CC) para 148.

to formal equality may take, they would find it difficult to rely solely on the doctrine of formal equality to tell us *why* rugby and chess players are similarly situated or not. This is because formal equality cannot speak to whether the criterion applied is itself objectionable. It therefore tells us little when trying to assess whether the rule is formally equal or formally unequal. In other words, it does not tell us how it was determined that two situations/circumstances share normatively relevant attributes. Formal equality therefore cannot tell us why it is objectionable to treat people differently based on their gender, class or skin colour. For instance: it cannot tell us why it is *always* morally and legally impermissible to treat people belonging to different races or genders differently, when different treatment is undertaken to promote socially legitimate ends or how this determination should be made.¹⁸

History demonstrates that such normative value judgements are often guided by the socio-economic and political environment where a particular legal rule may find application.¹⁹ For example: if societal institutions create an internalised discourse that women and men are different in normatively relevant respects ('that women are inferior') that could create a 'justification' for treating men and women differently. This is the central rationale (or 'justification') for patriarchy and misogyny. It is the reason why people were inhumanely denied civil, social, material and political rights because of the colour of their skin or their sex and gender. Our Constitution responds to this situation of inequality by introducing variants of formal equality insofar as it recognises that all people are equal bearers of the rights it protects. Section 7 of the Constitution recognises this by stating that 'this Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom'.

By enshrining the rights of all people in South Africa, the Constitution

¹⁸ See Albertyn & Goldblatt op cit note 9 at 35:13-35:15.

¹⁹Ibid at 35:3-35:4. For instance, contrast the decision of the United States Supreme Court in *Plessy v. Ferguson*, 163 U.S. 537 (1896) which concluded that the doctrine of 'separate but equal' did not violate the constitutional right to equality, whilst the same court in *Brown v Board of Education* 347 U.S. 483 (1954) concluded that the 'separate but equal' doctrine was a violation of the constitutional right to equality in overturning *Plessy*.

recognises that all its people are all equal bearers of the rights the it enshrines.²⁰ However, the consistent application and conferring of rights on all people is not the only thing the Constitution seeks to do. It also recognises that one of its principal objectives is the achievement of equality, illustrated by section 9(2) of the Bill of Rights which states that 'equality also includes the full and equal enjoyment of all rights and freedoms' and section 1(a) which states that the 'achievement of equality' is a foundational constitutional value. This raises three questions. First, how can the constitutional objective of (substantive) equality be achieved? Secondly, how can we ensure that all people fully and equally enjoy all the rights and freedoms the Constitution guarantees? Thirdly, what conditions are necessary for every citizen to enjoy all these 'rights and freedoms'? Boiled down to its essence, all three questions require us to ask, 'equality of what'?²¹ The answer to such a complex question largely depends on the substantive principles that underpin different theoretical approaches to equality.

(b) Substantive Equality

'Formal equality' can be contrasted with the second view of equality known as 'substantive equality'.²² Substantive equality is different to formal equality because it recognises that it may be necessary to treat people differently to ensure that all people become substantively equal. In other words: 'substantive equality requires the law to ensure equality of outcome and is prepared to tolerate different treatment to achieve this goal'.²³ The Constitutional Court ('CC') has unequivocally held that

²⁰ However, as explained in chapter seven, whilst all people benefit from the majority of constitutional rights, some rights only benefit a narrower and more specific category of beneficiary. However, the right to equality is not such a right because it is for the benefit of 'everyone'.

²¹ See Albertyn op cit note 16 at 4:4-4:5. The phrase 'equality of what' was coined by Amartya Sen op cit note 9.

²² See Currie & de Waal op cit note 8 at 213-15.

²³ Ibid at 213. On the philosophical and legal difference between 'equality of outcome' versus 'equality of opportunity', see Cathi Albertyn 'Substantive Equality and Transformation in South Africa' (2007) 23 *SAJHR* 253 and T Loenen 'The Equality Clause in the South African Constitution: Some Remarks from a Comparative Perspective' (1997) 13 *SAJHR* 401.

equality must be interpreted in a 'substantive' and not a 'formal way'.²⁴ This is because it has unequivocally held that different treatment between groups is not necessarily a violation (or aberration) of the right to equality. Rather, it is an intrinsic part of the constitutional objective of achieving true substantive equality.²⁵ In *National Coalition for Gay and Lesbian Equality v Minister of Justice* the court explained this as follows:

*'Particularly in a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied.'*²⁶

In *Minister of Finance v Van Heerden*, the court further explained the meaning of the constitutional conception of substantive equality:

*'This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution.'*²⁷

Aside from the *National Coalition* and *Van Heerden* cases, referred to above, a vast array of case law shows us that the courts have consistently affirmed that the constitutional right to equality must be interpreted to best promote substantive

²⁴ See *President RSA v Hugo* 1997 (6) BCLR 708; 1997 (4) SA 1 (CC) para 41; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6; 1998 (12) BCLR 1517 (CC) para 60-1; *SAPS v Solidarity obo Barnard* 2014 (6) SA 123 (CC); [2014] 11 BLLR 1025 (CC) para 28-35; *Bato Star v Minister of Environmental Affairs* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) para 74. For a further discussion, see Albertyn op cit note 16 at 4:4-4:7.

²⁵ See *Barnard* ibid and *Van Heerden* supra note 14.

²⁶ *National Coalition* supra note 24 at para 60.

²⁷ *Van Heerden* supra note 14 at para 27.

equality.²⁸ The essence of what this all means is that the courts have consistently accepted that the right to equality does not only entail treating people in a formally equal way ('formal equality') but that it also requires the state – and even private people²⁹ – to take steps to ensure all people are substantively equal and that differential treatment between groups may be necessary to achieve this goal.³⁰ In other words: a central objective of the Constitution is to rectify historical patterns of inequality and ensure the law can respond equally to the needs and interests of all people subject to it.³¹

But how does it purport to do this? In answering this question, constitutional values which inform the right of equality are of central interpretative assistance.³² This is because, as explained above, several founding constitutional values not only inform the interpretation of all constitutional rights but are also enforceable rights themselves. For example: dignity (section 10) and equality (section 9) are founding constitutional values and rights which influence our understanding of what the right to equality protects.³³ This requires us to ask the following question: what does the constitutional right to equality protect in a democratic South Africa? Part of the answer lies in examining the relationship between the *right* to equality and the

²⁸ See the authorities cited above at footnote 24.

²⁹ For example: chapter three of the Employment Equity Act 55 of 1998 requires designated employers to implement affirmative action measures to advance racial and gender diversity in the workplace. Also see the discussion of the concept of 'reasonable accommodation' in *Pillay v MEC for Education: KZN* 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) para 72-9.

³⁰ *Hugo and National Coalition* supra note 24.

³¹ *Van Heerden* supra note 14. Also see *Stoman v Minister of Safety and Security* 2002 (3) SA 468 (T) and the discussion of this case in Currie & de Waal op cit note 8 at 243.

³² See Fawkes op cit note 6.

³³ See *Makwanyane* supra note 6 and *Van Heerden* supra note 14 at para 22 ('Thus the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance').

constitutional *values* of human dignity and dignity. The relationship between equality and these two foundational constitutional values is explained immediately below.

(c) Connection Between the Value of Human Dignity and the Right to Equality

Until recently – at least in a historical sense – it was assumed that human beings were inherently unequal on the assumption that there was a natural human hierarchy which made some people superior to others. The idea of inherent inequality between human beings has gradually eroded with the development of human rights discourse and the assumption that equality is the natural order in a civilised society.³⁴ This new assumption means that all people – simply by virtue of being human – have inherent human dignity and moral value worthy of protection. This has become the point of departure in human rights discourse and South African constitutional law.³⁵

Our courts have explicitly endorsed the proposition that the achievement of equality entails recognising the equal moral worth of all human beings.³⁶ In developing case law around the right to equality, courts often flesh out its meaning by examining its connection with the founding constitutional value of human dignity.³⁷ This interpretative approach to equality needs to be understood in the context of the atrocities of apartheid, which stripped the vast majority of people of their personhood

³⁴ See Laurie Ackerman, *Human Dignity: Lodestar for Equality in South Africa* (2012) who comprehensively explains the influence of human dignity upon human rights discourse and law.

³⁵ Ibid. For example: Art 1 of the United Nations Universal Declaration of Human Rights states 'all human beings are born free and equal in dignity and rights'. See further *Dawood v Minister of Home Affairs* 2000 (3) SA 936; 2000 (8) BCLR 837 (CC) para 34-5 and Stuart Woolman 'Dignity' in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (2013) Revision Service 5 at 36:1.

³⁶ See *van Heerden* supra note 14 at para 22 and *Satchwell v President RSA* 2002 (6) SA 1; 2002 (9) BCLR 986 (CC) para 17.

³⁷ See *Hugo* supra note 24 at para 41 and *Harksen v Lane NO* 1997 (11) BCLR 1489; 1998 (1) SA 300 (CC) para 50.

and intrinsic moral worth.³⁸ This is because apartheid rested on the premise that the moral worth of all people was not worthy of equal protection, a premise which required the apartheid state to reinforce the arbitrary social constructs which it created.³⁹ In *President RSA v Hugo*, the CC explained this fundamental connection between human dignity and equality in the following words:

*'The prohibition on unfair discrimination seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. 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 where all human beings will be accorded equal dignity and respect regardless of their membership of different groups.'*⁴⁰

In *SAPS v Solidarity obo Barnard*, the CC expanded on the connection between dignity and equality which it first drew in *Hugo*, as follows:

*'Our constitutional democracy is founded on explicit values. Chief of these, for present purposes, are human dignity and the achievement of equality in a non-racial, non-sexist society under the rule of law. The foremost provision in our equality guarantee is that everyone is equal before the law and is entitled to equal protection and benefit of the law. But, unlike other constitutions, ours was designed to do more than record or confer formal equality.'*⁴¹

Another example of the court drawing express connections between the value of human dignity and the right to equality comes from *Prinsloo v Van der Linde* where it remarked:

*'We are emerging from a period of 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 recognition of their inherent dignity.'*⁴²

³⁸ *Brink v Kitshoff NO* 1996 (4) SA 197; 1992 (6) BCLR 752 (CC) para 33 and 40 and *Prinsloo v van der Linde* 20 and 31-2.

³⁹ See *Moseneke v [The] Master of the High Court* 2001 (2) BCLR 103; 2001 (2) SA 18 (CC) para 20-22 and *Bhe v Magistrate Khayelitsha* 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) para 48-51.

⁴⁰ *Supra* note 24 at para 41.

⁴¹ *Supra* note 24.

⁴² *Supra* note 38 at para 31.

(d) Connection Between the Value of Equality and the Right to Equality

The CC has similarly relied on the founding constitutional value of equality to determine the meaning (or 'scope and content') of the right to equality.⁴³ In the *Van Heerden* case, the Court explained the connection between the value of equality and the right to equality:

*'The achievement of equality goes to the bedrock of our constitutional architecture. The Constitution commands us to strive for a society built on the democratic values of human dignity, the achievement of equality, the advancement of human rights and freedom. Thus, the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance.'*⁴⁴

In *Fraser v Children's Court, Pretoria North*, the CC referred to the preamble of the Constitution and the constitutional value of equality in remarking that:

*'There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised. In the very first paragraph of the preamble it is declared that there is a '... need to create a new order ... 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.'*⁴⁵

In *Bhe v Magistrate Khayelitsha*, the court further explained the intrinsic interaction between the right to equality and constitutional value of equality:

'The centrality of equality is underscored by references to it in various provisions of the Constitution and in many judgments of this Court. Not only is the achievement of equality one of the founding values of the Constitution, section 9 of the Constitution also guarantees the achievement of substantive equality to ensure that the opportunity to enjoy the benefits of an egalitarian

⁴³ See De Vos, P 'Equality for all? A critical analysis of the equality jurisprudence of the Constitutional Court' (2000) 63(1) *THRHR* 65 and Albertyn & Goldblatt op cit note 9 at 35:8-3514.

⁴³ S Cowen 'Can Dignity Guide our Equality Jurisprudence?' (2001) 17 *SAJHR* 34; S Liebenberg 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 *SAJHR* 1.

⁴⁴ *Van Heerden* supra note 14 at para 22

⁴⁵ 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC) at para 20

*and non-sexist society is available to all, including those who have been subjected to unfair discrimination in the past.*⁴⁶

In practice, the courts have often relied upon the value of the equality when interpreting the provisions of section 9(2) of the Constitution which concern restitutionary measures to promote substantive equality (explained below).⁴⁷ Generally, the constitutional value requiring the ‘achievement of equality’ is used to support a purposive approach of the equality clause which supports the notion of substantive (and not merely formal) equality.⁴⁸ Closely connected to substantive equality is the freedom of people to live in conditions of material well-being.⁴⁹ For this reason, the constitutional value of equality is also often invoked in the context of socio-economic rights litigation,⁵⁰ because the constitutional commitment to substantive equality requires the state to take active steps to ensure people have access to material goods – such as decent housing, education, food, water and healthcare – necessary for them to meaningfully enjoy all the rights the Constitution protects in reality.⁵¹ In *Van Heerden*, the CC touched on this aspect of substantive equality as follows:

‘What is clear is that the Constitution and in particular section 9 thereof, embraces for good reason a substantive conception of equality inclusive of measures to redress existing inequality. Absent a positive commitment

⁴⁶ 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) para 51.

⁴⁷ See *Albertyn* op cit note 16 at 4:10-4:12.

⁴⁸ *Ibid.* See *Bannatyne v Bannatyne* 2003 (2) BCLR 111; 2003 (2) SA 363 (CC) para 29 (court considering disadvantages faced by divorced mothers when interpreting the constitutional right to equality).

⁴⁹ See S Cowen ‘Can Dignity Guide our Equality Jurisprudence?’ (2001) 17 *SAJHR* 34 and *Soobramoney v MEC Health*: KZN 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) para 8-9.

⁴⁹ See Sandra Liebenberg ‘The Interpretation of Socio-Economic Rights’ in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (Revision Service 5) 33:1 and chapter 13.

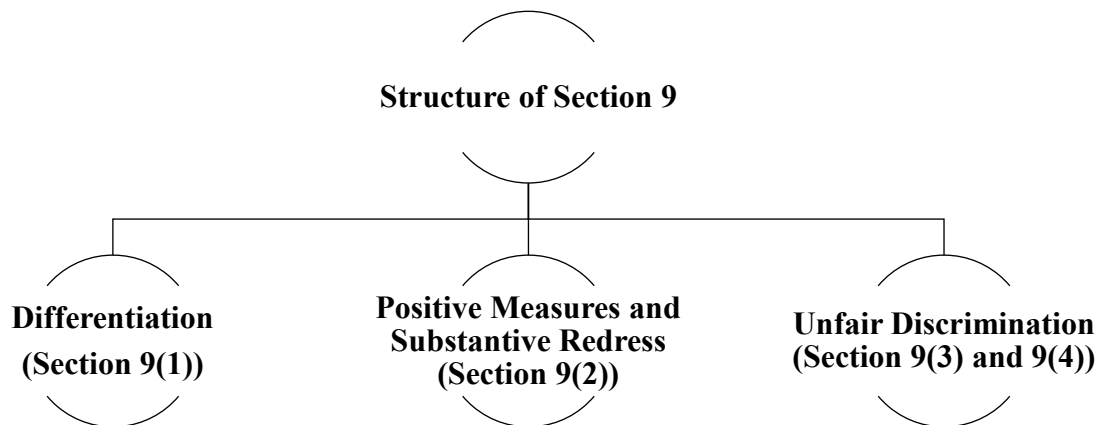
⁵⁰ *Ibid.* See *Government RSA v Grootboom* 2001 (1) SA 46; 2000 (11) BCLR 1169 (CC) para 1-2 and *Khosa v Minister for Social Development* 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) para 42.

⁵¹ *Grootboom* *ibid.* Also see *Bato Star* supra note 24 at para 74

*progressively to eradicate socially constructed barriers to equality and to root out systematic or institutionalised under-privilege, the constitutional promise of equality before the law and its equal protection and benefit must, in the context of our country, ring hollow.*⁵²

Having explained the difference between ‘formal’ and ‘substantive’ equality and how constitutional values of equality and inherent human dignity influence how courts interpret the equality clause in practice, we can now consider the structure of equality clause itself.

3. STRUCTURE OF THE CONSTITUTIONAL RIGHT TO EQUALITY



(a) Outline of the three main components in the equality clause

As the above diagram above illustrates, the equality clause has three primary components, the broad objectives of which can be summarised as follows:

1. To prevent the state from differentiating between different people or groups in an arbitrary or irrational way **(section 9(1))**.
2. To expressly permit the state to use the law as an instrument to achieve redress for previously disadvantaged groups to achieve substantive equality **(section 9(2))**.

⁵²*Van Heerden* supra note 14 at para 23.

3. To expressly prohibit the state, and private persons, from treating people differently in ways which undermine their human dignity and worth (**section 9(3) and (4)**).⁵³

At a broader level, the constitutional right to equality – like all constitutional rights – should not be interpreted in isolation from other rights. This is because all rights in the Bill of Rights are interconnected.⁵⁴ For instance: section 10 protects the right to ‘inherent human dignity’ while section 13 protects the right of everyone not to be subjected to ‘slavery, servitude or forced labour’. Both constitutional rights are indivisible and connected because inherent human dignity is violated whenever someone who is subjected to slavery or forced labour.⁵⁵ Similarly, as noted in *Hugo*, whenever the right to equality is violated, the constitutional right to human dignity is also infringed.⁵⁶

Thus, the right to equality cannot be properly understood by interpreting each sub-section (or ‘component’) in isolation from the others. However, whenever a court is faced with an equality claim it will apply different legal tests depending on which sub-section or component the applicant bases their equality claim upon.⁵⁷ At the same time, and while different tests apply depending on the nature of the equality claim, courts have stressed that the equality clause should be interpreted

⁵³ Section 9(5), which creates a rebuttable presumption of ‘unfairness’ – whenever discrimination on a ground listed in section 9(3) is established – is discussed below. Section 9(4) which prohibits private people from unfairly discriminating against other private people is considered below where the PEPUDA is discussed.

⁵⁴ See *Gcaba v Minister of Safety and Security* 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) 53 and *Case v Minister of Safety and Security* 1996 (3) SA 617; 1996 (5) BCLR 608 (CC) para 27.

⁵⁵ See NRL Haysom ‘Slavery, Servitude and Forced Labour’ in MH Cheadle, DM Davis & NRL Haysom *South African Constitutional Law: The Bill of Rights* (2018) 8:1.

⁵⁶ See *Hoffmann v SAA* 2000 (11) BCLR 1211 ; [2000] 12 BLLR 1365 (CC) para 27.

⁵⁷ See De Vos op cit note 15 at 429 and Currie & de Waal op cit note 8 at 215.

harmoniously.⁵⁸ This means one component of the equality clause cannot be interpreted in isolation from the others or the founding constitutional values of equality and dignity which inform the overall interpretation.⁵⁹ The three different components of the equality clause can be briefly summarised as follows:

- **Section 9(1)** recognises that a necessary part of the right to equality is to prevent the state from acting in ways – or enacting laws – which treat people differently for arbitrary or capricious reasons. This is because when the state acts in an arbitrary or capricious way, it acts irrationally which violates the founding constitutional value of the rule of law.⁶⁰ Whenever it is argued that the state has acted irrationally, it is possible for the applicant to rely on section 9(1) to challenge that conduct as irrational and unconstitutional.⁶¹
- **Section 9(2)** recognises that substantive equality requires the state to enact legislation and take ‘other measures’ to ensure the ongoing effects of past unfair discrimination are addressed.⁶² This section therefore allows the state to take such measures to promote substantive equality by taking ‘legislative and other measures’ to advantage people disadvantaged by past unfair discrimination to ensure substantive equality is achieved.⁶³ Whenever it is argued that such a redress measure is unconstitutional, the court must test the

⁵⁸ See *Van Heerden* supra note 14 at para 28 where the CC stated that ‘[a] comprehensive understanding of the Constitution’s conception of equality requires a harmonious reading of the provisions of section 9.’

⁵⁹ *Ibid.*

⁶⁰ Section 1(c) of the Constitution. On the relationship between the rule of law and the requirement of rationality see *Pharmaceutical Manufacturers* and *SARFU* supra note 17.

⁶¹ However, as noted by Currie & de Waal op cit note 8 at 219, the development by the CC of the concept of ‘legality’ – sourced in section 1(c) of the Constitution – has rendered section 9(1) somewhat redundant because all action can be reviewed and set aside as unconstitutional if it does not comply with this requirement. On the principle of legality generally see Cora Hoexter ‘The Principle of Legality in South African Administrative Law’ (2004) 4 *Macquarie Law Journal* 164.

⁶² *Van Heerden* supra note 14 at para 30-1.

⁶³ *Ibid.*

measure against section 9(2) to determine if that measure passes constitutional muster.⁶⁴

- **Section 9(3):** prohibits the state from directly or indirectly ‘unfairly discriminating’ against any person on 16 ‘listed grounds’ of unfair discrimination or grounds of discrimination which are ‘analogous’ to the 16 listed grounds.⁶⁵ When discrimination is established on a ‘listed ground’, the discrimination is rebuttably presumed to be unfair and unconstitutional.⁶⁶ A similar presumption does *not* exist for ‘analogous’ grounds.⁶⁷ Whenever the state is alleged to have unfairly discriminated against someone, that person can rely on section 9(3) to have said discriminatory or conduct law declared invalid.⁶⁸

We have now briefly canvassed the different components of the equality clause in section 9 of the Constitution. Now, we can consider each sub-section in more detail, together with the tests each one attracts, and how the courts have interpreted them.

(b) Section 9(1): mere differentiation by the state

Section 9(1) states that ‘everyone is equal before the law and has the right to equal protection and benefit of the law’. This section is concerned with what is often referred to as ‘mere differentiations’ made by the state.⁶⁹ For modern bureaucracy to function the state must necessarily make distinctions between different groups and

⁶⁴ Ibid. See *Motala v University of Natal* 1995 (3) BCLR 374 (D) (student unsuccessfully challenging affirmative action for entrance to medical school as unconstitutional).

⁶⁵ See *Hoffmann v SAA* supra note 56 at para 27-8 and *Khosa* supra note 50. Both judgments – and the meaning and difference between ‘listed’ and ‘analogous’ grounds of discrimination – are discussed below.

⁶⁶ *Harksen* supra note 37 at para 49.

⁶⁷ Ibid.

⁶⁸ See Currie & de Waal op cit note 8 at 222-3 who explain the difference between ‘fair’ versus ‘unfair’ discrimination. This distinction is also discussed further below.

⁶⁹ See Albertyn & Goldblatt op cit note 9 at 35:26 and *Prinsloo* supra note 20 at para 17.

persons⁷⁰ because it would be impossible for modern government to properly function if it was never permitted to make any distinctions at all.⁷¹ For example, the state can differentiate between people who earn less income versus people who earn higher income for tax purposes, or between shop owners who sell tobacco and alcohol versus vegetables, and the rules which regulates doctors versus those which regulate lawyers etc.⁷² Such a distinction (or 'mere differentiation') will be constitutional and comply with section 9(1), provided it is 'rational'.⁷³ In *Prinsloo*, the CC summarised the rationality test with which a 'mere differentiation' must comply to be consistent with section 9(1) of the Bill of Rights:

*'In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner.'*⁷⁴

This dictum affirms that a mere differentiation will not violate the right to equal protection and benefit of the law under section 9(1) if it is: (a) rational and (b) does not manifest 'naked preferences which serve no legitimate government purpose'.⁷⁵ In *Harksen v Lane NO*, the CC distilled this rationality test into two components:⁷⁶

⁷⁰ Ibid 218.

⁷¹ Ibid.

⁷² See P Hogg *Constitutional Law of Canada* 3 ed at para 52.6(b) cited in Currie & de Waal *ibid* and *Prinsloo* *supra* note 20 at para 17.

⁷³ Currie & de Waal *ibid*.

⁷⁴ *Prinsloo* *supra* note 20 at para 25.

⁷⁵ Ibid. However, see Currie & de Waal *op cit* note 9 at 222 who argue that the development of the principle of legality has rendered much of section 9(1) redundant. On legality generally see Hoexter *op cit* note 61.

⁷⁶ *Harksen* *supra* note 37 at para 38. See also Albery *op cit* note 16 at 4:14-4:16.

1. **Does the provision differentiate?** This means the applicant must establish that the challenged provision differentiates between different groups or people.⁷⁷ If the applicant cannot establish any such differentiation, the challenge based on a violation of section 9(1) must fail.⁷⁸ If the applicant establishes a differentiation, the court considers the next step.⁷⁹
2. **Is the differentiation rational?** This means the applicant must establish the differentiation bears no rational connection to a legitimate government purpose or is arbitrary or displays 'naked preferences' which serve no legitimate purpose'.⁸⁰

If the applicant argues that the differentiation occurs on a listed or 'analogous' ground of unfair discrimination in terms of section 9(3), then the court must consider whether the provision constitutes unfair discrimination – an inquiry which is explained below.⁸¹ It should be noted that the rationality test into 'mere differentiation' does not permit the court to determine whether the 'best' or 'most appropriate' means have been chosen. Its task is limited to determining whether the differentiation seeks to achieve a legitimate purpose and whether the means chosen to achieve that purpose are rational.⁸² Rationality is also a relatively low threshold which is met in

⁷⁷ *Harksen* *ibid.*

⁷⁸ *ibid.*

⁷⁹ *ibid.*

⁸⁰ *Prinsloo* *supra* note 20 at para 25.

⁸¹ *Harksen* *supra* note 37 at para 38.

⁸² See *East Zulu Motors v Empangeni/Ngwelezane Transitional Local Council* 1998 (1) BCLR 1; 1998 (2) SA 61 (CC) para 24 and *Prinsloo* *supra* note 20 at para 35-8.

most cases.⁸³ In *Van der Merwe v Road Accident Fund*, the CC explained this aspect of the rationality test as follows:⁸⁴

*'[T]he 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 purpose. The test is simply whether there is a reason for the differentiation that is rationally connected to a legitimate government purpose.'*⁸⁵

(c) Section 9(2): redress measures to promote substantive equality

Section 9(2) of the Constitution states that, '[e]quality 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'. Section 9(2) of the Constitution explicitly recognises that restitution measures for past unfair discrimination under apartheid and colonial rule are necessary to achieve true substantive equality.⁸⁶ In the *Van Heerden* case the CC explained the role of section 9(2) as follows:

*'Of course, democratic values and fundamental human rights espoused by our Constitution are foundational. But just as crucial is the commitment to strive for a society based on social justice. In this way, our Constitution heralds not only equal protection of the law and non-discrimination but also the start of a credible and abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of our constitutional framework.'*⁸⁷

Section 9(2) therefore expressly allows the state to take 'legislative and other

⁸³ See *Ngewu v Post Office Retirement Fund* 2013 (4) BCLR 421 (CC) and *S v Ntuli* 1996 (1) BCLR 141; 1996 (1) SA 120 (CC) where a legislative provision failed to meet the rationality threshold in terms of section 9(1).

⁸⁴ [2006] ZACC 4; 2006 (4) SA 230 (CC); 2006 (6) BCLR 682 (CC) para 46. Also see Lauren Kohn 'The burgeoning constitutional requirement of rationality and the separation of powers: has rationality review gone too far?' (2013) 130 SALJ 810.

⁸⁵ See *Prinsloo* supra note 20 at para 38.

⁸⁶ *Minister of Constitutional Development v South African Restructuring and Insolvency Practitioners Association* 2018 (5) SA 349 (CC); 2018 (9) BCLR 1099 (CC) para 1-2.

⁸⁷ *Van Heerden* supra note 14 at para 25.

measures' to 'protect or advance' people who were 'disadvantaged by unfair discrimination'. In terms of the constitutional commitment to substantive equality, such measures are not aberrations from the overall right to equality (as they would be under a formal equality approach) but rather part and parcel of the constitutional right and commitment to substantive equality itself.⁸⁸ This means that if the state differentiates (or 'discriminates') against different groups – even based on prohibited grounds listed in section 9(3) – but if such discrimination properly complies with section 9(2), the measure will be constitutional.⁸⁹ It is only when a restitutionary measure does not properly comply with section 9(2) that a court will then determine if the discrimination is 'unfair' in terms of the section 9(3) inquiry, explained below.⁹⁰ It is also not necessary for the state to establish that such measures properly comply with the requirements of section 9(2), because restitutionary measures are presumed to be valid.⁹¹ Rather the applicant who challenges the measure bears the onus to establish that it does not comply with section 9(2).⁹²

In *Van Heerden* the CC set out three separate requirements which a restitutionary measure must satisfy in order to comply with section 9(2) of the Bill of Rights:⁹³

1. The measure must target groups or categories of persons who have been disadvantaged by past unfair discrimination.⁹⁴

⁸⁸ Ibid para 73. Also see *Walker v Pretoria City Council* 1998 (2) SA 363; 1998 (3) BCLR 257 (CC) para 43 where Langa DJP stated 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 recognised and dealt with.'

⁸⁹ Ibid para 33.

⁹⁰ Ibid para 34.

⁹¹ Ibid.

⁹² Ibid.

⁹³ See De Vos op cit note 15 at 438 who summarises these three factors further.

⁹⁴ *Van Heerden* supra note 14 at para 38.

2. The measure must be designed to 'protect or advance' groups or categories of persons who have been disadvantaged by past unfair discrimination.⁹⁵
3. The measures must 'promote the achievement of equality in the long run'.⁹⁶

Each of these three elements is explained in more detail immediately below.

(i) Element one: does the measure target persons from a disadvantaged group?

First, the court must consider whether the group which the measure seeks to 'protect or advance' is a group which was 'previously subjected to unfair discrimination and [which] continues to suffer from the effects of that discrimination'.⁹⁷ This means that the measure must target a group which suffered from unfair discrimination in the past.⁹⁸ De Vos summarises this requirement and the different groups which could hypothetically meet this element as follows:

*'The beneficiaries, individuals or categories of persons who belong to an identifiable [group] defined by their race, sex, gender, disability or sexual orientation, must have been disadvantaged by unfair discrimination. Because the test focuses on the group [having] been disadvantaged by past unfair discrimination, such groups include black (rather than white) citizens, women (rather than men), gay men and lesbians (rather than heterosexuals); people living with disabilities (rather than able-bodied people); and people living with HIV (rather than HIV negative people).'*⁹⁹

However, as with any restitutionary measure, there are degrees of disadvantage within different groups.¹⁰⁰ This broadly means there may be 'windfall'

⁹⁵ Ibid para 41.

⁹⁶ Ibid para 44.

⁹⁷ De Vos op cit note 15 at 438.

⁹⁸ Ibid.

⁹⁹ Ibid 438.

¹⁰⁰ See Ockert Dupper 'Affirmative Action: Who, How and How Long?' (2008) 3 SAJHR 425 who explains 'degrees of disadvantage' within disadvantaged groups.

beneficiaries who benefit from the measure, namely people who benefit from the remedial measure but who are not necessarily disadvantaged or who suffer relatively less seriously from the impact of the unfair discrimination than other members of the targeted group.¹⁰¹ In *Van Heerden*, the CC explained that the existence of ‘windfall beneficiaries’ did not necessarily mean the remedial measure would not comply with this first element:

*‘ . . . it is difficult, impractical or undesirable to devise a legislative scheme with “pure” differentiation demarcating precisely the affected classes. Within each class, favoured or otherwise, there may indeed be exceptional or ‘hard cases’ or windfall beneficiaries. That however is not sufficient to undermine the legal efficacy of the scheme . . . the legal efficacy of the remedial scheme should be judged by whether an overwhelming majority of members of the favoured class are persons designated as disadvantaged by unfair exclusion’.*¹⁰²

Broadly, the above *dictum* means that provided the remedial measure targets an ‘overwhelming majority’ of people who belong to a class or group which was disadvantaged by past unfair discrimination, the remedial measure will comply with this first element.¹⁰³ Windfall beneficiaries will therefore not be excluded from a remedial measure at this first step, provided the overwhelming majority of disadvantaged people are targeted.

(ii) Element two: is the measure designed to protect or advance identified beneficiaries?

Secondly, the court must consider whether the measure is ‘designed to protect or advance persons or categories of persons’ who have been disadvantaged by past unfair discrimination.¹⁰⁴ This means the remedial measure must be ‘reasonably capable’ of attaining the outcome’ of ‘advancing or protecting’ the

¹⁰¹ Ibid.

¹⁰² *Van Heerden* supra note 14 at para 39-40.

¹⁰³ See de Vos op cit note 15 at 438.

¹⁰⁴ Ibid para 41.

identified beneficiaries.¹⁰⁵ The fact that the measures must be ‘reasonably capable’ of achieving the goal of protecting or advancing identified beneficiaries means it is not necessary to establish that they will ‘definitively’ achieve their intended outcome.¹⁰⁶ It is also not necessary for the remedial measure to disadvantage one group or class (such as heterosexual white males) to benefit a disadvantaged class or group (such as HIV positive and disabled lesbian black women) for it to comply with this second element.¹⁰⁷ However, if the applicant can show that the remedial measure is ‘arbitrary, capricious or displays naked preference’ or is not ‘reasonably capable’ of achieving its desired end, then the remedial measure will fail to comply with second requirement in terms of section 9(2).¹⁰⁸

(iii) Element three: will the measure promote equality in the long run?

The third requirement is that the remedial measure must ‘promote the achievement of equality in the long run’.¹⁰⁹ This requires the court to make a moral value judgement about whether any harm the measure may cause to the excluded group is outweighed by the benefits it provides to identified beneficiaries and realising a ‘non-sexist, non-racial society in which in which each person will be recognised and treated as a human being of equal worth and dignity’.¹¹⁰

This element is a necessary part of the inquiry into whether a measure complies with section 9(2) because such measures may intrude on the rights and interests of groups and people who are excluded from the benefits of the remedial

¹⁰⁵ Ibid para 41.

¹⁰⁶ De Vos op cit note 15 at 440.

¹⁰⁷ *Van Heerden* supra note 14 at para 43.

¹⁰⁸ Ibid para 41.

¹⁰⁹ Ibid para 44.

¹¹⁰ Ibid.

measure.¹¹¹ This means that the court should balance the harms and benefits of the measure to ensure it does not impose ‘substantial and undue harm’ on the groups or people or people who are excluded from it.¹¹² In essence: this requires the court to determine whether the measure strikes an appropriate balance between the ‘possible harm’ caused to individuals by positive measures and the collective benefit of these measures to society in overcoming past discrimination and disadvantage’.¹¹³ In his concurring judgment in Van Heerden Sachs J explained how this could be undertaken:

‘Courts must be reluctant to interfere with [remedial measures], and exercise due restraint when tempted to interpose themselves as arbiters as to whether the measure could have been proceeded with in a better or less onerous way. At the same time, if the measure at issue is manifestly overbalanced in ignoring or trampling on the in the interests of the advantaged [excluded] section of the community, and gratuitously and flagrantly imposes disproportionate burdens on them, the courts have a duty to interfere. Given our historical circumstances and the massive inequality that plagues our society, the balance when determining whether a measure that promotes equality is fair will be heavily weighed in favour of opening up opportunities for the disadvantaged. This is what promoting equality (section 9(2)) and fairness (section 9(3)) require. Yet some degree of proportionality, based on the particular context and circumstances of each case, can never be ruled out.’¹¹⁴

De Vos argues that a court should consider various open-ended factors to determine if an appropriate balance is struck, as required by this third element.¹¹⁵ Relevant circumstances would include:

1. The history of the marginalisation of the benefited group;
2. The oppression of different groups based on ‘race, sex, sexual orientation and other grounds’;

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Ibid.

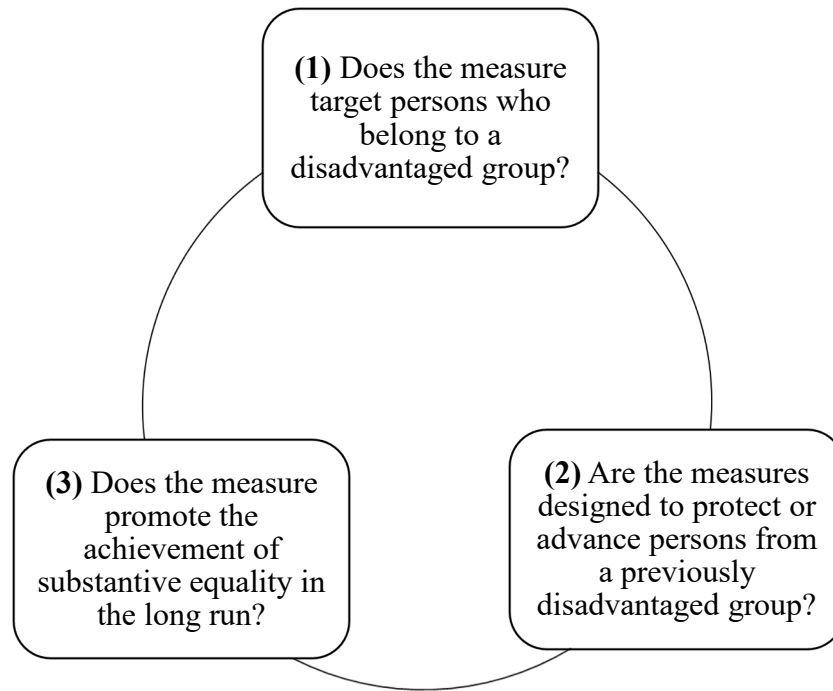
¹¹⁴ Ibid para 152 cited in full in De Vos op cit note 15 at 441.

¹¹⁵ De Vos ibid at 441-2.

3. The 'current social and economic status of the various groups previously unfairly discriminated against';
4. The continuing prevalence of 'racism, sexism, homophobia and other forms of misrecognition that are still prevalent in [South African] society';
5. The 'effect of the measure on the advantaged section of society'; and
6. 'Whether the measures taken are so extreme that they send a signal that the equal dignity' of the excluded group is 'not respected.'¹¹⁶

**Diagram of the three different factors which a redress must have in order
to comply with section 9(2)**

¹¹⁶ Ibid.



(d) Section 9(3): Prohibition on unfair discrimination by the state

Section 9(3) of the Constitution prohibits the state from passing any law – or acting in any way – which directly or indirectly unfairly discriminates against any person on 16 listed grounds or grounds which are ‘analogous’ to the listed grounds.¹¹⁷ Section 9(3) reads:

‘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.’

The essential purpose of section 9(3) is to prohibit the state from passing legislation or acting in ways that treat people differently in a manner which negatively impacts upon their inherent human dignity.¹¹⁸ Before explaining the test which the courts use to determine whether section 9(3) has been infringed, it is necessary to

¹¹⁷ The difference between the 16 listed grounds and analogous ground is explained below.

¹¹⁸ See *Hugo* supra note 24 and *Harksen* supra note 37 at para 46 and 50.

note three important things. First, section 9(3) only prohibits the state from engaging in ‘unfair discrimination’.¹¹⁹ This means that section 9(3) permits the state to discriminate, provided the discrimination is ‘fair’.¹²⁰ Secondly every instance of discrimination (whether fair or unfair) necessarily requires some form of differentiation between persons or groups.¹²¹ Thirdly, wherever an applicant establishes that they have been discriminated against on one (or more) of the 16 listed grounds in section 9(3), the discrimination will be rebuttably presumed to be unfair in terms of section 9(5).¹²² All three of these preliminary points will become clearer as we unpack the test developed by the CC to determine unfair discrimination, immediately below.

In *Harksen v Lane NO*, the CC set out a three-part test (‘*Harksen test*’) to determine if a law contravenes section 9(3) on the basis that it constitutes ‘unfair discrimination’:¹²³

1. The court must determine whether the whether the applicant has established the existence of a differentiation.¹²⁴ If no differentiation is established, the case

¹¹⁹ Currie & de Waal op cit note 8 at 223.

¹²⁰ Ibid. Intuitively, it may seem strange to permit the state to engage in ‘fair discrimination’. The notion of ‘unfair discrimination’ was explained by the CC in *Prinsloo* supra note 20 at para 37 where it stated, ‘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. [U]nfair discrimination, when used in this second form in section [9(3)], in the context of section [9] as a whole, principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity’. The concept of ‘fair discrimination’ is explained further below.

¹²¹ See *Harksen* supra note 37 at para 42 and Currie & de Waal ibid at 223.

¹²² Section 9(5) states that ‘[d]iscrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.’ See *Harksen* ibid at para 46

¹²³ *Harksen* supra note 37 at para 42-3.

¹²⁴ Ibid para 42.

must fail.¹²⁵ If a differentiation is established, the court must determine if that differentiation complies with section 9(1) on the basis it rationally seeks to achieve a legitimate government purpose.¹²⁶ If it complies with section 9(1), the court considers step two.¹²⁷

2. The court must determine whether the differentiation constitutes 'discrimination'.¹²⁸ If the differentiation occurs on the basis of one (or more) of the 16 listed grounds in section 9(3) it is rebuttably presumed to be unfair in terms of section 9(5) of the Constitution.¹²⁹ In this instance, the state bears the onus to rebut the presumption of 'unfairness' by establishing that the discrimination is 'fair'.¹³⁰ If the differentiation occurs in terms of an 'analogous ground', a ground not listed in section 9(3), the applicant bears the onus to establish that the differentiation: (a) amounts to discrimination and (b) that the discrimination is also 'unfair'.¹³¹ If it is established that the discrimination is 'unfair', then the court moves to consider the third step.
3. The court must determine whether the unfair discrimination can be justified as a permissible violation of section 9(3) in terms of the general limitation clause in section 36(1).¹³² This means the state must establish the unfair discrimination

¹²⁵ Ibid para 43 where the court stated 'Differentiation that does not constitute a violation of section 8(1) may nonetheless constitute unfair discrimination for the purposes of section 8(2) [of the Interim Constitution]'

¹²⁶ Ibid.

¹²⁷ Ibid.

¹²⁸ Ibid para 45.

¹²⁹ Ibid.

¹³⁰ Ibid para 47

¹³¹ Ibid.

¹³² Ibid para 52.

can be justified as a 'reasonable and justifiable violation' of section 9(3) under section 36(1).¹³³

(iv) Step one: has the applicant established that the challenged law directly or indirectly differentiates and that it amounts to discrimination?

This step requires the applicant to show that the challenged law objectively differentiates against them either directly or indirectly.¹³⁴ This step is determined 'objectively' because it is not necessary for the applicant to show there was an 'intention' to differentiate or discriminate.¹³⁵ In other words, the applicant must only show that a reasonable person would conclude that the challenged provision differentiates against them.

At this point, it is necessary to discuss the difference between 'direct' and 'indirect' discrimination. Direct discrimination is when a law expressly differentiates between different groups or persons ie expressly distinguishes between homosexual couples and heterosexual couples.¹³⁶ Indirect discrimination is when a law is *prima facie* neutral and does not expressly draw distinctions between different people or groups but the law, nevertheless, differentiates between them when it is practically applied.¹³⁷ For example: when a law prohibits all people from wearing headscarves, it is *prima facie* neutral, but may nevertheless discriminate against Muslim women who

¹³³ Ibid.

¹³⁴ Ibid para 47. See *Walker* supra note 83 at para 43. However, intention to discriminate could be relevant as to whether the discrimination is 'unfair'. See *Albertyn* op cit note 18 at 4:36.

¹³⁵ Ibid.

¹³⁶ See *National Coalition Gay and Lesbian Equality v Minister Home Affairs* 2000 (2) SA 1; 2000 (1) BCLR 39 (CC) (in which it was held that a law which prohibited homosexual couples from marrying constituted direct discrimination on the listed ground of sexual orientation).

¹³⁷ *Albertyn* op cit note 18 at 4:34. See *Walker* supra note 83 at para 32 and 4. Also consider *S v Jordan* 2002 (6) SA 642; 2002 (11) BCLR 1117 (CC) (majority of court concluding that *prima facie* neutral law which criminalises prostitution – but not the client – did not constitute indirect discrimination on the basis of sex and gender)

wear headscarves as part of their religious beliefs.¹³⁸ If such a differentiation is established, the court considers the next step.¹³⁹

(ii) Step two: does the differentiation occur on a ground listed in section 9(3) or an analogous ground and is it fair or unfair?

This step requires the court to determine whether the differentiation constitutes discrimination and if it occurs on a listed or ‘analogous’ (or unlisted) ground of discrimination.¹⁴⁰ Similar to the first step, this is considered objectively, which means the court must determine if a reasonable person would conclude the differentiation occurs on a listed or analogous ground.¹⁴¹

It is also necessary to examine the important distinctions between a ‘listed’ versus an ‘analogous’ ground of discrimination. If a differentiation is established based on one or more of the grounds listed in section 9(3), it automatically constitutes discrimination and is also rebuttably presumed to be unfair in accordance with section 9(5).¹⁴² However, the 16 listed ground do not constitute a closed list which means it is possible to establish discrimination on other grounds.¹⁴³ The test to determine whether differentiation on a ground not listed in section 9(3) constitutes discrimination is whether it is ‘analogous’ to the listed ground. This means that that the differentiation has the potential to impact on the fundamental human dignity of the applicant in a way which is ‘analogous’ to the 16 listed grounds.¹⁴⁴ For example:

¹³⁸ See *Pillay* supra note 29 (*prima facie* neutral school code which prohibited all students from wearing nose studs indirectly discriminated against the applicant on the basis of religious and cultural beliefs).

¹³⁹ *Harksen* supra note 37 at para 47-8.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² *Ibid* para 47.

¹⁴³ *Hoffmann* supra note 56.

¹⁴⁴ *Ibid.*

neither HIV positive status or foreign citizenship are listed grounds of discrimination in section 9(3), but in *Hoffmann v SAA*¹⁴⁵ and *Khosa v Minister of Social Security*,¹⁴⁶ the CC concluded that a differentiation based on these grounds was analogous to the listed grounds because such differentiations had the potential to negatively impact on the inherent human dignity of both HIV positive people¹⁴⁷ and foreign citizens in South Africa.¹⁴⁸ Importantly, ‘analogous grounds’ of discrimination do not automatically constitute discrimination: the applicant bears the onus to show that the differentiation constitutes discrimination because it adversely affects their human dignity in a manner analogous to the listed grounds.¹⁴⁹ Secondly, if the applicant establishes that a differentiation based on an analogous ground constitutes ‘discrimination’, they must also show that the discrimination is ‘unfair’.¹⁵⁰ This is because analogous grounds of discrimination do not attract a rebuttable presumption of unfairness in the same way as listed grounds of discrimination.¹⁵¹

Once discrimination has been established, either on a listed ground or on an analogous ground, the court must then consider if the discrimination is also unfair.¹⁵² Remember, if the discrimination was based on a listed ground, the court presumes the discrimination is unfair. If it was based on an analogous ground, the complainant must further prove that the discrimination was unfair, and this depends primarily on

¹⁴⁵ Ibid.

¹⁴⁶ *Khosa* supra note 50.

¹⁴⁷ *Harksen* supra note 37 at para 48.

¹⁴⁸ *Khosa* supra note 50.

¹⁴⁹ *Harksen* supra note 37 at para 48.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² Ibid para 47.

how it impacts on the fundamental human dignity of the complainant.¹⁵³ In *Harksen*, the CC set out three relevant factors a court must consider to determine whether discrimination is fair or unfair:¹⁵⁴

- **The position of the complainants in society, whether the discrimination occurs on a listed or unlisted ground and whether they have suffered in the past from unfair discrimination.**¹⁵⁵ This group of factors means that if the applicant belongs to a marginalised group which suffers from prejudice in society, the discrimination is less likely to be fair.¹⁵⁶ If the discriminatory provision also has a strong stigmatising effect on the affected group, on the basis it sends a societal message that their inherent human dignity is not worthy of respect, the discrimination is also likely to be unfair.¹⁵⁷ If the discrimination occurs on a listed ground constituting the undermining of inherent human dignity of people who were undermined in the past, the unfairness of the discrimination is likely to be reinforced.¹⁵⁸
- **The nature of the discriminatory provision and purpose sought to be achieved by it.**¹⁵⁹ This requires the court to consider whether the discriminatory provision seeks to achieve a legitimate purpose and not necessarily undermine the inherent human dignity of the applicant.¹⁶⁰ If the provision seeks to achieve a legitimate purpose such as benefiting a poverty stricken group at the expense of

¹⁵³ Ibid para 50-1.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ See *Albertyn* op cit note 18 at 4:52 and *Khosa* supra note 55.

¹⁵⁷ *Khosa* ibid.

¹⁵⁸ *National Coalition* supra note 136.

¹⁵⁹ *Harksen* supra note 37 at para 50-1.

¹⁶⁰ *Albertyn* op cit note 18 at 4:54.

a relatively wealth group, it is less likely that the discrimination will be unfair and violate section 9(3) of the Constitution.¹⁶¹

- **With due regard to the first two factors, any other relevant factors may be established to determine whether the discrimination impacts on the fundamental human dignity of the complainant or affects them in a comparably serious manner.**¹⁶² This means that the first two considerations do not constitute a closed list. The overall inquiry turns on whether the discrimination negatively impacts on the inherent human dignity of the complainant.¹⁶³ Also relevant is whether the impact of the discrimination on the human dignity of the complainant is lessened by the use of less restrictive means to achieve the purpose of the discrimination or whether the state has made an attempt to reasonably accommodate the discriminated group.¹⁶⁴

(iii) Step three: can the unfair discrimination be justified as a 'reasonable and justifiable' violation of section 9(3) in terms of section 36(1)?

If the existence of unfair discrimination is established, then the challenged provision will constitute a limitation of the right not to be unfairly discriminated against by the state under section 9(3). The court must then determine whether the discrimination can be justified as a permissible violation of the right not to be unfairly discriminated against in terms of section 36(1) of the Constitution.¹⁶⁵ In practice however, it can be difficult to justify a limitation of section 9(3) as 'reasonable and justifiable' under section 36(1). Indeed, the CC has never concluded that a limitation

¹⁶¹ See *Walker* supra note 83 (not unfair discrimination to discriminate against wealthy white suburbs by charging poor black suburb lower electricity tariffs).

¹⁶² *Harksen* supra note 37 at para 50-1.

¹⁶³ *Albertyn* op cit note 18 at 4:55-4:56.

¹⁶⁴ See *Pillay* supra note 29 and the minority judgment of Sachs J in *Prince v President Cape Law Society* 2002 (2) SA 794; 2002 (3) BCLR 231 (CC) para 160-3.

¹⁶⁵ *Harksen* supra note 37 at para 55.

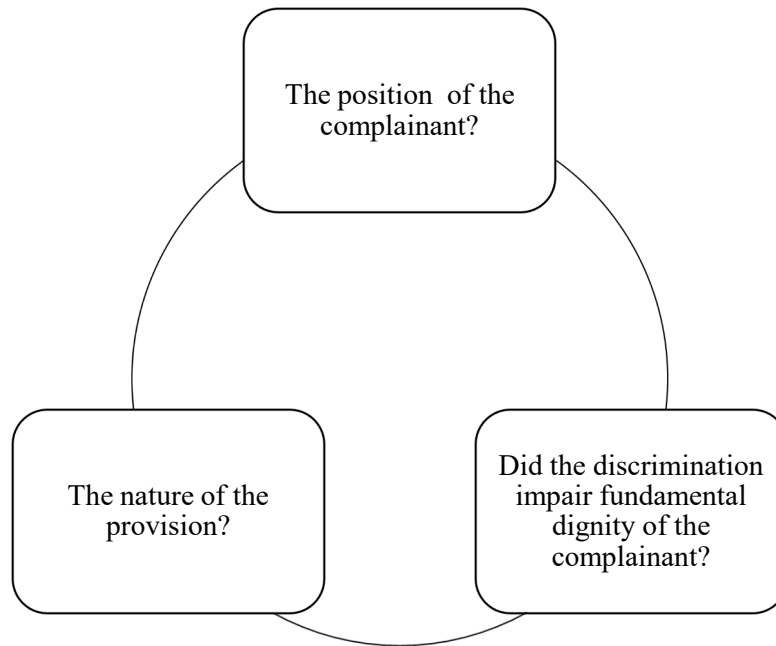
of section 9(3) constituted a justifiable limitation of the right.¹⁶⁶ Currie and de Waal explain why it is almost impossible to justify a limitation of section 9(3) of the Bill of Rights:

'In the case of the right to equality, it is difficult to apply the usual two-stage analysis of a right and its limitation. Indeed, it is far from clear whether section 36 can have any meaningful application to section 9. This is because the section 9 rights are qualified by the same or similar criteria to those used to adjudicate the legitimacy of a limitation of rights in section 36. It is, for instance, difficult to see how discrimination which has already been characterised as unfair because it is based on attributes or characteristics which have the potential to impact the fundamental human dignity of persons as human beings can ever be acceptable in an open and democratic society based on human dignity equality and freedom'.¹⁶⁷

Diagram showing essentials for redress to comply with section 9(2)

¹⁶⁶ See Currie & de Waal op cit note 8 at 218.

¹⁶⁷ Ibid. Also see *S v K* 1997 (9) BCLR 1283 (C) at para 30 where the court suggested a violation of section 9(3) could never be justified under section 36(1).



8.4. SECTION 9(4): UNFAIR DISCRIMINATION BY PRIVATE PERSONS IN TERMS OF PEPUDA

(a) PEPUDA and the principle of constitutional subsidiarity

Section 9(4) extends the prohibition against unfair discrimination in section 9(3) to private persons other than the state.¹⁶⁸ This means that section 9(4) also prohibits private persons – individuals or corporations for example – from unfairly discriminating against other people.¹⁶⁹ The national legislation which gives effect to the horizontal application of the right against unfair discrimination – in terms of section 9(4) – is the Promotion of Equality and Prevention of Unfair Discrimination Act ('PEPUDA').¹⁷⁰ Because the PEPUDA gives effect to the horizontal application of

¹⁶⁸ De Vos op cit note 15 at 453.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid. See *Pillay* supra note 29 at para

the right to equality, the principle of constitutional subsidiarity applies.¹⁷¹ This means that a litigant cannot rely on section 9(4) of the Constitution directly, unless the constitutionality of the PEPUDA is challenged.¹⁷² The preamble of PEPUDA sets out the purpose of the Act as follows:

‘... [to] give substance to the constitutional commitment to equality by providing a legal mechanism with which to confront, address and remedy past and present forms of incidental, as well as institutionalised or structural, unfair discrimination and inequality’.

PEPUDA has two main sections. The first concerns measures to prevent unfair discrimination (chapters 2 and 3) and the second concerns measures to promote equality (chapter 5). Additionally, the PEPUDA also contains provisions aimed at preventing harassment and prohibiting acts of hate speech. This mirrors the equality jurisprudence developed by the CC around unfair discrimination in terms of section 9(3) of the Bill of Rights. ‘Discrimination’ is defined in section 1 of PEPUDA as follows:

‘Any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly:

- (a) imposes burdens, obligations or disadvantage on; or*
- (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds.’*

Similar to section 9(3) of the Constitution, section 1 of PEPUDA also lists 19 prohibited (or ‘listed’) grounds of discrimination; and similar to section 9(3), the PEPUDA definition of ‘discrimination’ also envisages analogous grounds of discrimination because it refers to ‘any other ground’ indicating that the listed grounds are not exhaustive. Section 14 follows a similar structure to the *Harksen* test which sets out to how to determine the existence of unfair discrimination under the Act:

¹⁷¹ *Pretorius and another v Transport Pension Fund and others* 2018 ZACC 10

¹⁷² See the minority judgment of Sachs J in *Prince* supra

DETERMINATION OF FAIRNESS OR UNFAIRNESS

(1) It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.

(2) In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:

(a) the context;

(b) the factors referred to in subsection (3);

(c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.

(3) The factors referred to in subsection (2)(b) include the following:

(a) Whether the discrimination impairs or is likely to impair human dignity;

(b) The impact or likely impact of the discrimination on the complainant;

(c) The position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;

(d) The nature and extent of the discrimination;

(e) Whether the discrimination is systemic in nature;

(f) Whether the discrimination has a legitimate purpose;

(g) Whether and to what extent the discrimination achieves its purpose;

(h) Whether there are less restrictive and less disadvantageous means to achieve the purpose;

(i) Whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to-

(i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or

(ii) accommodate diversity.

Significantly, PEPUDA expressly introduces the additional requirement of 'reasonable accommodation'. In *MEC for Education: KZN v Pillay*¹⁷³ the CC had to determine whether a school code which prohibited a Hindu girl from wearing a nose ring violated section 9(4) of the Constitution as given effect to by PEPUDA.¹⁷⁴ In concluding that the refusal of the school to allow her to wear the nose ring violated PEPUDA, the CC proceeded to define the concept of 'reasonable accommodation' under the Act as follows:

*'There may be circumstances where fairness requires a reasonable accommodation, while in other circumstances it may require more or less, or something completely different. It will depend on the nature of the case and the nature of the interests involved. Two factors seem particularly relevant. First, reasonable accommodation is most appropriate where, as in this case, discrimination arises from a rule or practice that is neutral on its face and is designed to serve a valuable purpose, but which nevertheless has a marginalising effect on certain portions of society. Second, the principle is particularly appropriate in specific localised contexts, such as an individual workplace or school, where a reasonable balance between conflicting interests may more easily be struck. Even where fairness requires a reasonable accommodation, the other factors listed in the section will always remain relevant.'*¹⁷⁵

¹⁷³ (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007).

¹⁷⁴ *Pillay supra*

¹⁷⁵ *Pillay* para 73.

Tabular Summary of Section 9 and PEPUDA

	<u>Section</u> <u>9(1)</u>	<u>Section</u> <u>9(2)</u>	<u>Section</u> <u>9(3)</u>	<u>Section</u> <u>9(4)</u>
Differentiation or Discrimination:	Differentiation	Discrimination (For purposes of redress)	Discrimination	Discrimination
Source:	Legislative Provision	Legislative Provision	Legislative Provision	Other forms of conduct other than legislation/statute
Legal Test:	Rationality	<i>Van Heerden</i> Test	<i>Harksen</i> Test	Section 14 of <i>PEPUDA</i>
Example:	Legislation which differentiates between professions (ie differentiating statutory regulation for doctors and lawyers respectively)	Legislation enacted in the Employment Equity Act, to further previously disadvantaged groups	Legislation enacted which prohibits men from receiving maternity leave	A school code of conduct which prohibits the wearing of a nose ring.

PART IV: REVISION QUESTIONS

(i) TRUE & FALSE QUESTIONS

- A) Section 9 of the Constitution prohibits *all* forms of differentiation on listed or analogous grounds. (T/F)
- B) The test for assessing whether redress measures comply with section 9(2) was summarised in *Minister of Finance and Others v Van Heerden (Van Heerden)* as follows: (i) whether the measure targets a previously disadvantaged group; (ii) whether the measure is designed to promote or protect that group which has been identified and (iii) whether the measure promotes equality in the long term. (T/F)
- C) PEPUDA is only applicable to the conduct of private actors, in other words a challenge to the discriminatory the conduct of public organs may not be subject to *PEPUDA*.
- D) A litigant may not rely directly on section 9(4) unless they are challenging the constitutionality of a provision in PEPUDA or the statute in its entirety. This is based on the principle of subsidiarity.

(ii) SHORT QUESTIONS

- (A) Briefly explain which values of the Constitution, have been used to interpret the right of equality contained in section 9. (5 marks)
- (B) Briefly explain the difference between direct and indirect discrimination and provide examples of each. (4 marks)

(iii) LONG/PROBLEM QUESTION

Thabang Molefe is a learner at BrightSparks High School on the outskirts of Johannesburg. The school was previously a school only attended by students who would have been classified as 'white' under apartheid. As the demographics of the area began to change so too did the demographics of learners at Thabang's school. Now 60% of learners at BrightSparks fall into the category of 'African' ie 'black'. A teacher at BrightSparks was recently depicted in the news in a video, which went viral, showing her hysterically screaming at one of her students. The principal of BrightSparks decides to amend the school's code of conduct and provide for 'greater levels of discipline because the young generation are entitled and disrespectful'. One of the school's policies deals with hairstyles and reads as follows:

1. No long hair, dyed/coloured hair, no braids and no dreadlocks.
2. All learners who do not comply with the rule will be barred from representing the school in all extra-curricular activity.
3. Students may apply for an exemption if the principal is satisfied that the application is based on grounds which 'embody the school's ethos and values'.

You are a candidate attorney at JusticeLeague Attorneys and your principal, Mr Bruce Wayne, has asked you to prepare a memorandum in which you answer the following questions (you are also requested to provide case and statutory authority where applicable):

- (i) What section of the Constitution is applicable and is there any governing legislation giving effect to this section. (1 mark)
- (ii) What implications does the principle of subsidiarity have in this set of facts? (2 marks)
- (iii) Explain whether the rule might discriminate directly/indirectly. (3 marks)
- (iv) Critically assess Thabang's chance of successfully challenging BrightSparks code of conduct. (10 marks)

- (v) Provide your opinion on whether BrightSparks can successfully argue that they have reasonably accommodated Thabang, by providing for the exemption.
(4 marks)

Total 20 Marks

QUESTION

1. Define PEPUD
2. Discuss how the rule differentiates and whether this differentiation is discrimination
3. Discuss the test of fairness in pepuda in conjunction with case law

PART V: ANSWERS

(i) TRUE & FALSE Answers

- A) False: see section 9(2); additionally only unfair discrimination is constitutionally impermissible.
- B) True
- C) False: Public organs are subject to the requirements of PEPUDA; it is only where discrimination comes from legislation where the challenge to the discrimination will have to be established using section 9(3) – in other words PEPUDA only applies to section 9(4).
- D) True

(ii) SHORT Answers

A) Equality as a founding value of the Constitution has been invoked to interpret equality as a right. Our courts have explicitly endorsed the proposition that the achievement of equality entails the equal recognition of our moral worth as human beings. Our courts have long discussed the relationship between the value of dignity and the right to equality. The right to equality entails a recognition of equal moral and humane worth. Such an approach needs to be understood in the context of the atrocities of apartheid which stripped its victims of their personhood and humanity. This is because the law refused to recognise the moral worth of others based on arbitrary social constructs.

See:

- *President of the Republic of South Africa and Another v Hugo*
- *Social Justice Coalition v Minister of Police and Others*
- *Prinsloo v Van der Linde and Another*
- *Hoffmann v South African Airways*

B) Direct discrimination occurs where a rule differentiates explicitly on a listed or analogous ground. For example, direct discrimination can take the form of a rule differentiating on race, religion or HIV status. Indirect discrimination occurs where a rule does not differentiate on a listed or analogous ground, but the application of the rule has the *effect* of discriminating on a listed or analogous ground. For example, the minority in *S v Jordan and others* stated that a rule that criminalised sex workers offering their services but failed to criminalise those who engaged the services of sex workers indirectly discriminated against women.

(iii) LONG/PROBLEM QUESTION

- i. This provision would be challenged under section 9(4) of the Constitution.
- ii. According to the constitutional principle of subsidiarity, a litigant may only rely, directly on a constitutional right to the extent that (i) the common law or legislation has not been enacted to give effect to the right or (ii) where the

provisions or the entire statute giving effect to right, are challenged on the basis that they violate the Constitution. Therefore, Thabang will have to rely on PEPUDA, to challenge the school's code of conduct (*MEC for Education: KwaZulu-Natal and others v Pillay*).

- iii. The rule may possibly indirectly discriminate on the grounds of race. Indirect discrimination occurs where a rule does not differentiate on a listed or analogous ground, but the application of the rule has the effect of discriminating on a listed or analogous ground. For example, the minority in *S v Jordan and others* stated that a rule which criminalised sex workers offering their services but failed to criminalise those who engaged the services of sex workers indirectly discriminated against women.
- iv. The rule does not explicitly differentiate on the grounds of race – but the application of the rule may have disproportionate effects for black learners because of the way hairstyles historically attributed to black learners have been targeted. Section 9(3) of the Constitution prohibits discrimination on any of the 16 listed grounds directly/indirectly. The rule embodies indirect discrimination because a supposedly 'neutral differentiating criterion produces a markedly different impact on a listed ground' (*S v Jordan* (minority)).

Question

1. Answer:

Section 1 of the *PEPUDA* refers to any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly: (i) imposes burdens, obligations or disadvantage on; or (ii) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds. Determining unfair discrimination in relation to PEPUDA requires a two-stage process in which one first establishes whether there has been discrimination and thereafter an assessment of whether – if discrimination did occur – the discrimination in question was fair or unfair. Mirroring section 9 equality jurisprudence in the Constitution, the focus of a PEPUDA inquiry is predicated on

substantive as opposed to formal equality (See *Harksen, Hoffmann, National Coalition for Gays and Lesbians & Prinsloo & Pillay*).

2. Define differentiation and its relationship with discrimination. If the differentiation is on a prohibited ground then it constitutes discrimination and must be dealt with in accordance with 9(3). If there is no differentiation, that will be the end of the inquiry. Where differentiation has been found, it must be established that it has rational connection to a legitimate governmental purpose.

3. (i) Apply the test emanating from *Pillay* to the facts – it seems unlikely *BrightSpartks* have satisfied the test. It will depend on the nature of the case and the nature of the interests involved. Two factors seem particularly relevant. First, reasonable accommodation is most appropriate where, as in this case, discrimination arises from a rule or practice that is neutral on its face and is designed to serve a valuable purpose, but which nevertheless has a marginalising effect on certain portions of society. Second, the principle is particularly appropriate in specific localised contexts, such as an individual workplace or school, where a reasonable balance between conflicting interests may more easily be struck. Even where fairness requires a reasonable accommodation, the other factors listed in section will always remain relevant.