ARTICLE

THE ARTICULATION OF AN AFRICAN PHILOSOPHY OF EQUALITY AS LEGACY OF THE SOUTH AFRICAN CONSTITUTION

Dunia P. Zongwe[1]

ABSTRACT

African nations have in common the brutal and humiliating experiences of racism, slavery, colonialism, exploitation, and marginalisation. I refer to this collective trauma as the triple humiliation of racism, slavery and colonialism. These shared experiences to a varying degree have informed those nations' perspectives on equality and non-discrimination in the quest for the recognition of equal humanity. Unlike the rest of the continent, several countries in Southern Africa (ie, Namibia, South Africa, Zimbabwe) achieved black democratic rule towards the end of the twentieth century. Most notably, in 1994 South Africa realised democratisation and adopted an interim constitution. The final Constitution, promulgated in 1996, enshrines equality provisions that express lessons learned from South Africa's history of racism, colonialism and apartheid – a past defined by institutionalised inequality.

The Constitutional Court and other competent courts since 1994 have developed an impressive and coherent philosophy of equality. Although South African equality jurisprudence has echoes in all regions of Africa and beyond the legal sphere, no effort has been made to bring this radiating influence to its ultimate conclusion, namely that the South African Constitution and constitutional law largely articulates a truly African philosophy of equality. I draw just such a conclusion. In reflecting on the successes and shortcomings of the South African Constitution twenty years after its promulgation, I find that the equality jurisprudence is indisputably an enduring legacy, not only in South Africa, but in Africa as well. Earlier studies have not elevated the equality jurisprudence to an African jurisprudence because they did not connect the ideal of equality to the pan-African philosophy of the muntu or ubuntu. If the connection is made, different people in different parts of the continent will not merely be able to appropriate this philosophy; they will actively build on it as a rich, invaluable, living source of meaning, self-identity and self-worth.

---

1 Senior Lecturer, University of Namibia. JSD (Cornell); LLM (Cornell); Cert (Univ Montréal); LLB (Univ Namibia); BJuris (Univ Namibia). I owe deep debts of gratitude to Peter A. Iita, Cynthy R. Owoseb and Petrus Shoopala for superb research assistance. I am also indebted to Leezola R. Green for constructive comments on an early draft of this article. Any residual imperfections in this article are my own.

UNISA university of south africa PRESS

Southern African Public Law
https://upjournals.co.za/index.php/SAPL/index
Volume 31 | Number 1 | 2016 | pp. 32–53

https://doi.org/10.25159/2219-6412/2659
ISSN 2219-6412 (Print)
© Unisa Press 2017

1. INTRODUCTION

Imagine, somewhere in Africa, judges striving to settle an unusual discrimination claim before the court. The plaintiff complains that the state has indirectly discriminated against her because she is a sex worker.[2] She brings up the equality clause in that African country's constitution to file suit and seek redress against the state because its laws criminalise sex work.

The dilemma the judges face is that, while the constitution forbids the state from discriminating against people based on sex, it does not expressly stop it from differentiating between people based on work. The plaintiff claims that the state's differential treatment has robbed her of her dignity and sense of self-worth, that she feels intensely violated, and that the state's criminal laws are indirectly discriminatory because most sex workers are women, a vulnerable group in society.[3] On the other hand, the respondent state denies its conduct is discriminatory since distinctions between prostitution and other professions are not only rationally connected to the state's legitimate objectives, they translate society's loud rejection of the practice.

How should the court resolve this case? Does the distinction amount to a violation of the plaintiff's right to equality? If this is a case of discrimination, what kind of discrimination is it? Situations such as these raise fundamental practical and philosophical issues.

The Constitutional Court and other competent courts in South Africa have since 1994 developed an impressive and coherent philosophy of equality.[4] Even if South African equality jurisprudence has echoed across regions within Africa[5] and without,[6]

2 The Constitutional Court of South Africa faced similar facts in *Jordan and Others v S* [2002] 6 SA 642 (CC).

3 The Supreme Court of Canada was confronted with similar arguments in Canada (*Attorney-General*) *v Bedford* [2013] SCC 72.

4 For an examination of the equality jurisprudence of the South African Constitutional Court, see Anne Smith, 'Equality constitutional adjudication in South Africa' (2014) 14 AHRLJ 609–632; Karthy Govender, 'The developing equality jurisprudence in South Africa' (2009) 107 Michigan Law Review First Impressions (MLR FI) 120–123, and Albie Sachs, 'Equality jurisprudence: the origin of doctrine in the South African Constitutional Court' (1999–2000) 5 Review of Constitutional Studies 76–103.

5 See for example Gustavo Gomes da Costa Santos, 'Decriminalising homosexuality in Africa: lessons from the South African experience' in Corinne Lennox and Matthew Waites (eds), *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth: Struggles for Decriminalisation and Change* (Human Rights Consortium, Institute of Commonwealth Studies, School of Advanced Study, University of London 2013) 313–337 (drawing lessons from the South African experience for other African countries on how to advocate lesbian and gay rights).

6 See for example Anne Smith, 'Constitutionalising equality: the South African experience' (2008) 9 International Journal of Discrimination and the Law (IJDL) 201–249 (examining how South Africa addressed the technicalities of constitutionalising equality in order to draw out lessons for other countries in the process of constitutionalising equality); Charles J Ogletree, 'From Pretoria to Philadelphia: Judge Higginbotham's racial justice jurisprudence on South Africa and the United States' (2002) 20 Yale Law & Policy Review (YLPR) 383–397 (praising South Africa's racial justice

no effort has been made to bring this radiating influence to its ultimate conclusion. I will draw just such a conclusion, and go beyond it.

To make these points I divided the substance of this article into five sections. In the first section, I spell out the notion of equality and the jurisprudence derived from it. The next section tackles South African constitutional equality jurisprudence. I unveil the link between the South African equality jurisprudence and African constitutional laws in the third section. The connection I establish between the two leads to my principal submission (fourth section), which is that the South African constitutional equality jurisprudence largely articulates an authentic African philosophy of equality (fifth section).

2. EQUALITY

2.1. A runaway concept

Equality is a complex issue: the notion of equality eludes and defies definition. It is a multi-headed beast with a deceptively one-dimensional appearance. It is a philosophical, economic, moral, political and legal concept. It is a 'chameleon-like' idea,[7] used every day in a myriad of social contexts: racial equality, sex equality, economic (in)equality, equality of opportunity, same-sex equality, political equality and so on. It is such a fugitive concept that it is questionable whether it is possible to comprehensively understand the concept of equality. As Camp and Gonzalez note, the term 'equality' is widely used yet little understood.[8]

2.2. Why this philosophical inquiry matters

Despite its indefinable qualities,[9] equality is at the centre of constitutional conversations on several accounts. In view of South Africa's history of institutional racism, the Constitution was written with the guarantee of *equality at its very heart;*[10] therefore, the equality clause is the most prominent aspect of the South African Constitution.

as a model for the United States of America to emulate).

7 Jack B Weinstein, 'Changing equalities' (2010) 54 New York Law School Law Review (NYLSLR) 421 at 423.

8 IFC Camp and MR Gonzalez, 'The philosophical notion of equality' (2009–2010) 8 Ave Maria Law Review 153.

9 See Donald J Kochan, 'On equality: the anti-interference principle' (2011) University of Richmond Law Review 431 at 458 (stating that the law will always struggle with the definition of equality).

10 *Fraser v Children's Court Pretoria North and Others* [1997] 2 SA 218 (CC) para 20 (holding that 'there can be no doubt that the guarantee of equality lies at the very heart of the Constitution'); Kate O'Regan, 'The right to equality in the South African constitution' (2013) 25 Columbia Journal of

Since this year marks the twentieth anniversary of the 1996 Constitution, it is a suitable occasion to focus on the notions of equality and discrimination in order to look back on what has been achieved and to chart the way forward. The time is ripe for soul-searching and a critical evaluation of the Constitution.

The significance of this introspective exercise goes beyond the legal and constitutional spheres: it includes matters of policy and societal design as a result of growing concern about inequality and instability. Globalisation has moved to the front burner the issues of equality and non-discrimination. This exercise highlights that distinctions between people, and hence the risk and possibility of discrimination, arise as a consequence of the need to lay down rules to regulate behaviour: 'All of law differentiates, distinguishing between one group and another' said Sachs.[11] '[T]hat is the nature of law; it classifies'.[12] 'It is not realistic to believe that classifications, preferences, progressive taxation, or other unequal laws will disappear', adds Kochan.[13] As a by-product of legislation, classification follows and discrimination is the result.

A traditional place for the resolution of competing discrimination and equality-based claims is the courtroom. The equality jurisprudence developed over time in Africa, in Europe[14] and elsewhere on the globe is crucial in this process. In particular, South Africa is ideally positioned for an open conversation on an African philosophy of equality because it – this is my main argument – has formulated a coherent and elaborate philosophy.

The value of philosophy lies in the profound and reflective contemplation that it entails; philosophy is also useful for its practical applications. When it comes to equality and non-discrimination philosophy effectively aids in the interpretation of equality principles and ideals. The African Charter on Human and Peoples' Rights stipulates that the virtues of African historical tradition and the values of African civilisation must 'inspire and characterise' reflections on the concept of human and peoples' rights.[15]

In order to become practically useful a philosophy must be articulated. In the African context this richer understanding needs to speak to the particular circumstances of the continent. This is what I mean by a 'truly African philosophy'. African philosophy, among other things, is a reaction to the changes in African societies triggered by

Gender and Law (CJGL) 110 at 111 (stating that equality is a central theme of the South African Constitution).

11 Sachs (n 4) at 81.

12 id.

13 Kochan (n 9) at 458.

14 For an effective exposition of the equality jurisprudence in Europe, see European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Non-Discrimination Law* (European Union Agency for Fundamental Rights 2010).

15 Preamble of the African Charter on Human and Peoples' Rights (ACHPR).

modernisation and globalisation, and it arises as 'a means of meeting the challenges posed by the new situation'.[16]

South African equality jurisprudence, though logical and consistent, in this sense has not been articulated fully. The thrust of my argument is that over the past twenty years South African courts have developed an elaborate and coherent philosophy of equality but that they fall short in not mounting a fully-fledged philosophy.

2.2.1. The mathematical origins of equality and their extensions

The yearning for equality is explained by evolutionary psychology as an instinct that manifests itself in early childhood.[17] On the other hand, the idea of equality is traceable to mathematics.[18] It is by analogy – and not literally – that the mathematical notion of equality has been extended to apply to the behaviour of human beings.[19] Equality before the law does not entail that human beings are equal in every respect in an absolute mathematical sense.

Outside the field of mathematics equality is an elusive concept.[20] Capaldi notes that the concept is both descriptive (factual) and normative. As a normative concept, 'equality' is the notion that there is some special respect in which all human beings are in fact equal (descriptive) and that this factual equality requires that they be treated in a special way.[21] Special treatment may entail identical treatment or differential treatment to restore them or aid them in reaching or realising the specific factual state.[22]

However, as a normative concept, equality remains starkly at odds with reality. An Australian judge, Gaudron, once remarked that human beings are different as a matter of fact and in those differences lie patent inequalities.[23] She added that

> [a]s a social objective, [equality] *flies in the face of those all-pervasive customs and mores by which we are continuously and comprehensively ranked one against the other, our inequalities determining our relative positions in this or that particular pecking order.*[24]

16 Fidelis Eleojo Egbunu, 'A review of the question of African philosophy' (2013) 11 International Journal of Humanities and Social Sciences (IJHSS) 138 at 139.

17 See Kenneth L Karst, 'Why equality matters' (1983) 17 Georgia LR 245 at 251.

18 Camp and Gonzalez (n 8) at 155–158.

19 id at 158–160.

20 Mary Gaudron, 'In the eye of the law: the jurisprudence of equality' The Mitchell Oration 1990 (1990). [The Mitchell Oration is a series of formal addresses made by various speakers that recognises Dame Roma Mitchell's lifelong advocacy for human rights and preventing discrimination]

21 Nicholas Capaldi, 'The meaning of equality' in Tibor R Machan (ed), *Liberty and Equality* (Hoover Institution Press 2002) 1.

22 ibid.

23 Gaudron (n 20).

24 ibid.

2.2.2. Equality by its negation

Perhaps, the meaning of equality can best be illustrated by shining a light on what the absence of it, inequality, implies. This method is more pragmatic than defining equality because it is easier to identify practical episodes of inequality than provide a panoptic theoretical definition of equality.

Kochan sees equality, from a legal standpoint, in terms of discrimination: no person or class may receive privileges or immunities, or punishments, in any discriminatory sense.[25] Fineman argues for an approach to social justice that puts aside equality and takes differences [inequalities] into account.[26] Following the dichotomy made famous by Parfit, inequality is either bad in itself (telic egalitarianism) or bad for some other reason (deontic egalitarianism),[27] for instance, because it is unjust.

Therefore, it appears for many that equality at its core is variously understood as an inextricable part of justice.[28] Rawls's book *A Theory of Justice* (1971) is widely regarded as an illustration of the intimate bond between justice and equality. In *Inequality Re-examined* (1992), Sen makes the case that all conceptions of justice are egalitarian.

2.3. Equality in the legal system

Equality is an indispensable component of human rights. The archetype of the classical formulations of the right to equality is Article 7 of the Universal Declaration of Human Rights, which stipulates that '[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law'. The nature of the criticisms levelled against classical formulations of the right to equality reveals the intersection between law and politics in this field of human rights and constitutional law.[29] These critiques are sometimes classified, except for the 'process versus results' debate, according to the

25 Kochan (n 9) at 437.

26 Martha Albertson Fineman, 'Equality and difference' (2015) 66 Alabama LR 609 at 612.

27 Derek Parfit, 'Equality or priority?' in Matthew Clayton and Andrew Williams (eds), *The Ideal of Equality* (Palgrave Macmillan 2000) 81–125. For scholars rejecting the telic view of equality, see for example Martin O'Neill, 'What should egalitarians believe?' (2008) 36 Philosophy & Public Affairs 119.

28 John-Stewart Gordon, 'Justice or equality?' (2006) 7 Journal for Business, Economics and Ethics 183 (presenting a critical discussion of the relation between justice and equality); Camp and Gonzalez (n 8) at 153 and 165 (stating that, as it relates to social dealings, equality is essentially tied to justice and that justice is more helpful concept than equality in those dealings); Christina Lee, 'Towards a transformative equality: a comparison of South Africa's and the United States' constitutional equality doctrines' (2013–2014) 16 The Scholar 749 at 804 (observing that '[e]quality in a multiracial society with a past of subordination raises fundamental questions about the meaning of justice'); Elizabeth S Anderson, 'What is the point of equality?' (1999) 109 Ethics 287 at 288–289 (arguing that the aim of egalitarian justice is to end oppression).

29 Robin West, 'Progressive and conservative constitutionalism' (1990) 88 Michigan LR 641–721; Christopher McCrudden (ed), *Anti-discrimination Law* (Ashgate Publishing 1991) xvi ff.

different political (left, centre, and right-wing) persuasions of the various authors who made and refined them.

Unfortunately, legal definitions of equality often bite their own tail and have remarkably failed – owing to their circularity – to fully capture the reality that they are trying to represent. To make matters worse, existing legal models of equality are woefully deficient.[30]

2.3.1. Conceptions of equality

Dworkin observes that, though the political ideal of equality is 'mysterious', it needs no definition and no analysis of its practical applications but rather the identification of its conceptions.[31] He draws a distinction, according to its level of abstraction, between the idea of equality as a 'concept' (more abstract) and as a 'conception' (less abstract).[32] There is more than one way of classifying the different theories of equality. These classifications are informed by the contemporary discourse on equality, which is shaped by the works of Rawls, Sen, Cohen, Dworkin and Nozick.

2.3.2. Substantive equality

A conventional way of classifying conceptions of equality is the distinction between process and results, that is, between formal equality and substantive equality, respectively. Formal equality requires consistency in the similar treatment of people similarly situated. The problem with formal equality is that it individualises discrimination claims and thus tends to ignore aspects of group membership, as well as patterns of group-based oppression and subordination.[33]

Embracing a substantive conception of equality is a move from consistency to substance.[34] This heavier conception of equality has multiple facets. It is concerned with the impact of laws or policies on groups already suffering social, political or economic disadvantage; accommodating peoples' differences; recognising diversity; eliminating

30 See Jarlath Clifford, 'Locating equality: from historical philosophical thought to modern legal norms' (2008) 1 The Equal Rights Review 11. See Amartya Sen, 'Equality of What? The Tanner Lecture on Human Values' (Stanford University 1979) (stating that utilitarian and Rawlsian theories of equality have serious limitations).

31 Ronald Dworkin, 'What is equality? Part I: equality of welfare' (1981) 10 Philosophy & Public Affairs 185.

32 Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 134–136.

33 Smith (n 4) at 642. See also Iain Currie and Johan De Waal, *The Bill of Rights Handbook* (Juta 2013) 213–214 (reasoning that a purely formal understanding of equality risks neglecting the deepest commitments of the Constitution).

34 See Smith (n 4) at 613.

social barriers; and helping to achieve an equal distribution of social goods.[35] According to that view, the results or effects of a given rule weigh far more than its mere form.[36]

3. EQUALITY IN SOUTH AFRICAN CONSTITUTIONAL LAW

3.1. The rainbow nation and its colour lines

3.1.1. The apartheid days

Cameron once said that '[South Africa's] national mind is scarred by the oppression of three centuries of systematized inequality'.[37] From the introduction of apartheid in 1948 until its abolition, South Africa was symbolic of the oppression of native Blacks. It was regarded as one of the world's most unequal societies.[38] In the phrase used by Winks, apartheid was the 'very anti-thesis of "ubuntu" as it literally means "separateness" while African humanism underlines "togetherness"'.[39]

Apartheid ideology 'privileged Whites and marginalized Blacks in all aspects of life'.[40] It was entrenched in the South African legal system. Blacks were systematically discriminated against with respect to access to services and resources. Tragically, countless Blacks breathed their last breath at the hands of the enforcement agents of the apartheid regime. In part because of these graphic images many rallied to force change in South Africa, the rainbow nation.

3.1.2. Constitutional law before and after 1994

Before the advent of democratisation in 1994, constitutional law in South Africa was distinctive for the lack of any genuine human rights culture. As was the case with other facets of the legal system, South African constitutional law was marked by legislated racism. The Constitutional Court held in *Prinsloo* that the legal system had rich

35 id at 613–614.

36 Currie (n 33) at 213.

37 Edwin Cameron, 'Constitutional protection of sexual orientation and African conceptions of humanity' (2001) 118 SALJ 642 at 644.

38 Smith (n 4) at 609–610.

39 Benjamin Elias Winks, 'A Covenant of Compassion: African humanism and the rights of solidarity in the African Charter on Human and Peoples' Rights' (2011) 11 African Human Rights LJ 447 at 449.

40 Arthur Chaskalson, 'From wickedness to equality: the moral transformation of South African law' (2003) 1 IJCL 590.

experience in 'constitutionalizing inequality'.[41] Eventually, constitutional law lost its credibility. The law was enforced in a manner that could not keep up even the pretence of the separate but equal doctrine that influenced law in the United States prior to the decision in *Brown v Board of Education*.[42]

After it achieved majority rule in 1994 South Africa adopted an interim constitution that heralded a radical departure from the practice and policy of the past. Later, South Africa promulgated an ambitious and programmatic constitution in 1996 that was hailed as 'revolutionary'[43] and one of the world's best. Most importantly, the Constitution was said to be 'transformative' in the sense that one of its greatest strategic goals was to reengineer South African society from one characterised by systemic inequality to one that is egalitarian and united in its diversity.

The transformative nature of the 1996 Constitution is registered in its Preamble, which indicates that the intention of the constitution-makers was to 'heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights'. In addition, the epilogue to the 1994 Interim Constitution was premised on the notion of 'equality' as one of the fundamental ideals that symbolised South Africa's project of transformation.[44]

3.2. Equality in the 1996 Constitution

3.2.1. Section 9

Unlike the situation in the rest of the continent, a handful of countries in Southern Africa (Namibia, South Africa, Zimbabwe) attained black democratic rule towards the end of the twentieth century; notably, South Africa in 1994 when it adopted democratisation through an interim constitution. The final Constitution, promulgated in 1996, enshrines equality provisions that demonstrate the lessons learned from the country's history of colonialism, segregation and apartheid – a past defined by institutionalised inequality. Section 9 is the equality clause of the 1996 Constitution of the Republic of South Africa. It reads as follows:

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

---

41 *Prinsloo v President, Cape Law Society* [2002] 2 SA 794 (CC) para 20.

42 Chaskalson (n40) at 590. *Brown v Board of Education* is a landmark decision of the US Supreme Court that declared as unconstitutional laws that established separate public schools for black and white students.

43 Currie (n 33) 1–3.

44 Mashele Rapatsa, 'The right to equality under South Africa's transformative constitutionalism: A myth or reality? (2015) 11 Acta Universitatis Danubius 11 at 11.

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

The central place of equality is a 'transformative approach to the fragile and complex relationship between race and equality'.[45] Due to the colonial and apartheid past, the human rights approach was instrumental in building a coherent philosophy of equality for South Africa.[46]

3.2.2. Stages of analysis

There are two distinct bases for judicial intervention in relation to equal protection of the law: the rational-relationship rationale and the human rights rationale[47] (Namibian courts follow a similarly bifurcated approach[48]). In South Africa, the primary focus of equality jurisprudence is 'the human rights dimension'.[49]

The Constitutional Court proceeds to settle discrimination claims on two general bases. This process was authoritatively framed in *Harksen,*[50] hence its name the 'Harksen test'. First, under the rational basis, the Court asks whether a disputed statutory provision makes a differentiation between people or categories of people. If there is no such differentiation, the statutory provision in question does not violate section 9. Second, if the Court finds that the statutory provision differentiates between people, it will ask whether the differentiation has a rational connection to a legitimate government

45 Lee (n 28) at 804.

46 Sachs (n 4) at 83.

47 id at 82.

48 *Chairperson of the Immigration Selection Board v Frank and Another* [2001] NR 107 (SC); see Dunia P Zongwe 'Equality has no mother but sisters: The Preference for comparative law over international law in the equality jurisprudence in Namibia' in Magnus Killander (ed), *International Law and Domestic Human Rights Litigation in Africa* (PULP 2010) 132.

49 Sachs (n 4) at 82.

50 *Harksen v Lane* [1998] 1 SA 300 (CC) paras [43–44] [46–48].

purpose.[51] Should the differentiation be rationally connected to such an objective, the Court will find no violation of section 9.

If, conversely, the impugned statutory provision is not rationally connected to a legitimate government objective, the Constitutional Court will inquire into the fairness of the differentiation. Under the human rights basis, if an applicant alleges discrimination on any of the grounds listed in sub-section 9 (3), the discrimination is presumed to be unfair[52] and the onus is on the respondent to prove that the discrimination was fair. If, on the other hand, an applicant alleges discrimination on grounds not listed in the Constitution, the onus is on the applicant to prove that he or she was adversely affected by the differentiation in question and that the differentiation was unfair.[53]

Should the Court conclude that the differentiation was unfair, it will have to ascertain whether the differentiation can nonetheless be justified under the general limitation clause in section 36 of the Constitution. Section 36 imposes on the respondent the obligation to justify any limitation on an applicant's right to equality. It is a mechanism for mediating between competing claims and rights, and as such, it is a mechanism for the peaceful co-existence between claimants.[54]

3.3. South African equality jurisprudence

On surveying South African equality jurisprudence, the then justice of the Constitutional Court, Albie Sachs, proposed six themes. [55] I use the same themes in this article to offer the gist of that jurisprudence. The themes are contextualisation, substantive equality, impact on lives, patterns of disadvantage, dignity and self-worth and objective analysis of subjective experience of discrimination.

3.3.1. Contextualisation

Contextualisation refers to the necessity to assess allegations of discrimination by placing them in concrete legislative and social contexts instead of abstract categories.[56] In a concurrent opinion in *National Coalition for Gay and Lesbian Equality,* Sachs J held that the contextual approach has the effect of acknowledging that grounds of unfair

---

51 For instance, in *Prinsloo v Van der Linde* [1997] 3 SA 1012 (CC) para 25 the Constitutional Court held that before it can be said that mere differentiation infringes the equality clause it must be established that there is no rational relationship between the differentiation in question and the governmental purpose which is proffered to validate it.

52 s 9 (5) of the Constitution.

53 Smith (n 4) at 615–616.

54 Yvonne Mokgoro, '*Ubuntu* and the law in South Africa' (1998) 4 Buffalo Human Rights LR 15 at 19.

55 Sachs (n 4) at 96–97.

56 id at 96.

discrimination can intersect so that the evaluation of the discriminatory impact involves a combination of several grounds contextually and not separately or abstractly.[57]

The focus is not on the formal text of the Constitution, nor on abstract comparisons of similarly situated persons. It is on 'the lives as lived and the injuries as experienced by different groups' in society.[58] With this approach, the accent is 'placed simultaneously on context, impact and the point of view of the affected persons'.[59]

3.3.2. Substantive equality

South African equality jurisprudence addresses itself to substantive equality. This is a position encouraged by the text of the 1996 Constitution. In *National Coalition for Gay and Lesbian Equality,* the Constitutional Court held that section 9 of the Constitution envisages a substantive concept of equality.[60] As the Court affirmed in *Hugo,* treating people equally can lead to inequality:[61]

> [W]e cannot achieve [the goal of an equal society] by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not.

Substantive equality calls for the selection of a suitable comparator. Thus, in *Pillay,*[62] the majority judgment compared school learners whose 'sincere religious or cultural beliefs or practices are not compromised by the [school's Code of Conduct]' with those whose beliefs or practices are compromised. In some cases, however, identifying an appropriate comparator may prove problematic. The requirement that like be compared with like may produce absurd outcomes, for example, the comparison between pregnant women with 'pregnant' men.[63]

Regrettably, the Constitutional Court has not been consistent in applying this thick concept of equality. Smith wrote:[64]

> At times, the Constitutional Court has granted an order favourable to a minority person or persons seeking recognition or redress for discrimination whereas, at other times, the Constitutional

57 *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others* [1999] 2 SA 6 (CC) para 113.

58 id para 126.

59 ibid.

60 *National Coalition v Minister of Justice* (n 57) paras 16 and 61.

61 *President of the Republic of South Africa and Another v Hugo* [1997] 4 SA 1 (CC) para 41.

62 *MEC for Education: KwaZulu-Natal and Others v Pillay* [2008] 1 SA 474 (CC) para 44.

63 See Smith (n 4) at 621.

64 id at 617.

> Court has been inconsistent in their deliberations in equality rights cases and in determining whether the differentiation in treatment constitutes unfair and indirect discrimination.

3.3.3. Impact on lives

In adjudicating equality cases, courts must delve into the impact of acts and legislation on the lives of the complainants and other people aggrieved by these actions. In *Pillay,* Chief Justice Langa noted that a school's code of conduct that prohibited the wearing of nose studs had an 'underlying indirect impact' on a minority who wore those studs for cultural reasons.[65]

3.3.4. Patterns of disadvantage

The South African approach is not obsessed with race. It is sensitive to all forms of marginalisation and exclusion.[66] Sachs put it thus:[67]

> [s]pecial attention must be paid to the manner in which inequality systematically flows from patterns of disadvantage, subordination and dominance, which may exist outside of the measure under consideration. Thus, measures that happen to reinforce disadvantage are more likely to breach equality than those designed to overcome it.

In *Brink v Kitshoff,* O'Regan wrote that, although racial discrimination has been the most visible and vicious pattern of disadvantage, other systemic patterns of disadvantage are inscribed in the South African social fabric.[68]

This closer attention to patterns of disadvantage is perceptible in the Constitutional Court's equality jurisprudence. In *Prince,* the Court held that the appellant belonged to the Rastafari community, a minority group which

> deserves the protection of the law precisely because it is a vulnerable minority. The very fact that Rastafari use cannabis exposes them to social stigmatization.[69]

In *Pretoria City Council v Walker,* the Court found that one of the reasons why Walker, a white South African, was not unfairly treated was that, far from being the victim of prejudice, he was the beneficiary of a structured system of advantage and that no pattern of disadvantage affecting the social group to which he belonged had been reinforced by

65 *MEC v Pillay* (n 62) para 44.

66 Sachs (n 4) at 84.

67 id at 97.

68 [1996] 4 SA 197 (CC) para 41.

69 *Prince v President, Cape Law Society* [2002] 2 SA 794 (CC) para 26.

the City Council's conduct.[70] Consequently, the Council did not undermine his dignity and sense of self-worth in any way.[71]

3.3.5. Core inquiry: dignity and self-worth

The core inquiry of equality adjudication is not the impact of the challenged act or legislation as such rather it is the impact of those acts on the dignity and self-worth of the complainants or other people aggrieved by the acts. In *President of the Republic of South Africa v Hugo,* the Court quoted with approval the holding by the Supreme Court of Canada in *Egan*[72] that equality means that society cannot tolerate legislative distinctions that offend fundamental human dignity.[73] Mokgoro asserted that human dignity was a key value of ubuntu.[74] Dignity is inextricably linked to identity because a person's sense of self-worth is determined by his or her identity.[75]

3.3.6. Objective analysis of subjective experience

In measuring the impact of conduct and legislation on the dignity and self-worth of people, an objective assessment of their subjective experience of discrimination is necessary. In light of the values of the Constitution, courts must objectively analyse the subjective experience or sense of injury of members of the affected group.[76]

4. THE CONNECTIONS BETWEEN SOUTH AFRICA AND AFRICA

4.1. A common history

For historical reasons, equality and non-discrimination carry special meanings in the African and South African contexts. What South Africa has in common with the rest of the continent is the brutal and humiliating experiences of slavery, colonialism and racism. I call this collective trauma the triple humiliation of racism, colonialism and slavery. These shared experiences to varying degree inform their perspectives on equality and non-discrimination, and drives the quest for the recognition of their humanity. That shared history is an essential aspect of what makes these countries 'African'.

70 [1998] 2 SA 363 (CC) paras 115, 123 and 135.

71 id para 113.

72 [1995] 29 SCR (2d) 79, 104–5.

73 [1997] 4 SA 1 (CC) para 41.

74 Mokgoro (n 54) at 19.

75 *MEC v Pillay* (n 62) para 53.

76 Sachs (n 4) at 97.

However, the common denominators between these nations are not confined to the similarity of their histories; they also relate to the challenges of surviving and prospering in a postcolonial environment that is still dominated by Western constructs and unequal exchange. One of the biggest challenges facing Africans is how to forge an identity, if not a mentality, that will help them transcend these obstacles.

4.2. African constitutions

The vast majority of constitutions in Africa set down and protect the right to equality or otherwise provide for an equal society.[77] As the Constitution of Mozambique proclaims, one of the fundamental objectives of the Republic is the defence and promotion of the equality of citizens before the law.[78] It is no coincidence that, common to these equality clauses, is the prohibition of discrimination based on race (or colour) and sex.[79] The Rwandan Constitution features a progressive provision in terms of gender equality: women are allocated at least thirty per cent of posts in decision-making organs.[80]

Similarly, the African Charter on Human and Peoples' Rights provides for the right to equality. The Preamble to the Charter recalls that African states ratified the Charter with a heightened awareness that they have a duty

> to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence and […] to eliminate colonialism, neo-colonialism, apartheid […] and all forms of discrimination, particularly those based on race, ethnic group, colour, sex, language, religion or political opinion.[81]

The African Charter further lays down that every individual must be equal before the law and entitled to the equal protection of the law.[82] South African constitutional jurisprudence offers those states persuasive interpretations of equality clauses by voicing and verbalising what is *already* part of their philosophy of life. These functions are performed through the interpretation provision of the African Charter, which is binding on all African states that ratified the Charter. Article 60 of the African Charter enables the African Commission on Human and Peoples' Rights to look into practices and rules

---

77 For instance, art 24 of the Constitution of the Republic of Côte d'Ivoire 2000; art 25 of the Constitution of the Federal Democratic Republic of Ethiopia 1995, art 8 of the Constitution of Guinea 2010, art 24 of the Constitution of the Republic of Guinea-Bissau 1984, art 27 (4) of the Constitution of Kenya 2010, art 19 of the Constitution of Lesotho 1993, art 9 of the Constitution of the Republic of Namibia 1990.

78 Constitution of the Republic of Mozambique 2004, art 11 (e).

79 There are a few exceptions where either or both of these grounds of discrimination do not appear. For instance, art 24 of the Constitution of the Republic of Guinea-Bissau.

80 Constitution of the Republic of Rwanda 2003, art 9 (4).

81 Preamble of the ACHPR.

82 African Charter on Human and Peoples Rights, art 3.

among member states, such as South Africa, when construing the equality clause of the Charter.

5. THE ARTICULATION OF A TRUE AFRICAN PHILOSOPHY OF EQUALITY

5.1. The articulation of a philosophy

From the root of the word, 'philosophy' is understood as being the 'love of wisdom'. This discipline, as the mother of all disciplines, is the meta-discipline from which all the others stem. Philosophy is distinguishable by its high level of abstraction, such that questions are raised regarding the application or implementation of philosophical ideas in practice. The concrete application of abstract ideas and rules requires them to be clearly articulated. Articulation requires translating a general idea or principle into a concrete form so that it can be specifically applied.

Because philosophy is so abstract, its articulation is an uphill task. There are several reasons why it may be impossible to put theory into practice, especially a theory of justice.[83] The understanding of equality is broad enough to accommodate diametrically opposed interpretations and applications. Put another way, very abstract ideas can be indeterminate.

5.2. A truly African philosophy of equality

5.2.1. An African philosophy of equality

A justification for a philosophy of equality is that inequalities create stigmatising differences in status and unacceptable forms of power and domination, and that the reduction of inequality leads to the alleviation of suffering and social exclusion.[84] The long line of cases dealing with equality and non-discrimination undoubtedly constitute a 'jurisprudence', but it is arguable whether they can be elevated to a 'philosophy' of equality.

The difference between a mere jurisprudence and a philosophy resides in the level of systematicity: not everything passes for a philosophy, nor is the growth of a veritable African philosophy to be stunted.[85] Nevertheless, considering the above survey of the

83 See Jonathan Wolff, 'Equality: the recent history of an idea' (2007) 4 Journal of Applied Philosophy 125 at 135.

84 TM Scanlon, *The Difficulty of Tolerance: Essays in Political Philosophy* (Cambridge University Press 2003) 202–218.

85 Egbunu (n 16) at 143.

South African equality jurisprudence, it can be safely inferred that the jurisprudence in question is fairly consistent and highly systematic and that it is, as a consequence, properly a 'philosophy'.

If it is granted that South African equality jurisprudence constitutes a 'philosophy', what makes it an 'African' philosophy? The almost spontaneous answer is that it originated in Africa. However, such an answer would not be correct because the South African approach to equality and non-discrimination is also informed by the positions and developments in jurisdictions outside of the continent. Nor would it be correct to maintain that the South African philosophy is African because of the skin colour of those who put it forward.

5.2.2. Ubuntu as an African philosophy of equality

The philosophy of equality, conveyed by South African constitutional law, is African insofar as it embodies African humanism or ubuntu. Ubuntu or concepts strikingly similar to it feature in most African languages.[86] As the Constitutional Court of Uganda held in *Salvatori,* ubuntu is not an exclusively South African concept, it is an African one.[87]

The 1993 interim Constitution of South Africa enshrined a post-amble that reads:

> The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past… These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.[88]

Ubuntu an undeniably African concept, is even more difficult to define than equality. Mokgoro rightly states that

> [d]efining an African notion in a foreign language [i.e., English] and from an abstract, as opposed to a concrete approach, defies the very essence of the African world-view.[89]

Its essence can be summed up by the statement that 'a human being is a human being because of other human beings'.[90] Ubuntu is the driving force behind the transition from

86 See Drucilla Cornell and Karin van Marle, 'Exploring *ubuntu*: Tentative reflections' (2005) 5 African Human Rights LJ 195 at 196.

87 See *Salvatori Abuki & Another v Attorney-General* [1997] UGCC 5.

88 Emphasis added.

89 Mokgoro (n 54) at 15.

90 See Mokgoro (n 54) at 16.

a racist past to a constitutional democracy.[91] The concept is rendered by Mokgoro as follows:[92]

> Ubuntu(-ism), which is central to age-old African custom and tradition, […] abounds with values and ideas which have the potential of shaping not only current indigenous law institutions, but South African jurisprudence as a whole.

The meaning of the concept becomes clear through its practical manifestations. Cornell and Van Marle maintain that certain aspects of customary law[93] and the African Charter on Human and Peoples' Rights are manifestations of ubuntu.[94] Ubuntu is visible in the African Charter, which is the only binding human rights instrument that provides for people's rights[95] as well as individual duties.[96] It also is manifest in the solidarity that African countries extended to South African liberation movements during apartheid.[97] Thus, ubuntu prioritizes family obligations, group solidarity, conformity, compassion, respect, human dignity, humanistic orientations and collective unity.[98]

Most pertinently, ubuntu serves as a bridge between South African constitutional equality jurisprudence and the historical importance of equality in the constitutional laws of other African countries.[99] Winks states that the principle of solidarity is a distinguishing attribute of African institutional law,[100] from which it can be cautiously concluded that ubuntu is a fixture of African constitutional law. Some national courts have

91 *Dikoko v Mokhatla* [2006] 6 SA 236 (CC) para 113 (Sachs held that historically ubuntu was foundational to the spirit of reconciliation and bridge-building that enabled the deeply traumatised South African society to overcome and transcend the divisions of the past.); Winks (n 39) at 449 (stating that ubuntu steadied South Africa's transition from racist repression to a constitutional democracy).

92 Mokgoro (n 54).

93 See C Himonga, M Taylor and A Pope, 'Reflections on judicial views of ubuntu' (2013) 16 PELJ 369 at 371 (reasoning that, since ubuntu is a fundamental value that informs African interpersonal relations and dispute resolutions, it is inherent to customary law).

94 (n 86) at 220.

95 ACHPR, arts 19–24. See Winks (n 39) at 459 (recalling, in order to emphasize the distinctiveness of African humanism, that the Western world was hostile to the notion that a person forms part of a people).

96 ACHPR, arts 25–29. See minority judgment by Ngcobo in *Bhe & Others v Khayelitsha Magistrate & Others* [2005] 1 SA 580 (CC) para 163 and 166 that ubuntu embodies the elaborate system of reciprocal duties among family members found in traditional African societies.

97 Winks (n 39) at 449.

98 Mokgoro (n 54) at 17.

99 See Cornell (n 86) 195.

100 Winks (n 39) at 455.

applied ubuntu or African humanism in cases before them, in Lesotho,[101] Tanzania,[102] and Uganda.[103]

Nevertheless, the concept of 'ubuntu' is problematic. Critics say the concept is idealistic, too general and meaningless. Though Mokgoro qualifies the concept as an 'expansive, flexible and philosophically accommodative idea',[104] its contours are grey areas (ie, they are difficult to define). A related criticism is that ubuntu cannot be translated into a justiciable principle.[105] A further objection is that in view of its roots in traditional African societies, certain aspects of ubuntu are inherently patriarchal and conservative. However, this weakness can be dealt with by modernising the least progressive facets of ubuntu.

Lastly, the continued presence of ubuntu in the 1996 Constitution is debatable. The absence of any express reference to ubuntu may imply that its constitutional status is questionable. However, a convincing case can be made that the South African Constitution and the Bill of Rights embody the values of ubuntu. Mokgoro agrees with that proposition despite declaring it 'arguable'.[106]

6. UBUNTU AND EQUALITY

6.1. Ubuntu equality

The foregoing exposition of the connection between South African constitutional jurisprudence and African constitutional law supports my argument that the South African Constitution and constitutional law articulate a truly African philosophy of equality. Now, I demonstrate that they have not *fully* articulated that philosophy.

If ubuntu is the 'unifying motif in the Bill of Rights' and equality is at the centre of the Constitution and is part of the Bill of Rights, then by implication equality is at the heart of or is intimately connected to ubuntu. This argument can be inferred from the literature on South African constitutional law, yet that inference is missing from the literature. Although equality is tied to the notion of ubuntu in several judicial and doctrinal analyses, the connection has not been completed. Given the idea of inclusivity embedded in ubuntu, it is surprising the link between ubuntu and equality has not been made if the two are so close.

101 *Mokoena v Mokoena & Others* [2008] LSHC 36.

102 *Director of Public Prosecutions v Pete* [1991] TZCA 1.

103 *Salvatori Abuki & Another v Attorney-General* (n 87).

104 Mokgoro (n 54) at 16

105 Cornell (n 86) at 196.

106 Mokgoro (n 54) at 19.

Himonga and others surveyed the various meanings and contexts in which courts have employed the notion of ubuntu,[107] but nowhere in that study is the link between equality and *ubuntu* to be found. Thus far, ubuntu has been used in the interpretation of several clauses in the Constitution, for example, with reference to the application of the death penalty in *Makwanyane*,[108] but not for the construction of the equality clause.

Edwin Cameron seemed to connect equality and ubuntu during a lecture he delivered in June 2001 in Windhoek, Namibia,[109] but it is arguable that Cameron actually made such a link. First, although he unequivocally stated that the Constitutional Court has clearly articulated ubuntu,[110] he did not elevate that articulation to the level of a philosophy, specifically an African philosophy of equality. As Cornell and Van Marle note, courts do not regard ubuntu as a philosophical doctrine but as a uni-dimensional concept.[111]

Cameron linked ubuntu and equality loosely and in a way that many Africanists find controversial in that he argued that the inclusive African concept of ubuntu extends to gays and lesbians.[112] Cameron's case is compelling on ethical grounds, but his argument is not so much that ubuntu embodies an African philosophy of equality. Rather, his argument is that the values of ubuntu – which features dignity, privacy and equality – extend to gays and lesbians.[113] To recognise the humanity of all is not identical to the recognition that ubuntu encapsulates an African philosophy of equality. Cameron's position does not directly address the question as to whether South African constitutional law has articulated an African philosophy of equality.

6.2. Ubuntu or Ubuntu/ism?

Earlier I maintained that South African equality jurisprudence is technically a philosophy. Does the same hold true for ubuntu? Is it more accurate to refer to ubuntu, the notion, or to ubuntu/ism, the philosophy? The fact that jurists and courts, at times, used the term 'philosophy' as referent does not entail that ubuntu is a philosophy in its technical sense. To this question, Cornell and Van Marle answer that the judiciary in South Africa does not regard ubuntu as a philosophical doctrine.[114] However, the legal position is less certain: Winks qualifies ubuntu as a legal philosophy.[115] In *Port Elizabeth Municipality*

107 Himonga (n 93).

108 *S v Makwanyane* [1995] 3 SA 391 (CC) paras 223–227.

109 Cameron (n 37).

110 id at 646.

111 Cornell (n 86) at 196.

112 Cameron (n 37) at 645.

113 id at 647.

114 Cornell (n 86) at 196.

115 Winks (n) at 458–463 (contending that ubuntu is a viable and valuable legal philosophy).

v Various Occupiers, Sachs said that the spirit of ubuntu combines individual rights with a 'communitarian philosophy'.[116] Another justice of the Constitutional Court, Mokgoro, noted that ubuntu has sometimes been depicted as a 'philosophy of life'.[117]

If it is granted that ubuntu is a genuine philosophy, the next question becomes what kind of philosophy. From the exposition above of its meanings and insofar as it is mainly used for interpretation purposes, ubuntu properly should be regarded as a philosophy of knowledge and to a lesser degree a philosophy of ethics. It should be regarded as a morality of cooperation, compassion and communalism, as well as a concern for the interests of others in the community and respect for the dignity of personhood.[118]

6.3. The contours of the African philosophy of equality

The contents and contours of the African philosophy of equality, encapsulated in ubuntu, are unclear. I have clarified the contents, now I delineate what I propose should be the contours of the philosophy of equality. First, that philosophy emphasizes substantive equality as opposed to formal equality. Second, it should feature the economic advancement of historically disadvantaged groups. It should be a race- or ethnicity-conscious criterion. Since equality allows certain inequalities and rejects others, it must have a method for determining which inequalities are permissible and when groups are equal or unequal in relevant ways.[119]

However, I qualify the economic advancement of historically disadvantaged groups in the name of substantive equality not to mean equality of outcomes or 'equality of fortune',[120] but equality of opportunity. As Frankfurt argued, the point of equality should not be that everybody has the *same* economically, but that they have *enough*.[121] Moreover, the implementation of this philosophy of equality should reflect on the situations and the extent to which the state should intervene for the sake of equality.[122]

Third, dignity is central to the interpretation and determination of equality cases. Fourth, the recognition of same-sex relationships is controversial, but nothing prevents states from employing the South African approach as a model to which these legal

116 [2005] 1 SA 217 (CC) para 37.

117 Mokgoro (n 54).

118 id at 17.

119 Norman Daniels, 'Democratic equality: Rawls's complex egalitarianism' in Samuel Freeman (ed), *Cambridge Companion to Rawls* (Cambridge University Press 2003).

120 See Anderson (n) 289–295 (criticising conceptions of equality based on the equality of outcomes). For scholars advocating equality of outcomes, see for example Anne Phillips, 'Defending equality of outcomes' (2004) 12 Journal of Political Philosophy 1.

121 Harry Frankfurt, 'Equality as a moral ideal' (1987) 98 Ethics 21 at 21–22.

122 See Kochan (n 8) at 446 ff arguing that equality requires that the state avoid interfering with individual choices and activities.

systems could aspire.[123] Following the South African example, African countries could opt for an equality-specific legislation instead of a maze of equality and non-discrimination provisions scattered in a multitude of statutes or cases.

Fifth, ubuntu could be used to reform and shape the law and legal institutions.[124] Sixth, the African philosophy of equality will have to address issues of priority in the allocation and distribution of resources: policies may forego benefits that are greater than those of a worse-off group.[125] Seventh, the philosophy should stress that equality protection is on social groups, rather than individuals,[126] or it could slip into some form of legalism and formalism that the exigencies of substantive equality reject.

Eighth, as Cameron said,[127] focus should not be on the wording itself, which would be to underestimate the profundity of the Constitutional Court's jurisprudence.[128] What matters is the approach, not the formulation of equality, provided that such an approach does not wander too far from the constitutional text. Constitutional formulations of equality are not unique to the continent. What are unique to African culture, in the words of Mokgoro, are the various methods, approaches, emphasis and attitude.[129]

7. CONCLUSION

I have demonstrated that South African constitutional law has largely articulated an authentic African philosophy of equality, albeit not deliberately. The articulation thus is neither complete nor explicit. My part in this debate has been to take that articulation to its conclusion.

In developing their equality jurisprudence, South African courts, understandably, almost solely focused on the situation within their jurisdiction. They have not contemplated the elaboration of a philosophy of equality applicable, to a greater or lesser degree, to the entire continent. In the process of developing that approach to equality and non-discrimination cases, they did not nor did they intend to build up a body of rules with the level of coherence required of a philosophical or normative theory.

My overall observation is that earlier studies have not elevated the equality jurisprudence to an African jurisprudence because they did not link the ideal of equality to the pan-African philosophy of the muntu or ubuntu. Once the connection is made, across the continent people will be able to appropriate this philosophy and build on it as a rich, invaluable, living source of meaning, self-identity and self-worth.

---

123 Smith (n 4) at 610–611.

124 Mokgoro (n 54) at 20.

125 Derek Parfit, 'Equality and priority' (1997) Ratio 202.

126 See Iris Marion Young, 'Equality of whom? Social groups and judgments of injustice' (2001) 9 The Journal of Political Philosophy 1.

127 Cameron (n 37) at 647.

128 id at 643.

129 Mokgoro (n 54) at 18.