

The limitations of restitutionary equality

SUMMARY

This is a compact review and analysis of the state of equality law in South Africa . Specific reference is made to what has been called "remedial" or "restitutionary" equality. From the analysis it appears that current equality law shows certain imbalances that are difficult to reconcile with the provisions of the Constitution. To point out shortcomings in equality law which is well intended to resolve the burning problems of inequality, can easily be misunderstood in the contemporary circumstances as a reactionary resistance against a necessary process of a justifiable drive for equality. Such is certainly not the purpose of this review. The intention is however to argue the position that striving for equality must be a balanced process in order to ensure that the boundaries of equality themselves are not transgressed, since that would contradict the very essence of equality.

In the first section the constitutional provisions on equality are briefly described. It is noted that the Constitution does not establish "a right to equality", but that it consistently deals with equality as a value. The wording of section 9 does however justify a term such as "the equality right."

Next the approach of the judiciary to equality, in which the analytical steps of interpretation that were developed by the Constitutional Court are set out, is reviewed with special mention of the role that has been allocated to the value of human dignity in the interpretation and application of equality rights.

In the third section an answer is sought to the question what "equality" means. As opposed to the choice of equality jurisprudence in the USA for a formal notion of equality, the South African courts operate with the concept of substantive equality. It is in this context that mention is made of "remedial or restitutionary equality". Equality is given a meaning which implies action. This is supported partly by the wording of sections 1 and 9(2) of the Constitution, but not by the formulation of sections 7(1), 9(1), 36(1) or 39(1). The only constitutional provision which imparts meaning directly to the notion of equality, is section 9(2), providing that "equality includes the full and equal enjoyment of all rights and freedoms." This gives meaning to equality as a value, to the equality rights and to equality as a description in the Constitution of the nature of the society that is being striven for. The complexity and multi-faceted nature of equality does not allow for a simplistic approach to its meaning. The boundary between equality and inequality is quite sharp and the mobilization of equality for the achievement of political, ideological or pragmatic goals can readily lead to inequality and injustice.

Against this background the most important pieces of equality legislation, the Employment Equity Act, 1998 and the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000, are discussed. These Acts were adopted "to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination" in terms of section 9(2) of the Constitution. Both however contain provisions that go beyond the scope of the Constitution by e.g. the addition of grounds upon which

unfair discrimination is prohibited and by excluding affirmative action measures from the meaning of unfair discrimination.

The Constitution can not be interpreted in a manner that would allow unfair discrimination for any purpose. The legislation however seem to disregard the possibility of affirmative action becoming discriminatory in itself. This resonates with the view that "substantive equality" allows for measures "that favour relatively disadvantaged groups at the expense of those who are relatively well off". It is however submitted that not the current ideology behind affirmative action, nor one's preferred understanding of equality or the analytical model that is being used, can determine what the justifiable content of equality law should be: the question is rather what may be justified in law, specifically under the Constitution.

The form in which elements of the equality legislation are cast, viz. guidelines for its application and illustrative lists of unfair practices, harbours the danger that uncared interpreters of the law could be seduced to give precedence to the legislation above the Constitution. This would result in a persecutory application of equality law in terms of examples in stead of the constructive and principled approach required by the Constitution.

The equality laws also attempt to extend the list of grounds contained in section 9(3) of the Constitution upon which discrimination is presumed to be unfair by the addition of HIV status, family responsibility, political opinion, socio-economic status, nationality and family status. The constitutionality of amending section 9(3) in this manner by means of ordinary legislation is suspect, especially if it is considered that differentiation which is justifiable under the Constitution may be rendered unfair discrimination under ordinary legislation.

It is concluded that an emphasis on only the restitutionary element causes a conceptual tension to occur within the multi-faceted notion of equality. This can not be explained only in terms of the distinction between formal and substantive equality, since an over-emphasis of restitution will inevitably bring about imbalances in the outcome of equality actions, i.e. within the framework of striving for substantive equality. Some commentators, courts and the legislature tend to attempt to improve on the Constitution insofar as the achievement of equality is concerned. It is submitted that such attempts are unnecessary, since the Constitution makes sufficient provision for the restitutionary process while the balance of a comprehensive notion of equality is maintained in the form of equality as core value. The limitation of the concept of equality to restitutionary equality will unjustifiably impoverish and partially neutralize the constitutional text. Lessons must in this regard be learnt from the pre-constitutional errors of positivistic legal interpretation.

Keywords

Socio-economic rights, social and economic rights, housing, shelter, children, children's rights, poverty, human dignity, enforcement, limitations, right to access to adequate housing, right to shelter, child headed households, Constitutional Court, South African Human Rights Commission.

