DISADVANTAGE AND DISCRIMINATION: THE EMERGING JURISPRUDENCE OF THE SOUTH AFRICAN CONSTITUTIONAL COURT

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INTRODUCTION

In most countries of the world, and in much of the existing international human rights law, equality is recognised in the Aristotelian sense.[1] Aristotle's view was that "justice considers that persons who are equal should have assigned to them equal things".[2] Consequently, "there is no inequality when unequals are treated in proportion to the inequality existing between them".[3] Laws which seek to draw distinctions between groups of persons and treat them differently must first, identify those who are alike correctly so as to draw appropriate distinctions between persons, and second, provide for appropriately different treatment for those who are not alike. Aristotle's definition provides the test for laws that do not offend the principle of equality, but it is formal, without substantive content: there are no criteria by which to assess appropriate distinctions and appropriately different treatment.

The (virtually) universal approach to equality in law is to declare the equality of all persons, or to imply, from the drafting of the human rights provisions, that this equality is an *a priori* fact, from which the legal guarantee of equal treatment or protection before or under the law flows and from which follows the prohibition of discrimination on specified or unspecified grounds. Equality norms in law therefore, generally, follow the Aristotelian approach, while supplying the categories or classes which are not appropriate bases on which to draw distinctions from which legal differences will follow. They therefore give some normative content to the Aristotelian criteria for those who are alike, but that content is not substantively elaborated. While the model relating to equality presumes equality of fact, those often more specific provisions outlawing discrimination are usually expressly premised on the desire to redress perceived injustices or disadvantage being experienced by a particular group or groups within a society or community. Women or ethnic or religious minorities, for example, are identified as participating to a disproportionately and unfairly small degree in such areas as employment and educational opportunities.[4] Anti-discrimination laws specifically created for the relief of such disadvantage generally provide punitive measures where active prejudice results in disadvantaged treatment,

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1 See Aristotle's *Nicomachean Ethics*, (trans. Ross, *World's Classic Series* 1980).

2 *The Politics of Aristotle* (trans. Barker, 1946) Book III, xii, 1282b.

3 Book V, i, 1301a.

4 See for example, the White Paper *Equality for Women* which preceded the Sex Discrimination Act 1975 in the United Kingdom. The justification for the legislation was stated as follows: "The status of women in society, the disabilities and disadvantages imposed on women and their consequences, are social questions. They are legitimate subjects of the public interest and are appropriate matters for government action." Cmnd 5724 (1974), para 3.

as well as measures designed to relieve that more subtle "institutionalised" discrimination. The logic underlying these latter measures is compensation for the victims of the prior system, which acts both remedially and as a deterrent to any repeated injustices in the future. Therefore, however the courts may interpret them, the conceptual foundation for such provisions is that it is the effect on the victims with which the law is concerned, not the conduct of the perpetrators.

It is the legal recognition of the conceptual foundations of such legislation which has challenged the formal, public law model of equality laws. Ironically, though specifically designed to alleviate disadvantage, those anti-discrimination laws are often drafted using the same, formal criteria for claims as equality laws which adopt the simple legal statement of the Aristotelian ideal. Witness the United Kingdom Sex Discrimination Act 1975, for example: the White Paper introducing it was titled "Equality for Women", and virtually all Parliamentary debate concerned the alleviation of women's disadvantaged status as the legislative goal. But, despite the rhetoric accompanying its enactment, the legislation adopts a formal concept of equality between the sexes, rather than specific measures designed to cure the identified social evils of women's status. The case law under the Act has demonstrated the failure of the provisions to cure many of the problems which are most pressing for women, precisely because they are incapable of argument under the provisions which are claimed to establish equality in law − and the resulting equality of fact. The gulf between the justification for the measures and the actual rules created is certainly not unique among legislative provisions aimed at the question of discrimination: but it serves to highlight the difficult concept of equality in law and the idea of the alleviation of discrimination in the name of equality.

Since discrimination and equality have been conceived as "two sides of the same coin", it is problematic to introduce into the concept of discrimination the idea of the alleviation of disadvantage without also challenging the very notion of equality in law. Central to the re-evaluation of the meaning of equality (or discrimination) is the question of the purpose or purposes of equality law, and it is in relation to that purpose or those purposes that the concept of disadvantage – and its precise legal status − is beginning to be considered. This re-evaluation of disadvantaged status is proving particularly intense and controversial under the new South African Constitution.

The questions of ensuring equality and redressing past disadvantage have particular resonance and relevance in Northern Ireland. Like South Africa, Northern Ireland has been engaged in a process of constitutional change against a background of historical and entrenched inequality. The Good Friday Agreement identified equality as central to the settlement process. The subsequent Northern Ireland Act of 1998, which forms the legislative basis for a new constitutional settlement in Northern Ireland makes provision for a number of measures aimed at addressing the problem of discrimination. Most significant among these is a statutory duty placed on public authorities to carry out their public duties having due regard to the need to promote equality of opportunity between persons and groups in a number of categories, which include religious belief, political opinion and racial groups

amongst others.[5] In addition, the equality requirements of the European Convention on Human Rights will begin to apply in Northern Ireland when the Human Rights Act 1998 comes into operation in October 2000. The effect of these measures for Northern Ireland has been rightly assessed as one of mainstreaming equality issues, in the sense that public authorities will be required to engage in an analysis of the impact of their decisions in relation to the greater goal of equality − in law and in fact − within the jurisdiction.[6] It is therefore all the more important that such public authorities have an understanding of equality (and discrimination) which adequately serves the purposes of mainstreaming. While Northern Ireland has to some extent engaged on an analysis of those issues which relate to substantive equality,[7] it is suggested that the South African experience in re-evaluating equality and discrimination within the context of disadvantage provides further useful insights.

In light of South Africa's history of legally enforced and socially entrenched racial discrimination, it is hardly surprising that equality is one of the fundamental principles which has shaped the Constitution and will continue to do so.[8] In the words of one of the judges of the Constitutional Court, "the Constitution is an emphatic renunciation of our past in which inequality was systematically entrenched."[9] Like most constitutional equality guarantees around the world, the equality provisions of the Bill of Rights follow the Aristotelian model. But, given the history of apartheid and the grave disadvantage suffered by the majority population, the very purpose of the equality clause has been controversial. Against this background, the Constitutional Court has commenced the Herculean task of contextualising the notion of equality and developing a framework for the adjudication of discrimination claims.[10]

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[5] See McCrudden, "Mainstreaming Equality in the Governance of Northern Ireland" (1999) 22 *Fordham International Law Journal* 1696 for a detailed discussion of the background and new legislative provisions.

[6] McCrudden, note 5 at 1698.

[7] Particularly in relation to the Fair Employment (Northern Ireland) Act 1989. See Hepple, "Discrimination and equality of opportunity – Northern Irish lessons" (1990) 10 *OJLS* 408 and McCrudden, "Affirmative Action and fair participation: interpreting the Fair Employment Act 1989" (1992) 21 *Industrial LJ* 170.

[8] In *President of the Republic of South Africa and Another* v *Hugo* 1997 (4) SA 1 (CC), Justice Kriegler described equality as the central "organising principle" of the Constitution (at para 74).

[9] Justice O'Regan in *Brink* v *Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC) at para 33.

[10] To date there have been eight cases in which discrimination was the only or one of the main issues: *Brink* v *Kitshoff NO* 1996 (4) SA 197 (CC), 1996 (6) BCLR 752 (CC); *Prinsloo* v *Van der Linde and Another* 1997 (3) SA 1012 (CC), 1997 (6) BCLR 759 (CC); *President of the Republic of South Africa and Another* v *Hugo* 1997 (4) SA 1 (CC), 1997 (6) BCLR 708 (CC); *Harksen* v *Lane NO and Others* 1998 (1) SA 300 (CC), 1997 (11) BCLR 1489 (CC); *Larbi-Odam and Others* v *Member of the Executive Committee for Education (North West Province) and Another* 1998 (1) SA 745 (CC), 1997 (12) BCLR 1655 (CC); *Pretoria City Council* v *Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC); *The National Coalition for Gay and Lesbian Equality and Another* v *Minister of Justice and Others* (*National Coalition No 1*) 1999 (1) SA 6 (CC), 1998 (12) BCLR 1517 (CC); *The National Coalition for Gay and Lesbian Equality and Others* v *Minister*

In one of the earliest equality cases before the Constitutional Court, *Brink* v *Kitshoff*,[11] O'Regan J, delivering the unanimous judgment of the Court stated:

> "Section 8[12] was adopted . . . in the recognition that discrimination against people who are members of disfavoured groups can lead to patterns of group disadvantage and harm. Such discrimination is unfair: it builds and entrenches inequality amongst different groups in our society."[13]

This dictum is often cited by commentators who argue that the reversal of systemic discrimination and patterns of group disadvantage are the central characteristics of substantive equality. Equality is understood as remedial in nature, associated with the protection of those who have suffered from historical and systemic disadvantage and the creation of the circumstances in which equality of outcome is made possible for such applicants.[14] Furthermore, it is contended, if the primary aim of the equality clause is remedial and transformative, its protection is to be restricted to those who have suffered disadvantage in the past. This, it is argued, requires the Constitutional Court to interpret equality substantively in the light of the real social and economic circumstances of the victims of discrimination[15] and to allot to the notion of historical disadvantage a key role in determining discrimination.[16] But, while the Constitutional Court has, from the outset, agreed on the need to develop a substantive equality jurisprudence, the role of disadvantage in the adjudication of discrimination claims has been much more problematic.

Non-discrimination in the South African Bill of Rights[17]

Non-discrimination is provided for in section 9(3)[18] of the Constitution, which states:

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of Home Affairs and Others (*National Coalition No 2*) Judgment of 2 December 1999, as yet unreported.

11 Above note 10.

12 The case concerned the interpretation of the equality clause in the interim Constitution (Act 200 of 1993). Although there are textual differences between the equality clauses in the interim and final Constitutions, the Constitutional Court held in *National Coalition for Gay and Lesbian Equality* (*No 1*) (above note 10) that the equality jurisprudence developed in relation to the interim Constitution remains applicable (at para 15).

13 At para 42.

14 See Albertyn and Goldblatt, "Facing the challenge of Transformation: Difficulties in the development of an indigenous jurisprudence of Equality" (1998) 14 *South African Journal on Human Rights* 248 at 256-7.

15 See for example, Albertyn and Kentridge, "Introducing the Right to Equality in the Interim Constitution" (1994) 10 *South African Journal on Human Rights* 149; Davis, "Equality and Equal Protection" in Van Wyk, Dugard, De Villiers and Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* 196.

16 See Albertyn and Goldblatt, note 14.

17 The Bill of Rights is Chapter 2 of the Constitution, Act 108 of 1996.

18 Section 9(1) provides for equal protection of the law. It has been the subject of argument in favour of a substantive law which focuses on disadvantage, but the Constitutional Court has rejected this approach, firmly placing the notion of

> "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."

That such an extensive list of prohibited grounds has been specified is not surprising in light of the history and the nature of the constitution-making process. The use of the term "including" means that the list is not exhaustive, permitting applications on grounds other than those stated. Section 9(4) further extends the potential reach of the provision in providing for horizontal application thereof.[19] Because of the peculiar formulation prohibiting unfair discrimination rather than discrimination *per se*, the Constitutional Court has established a two stage analysis. At the first stage the question is whether the acts or legislative provisions challenged by the complainant amounted to discrimination. The second stage is concerned with the question of unfairness.[20] It is significant for the second stage that, in relation to the specified grounds of discrimination, section 9(5) reverses the burden of proof of unfairness, placing it on the alleged perpetrator of discrimination, rather than the victim.[21] The division of the enquiry into two stages thus has both procedural and conceptual implications: the analysis at the first stage may have a decisive impact on the way in which the Court approaches the enquiry at the second stage which may be crucial to the success or failure of applications under section 9(3).[22]

Stage 1: The meaning of discrimination:

Clearly, differentiation or different treatment of individuals or groups of individuals does not, of itself, constitute discrimination. While discrimination at root means differentiation, it carries opprobrious connotations which distinguishes it from acceptable and essential differentiation. But the use of the term 'unfair' to qualify discrimination in section 9(3) raises the question whether, in this context, discrimination has been stripped of its pejorative signification.[23] The Constitutional Court has, however, firmly

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disadvantage and its legal status within an analysis under section 9(3). See Small and Grant, "Equality and Non-discrimination in the South African Constitution" (2000) 4 *IJDL* 47. Section 9(2) deals with affirmative action, but has not yet been considered in the Constitutional Court. Accordingly, arguments here are restricted to section 9(3).

19 The subsection also provides that national legislation is to be enacted to give effect to horizontal application. The Promotion of Equality and Prevention of Unfair Discrimination Act 2000, the aim of which is to give effect to s 9(4), was passed in January 2000. The legislation is controversial, opponents arguing that it does not strike a proper balance between the right to equality and other important rights in the Bill of Rights. See *Financial Times* 27 October 1999 and 27 January 2000.

20 See *Harksen* (note 10) at para 45.

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

22 If at the end of the two-stage enquiry it is held that a provision or act is unfairly discriminatory, it may still be justified in terms of the limitation clause, section 36 of the Constitution, as "reasonable and justifiable in an open and democratic society based on human dignity equality and freedom".

23 See Davis, (note 15) at 208.

rejected any suggestion that discrimination had become a neutral term because of the addition of 'unfair', stating in *Prinsloo* v *Van der Linde:*

> "The proscribed activity is not stated to be "unfair *differentiation*" but is stated to be "unfair *discrimination*". Given the history of this country we are of the view that 'discrimination' has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them. . ." (emphasis in the original).[24]

According to the Court, two types of discrimination are provided for in section 9(3), namely discrimination on a specified ground and discrimination on an unspecified ground. In its analysis, differentiation on a specified ground is assumed to be discriminatory, while differentiation on a ground not specified must be examined by the court to determine, on a case by case basis, whether the provision or action is discriminatory.[25]

What is it about differentiation on the specified grounds which renders such action immediately discriminatory? According to Goldstone J in the leading case of *Harksen* v *Lane*:

> "What the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorise, marginalise and often oppress persons who have had, or who have been associated with those attributes or characteristics. These grounds have the potential when manipulated, to demean persons in their inherent humanity and dignity. . . Section 8(2) seeks to prevent the unequal treatment of people based on such criteria which may, amongst other things, result in the constitution of patterns of disadvantage such as has occurred only too visibly in our history."[26]

In order to prevent the perpetuation of inequality, use of any of the specified grounds as the basis for differentiation is thus in itself suspect. Although the same historical experience which informed the selection of the fourteen grounds will also have shown that it is usually particular groups, such as women or members of particular racial groups who have been disadvantaged by differentiation, section 9(2) itself does not distinguish such groups as being more deserving of protection than others. As with other provisions in the Aristotelian mould, it is couched in neutral terms. Thus, for example, it is discrimination on the ground of race which is prohibited, rather than discrimination against particular racial groups who have been disadvantaged in the past. In the case of *Pretoria City Council* v *Walker*[27], the applicants alleged that the City Council had discriminated against them on racial grounds. But the applicants themselves, white residents of a relatively affluent suburb of Pretoria, had clearly not been disadvantaged in the past, especially not in relation to the provision of services and amenities which

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[24] *Prinsloo* (note 10) at para 31 .
[25] *Prinsloo* at para 28; see also *Harksen* (note 10) at para 46.
[26] *Harksen* at para 49.
[27] See note 10.

was the particular issue at stake in the case. Nonetheless, the Constitutional Court accepted that differentiation between black and white residents constituted discrimination without further ado[28]. In *President of the Republic of South Africa and Another* v *Hugo*[29], the applicant, a male prisoner, alleged sex discrimination. Although it is women who have suffered historically in relation to men, the Constitutional Court accepted that the applicant had suffered discrimination merely because of different treatment of men and women prisoners with regard to early release.[30] In this conception, discrimination becomes a legal status born from a factual situation of differentiation based on one of the stated categories.

But past disadvantage is not the only factor which is highlighted by the Court in *Harksen* as common to the specified grounds. The use of such grounds for purposes of categorisation or differentiation also has the "potential to demean persons in their inherent humanity and dignity".[31] It is this factor which the Constitutional Court has identified as the central to the determination of discrimination on an unspecified ground, formulating the test as follows:

> "There will be discrimination on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner."[32]

Just what may affect someone in a manner comparably serious to the impairment of fundamental dignity is yet to be fully worked out.[33] Although historical disadvantage is not explicitly identified as a factor in determining discrimination on an unspecified ground, it may nonetheless play a role in practice. In the case of *Larbi-Odam and Others* v *Member of the Executive Council for Education (North West Province) and Another*[34] a discrimination application was brought by teachers denied permanent appointments and other opportunities because they were non-citizens. In concluding that differentiation on the ground of citizenship had the potential to impair the fundamental human dignity of the applicants, Mokgoro J, in whose judgment the rest of the court concurred, said:

> "[The] general lack of control over one's citizenship has particular resonance in the South African context, where individuals were deprived of rights or benefits ostensibly on the basis of citizenship, but in reality in circumstances where citizenship was governed by race."[35]

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[28] At para 32. The approach of the Constitutional Court has been criticised by Jagwanth, "What is the Difference? Group Categorisation in *Pretoria City Council* v *Walker* 1998 (2) SA 363 (CC)" (1999) 15 *South African Journal on Human Rights* 200.

[29] See note 10.

[30] At para 33. The application failed however, because it was held that the discrimination was not unfair (para 47).

[31] At para 49.

[32] *Harksen* at para 46. See also *Prinsloo* (note 10) at para 33.

[33] See *Walker* (note 10).

[34] See note 10.

[35] At para 19.

Thus the court recognised that black non-citizens, in particular, had been historically disadvantaged, and this is used as a factor in determining the potential to impair the dignity of the applicant, thereby to establish discrimination.

Determining whether an applicant's claim is based on a specified or unspecified ground has important procedural implications because of the reversal of the burden of proof provided for in section 9(5). The case of *Walker*[36] is illustrative. The applicants were residents of a suburb of Pretoria, which had, under apartheid, been designated as "white". Their discrimination claim was based on the fact that residents in previously "white" areas were paying more for electricity and water services than residents in previously "black" areas, and that a different policy in relation to non-payment operated in relation to the two areas. The majority of the Constitutional Court concluded that this was a case of indirect discrimination, based on race.[37] This being a specified ground, the applicants had two very important advantages which they would not have had if the majority of the court had agreed with the minority judgment of Sachs J, that the ground of discrimination at issue was geographical location.[38] First, it was not necessary for the applicants to prove discrimination because they were able to rely on a specified ground which permits the court to assume discrimination. Secondly, because of the reversal of the usual burden of proof provided for in subsection 5, the applicants were in the fortunate position of not having to prove unfairness either. Instead it was for the defendants to prove that the differentiation was not unfair.

The decision as to the applicable grounds of discrimination is also significant for the substance of the enquiry into unfairness at the second stage. The question of unfairness arises only in relation to the specific ground established as the basis for discrimination at the first stage. Thus for example in *Walker*, because the majority judgment held that the defendant had discriminated against the applicant on the grounds of race, it was the unfairness of race discrimination which was at issue in the second stage. By contrast the focus of the unfairness analysis in the minority judgment of Sachs J related to discrimination on the grounds of geographical location. As the judgment shows, the evidence, scope of enquiry and outcome may be very different in the case of discrimination on the grounds of geography than it is in relation to race discrimination. Moreover, the extent to which disadvantage features as a relevant consideration may differ depending on the ground of discrimination being analysed. In *Harksen*[39], O'Regan J entered a strong dissent[40] to the majority judgment of Goldstone J. The issue in the case was whether certain provisions of the Insolvency Act[41] which impacted on spouses of insolvents offended the equality clause. Whereas the majority decision categorised the applicable ground of discrimination in the case as between spouses of insolvents as compared with other persons who

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[36] See note 10.
[37] This was the first case in which indirect discrimination was considered by the Constitutional Court, see para 30-33.
[38] At para 118.
[39] See note 10.
[40] Supported by Madala J and Mokgoro J.
[41] Act 24 of 1936 as amended.

had dealings with insolvents, the minority identified marital status as the primary basis of differentiation. This difference in approach had no effect on the burden of proof in relation to unfairness because marital status was not at that time a specified ground.[42] But, as in *Walker*, the difference in approach did have a profound impact on the scope and substance of the unfairness enquiry, in which the relevance of disadvantage played a key part.

Such difference in opinion regarding the basis of the claim at the first stage is particularly problematic in cases in which applicants wish to rely on more than one ground. Section 9(3) refers to discrimination "on one or more grounds", clearly contemplating applications based on either single or multiple grounds. But, since discrimination is assumed if based on a specified ground, it is only necessary to show differentiation on one of the specified grounds in order to activate the assumption of discrimination and to shift the onus of proof regarding fairness onto the defendant. In light of this, the Court has ruled that if discrimination on a single specified ground has been established, it is unnecessary to investigate additional grounds. In *Brink*,[43] for example, the applicant relied on two grounds of discrimination, sex, a specified ground, and marital status, which was not a specified ground at the time[44]. In giving the unanimous judgment of the court, O'Regan J, said that since sex is a specified ground it was unnecessary to consider whether marital status would be a ground, ". . . [i]t is sufficient that the disadvantageous treatment is substantially based on one of the listed prohibited grounds. . .".[45] The case thus proceeded to the second stage on the basis that the only issue to be determined was the unfairness of sex discrimination. Although the Court actually referred to the fact that discrimination on a particular ground may be compounded by discrimination on overlapping grounds[46], this did not actually play a role at the second stage because there was no finding of discrimination based on marital status. If the Court were to persist in this approach, there would be little point in relying on multiple grounds especially if any additional grounds are unspecified. The knock-on effect at the second stage is that circumstances which may be relevant to the overall experience of the applicant, such as disadvantage stemming from different types of discrimination may not be taken into account. The undesirable effect of this may well be an impoverished and one-dimensional equality jurisprudence which fails to come to grips with the real experience of the victims of discrimination.

There are, however, signs of a better understanding of the impact of discrimination on overlapping grounds in the most recent discrimination decision of the Constitutional Court, *The National Coalition for Gay and Lesbian Equality and Another* v *Minister of Home Affairs and Others*

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[42] Marital status is now a specified ground. If the case had been heard after the 1996 Constitution had come into effect, the impact of the difference in approach would have been amplified since the burden of proof would also have differed.

[43] See note 10.

[44] The case was decided under the 1993 Interim Constitution. Marital status is now a specified ground under s 9(3) of the Constitution.

[45] At para 43. In *Hugo* (note 10) the Constitutional Court similarly ignored one of the grounds, since a single ground, sex, was held to be sufficient in order to prove breach of the non-discrimination provision (at para 33).

[46] At para 44.

(National Coalition No 2)[47]. The case concerned the constitutionality of immigration laws facilitating the immigration of spouses of South African citizens, which the respondents refused to apply to same-sex partners. Although it was possible to view the application as one based on the ground of sexual orientation alone, Ackermann J, in an unanimous judgment said that the better view was that the discrimination in question constituted "overlapping or intersecting discrimination on the grounds of sexual orientation and marital status".[48] In coming to this conclusion the judgment explicitly recognised that an approach which is substantive and contextual requires account to be taken of the interrelationship between grounds of discrimination and the full impact of discrimination on multiple grounds. In this particular case the burden of proof was not affected by the use of joint grounds because both sexual orientation and marital status are specified grounds, but the determination of unfairness proceeded on the basis of an investigation of the effect of discrimination on the applicants, both in relation to sexual orientation and in relation to their relationships. This suggests a growing awareness on the part of the court of the problem of overlapping or intersecting discrimination and willingness to engage with the issues in a more careful and thoughtful manner.

It may be argued that one of the strengths of the two-stage enquiry implicit in the South African provision is that formal equality is determined at the first stage, while the unfairness enquiry at the second stage provides the courts with a separate opportunity to assess substantive equality.[49] Thus, it may be contended that the absence of any real opportunity to consider disadvantage at the first stage is not significant, since it has greater relevance to the enquiry into the substantive impact of the impugned measure which takes place at the second stage. However, although this provides a neat explanation of the peculiar formulation and application of the provision, the uncritical acceptance that the two stages perform separate functions fails to take account of the potential impact of decisions at the first stage on the second. Since the first stage of the enquiry determines the scope and substance of the enquiry into unfairness at the second stage, decisions made at the first stage have the potential to limit the substantive analysis. As the discussion of the cases shows, this is an issue which has not been discussed by the Constitutional Court: indeed there is little indication in the cases that the Court fully appreciates its significance.

Stage 2: The meaning of Unfairness

In *Brink*, O'Regan J asserted that that the equality clause was adopted in the recognition that the disadvantage to disfavoured groups by discriminatory treatment is unfair because it builds and entrenches inequality amongst different groups.[50] This dictum is often invoked to support the argument that the requirement of unfairness was specifically inserted in the equality clause in order to provide a means of distinguishing mere discrimination, which may affect both advantaged and disadvantaged applicants, and discrimination

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[47] See note 10.
[48] At para 40.
[49] See Albertyn and Kentridge, (note 15) at 161-2.
[50] At para 42.

against historically disadvantaged groups, which is unfair. Accordingly, so goes the argument, discrimination is unfair when perpetrated against persons or groups who have suffered historical and systemic disadvantage.[51] But the subsequent cases of *Hugo*[52] and *Prinsloo*,[53] decided on the same day, provide a more detailed analysis of the unfairness requirement than *Brink*, an analysis, moreover, in which the notion of historical disadvantage is not given an exclusive or even controlling role. In *Hugo*, the court stated its understanding of the purpose of the equality clause as follows:

> "The prohibition on unfair discrimination in the interim Constitution 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 in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked."[54]

In the evolving approach of the Constitutional Court, it is the impact on the victims of discrimination which is to be examined in order to establish unfairness. This impact is to be evaluated on the basis of three key considerations which were confirmed and elaborated in *Harksen* v *Lane NO*[55], now considered to be the leading authority.[56] According to *Harksen* the three factors are:

> "(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;
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> (b) the nature of the provision or power and the purpose sought to be achieved by it. . . .
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> (c) with due regard to (a) and (b) above and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature."[57]

Clearly, in the view of the Constitutional Court, historical disadvantage has a role to play in determining unfairness. But it is not the only consideration, or even the most important consideration. It is one of three identified factors in

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51 Albertyn and Goldblatt, (note 14) at 253.
52 See note 10.
53 See note 10.
54 *Hugo* para 41, quoted approvingly in *Harksen* at para 50.
55 See note 10.
56 See *National Coalition (No 1)* (note 10) at para 17.
57 At para 51.

a non-exhaustive list.[58] Although the Court in *Harksen* specifically stated that it was the cumulative effect of the three factors which was to be considered in deciding the unfairness question[59], the majority judgment, at the same time, appeared to give prominence to the protection of human dignity, quoting the above dictum from *Hugo* with approval.[60] The enunciation of the *Harksen* test has been regretted by some commentators, as representing a shift in focus from an overtly remedial equality provision which is designed and operates so as to cure historical, systemic disadvantage, epitomised, it is argued, by *Brink*, to one which is less purposefully conceived. The perceived privileging of the concept of dignity − at the expense of the "value of equality" − is seen as eviscerating the essence of the equality clause: dignity being a liberal, individualised conception of the right to equality.[61] That a conception of equality which focuses exclusively on redressing the wrongs of the past was central to the jurisprudence of the Court in the earlier cases is not perhaps so self-evident from the judgments. Although the statement of O'Regan J in *Brink* appears to accept group-based historical disadvantage as the sole criterion relevant to the assessment of discrimination, it is equally plausible that this approach was merely reflective of the facts of the case. There is nothing in her judgment which precludes other criteria from being identified as relevant. And such other criteria do emerge in subsequent cases. It is also arguable that the impression that the notion of human dignity has displaced historical disadvantage as the central concern of the equality clause is not borne out by the application of the *Harksen* test to the facts of the cases, in spite of the prominence given to human dignity in some passages.[62]

Although disadvantage is now clearly established as a factor in determining unfairness, there has been little discussion of the meaning of disadvantage itself. In the *Harksen* test, the question to be asked is simply whether the complainant "had suffered in the past from patterns of disadvantage".[63] But clearly, different types of disadvantage arise in the cases. In *Brink*, for example, the Constitutional Court held that certain provisions of the Insurance Act[64] discriminated against women. The aim of the provisions in question was to protect the interests of creditors of insolvent estates, but it did so by depriving married women in some circumstances of some or all of

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58 Goldstone J stated in clear terms in *Harksen* that the three considerations do not constitute a closed list and that others may emerge in the course of the development of the Court's equality jurisprudence (at para 51).

59 At para 51.

60 At para 50. See also *Walker* (note 10) which succeeded on the basis that the policy operated by the local authority affected the applicants in a manner which was comparably serious to an infringement of dignity.

61 See Albertyn and Goldblatt (note 14) at 258 and Davis, "Equality: The majesty of Legoland Jurisprudence" (1999) 116 *South African Law Journal* 394 at 404.

62 It is arguable that the deciding factor in three of the cases (*Hugo, Prinsloo and Harksen)* was the aim of the provision. In *National Coalition (No1)* and *(No2)* and *Larbi-Odam* historical disadvantage and impairment of dignity support and reinforce each other. In *Walker* impairment of human dignity is given prominence, the case succeeding on the basis that the discriminatory measure had an impact which was comparably serious to the infringement of human dignity.

63 *Harksen*, para 50-1, per Goldstone J.

64 Act 27 of 1943.

the benefits of life insurance policies ceded to them or made in their favour by their husbands. The disadvantage at issue here was monetary or material. In the course of giving judgment in *Brink*, O'Regan J also commented on the disadvantages suffered by black people in the past as a result of racial discrimination:

> "Our history is of particular relevance to the concept of equality. The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as 'white' which constituted nearly 90% of the landmass of South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities including transport systems, public parks, libraries and many shops were also closed to black people."[65]

Clearly, disadvantage does not relate to material matters only, but may be suffered in relation to education, job opportunities and access to public amenities. In *National Coalition for Gay and Lesbian Equality and Another* v *Minister of Justice and Others (National Coalition No 1)*, which concerned the constitutionality of a number of provisions criminalizing gay sex, different types of disadvantage experienced by gay people as a result of the criminal provisions in question were identified:

> "Even when these provisions are not enforced, they reduce gay men . . . to what one author has referred to as 'unapprehended felons', thus entrenching stigma and encouraging discrimination in employment and insurance and in judicial decisions about custody and other matters bearing on orientation."[66]

The Court also emphasised the psychological harm suffered by gay people as a result of the impugned provisions, noting that the existence of criminal sanctions against homosexual acts reinforced prejudice against gays and generated feelings of anxiety and guilt which could lead to depression or have other serious consequences.[67] Clearly, then, the term disadvantage as used by the Constitutional Court has a wide and inclusive meaning, providing the Court with the opportunity to consider a range of circumstances which impact on applicants, which in turn provides scope for broad application of the non-discrimination provision.

Investigating Disadvantage

Harksen represents an attempt by the Constitutional Court to state a principled and comprehensive test consistent with the overall purpose of the equality provision. The goal is explicitly and emphatically to reflect a substantive approach to equality. The test itself is, of course, not

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[65] At para 40.

[66] At para 23 quoting Cameron "Sexual orientation and the Constitution: A test Case for Human Rights" (1993) 110 *South African Law Journal* 450 at 455.

[67] At para 23 citing the decision of *Norris* v *Republic of Ireland* (1991) 13 EHRR 186 at 192 para 21.

unproblematic: the identification of that range of factors which are relevant to claims under the equality provision renders it vulnerable to criticism as both over-inclusive and imprecise. Presumably, disadvantage is relevant to the test formulated in *Harksen* because some weight is to be given to the fact, thereby enabling the court to give legal effect to that finding. It is worth recalling that the test is formulated so as to consider first, whether the claimant has suffered in the past from patterns of disadvantage, second, the aim of the provision and third, with due regard to the other factors, whether the discrimination has affected the rights or interests of the claimant or has led to an impairment of fundamental dignity (or some comparably serious impairment). Suppose that the test is applied and there is a finding that a claimant has suffered in the past from patterns of disadvantage. What will the consequences of such a finding be? What if the patterns of disadvantage are subject to other remedial measures, such as affirmative action: are these relevant to a claim under section 9(3)? Is there a distinction to be drawn between two claimants under section 9(3): one who has suffered in the past from patterns of disadvantage, and one who has not, where their claims are otherwise in all relevant respects similar? Although the Constitutional Court has begun to grapple with some of these questions, a significant number of their responses remain controversial.

Hugo is illustrative. At issue in the case was a Presidential Act, which granted remission of sentence to women prisoners with children under the age of 12 years. According to the applicant, this discriminated against men with children under 12. All the members of the court agreed that the Act discriminated on a specified ground, namely sex. There was also general agreement regarding the test for unfairness, but two of the members of the Court entered strong dissents based on the application of the test to the facts of the case.[68] The majority of the court, *per* Goldstone J, held that men were not a historically disadvantaged group, that the aim of the provision was to benefit women who had been disadvantaged in the past, and that the action did not impair the fundamental dignity of the applicants. But these findings followed an almost mechanical application of the test, in which disadvantage was often repeated, mantra-like, without any real investigation of the role and consequences of the particular disadvantage in question, leading to the conclusion that the discrimination imposed by the Presidential Act was not unfair. Kriegler J was highly critical of this verdict, particularly the prominence given in the majority judgment to the conclusion that the act would benefit women. In his view, the decision to pardon women and not men was based explicitly on the assumption that women were the primary caregivers, an assumption which had in the past been the cause of women's inequality. Thus, instead of reversing patterns of disadvantage, the Act had the effect of perpetuating a particular view of women which had in the past operated to their detriment. Kriegler J accepted that there may be circumstances in which Acts which in fact perpetuated disadvantage could be used in order to rebut a presumption of unfairness, but he was emphatic that this was only possible if the advantages of perpetuating a particular stereotypical view clearly and sufficiently outweighed the disadvantages. On the facts of the case he held that the benefits to a relatively small number of

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[68] Kriegler J and Mokgoro J. Didcott J dissented for reasons not connected with the application of the non-discrimination clause itself.

women released from prison were far outweighed by the detriment to both men and women in the perpetuation of gender stereotypes associated with childcare. In her separate dissenting judgment, Mokgoro J, too, highlighted the negative consequences of perpetuating the view that it was women who bore the primary responsibility for childcare. However, her judgment emphasised the impact of this view on men. Treating men as less able parents she said, constituted "an infringement upon their equality and dignity"[69], which supported the conclusion that the action of the President constituted unfair discrimination.[70] It is this bolder vision of the role of the equality clause and an engagement with the broader impact of discrimination which distinguishes the judgments of Kriegler and Mokgoro JJ. By contrast, the judgment of Goldstone J is notable for its failure to undertake more than a superficial analysis of the meaning of equality and its largely uncritical acceptance that action which benefited women, any women, must necessarily be fair. Although O'Regan J agreed with the conclusions reached by Goldstone J, she attempted to respond to the objections raised by Kriegler J and Mokgoro JJ. In her view, the Presidential Act benefited women prisoners while causing no significant harm to other women, and it did not harm male prisoners either, since it did not deprive them permanently of the benefits of parenthood. However, in focusing only on the immediate benefits and disadvantages to the parties involved, her judgment served to obscure rather than enlighten the question of the precise role of disadvantage in determining unfairness or the wider role of the equality clause.[71]

The precise legal effect of disadvantage is furthermore obscured by terminological inconsistencies. Although it is disadvantage which is identified in the *Harksen* test as being relevant, disadvantage is often used interchangeably with, or linked to, the concept of "vulnerability." For example, in *Larbi-Odam*[72] Mokgoro J, giving the unanimous verdict of the Court, concluded that discrimination against non-citizens was unfair. But, in applying the first part of the unfairness test which relates to historical disadvantage, the only factor specifically mentioned was that non-citizens were a vulnerable group.[73] In *National Coalition (No 1)*, Ackermann J noted:

> "The impact of discrimination on gays and lesbians is rendered more serious and their vulnerability increased by the fact that they are a political minority not able on their own to use political power to secure favourable legislation for themselves."[74]

Since both *Larbi-Odam* and *National Coalition (No 1)* were concerned with groups who had been disadvantaged, it is not necessarily significant that the court also referred to those groups as vulnerable. But in *Walker*, in his majority judgment in the case, Langa DP, said:

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69 At para 92.
70 Mokgoro J however ultimately concluded that the act was justified in terms of section 33 of the Constitution, (now s 36, see note 22).
71 A similar difference in approach is evident in the majority and minority judgments in *Harksen*.
72 See note 10.
73 At para 23.
74 At para 25.

> "The respondent does however belong to a racial minority which could, in a political sense, be regarded as vulnerable. It is precisely individuals who are members of such minorities who are vulnerable to discriminatory treatment and who, in a very special sense, must look to the Bill of Rights for protection."[75]

This was said in almost the same breath as noting that the applicant belonged to a group which had not been economically disadvantaged in the past.[76] The question then arises: what exactly is the relationship between disadvantage and vulnerability? This question has been partially answered in *National Coalition (No 2)*, by Ackermann J who said:

> "This Court has recognised that '[t]he more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair.'[77] Vulnerability in turn depends to a very significant extent on past patterns of disadvantage, stereotyping and the like. This is why an enquiry into past disadvantage is so important."[78]

Although, according to the Court, then, disadvantage is an indicator of vulnerability which in turn weighs in favour of a finding of unfairness, it is also clear from the passage that vulnerability is not entirely dependent on past disadvantage and could be proved in other ways, such as was the case in *Walker*. The judgment of Ackermann J in *National Coalition (No2)* also for the first time makes explicit the relevance of disadvantage to discrimination, quoting at length from the Canadian case of *Law* v *Canada (Minister of Employment and Immigration)*[79]:

> "[P]robably the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory will be, where it exists, pre-existing disadvantage, vulnerability, stereotyping or prejudice experienced by the individual or group. . . These factors are relevant because, to the extent that the claimant is already subject to unfair circumstances or treatment in society by virtue of personal characteristics or circumstances, persons like him or her have often not been given equal concern, respect and consideration. It is logical to conclude that, in most cases, further differential treatment will contribute to the perpetuation or promotion of the unfair social character-ization, and will have a more severe impact on them, since they are already vulnerable.[80]

Accordingly, disadvantage is relevant because without an assessment of pre-existing disadvantage it is not possible for the Court to determine the full impact on the applicant of a measure subject to challenge. Reference to

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[75] At para 48.
[76] At para 47.
[77] O'Regan J in *Hugo* para 112.
[78] At para 44.
[79] (1999) 170 DLR (4th) 1.
[80] *National Coalition (No 2)* (note 10) at para 44.

"equal concern, respect and consideration" in the quoted passage, however, also raises the vexed question of the relationship between disadvantage and impairment of dignity.[81] That there may be a close relationship, or even an overlap, between disadvantage and infringement of dignity is also clearly demonstrated in *National Coalition for Gay and Lesbian Equality and Another* v *Minister of Justice and others (National Coalition No 1)*.[82] Consider the following passage from the Canadian case of *Vriend* v *Alberta*[83] quoted with approval by Ackermann J :

> "Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem. Compounding that effect is the implicit message conveyed by the exclusion, that gays and lesbians, unlike other individuals, are not worthy of protection. This is clearly an example of a distinction which demeans the individual and strengthens and perpetrates [*sic*] the view that gays and lesbians are less worthy of protection as individuals in . . . society. The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination."[84]

However, although the Constitutional Court has frequently cited Canadian dicta[85] which emphasise the interrelationship of the concepts of disadvantage and dignity, it has not properly analysed the connection between the two concepts and their separate roles in the *Harksen* test.

National Coalition (No2) has therefore begun to clarify the role and legal effect of disadvantage in determining unfairness, but the discussion of these issues in the case is very brief, and further questions such as what weight is to be given to disadvantage in the *Harksen* test and the exact nature of the relationship between disadvantage and impairment of dignity, as separate elements of the test, remain.

Another question, not considered in *National Coalition (No 2),* is whether the *Harksen* test is to be applied to the individual applicant in any given case or the applicant as representative of particular groups. The test itself is formulated in terms which indicate that it is patterns of disadvantage suffered by the individual claimant which are relevant. But if that is the actual test to be applied, then women such as Mrs Harksen, who come from a privileged position in South African society, would arguably never succeed in any case. That this cannot be a correct understanding of the test is perhaps borne out by the minority judgment, which takes detailed account of the position of women in society rather than Mrs Harksen herself. It must therefore be

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[81] This issue has been hotly debated by South African commentators. See for example Albertyn and Goldblatt, (note 14); Davis, (note 61) and Fagan, "Dignity and Unfair Discrimination: A Value Misplaced and a Right Misunderstood" (1998) 14 *South African Journal on Human Rights* 220. For a general consideration of dignity and human rights see Feldman, "Human Dignity as a Legal Value - Part I" [1999] *PL* 682. (Part II is in Spring 2000 *PL* 61).

[82] See note 10.

[83] (1998) 156 DLR (4th) 385.

[84] At para 69.

[85] See also *Hugo* at para 41 and *Prinsloo* at para 32.

asked whether, or when, an individual applicant ought to be able to rely on the non-discrimination provision merely because he or she belongs to a disadvantaged group, yet, as an individual has not suffered in the past. There is a clear argument in favour of giving prominence to group disadvantage if the measure at issue in fact or potentially affects the whole group, such as in the case of legislation. But can a distinction be made between such provisions and measures which affect only a particular individual – such as sacking or deprivation or property − who may not have been historically disadvantaged? It is submitted that such a distinction would be very difficult to draw in practice. It is extremely problematic to argue that a particular measure has an impact on a particular individual only, since it is conceivable that any case which is decided on this basis, itself, could have an impact on the way in which the group is treated. Perhaps the use of more than one factor to determine unfairness (especially impairment of dignity) provides the court with a more sophisticated means of distinguishing the deserving from the undeserving. But if that is so, it is important that this be squarely faced by the Constitutional Court and that elaboration or extension of the *Harksen* test be considered in order to deal with a matter which is potentially complex and divisive.

There is no doubt that the inclusion of the disadvantage element of the test will need to be elaborated and refined by the court. Until the recent case of *National Coalition (No 2)*, there had been little real justification for the inclusion of patterns of disadvantage in the unfairness test. Given the different judgments, it seemed that the phrase meant different things to different judges. Although it is understandable that the Court may prefer to move slowly, developing and clarifying the principles on a case by case basis, it is surely incumbent on the Court to do more than expound a factor (which is admittedly highly populist) without undertaking a rigorous examination of its place in the jurisprudence. In the light of the paucity of cases in which the role of disadvantage has been fully examined and explained, it is perhaps useful to consider another jurisdiction which has also attempted to avoid the pitfalls of the formal Aristotelian test in favour of a test for discrimination which looks to disadvantaged status.

A Canadian Comparison

The status of disadvantaged serves a functional − if somewhat uncertain − role in Canadian case law. At issue in the case of *Andrews* v *Law Society of British Columbia*[86] was the fact that the appellant could, in all respects, comply with the requirements to practise law in the province of British Columbia, but he was denied entry to the bar because he lacked Canadian citizenship. The court in that case unanimously rejected the Aristotelian test as "seriously deficient" as "the fixed rule or formula for the resolution of equality decisions".[87] In its favour the court adopted a test which looks to whether a person is a member of a persistently disadvantaged group: if a person of that group can show that characteristics either personal to the individual, or arising out of being a member of the group, continue or worsen the disadvantage, then the distinction is discriminatory whether intentional or not.

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[86] 1 SCR 143 (1989).
[87] At 168, per McIntyre J.

The "disadvantaged" test was later applied in a pregnancy case. In *Brooks* v *Canada Safeway Ltd*[88] benefit provisions in legislation gave disfavoured treatment to pregnant workers, not shared by men or women who were not pregnant. The Court stated that "[it] is difficult to conceive that distinctions or discriminations based upon pregnancy could ever be regarded as other than discrimination based upon sex".[89] In this case, the court found it unnecessary to find a male comparator: the disadvantage pregnant women suffer comes about because of their condition; their difference. The court located the discrimination in the disadvantage of having to bear the costs of pregnancy. As the Court stated, "those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged. . . . It is unfair to impose all the costs of pregnancy upon one half of the population".[90] Once this was decided, it was impossible not to find that differential treatment on the basis of pregnancy was anything but discrimination on the basis of sex.

This test was subsequently applied to find that sexual harassment was without doubt sex discrimination, when the Supreme Court unanimously overturned a lower court's decision that sexual harassment did not in fact constitute discrimination based on sex.[91] The reasons for the decision were based on the fact that sexual harassment has a negative, differential impact on women in terms of gender hierarchy in the labour force, and that it is inherently an "abuse of both economic and sexual power." [92] The Court compared sexual harassment with racial harassment, stating that sexual harassment was as much a barrier to sexual equality as racial harassment was to racial equality.

Brooks represents a re-evaluation of the concept of gender equality. The Supreme Court of Canada favoured a contextual approach over the detached objectivity of the Aristotelian model, so that the concept of equality is given content which is based on the systemic disadvantages in society. In other words, the court is obliged to view the claimant's social, political and legal reality. This test does not rule out a male comparator where it is relevant because the remedies require identical treatment as between women and men: but where the issues are female-specific, the comparator is abandoned in favour of the question as to whether the law increases the persistent disadvantaged status of women. The effect of a shift from an individual (whether hypothetical or real) male comparator to the identification of a disadvantaged group enables the court to consider systemic discrimination.

The court's claim that it has abandoned the "similarly situated" test in *Andrews*, in favour of the new "disadvantaged" test subsequently applied in *Brooks*, is somewhat overstated. The court in *Andrews* did not deny that equality is an inescapably "comparative concept" [93]. Similarly, there cannot be disadvantage without advantage. The test is radical because the concept of proportionality is replaced with a presumption that where those who are different because they are socially disadvantaged are also affected by laws − based on personal characteristics of the individual or group − which

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[88] 1 SCR 1219 (1992).
[89] At 1244.
[90] At 1243.
[91] *Janzen and Govereau* v *Platy Services* [1989] 1 SCR 1252 .
[92] *Janzen* at 1284.
[93] *Andrews* (note 86) at 164, per McIntyre J.

perpetuate that status then they are discriminated against. The result is that discrimination is recharacterised in terms of disadvantage to already disadvantaged persons.

The court clearly conceived of equality and discrimination as distinct concepts which, although they are related, operate independently of each other. This view has been sharply rebuked. As Beatty has remarked:

> "Discrimination relies on the concept of relevance to test the adequacy of the reasons that are advanced to justify distinctions and classifications when they are challenged in exactly the same way as the formal equality rule. Relevance is as central to the proscription against discrimination as it is to the principle of equality. In fact, discrimination and equality are virtually identical concepts. They form a kind of binary relationship, a pair of opposites, like two sides of the same coin. Equality and discrimination are words that describe two possible (and contradictory) conclusions that can be drawn after an impugned classification is tested for the extent to which it is relevant to the objectives it is expected to promote."[94]

The court's attempt to reformulate the content of equality norms in Andrews was based in part on a literal (mis)understanding and application of the equality principle. There, the Court stated, that the application of the equality laws could justify furthering atrocities such as those under the Nuremburg laws. But that would only be achieved if one ignores the way in which the equality principle has been given effect as legal norm. In a review of the Andrews decision, Gold[95] has pointed out that the core idea of formal equality today is that legislative distinctions must be relevant to the purposes of law. The principle of treating likes alike is violated if a law distinguishes between two classes which are similarly situated with respect to the purpose of that law. When this approach is coupled with the limits which constitutional principles place on the legitimacy of legislative purpose, the formal notion of equality is saved from the court's conclusion that it could legitimate atrocities such as the Nuremburg laws.

Gold's criticisms might be answered, in part, by observing that he somewhat misstates the modifications of the Aristotelian approach in law. The principle of equality may be violated if a law distinguishes between two classes which are similarly situated with respect to the purpose of that law, but the law is often nevertheless saved because of the constitutional principles which limit the absolute character of human rights norms. Moreover the criticism made by Gold and Beatty are valid in so far as one is able to clearly identify the distinction by which the class is defined. But the virtue of the disadvantage test from a woman's point of view is that it locates the remedy precisely in the difference and disadvantage which has been ignored under the relevance aspect of the Aristotelian approach in many equality cases. The disadvantage test escapes the need to first decide

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[94] Beatty, "The Canadian Concept of Equality" (1995) *University of Toronto Law Journal* 349 at 361.

[95] Gold, "Comment: *Andrews* v *Law Society of British Columbia*" (1989) 34 *Mc.Gill Law Journal* 1063.

whether distinctions based on pregnancy, sexual harassment, reproduction, and others are in fact based on "sex", because the starting point, when one is dealing with women as a disadvantaged group, is the difference (plus disadvantage) itself, and once that is identified, the fact that it is based on "sex" and is therefore a prohibited ground of discrimination, follows.

The Canadian disadvantaged test has numerous difficulties, some of which have been articulated here, but these difficulties, and the implications of the test itself, have not yet been fully explored by the courts. Instead, in some recent cases, the Court has retreated from the "disadvantaged" test. *Egan* v *Canada*[96], *Miron* v *Trudel*[97] and *Thibideau* v *Canada*[98] were decided together in 1995. The majority upheld a definition of equality which is restrictive and literal, and which in the first two cases seems to have led to error. In *Egan* the court upheld a section of the Old Age Security Act which restricted payment of spousal allowance for elderly people in need to married couples of the opposite sex. In *Miron*, "common law" spouses barely persuaded a majority that Ontario's Standard Automobile Policy discriminated unfairly against them. In both these cases, the majority tested the relevance of the classification of "married" couples literally, without reference to the overarching objectives of the legislation. In other words, they used the wrong standard of comparison, ignoring the "similarly situated" test's requirement that the purpose of the legislation be the standard by which the classes are evaluated. Even applying the formal equality test used before *Andrews*[99], they should have looked to how the classification served the broader purposes of the law at issue, the alleviation of the situation of serious economic need. On this application, these two cases probably should have succeeded. But in these cases, it was only L'Heureux-Dube who attempted to make the adverse impact and disadvantage effected by the law the focus of the court's review.

However, in a recent judgment, the Canadian Supreme Court has attempted to further clarify the concept of disadvantage in relation to a discrimination claim, and has arguably cured some of the errors revealed in the 1995 trilogy. *M* v *H* [100]concerned a challenge to section 29 of the Family Law Act of Ontario, which limited spousal support applications to same sex couples, but extended support to couples who were not married to each other but who were in a relationship of some permanence. The applicants in the case were a lesbian couple who separated after some 18 years together. The Supreme Court struck down section 29. In doing so the court restated its understanding, enunciated in *Law*, that probably the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory will be, where it exists, pre-existing disadvantage, vulnerability, stereotyping or prejudice experienced by the individual or group.

The Court clearly conceived of disadvantaged status as an impairment of dignity, which is itself exacerbated in those cases where discrimination is found

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[96] [1995] 2 SCR 513.
[97] 124 DLR (4th) 693.
[98] [1995] 2 SCR 627.
[99] Above note 86.
[100] (1999) 171 DLR (4th) 577.

to have been imposed by legislative measures. In the course of the judgment the court took the opportunity to reiterate the contextual nature of the inquiry in an equality claim, and to clarify the legal effect of ameliorative legislation. The single dissenting judge had observed that the Family Law Act was itself ameliorative legislation, aimed at women in opposite sex relationships, and thereafter determined that women in same sex relationships were not similarly disadvantaged. The majority disagreed. They stated the principle that any ameliorative legislation which accords with the purpose of section 15 of the Charter and which excludes a member of an advantaged group, will likely not violate the human dignity of the more advantaged group where their exclusion corresponds with the greater need or different circumstances of the disadvantaged group targeted.[101] Furthermore, the court reiterated that the disadvantage of the claimant does not preclude a claim by those not disadvantaged. The first question to be asked under section 15 is whether the provision draws a formal distinction between the claimant and others on the basis of one or more personal characteristics or whether the provision fails to take into account the claimant's already disadvantaged status.

CONCLUSION

The Canadian jurisprudence has challenged the Aristotelian relationship between equality and discrimination by rescuing the remedial aspect of the anti-discrimination law from the unsatisfactory comparator required by the legal application of the Aristotelian equality ideal. And it has done so by undertaking a legal analysis of the concept of disadvantaged status. In South Africa, the Harksen test has the potential to avoid the pitfalls which the Canadian approach encountered over the years. The South African Court has begun to undertake an inquiry as to how disadvantage is legally effective, and has looked in part to the Canadian cases for some guidance. But it is suggested that any wholesale borrowing of the Canadian approach would be unfortunate. The conceptual foundations for equality and discrimination law, the relationship between disadvantage and dignity, and the remedial effect of disadvantage are only a few of the issues which need consideration within the South African context and under the Harksen test itself. The re-evaluation of equality and discrimination undertaken in both Canada and South Africa is in its infancy, and the South African experience should no doubt unpack the conceptual foundations further.

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[101] At para 71.