

Equality constitutional adjudication in South Africa

Anne Smith*

Lecturer, Transitional Justice Institute, School of Law, University of Ulster,
United Kingdom

Summary

This article focuses on the South African judiciary and, in particular, the South African Constitutional Court's approach to the adjudication of the equality right in the Bill of Rights during the 20-year period since the official end of apartheid. The article does this by evaluating a necessarily select number of cases dealing with equality that have come before the Constitutional Court to find out whether the Court has consistently adopted a substantive notion of equality in its deliberations, an approach encouraged by the equality clause itself. The article offers some suggestions for both the South African Constitutional and others courts when engaging in equality rights adjudication. The article is a clarion call for the judiciary to adopt a contextual, robust and vigilant approach to equality and other rights adjudication.

Key words: *human rights adjudication; right to equality; substantive equality; equality adjudication; South African Constitution*

1 Introduction

As South Africa celebrates 20 years of constitutionalism, it is timely to examine critically the South African Constitutional Court's approach to one of the central pillars in pursuit of a non-racial and non-sexist South Africa: the interpretation, adjudication and implementation of the right to equality. The reasons why this article focuses on the right to equality are the following: Firstly, in pre-democratic South Africa, inequality and systemic discrimination were faultlines in violent conflict. During apartheid, South Africa was described as one of most

* BA LLM PhD (Ulster); a.smith1@ulster.ac.uk. I am grateful to Professors Rory O'Connell and Fionnuala Ni Aolain and the anonymous referees for comments on earlier drafts of this article. All errors are solely my responsibility.

unequal societies in the world,¹ a 'rights pariah',² with a 'wicked system of law'.³ Such wickedness controlled where South Africans were born,⁴ where they lived,⁵ where they were educated,⁶ who they married,⁷ with whom they socialised⁸ and what jobs they did.⁹

Arguably, as a result of South Africa's 'great experience in constitutionalising inequality',¹⁰ the equality right provision and other interrelated rights, such as dignity and socio-economic rights, occupy key positions in the South African Bill of Rights and have rightly been described as being truly 'revolutionary'.¹¹ Due to limited space and bearing in mind the focus for the 20 years of democracy special edition, this article primarily focuses on how the apex court in the country has dealt with equality rights cases. The article does this by focusing on a necessarily select number of equality cases, namely, *Prince*,¹² *Du Toit*,¹³ *Jordan*,¹⁴ *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others*,¹⁵ and *MEC for Education: KwaZulu-Natal and Others v Pillay*.¹⁶ These cases have been selected to determine whether the Court has consistently adopted a substantive notion of equality in its deliberations, an approach encouraged by the equality clause itself (see below). Furthermore, the Constitutional

1 A Chaskalson 'From wickedness to equality: The moral transformation of South African law' (2003) 1 *International Journal of Constitutional Law* 590.

2 V Hart 'The contagion of rights: Constitutions as carriers' in P Hanafin & M Williams (eds) *Identity, rights and constitutional transformation* (1999) 40.

3 Chaskalson (n 1 above) 590.

4 Population Registration Act 30 of 1950.

5 The Group Areas Act of 1950 provided for the segregation of different racial groups in different areas and resulted in a number of forced removals. One source estimates that in the period 1960 to 1983, over three-and-a-half million people were forcibly removed under one or other apartheid law. L Platzky & C Walker *The surplus people: Forced removals in South Africa* (1985) 10.

6 The Bantu Education Act of 1953 transferred responsibility for the administration of black education to the Department of Native Affairs. Under this Act, separate education systems for whites and blacks were established.

7 The Immorality Act of 1950 and Prohibition of Mixed Marriages Act of 1949 proscribed interracial sex, marriage and other forms of contact.

8 Separation was also extended to public facilities such as parks, beaches, schools and public transportation by measures such as the Reservation of Separate Amenities Act of 1953.

9 Mines and Works Act 1911 which institutionalised discrimination in the workplace as it reserved certain jobs for whites only in the workplace. See also the Mines and Works Amendment Act 25 of 1926 which provided that certificates of competence in skilled trades were only to be granted to whites and coloureds.

10 *Prinsloo v Van Der Linde & Another* 1997 (6) BCLR 756 (CC) para 20.

11 J de Waal *et al The Bill of Rights handbook* (2001) 2.

12 *Prince v President, Cape Law Society* 2002 (3) BCLR 231 (CC); 2002 (2) SA 794 (CC).

13 *Du Toit & Another v Minister of Welfare and Population Development & Others* 2003 (2) SA 198 (CC).

14 *Jordan & Others v S* 2002 (6) SA 642 (CC).

15 *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others* 1999 (1) SA 6 (CC) (*National Coalition*).

16 *MEC for Education: KwaZulu-Natal & Others v Pillay* Case CCT 51/06 [2007] ZACC 21 (*Pillay*).

Court's approach to the adjudication of the right to equality is a 'focal point'¹⁷ for other jurisdictions contemplating the constitutionalisation of rights as South Africa has been adjudicating on this right since 1994. South Africa has therefore a corpus of comprehensive equality jurisprudence and is 'uniquely situated to provide insight and permit assessment'¹⁸ on what type of approach is needed to help ensure that an equality right contributes to creating a more equal society. Commenting on South Africa, Kalula states:¹⁹

[T]he success or failure of the South Africa transformation will stand as an example to the region and the rest of the world, given the immensity of the division ... and the systematic discrimination and disregard for human rights.

Before examining the Constitutional Court's approach in the above cases, for conceptual clarity and coherence of argumentation, the following section will consider briefly what equality means. Having analysed the cases in section three, section four draws conclusions and recommendations on lessons to be learnt for both South Africa and other jurisdictions involved in constitutional equality adjudication.

2 Defining equality

Equality has perplexed writers and thinkers for well over two millennia.²⁰ To this day, there is no consensus on the exact meaning of equality. As Fredman states:²¹

We all have an intuitive grasp of the meaning of equality and what it entails, yet the more closely we examine it, the more its meaning shifts.

Broadly speaking, a distinction is frequently drawn between formal and substantive concepts of equality.

2.1 Formal equality

Formal equality or equality as consistency requires that all persons who are in the same situation be accorded the same treatment and that people should not be treated differently because of arbitrary characteristics such as religion, race or gender. This formulation resonates with the original Aristotelian conception of equality, that like cases should be treated alike. It is the most widespread and least

17 A Pillay 'Economic and social rights adjudication: Developing principles of judicial restraint in South Africa and the United Kingdom' (2013) July *Public Law* 599. Although Pillay is talking about economic and social rights jurisprudence, the same premise can apply to equality cases.

18 E Christiansen 'Using adjudication to remedy socio-economic injustice: Comparative lessons from South Africa' (2008) 13 *University of California, Los Angeles Journal of International Law and Foreign Affairs* 369 376.

19 E Kalula 'Editorial' (2001) 5 *International Journal of Discrimination and the Law* 99.

20 For a philosophical and historical account, see S Fredman *Discrimination law* (2011) ch 1.

21 Fredman (n 20 above) 1.

contentious understanding of equality and forms the conceptual basis of the legal concept, direct discrimination.²² Under this formal notion of discrimination, as long as there is consistency in treatment, there will be no discrimination. A formal approach to equality therefore only requires equal application of the law without further examination of the particular circumstances or context of the individual or group and, consequently, the content and the potential discriminatory impact of the law and/or policy under review. In other words, it is a symmetrical concept. Direct discrimination also requires a comparator. The comparator in proving direct discrimination tends to be the 'dominant norm': white, male, able-bodied, and heterosexual.²³ Such a limited notion disregards all aspects of group membership, and tends to individualise everything so that patterns of group-based oppression and subordination are rendered invisible.

This is not the way forward, especially in light of the growth of different cultures, religions and traditions in societies throughout the world. As Fraser notes, by abstracting individuals from their social and cultural context, they become by default conceptualised and treated as being in the same position as those in the privileged groups.²⁴ Fredman describes this as 'being clothed in the attributes of the dominant culture, religion or ethnicity'.²⁵ Thus, stressing sameness undermines the more important norm and value of diversity.²⁶ This is also echoed by Finley, who states that formal equality 'marginalizes, disempowers, and renders invisible those such as women, who have seemed most unlikely to ever melt into the white male model of homogeneity'.²⁷ On this view, 'difference' is considered as having a stigmatising effect as the 'assimilationist' idea underlying the conception of consistency as equality presumes sameness.²⁸ Given these limitations of formal equality, the author's preferred concept of equality is one which is concerned with making sure that laws or policies do not impose subordinating treatment on those already suffering social, political or economic disadvantage.

2.2 Substantive equality

The preferred notion of equality is substantive equality. A substantive approach to equality orients the right to equality from a negatively-oriented right of non-discrimination to a positively-oriented right to

22 Direct discrimination occurs, eg, where a person is disadvantaged simply on the ground of his or her race, sex, gender or some other criterion.

23 Fredman (n 20 above) 9.

24 N Fraser 'From individual to group' in B Hepple & E Szyszczak (eds) *Discrimination: The limits of the law* (1992) 102-103.

25 S Fredman 'Equality: A new generation' (2001) 30 *Industrial Law Journal* 145 154.

26 J Flax 'Beyond equality: Gender, justice and difference' in G Block & S James (eds) *Beyond equality and difference: Citizenship, feminist politics and female subjectivity* (1992).

27 LM Finley 'Transcending equality theory: A way out of the maternity and the workplace debate' (1986) 86 *Columbia Law Review* 1118 1153.

28 Finley (n 27 above) 1154.

substantive equality.²⁹ It does this by ensuring that laws or policies do not reinforce the subordination of groups already suffering social, political or economic disadvantage and requires that laws treat individuals as substantive equals, recognising and accommodating peoples' differences. Analysing the effects of laws, policies and practices on a disadvantaged individual or group, substantive equality is concerned with eliminating barriers which exclude certain groups from participation in the workplace or celebrating their different cultures and practices. With the emphasis on the impact of laws or policies and the move beyond consistency to substance, the substantive equality approach incorporates indirect discrimination in its analysis. The problem of indirect discrimination is rife in societies for those who were discriminated under the past undemocratic regime as they would not have had equal access to education, jobs, housing and medical care. Indirect discrimination is therefore important to incorporate in equality rights adjudication as it gives recognition to the reality that not all people are on the same playing field. As a former justice of the Constitutional Court stated:³⁰

Although the long term goal of our constitutional order [the South African Constitution] is equal treatment, insisting upon equal treatment in established inequality may well result in the entrenchment of that inequality.

Substantive equality, therefore, requires an asymmetrical approach and facilitating or helping to create 'equality of opportunity' (eliminating barriers which exclude certain groups from participation in the workplace or public office) and 'equality of results or outcomes' (seeking to achieve an equal distribution of social goods).³¹ This concept of equality is manifested through legal mechanisms such as affirmative action. Originating in the United States, affirmative action refers to provisions and programmes giving preferential treatment to members of certain groups considered to be in a disadvantaged position. As the author has argued elsewhere, affirmative action requires government to take positive measures so that they can enjoy full and equal advantage of particular opportunities. Thus, what may have been deemed directly discriminatory, measures which favour relatively disadvantaged groups at the expense of those who are relatively well off, will not constitute discrimination as the consequences of such measures are, in the end, a more equal society.

29 For further information, see A Smith 'Constitutionalising equality: The South African experience' (2008) 9 *International Journal of Discrimination and the Law* 201.

30 *President of the Republic of South Africa v Hugo* 1997 (4) SALR 1 (CC) 41 para 112 (per Justice O'Regan).

31 For further discussion on these and other tenets of substantive equality, see C McCrudden 'Theorising European equality law' in C Costello & E Barry (eds) *Equality in diversity* (2003) 19-33.

In short, affirmative action is therefore viewed as a manifestation, not a limitation of equality.³²

Furthermore, substantive equality emphasises the importance of recognising the cultural, political and legal choices of social groups.³³ The emphasis is on affirming and recognising diversity and difference. For political minorities, equality of recognition/identity is vital as it helps to secure 'a desire for equality [which] is not [based] on a hope for the elimination of all differences',³⁴ but one based on 'equal concern and respect across difference'.³⁵ Adopting such a notion of equality helps to fulfil four central aims identified by Fredman. These are: breaking the cycle of disadvantage associated with membership of a particular group; promoting respect for equal respect and dignity, thereby reducing stereotypical representation of their own culture; providing positive measures of individuals as members of the group; and facilitating integration and full participation in society.³⁶ Has the Constitutional Court been consistent in adopting this notion of equality in its deliberations?³⁷

3 The South African Constitutional Court's approach to equality

Before answering this question, it is necessary to set out the equality right. The equality provision is found in section 9 of the final Constitution of 1996. Section 9 provides:³⁸

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and

³² Smith (n 29 above).

³³ The author does not engage in the contentious issue surrounding group/minority rights which was debated and explicitly rejected by the drafters of the South African Constitution. Indeed, some formerly exclusive Afrikaner schools, under the auspices of pursuing group (linguistic and cultural) rights, have sought to exclude black students from their schools. Thanks to an anonymous referee for bringing this point to the author's attention.

³⁴ *National Coalition* (n 15 above) para 22.

³⁵ *National Coalition* para 132.

³⁶ These aims are borrowed from S Fredman *Human rights transformed: Positive rights and positive duties* (2008) 179.

³⁷ In the first equality case, adjudicated under the interim Constitution, the *Brink* case, the Court committed itself to adopting a substantive notion of equality. Sec 8 (the equality clause) 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. The drafters realised that it was necessary both to proscribe such forms of discrimination and to permit positive steps to redress the effects of such discrimination. The need to prohibit such patterns of discrimination and to remedy their results are the primary purposes of sec 8. *Brink v Kitschoff* 1996 (6) BCLR 752 (CC) para 42.

³⁸ For a discussion on the differences between secs 8 and 9 and the drafting of the equality provisions, see Smith (n 29 above) 201.

- 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.

Section 9 does not, in the words of the Constitutional Court, 'envisage a passive or purely negative concept of equality; quite the contrary'.³⁹ The equality clause incorporates a substantive notion of equality as it recognises the need to provide redress for past disadvantages. The Constitutional Court has coined this 'remedial or restitutionary equality'.⁴⁰

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

Has equality been 'delayed and denied' for vulnerable and political minorities who are⁴¹

not able on their own to use political power to secure favourable legislation for themselves [and] are accordingly almost exclusively reliant on the Bill of Rights for their protection?

Unfortunately, the Constitutional Court's approach in cases such as *Prince* and *Jordan* has resulted in the denial and delay of equality for some vulnerable minorities such as the black community, children, women, gays and lesbians.

Before examining these and other cases, it is important to briefly set out how the Constitutional Court deals with cases of equality. If an applicant is alleging discrimination on the listed grounds,⁴² the onus is on the respondent to prove that the discrimination was fair. If discrimination is not based on the listed grounds, a claimant relying on an unlisted classification is unaided by the wording of section 9(5) as he or she is required to prove that they were adversely affected by the particular distinction and the distinction is unfair. The claimant will

39 *National Coalition* (n 15 above) para 16.

40 As above. *National Coalition* para 60.

41 *National Coalition* para 25.

42 Sec 9(3).

have to show that the differentiation has the potential to impair his or her fundamental dignity, a burden which, as some of the cases below illustrate, is not easy to prove.⁴³ Similar to other rights, section 9 is not an absolute right as it is subject to a general limitation provision, section 36.⁴⁴ Therefore, if discrimination is found to be unfair, it is then subject to the section 36 test, where the respondent has the burden of justifying any limitation of an individual's right. If discrimination is held to be fair, then section 36 is superfluous.

That said, while the intention of the drafters was to subject the equality provision to a general limitation clause, following the case of *Harksen v Lane NO*,⁴⁵ the Constitutional Court adopts the following stages of enquiry that apply to the equality provision. Firstly, it will seek if the legislative provision or Act differentiates between people or categories of people. If not, there is no violation of section 9; if yes, the Court will ask if the differentiation has a rational connection to a legitimate governmental objective. If there is no rational objective, the legislative provision or Act is unconstitutional. If there is a rational connection, the Court will then ask whether the differentiation amounts to unfair discrimination. This requires a two-stage analysis. Firstly, does the differentiation amount to discrimination? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then, whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. Secondly, if the differentiation amounts to discrimination, does it amount to unfair discrimination? If the differentiation is based on one of the specified grounds listed in section 9(3), unfairness will be presumed. If the discrimination is found to be unfair, then a determination will have to be made as to whether the provision can be justified under the limitation clause (section 36). If the differentiation is on an unspecified

43 *Jordan & Others v S* 2002 (6) SA 642 (CC); *Volks NO v Robinson & Others* 2005 Case CCT12/04. For an excellent discussion on the Court's approach to human dignity, see C McConnachie 'Human dignity, 'Unfair discrimination' and guidance' (2014) 1 *Oxford Journal of Legal Studies* 1. In his article, McConnachie criticises Justice Laurie Ackermann's assumption in his book, *Human dignity: Lodestar for equality in South Africa* (2012) that a deeper understanding of human dignity can provide South African courts in identifying what constitutes unfair discrimination. Following his convincing critique, McConnachie then provides a 'surer route' that provides clearer guidance in identifying unfair discrimination. See also R O'Connell 'The role of dignity in equality law: Lessons from Canada and South Africa' (2008) 6 *International Journal of Constitutional Law* 267.

44 Sec 36 provides that the rights in the Bill of Rights 'may be limited only in terms of law of general application to the extent that the limitation is reasonable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose'.

45 1998 (1) SA 300 (CC) para 53.

or analogous ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If at the end of this stage of enquiry the differentiation is found not to be unfair, then there will be no violation of section 9(2).

Thus, for equality cases, as some of the cases below will show, the analysis is more difficult than with other rights, as some of the cases only require the two-stage analysis: Claimants alleging a violation of the right to equality have to go through the section 9 internal test and, only if the discrimination is not internally justified, the Constitutional Court will then proceed to the section 36 limitation clause enquiry.

The rationale for selecting these cases and the order in which they are presented show the oscillatory approach of the Constitutional Court. At times, the Constitutional Court has granted an order favourable to the minority person or persons seeking recognition or redress for discrimination whereas, at other times, the Constitutional Court has been inconsistent in their deliberations in equality rights cases and in determining whether the differentiation in treatment constitutes unfair and indirect discrimination. The *Prince* case is illustrative of these difficulties.

3.1 The *Prince* case

The *Prince* case concerned a law graduate (Gareth Prince) who had fulfilled all academic requirements for becoming an attorney in South Africa. In addition to academic qualifications, under the Attorney's Act 53 of 1979, future attorneys have to apply to the Law Society to register to do one year's community service. Following the disclosure of two convictions of a statutory offence of possessing cannabis and Prince's declaration that he would continue to use cannabis for religious purposes (he was a Rastafarian and argued that the use of the drug was required by his religion), the Law Society refused his registration. Prince unsuccessfully argued before the Constitutional Court that the Drugs and Drug Trafficking Act 140 of 1992 (Drugs Act) and section 22A(10) of the Medicines and Related Substances Control Act 101 of 1965 (Medicines Act) were incompatible with the South African Bill of Rights as they should have included a religious exemption allowing Rastafarians to use cannabis for religious purposes.⁴⁶ The case has been referred to as the 'Prince saga'⁴⁷ as the Constitutional Court delivered two judgments.

46 Prince argued that his rights to freedom of religion (secs 15(1) & 31(1)), dignity (sec 10), to pursue the profession of his choice (sec 22) and not to be subjected to unfair discrimination (sec 9) were infringed.

47 L du Plessis 'Religious freedom and equality as celebration of difference: A significant development in recent South African constitutional law' (2009) 12 *Potchefstroom Electronic Law Journal* 10 18.

In the first case (*Prince I*), the Constitutional Court issued an interim judgment as both parties were requested to provide additional evidence.⁴⁸ The Court explained that this case was one of the rare cases where parties were allowed to provide additional evidence on appeal:⁴⁹

[T]he appellant belongs to a minority group. The constitutional right asserted by the appellant goes beyond his own interest – it affects the Rastafari community. The Rastafari community is not a powerful one. It is a vulnerable group. It deserves the protection of the law precisely because it is a vulnerable minority. The very fact that Rastafari use cannabis exposes them to social stigmatisation ... Our Constitution recognises that minority groups may hold their own religious views and enjoins us to tolerate and protect such views.

However, notwithstanding the Constitutional Court's attempt to protect this vulnerable minority, in the second judgment by a slim majority (5:4), Prince's arguments were rejected.⁵⁰ If such religious exemptions were to be granted, the majority argued, it would be difficult to police such exemptions.⁵¹ Although the majority recognised that Rastafarians are a small, vulnerable and marginalised group and, therefore, protection afforded by the South African Bill of Rights is particularly important for them,⁵² the failure to provide such exemptions was reasonable and justified.⁵³ In doing so, such laws, although not directed nor intended expressly to interfere with Rastafari religious practices, did just that with unfortunate consequences, not just for the appellant in this case but for all Rastafarians. The majority judgment's refusal to allow limited exemptions which existed for research or analytical purposes resulted in the criminalisation and stigmatisation of Rastafarians. The majority's failure to appreciate the indirect impact of these statutes on this vulnerable minority is disappointing and 'regrettable',⁵⁴ as the judgment could be interpreted by Rastafarians that they are not deserving of equal concern, respect and consideration. Furthermore, the practical implications of the judgment are severe: It means that, as well as having the stigma of a criminal conviction, the appellant and other Rastafarians who would like to become attorneys are prevented from doing so. In this context, the majority's decision is 'profound

48 *Prince* (n 12 above).

49 *Prince* para 26.

50 As above.

51 *Prince* (n 12 above) para 130.

52 *Prince* para 112.

53 *Prince* para 139. The majority judgment also referred to international law which required a ban on the use of cannabis to be uniformly enforced. In this context, the majority opined that while 'the provision of medical exemptions from the prohibition against the possession and use of harmful drugs is necessary for health purposes and is sanctioned by the international conventions ... Such exemptions are amenable to control in ways in which a general exemption for religious purposes such as that proposed by the appellant would not be' (para 127).

54 P Lenta 'Cultural and religious accommodations to school uniform regulations' (2008) 1 *Constitutional Court Review* 259 267.

indeed'.⁵⁵ The negative profoundness of the decision is echoed by Lenta.⁵⁶

The burden imposed by the relevant legislation on Rastafarians is severe: Sacramental and liturgical practices are at the core of religion and forbidding these practices forces Rastafarians either to violate the tenets of their religion or become outlaws. This appears discriminatory since it is unthinkable that major faiths should have to face this choice. The use of wine in the Catholic Mass is unlikely ever to be forbidden.

The narrow judgment in this case shows the importance in the difference of adopting a substantive versus formal approach in constitutional equality adjudication. Had the minority judgment been adopted, Prince and other Rastafarians in the same position would have been able to continue to practise their religion, culture and choice of their profession without fear of a criminal conviction. The minority judgment delivered by Justices Ngcobo and Sachs were caustic of the majority's approach and the impugned provisions. They argued that a partial exemption (as sought by Prince) should have been granted. Focusing on the indirect impact of the laws, the justices stated that, although the statutes were not directed at Rastafarians and appear to be neutral, nor intended to interfere with their religious practices,⁵⁷

[t]hey [the laws] impact severely, though incidentally, on Rastafari religious practices. Their effect is accordingly said to be the same as if central Rastafari practices were singled out for prohibition.

Commenting on the discriminatory impact of such laws, Justice Ngcobo noted:⁵⁸

The impugned provisions do not distinguish between the Rastafari who use cannabis for religious purposes and drug abusers. The effect of the prohibition is to state that in the eyes of the legal system all Rastafari are criminals. The stigma thus attached is manifest ... There can be no doubt that the existence of the law which effectively punishes the practice of the Rastafari religion degrades and devalues the followers of the Rastafari religion in our society. It is a palpable invasion of their dignity.

Rejecting the majority's reasoning that such exemptions would be difficult to police, administer and regulate, Justice Ngcobo stated that a permit system in conjunction with administrative procedures and guidelines could have addressed practical problems.⁵⁹ While the majority's concerns about the dangers of drug abuse and the importance of protecting the public interest are valid, focusing on the precarious position of Rastafarians, Justice Sachs stated:⁶⁰

55 *Prince* (n 12 above) para 3(a) (*per* Justice Ngcobo).

56 *Lenta* (n 54 above) 267.

57 *Prince* (n 12 above) para 88 (*per* Justice Sachs).

58 *Prince* para 3(a).

59 *As above*.

60 *Prince* (n 12 above) 147.

Exemptions from general laws always impose some cost on the state, yet practical inconvenience and disturbance of established majoritarian mind sets are the price that constitutionalism exacts from government.

Emphasising the values which underlie the South African Constitution, namely, tolerance, respect for diversity, fairness, equality and dignity, Justice Sachs continued to state:⁶¹

The test of tolerance as envisaged by the Bill of Rights comes not in accepting what is familiar and easily accommodated, but in giving reasonable space to what is unusual, bizarre or even threatening.

The same justice talked about the importance of 'reasonable accommodation of difference'⁶² and called for the state to 'walk the extra mile'⁶³ to accommodate the Rastafari community. However, as Pillay argues, the Constitutional Court was not 'willing ... to walk the extra mile to grant the appellants relief'.⁶⁴ Not only was the Constitutional Court reluctant 'to walk the extra mile', but Pillay goes further in her critique by concluding that the 'current position in South Africa is that some religions are more equal than others',⁶⁵ a conclusion which is hard not to disagree with.

3.2 The Pillay case

In contrast to the *Prince* case, the *Pillay* case is an example where the Constitutional Court passed the 'test of tolerance',⁶⁶ as the Court adopted a substantive approach to equality as they recognised and addressed indirect discrimination. The respondent successfully instituted a law suit against the school's Code of Conduct (Code) and the Department of Education (who supported the school's approach) not to allow her daughter to wear a nose stud at school as an expression of her Hindu religion and South Indian culture as it conflicted with the Code. Upholding the High Court's decision, the Constitutional Court held that the Code conflicted with respondent's daughter's religious and cultural rights and also violated her right to freedom of expression. In particular, for the purposes of this article, Chief Justice Langa, writing for the majority,⁶⁷ held that the

61 *Prince* para 115. Prince then took his case before the African Commission on Human and Peoples' Rights and the Human Rights Committee. Both the African Commission and the Committee rejected his appeal. *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004); Communication 1474/2006, *Mr Gareth Anver Prince v South Africa*, UNHR Committee (14 November 2007) UN Doc CCPR/C/91/D/1474 (2006).

62 *Prince* (n 12 above) para 171.

63 *Prince* para 149.

64 A Pillay '*Prince v President of the Law Society of the Cape of Good Hope*' (2003) 1 *International Journal of Constitutional Law* 152 156.

65 Pillay (n 64 above) 156.

66 *Prince* (n 12 above) para 115.

67 Justice O'Regan issued a minority judgment, not because she disagreed with the majority judgment, but because she dissented in part from the order issued by the majority. As noted in the main text, Justice O'Regan also used a different comparator from that used by Chief Justice Langa.

prohibition of wearing jewellery had the potential for indirect discrimination because it allowed certain groups of learners to express their religious and cultural identity freely, while denying that right to others.⁶⁸

[T]he failure to treat her [respondent's daughter, Sunali] differently from her peers amounted to withholding from her 'the benefit, opportunity and advantage of enjoying fully [her] culture and/or of practising [her] religion' and therefore constituted indirect discrimination.⁶⁹

The Chief Justice thus compared those learners whose religious or cultural beliefs or practices were not affected by the school's Code with those pupils who were affected by the Code.⁷⁰ On this matter, Justice O'Regan argued that those pupils who had previously been granted an exemption, such as Hindu pupils who were allowed to wear 'Lakshmi strings' in honour of the Goddess Lakshmi, and pupils who had been allowed to wear hide bracelets as a mark of respect when a close relative died, would have been a better comparator.⁷¹ This raises two interesting questions. Firstly, which approach is preferable in advancing substantive equality? Secondly, as both judges found discrimination, is the choice of a comparator important or academic? Paradoxically, arguably both approaches are preferable. Chief Justice Langa's approach endorses substantive equality when he stated that when a code imposes 'a disparate impact on certain religion and cultures'⁷² and not others, such a code is 'not neutral but enforces mainstream and historically-privileged forms of adornment ... at the expense of minority and historically-excluded forms'.⁷³ At the same time, Justice O'Regan's comparator (those pupils who had been granted exemptions previously and those who had not) also advanced substantive equality.

In relation to the second question, to avoid the denial and delay of equality, the choice of a comparator does matter. Fortunately, in this case, both comparators were apt and were easily identified. Had the comparators been difficult to find such as comparing like with like (pregnant women with pregnant men),⁷⁴ such an approach would

68 The arguments regarding unfair discrimination were brought under the Equality and Prevention of Unfair Discrimination Act 4 of 2000 and not under the equality provision (sec 9) of the South African Bill of Rights. However, this did not affect the argument based on indirect discrimination as it was looking at a rule which appeared to be neutral but had a marginalising impact.

69 *Pillay* (n 16 above) para 15.

70 *Pillay* para 44.

71 *Pillay* para 130.

72 *Pillay* para 44.

73 As above.

74 Such a scenario arose in the infamous *Bliss v Attorney-General of Canada* [1979] 1 SCR 183. Stella Bliss, the claimant, had worked long enough to claim ordinary unemployment insurance benefits, but not long enough to claim the special maternity benefits. When she applied for the ordinary benefits shortly after the birth of her child, she was turned down despite the fact that she had paid the premiums and was available for and capable of employment according to her

have ensured the denial of the 'constitutional goal of equality'.⁷⁵ That said, if the school had not afforded the pupil an exemption, there would have been no discrimination under Justice O'Regan's approach, as the judge held that the Code was neutral. However, Chief Justice Langa rightly, in the author's opinion, found that the Code had an 'underlying indirect impact' on a minority.⁷⁶

The norm embodied by the Code is not neutral, but enforces mainstream and historically-privileged forms of adornment, such as ear studs which also involve the piercing of a body part, at the expense of minority and historically-excluded forms. Accordingly a burden is placed on learners who are unable to express themselves fully and must attend school in an environment that did not completely accept them.

When people are not able to express their own culture and are forced to assimilate to the dominant norm, such injunction 'falls short of [the South African] constitutional project which not only affirms diversity, but promotes and celebrates it'.⁷⁷ Had the Constitutional Court not examined the wider impact and effect of the school's refusal to allow an exemption to the school's Code, it is likely that equality in this instance would have been denied. Fortunately for Sunali (the respondent's daughter) and for other learners who 'hitherto were afraid to express their religions or cultures',⁷⁸ the Constitutional Court's purposive interpretation of the equality provision resulted in the school, in consultation with others (parents, staff and learners), being required to amend the Code to ensure reasonable accommodation of religious and cultural practices. Even though this may result in 'additional hardship or expense',⁷⁹ such positive measures are necessary 'to allow all people to participate and enjoy all their rights equally'.⁸⁰ In doing so, this prevents the relegation of people 'to the margins of society because they do not or cannot conform to certain social norms'.⁸¹ The Constitutional Court's approach fits in well with a notion of equality as recognition or identity discussed earlier. By prohibiting indirect discrimination and granting the exemption, rights in this case were made real as people of different cultures and identities were recognised 'as being worthy

doctor. A section of the Unemployment Insurance Act said that pregnant and recently-delivered women could not receive the ordinary benefits. Bliss argued that she was discriminated against because she was pregnant and that this constituted sex discrimination. The Supreme Court held that Stella Bliss had not been discriminated against because of her sex but because she was pregnant. The Court held that 'any inequality between two the sexes in this area is not created by legislation but by nature'. This case was overturned ten years later in *Brooks v Canada Safeway Ltd* [1989] 1 SCR 1219, a case where the court ruled that discrimination on the basis of pregnancy was sex discrimination.

75 *National Coalition* (n 15 above) para 61.

76 As above.

77 *Pillay* (n 16 above) para 65.

78 *Pillay* para 107.

79 As above.

80 *Pillay* (n 16 above) para 73.

81 As above.

of equal respect'.⁸² In this context, Du Plessis neatly sums up the *Pillay* case, that '[it] is about constitutional substantiation for the affirmation and celebration of identity ... and especially the identity of the *Other* ...'⁸³

3.3 The *Du Toit* case

The importance of recognising 'the other' is an important theme in the *Du Toit* case. In this case, the Constitutional Court, with relative ease, was able to find a violation of the right to equality due to a finding of direct discrimination. The Constitutional Court unanimously held that certain provisions of the Child Care Act 1983 and the Guardianship Act 1993, which prevented a lesbian couple in a permanent relationship from jointly adopting children, violated the equality provision on two grounds: sexual orientation and marital status. The latter was violated as the legislation confined the right to adopt children jointly to married couples. By recognising that the definition of 'family life' in the South African Constitution needs to reflect societal attitudes,⁸⁴ the Constitutional Court's approach in this case helped to widen the meaning of concepts such as 'family', 'spouse' and domestic relationships.⁸⁵

The manner in which the Constitutional Court approached this case is a stellar example of how the Constitutional Court and other courts should always deal with the equality right. The Constitutional Court adopted a substantive notion of equality, as it embraced the notion of equality of recognition emphasising the importance of accepting people for what they are and not based on stereotypical prejudices which prohibits people from enjoying and exercising their rights and fundamental freedoms simply because they are 'different' from the rest of society. Furthermore, the advancement of equality was brought one step forward as the Constitutional Court read in words to the impugned provisions to ensure that they cover the rights of same-sex life partners to jointly adopt children. In this way, the Constitutional Court in this case and in other same-sex rights cases⁸⁶ adopted a substantive approach to equality.

82 *Pillay* (n 16 above) para 185.

83 Du Plessis (n 47 above) 25.

84 *Du Toit* (n 13 above) para 19.

85 The Constitutional Court has recently affirmed this approach: 'Family life as contemplated by the Constitution can be provided in different ways and that legal conceptions of the family and what constitutes family life should change as social practices and traditions change.' *Hattingh & Others v Juta* (CCT 50/12) 2013 ZACC 5; 2013 (3) SA 275 (CC); 2013 (5) BCLR 509 (CC).

86 *Minister of Home Affairs & Another v Fourie & Another/Lesbian and Gay Equality Project & Eighteen Others* 2006 (1) SA 524 (CC); *National Coalition* (n 15 above); *Satchwell v President of the Republic of SA & Another* 2002 (9) BCLR 986 (CC); *J & B v Director-General, Department of Home Affairs & Others* 2003 (5) (SA) 621 (CC).

3.4 The *National Coalition* case

In one of the earlier same-sex rights landmark cases (the *National Coalition* case), the Constitutional Court held that sodomy laws that criminalised sexual activity between consenting males violated the equality right.⁸⁷ Justice Ackermann (as he then was), who delivered the majority judgment, carried out a comprehensive and detailed analysis of comparative and international law to substantiate his finding.⁸⁸ Using these sources, the justice emphasised the importance of recognising ‘the other’:⁸⁹

The desire for equality is not a hope for the elimination of all differences – the experience of subordination of personal subordination, above all – lies behind the vision of equality. To understand ‘the other’ one must try, as far as is humanly possible, to place oneself in the position of ‘the other’. It is easy to say that everyone who is just like ‘us’ is entitled to equality. Everyone finds it more difficult to say that those who are ‘different’ from us in some way should have the same equality rights that we enjoy. Yet so soon as we say any ... group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of ... society are demeaned. It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour or sexual orientation are less worthy.

The justice continued to state that sometimes treating people identically does not foster equality, but inequality:⁹⁰

We need, therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal 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. A classification which is unfair in one context may not necessarily be unfair in a different context.

In so doing, to quote Justice Ackermann, ‘it is in this latter way that we [the Constitutional Court] have encapsulated the notion of substantive as opposed to formal equality’.⁹¹ Adopting a similar approach, Justice Sachs’s separate concurring speech discussed at length the importance of recognising diversity and examining rights

⁸⁷ *National Coalition* (n 15 above).

⁸⁸ The former justice specifically referred to the laws of England, Wales, Scotland, Ireland, member states of the Council of Europe, Germany, Australia, New Zealand and Canada and art 17 of the International Covenant on Civil and Political Rights. Art 17 states: ‘(1) No one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks.’

⁸⁹ Quoted by Ackermann J in the *National Coalition* case (n 15 above) para 22, citing Per Cory J, delivering part of the joint judgment of the Canadian Supreme Court in *Vriend v Alberta* [1998] 1 SCR 493 para 69.

⁹⁰ *National Coalition* (n 15 above) para 66.

⁹¹ *National Coalition* para 61.

contextually rather than abstractly. Quoting a former justice of the Supreme Court of Canada, Claire L'Heureux Dubé, in the case of *Egan v Canada*,⁹² Justice Sachs talked about the advantages of such an approach:⁹³

One consequence of an approach based on context and impact would be the acknowledgment that grounds of unfair discrimination can intersect, so that the evaluation of discriminatory impact is done not according to one ground of discrimination or another, but on a combination of both, that is, globally and contextually, not separately and abstractly.

Looking at the historical and social context of gay men in South Africa, Justice Sachs took into consideration disadvantage and difference (two core characteristics of substantive equality) of gay men and lesbians in society and the discriminatory effect of legislation on this vulnerable group. Talking about disadvantage, Justice Sachs stated that 'gays constitute a distinct though invisible section of the community' and have been treated 'not only with disrespect or condescension but with disapproval and revulsion' and have been 'pressurised by society and the law to remain invisible'.⁹⁴ On difference, Justice Sachs eloquently talked about equality as not⁹⁵

pre-suppos[ing] the elimination or suppression of difference [and] imply[ing] a levelling or homogenisation of behaviour [but rather equality is] about [the] acknowledgment and [the] acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation, stigma and punishment. At best, it celebrates the vitality that difference brings to any society.

This approach resulted in 'emphasis being placed simultaneously on context, impact and the point of view of the affected persons'.⁹⁶ Adopting such a focus is 'the guarantor of substantive as opposed to formal equality'⁹⁷ and in this case, and in the *Du Toit* case and other same-sex rights cases referred to earlier, the Constitutional Court was the 'leader of opinion',⁹⁸ creating an environment where lesbians and gay men are treated equally, and helping to ease the 'sting of the past and continuing discrimination against both gays and lesbians',⁹⁹ which was rife during and after the apartheid era.

The above judicial excerpts are stellar examples of how the Constitutional Court and other courts should be interpreting the equality clause in helping to build a democratic and tolerant society. They show how the Court signals its intention to embrace a substantive notion of equality and to move beyond the narrow and formalistic understanding of equality. As a result of the Constitutional

92 (1995) 29 SCR 79.

93 *National Coalition* (n 15 above) para 113.

94 *National Coalition* para 128.

95 *National Coalition* para 132.

96 *National Coalition* para 126.

97 As above.

98 A Bickel *The least dangerous branch* (1962) 239.

99 *Minister of Home Affairs & Another v Fourie* (n 86 above) para 31.

Court's approach in these same-sex rights cases, South Africa has passed various pieces of legislation committing government to promote equality irrespective of sexual orientation and marital status and to allow same-sex couples to marry.¹⁰⁰

3.5 The *Jordan* case

In stark contrast, the *Jordan* case is a more jarring case, as the majority of the Constitutional Court adopted a focus which guaranteed a formal rather than a substantive approach to equality as they failed to address the impact of the legislation in question. In other words, they failed to address indirect discrimination. At issue in this case was the constitutionality of sections of the Sexual Offences Act which criminalised the 'sex worker' for prostitution, but not the 'client' or the keeping or managing of a brothel.¹⁰¹ While the Constitutional Court unanimously upheld the constitutionality of the brothel provisions,¹⁰² there was a split of six to five with respect to whether the criminalisation of the 'sex worker' but not the 'client' amounted to unfair discrimination against women. Justice Ngcobo, writing for the majority, found that the provision was constitutional as section 20(1)(a) was gender-neutral and differentiating between the dealer and the customer was a common distinction made by statutes.¹⁰³

Justices Sachs and O'Regan, writing for the minority, found that the section constituted unfair discrimination based on sex as it applied only to the conduct of the prostitutes¹⁰⁴

(who are overwhelmingly female, and patrons [who] are overwhelmingly (though not exclusively) male [and are] relatively more powerful and socio-economically privileged).

On a technical point, the majority was correct in holding that the impugned provision did not constitute direct discrimination as it was gender-neutral. However, given the legacies of gender inequality under the previous apartheid regime, a technical approach was not enough. What was needed (and this was reflected in the minority judgment) was a contextual approach, one that took into consideration the effects of the legislation and the unique history of South Africa. In a scholarly and extensively researched judgment which drew upon a number of foreign and local sources,¹⁰⁵ the

100 Promotion of Equality and Prevention of Unfair Discrimination Act of 2000; Domestic Violence Act of 1999; Rental Housing Act of 1999; Employment Equity Act of 1998; Medical Schemes Act of 1998; and Labour Relations Act of 1995.

101 *Jordan* (n 14 above) para 58, per O'Regan J and Sachs J.

102 The purpose of the Act was to outlaw commercial sex. All the judges unanimously held that the right to human dignity was not violated.

103 *Jordan* (n 14 above) para 10.

104 *Jordan* paras 59 & 68.

105 They drew upon jurisprudence from the European Court of Human Rights and the Canadian Supreme Court. They also paid particular regard to submissions by the Gender Commission and acknowledged their special constitutional role and expertise in the field of gender equality.

minority approached the issue as to whether such differentiation was unfair by viewing the relevant legislation within the social reality of South Africa. Such an approach, which has been described as a 'contextual' or 'super context' approach,¹⁰⁶ has the hallmarks of substantive equality. As Albertyn and Goldbatt state:¹⁰⁷

Contextual analysis [shifts] the legal enquiry from an abstract comparison of 'similarly situated' individuals to an exploration of the actual impact of an alleged rights violation within the existing socio-economic circumstances.

Unfortunately for both the claimant in the *Jordan* case and for the agenda of advancing gender equality in South Africa, the majority judgment adopted an abstract approach which resulted in a 'missed opportunity to make a difference in the lives of women'.¹⁰⁸ It was a 'missed opportunity' as the majority ignored the social reality which is that sex workers tend to be primarily uneducated women from poor socio-economic backgrounds. These women engage in prostitution knowingly accepting the risk of demeaning their dignity, a point noted by the minority but ignored by the majority, and which reflects the reality that many female prostitutes become involved in prostitution because they have few or no alternatives.¹⁰⁹ Not only did the majority judgment foster gender inequality but, as Simpson argues, it has the potential to impair the dignity of women:¹¹⁰

[A] system where only the sex worker, and not the customer, is liable to criminal sanction is one that reinforces harmful stereotypes and creates stigma that prevent sex workers from participating fully in their communities, makes them vulnerable to abuse and exploitation, suppresses their ability to access social benefits, and limits sexual self-expression of men and women. The legal environment described here is hostile to the values of gender equality.

In stark contrast, the minority's 'contextual' or 'super context' approach allowed for the broader social context to be taken into consideration and showed how the impugned law portrayed the

106 P de Vos 'A bridge too far? History as context in the interpretation of the South African Constitution' (2001) 17 *South African Journal on Human Rights* 1 7-8.

107 C Albertyn & B Goldbatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *South African Journal on Human Rights* 248 260.

108 MJ Maluleke & T Madonsela 'Gender equality jurisprudence in landmark court decisions' Department of Justice and Constitutional Development 2004 1 6 http://www.justice.gov.za/docs/other-docs/2009_Women_law_court-decisions.pdf (accessed 26 June 2014).

109 *Jordan* (n 14 above) para 66, per O'Regan J and Sachs J. It is worth noting here that in feminism there is a division between feminists who believe sex work demeans dignity and those who think it does not. Thanks to an anonymous referee for pointing this out.

110 J Simpson 'Stereotyping sex workers: *S v Jordan & Others*' paper submitted to the 2009 John and Mary Yaremko Forum on Multiculturalism and Human Rights: Student Symposium on Women's Human Rights, Faculty of Law, University of Toronto, 6 March 2009, http://www.law-lib.utoronto.ca/diana/2009_symposium_papers/simpson_paper.pdf (accessed 15 January 2014).

female prostitute as the 'social outcast'¹¹¹ and the male client as 'having done the sort of thing that men do'.¹¹² The minority judgment is an exemplar of how courts should approach indirect discrimination. This approach requires examining the effects of what appears to be facially-neutral criteria and looking at the disproportionate effect it may have on vulnerable groups.

The composition of the Constitutional Court at that time is also important, highlighting the need for a representative judiciary. There were only two female judges (Justices Mokgoro and O'Regan) on the Constitutional Court at the time of the case and it was Justice O'Regan who dissented from the majority judgment delivered by Justice Ngcobo.¹¹³ The six male majority judges could not see how equality could be violated by making a distinction between the 'sex worker' for prostitution, but not the 'client'.¹¹⁴ They were unable to 'see' the issue as they failed to contextualise their judgment; they did not examine the individual within and outside of different social groups and the nature of the group discriminated against – all the hallmarks of substantive equality.

The failure of the majority judgment, in upholding the constitutionality of criminalising the prostitute but not the client, 'reinforces and perpetuates sexual stereotypes which degrades the prostitute but does not equally stigmatise the client, if it does at all'.¹¹⁵ In so doing, this and the other cases illustrate a simple trend. The delay and denial of equality will be guaranteed if a formal approach is continually adopted in equality rights adjudication.

To avoid denying the political minority and the most vulnerable in society the constitutional goal of equality, which is after all the *raison d'être* of the South African Constitution, the Constitutional Court and other courts need to ensure that they encapsulate the notion of substantive equality. In short, they need to avoid insisting upon identical treatment in all circumstances, to embrace and affirm diversity and difference, to analyse and understand the overall impact of any action, law or policy to ensure that there is no discriminatory impact, to espouse a 'contextual' or 'super context' approach,¹¹⁶ and to adopt, where necessary, positive measures to address the disparities and inequalities for the political minority who do not have the political voice to ensure that their needs are secured.

That said, some scholars have suggested that in a country like South Africa, the substantive approach to equality, while more

111 *Jordan* (n 14 above) para 64.

112 As above.

113 Justice Sachs concurred with the dissenting judgment of O'Regan J. Chaskalson CJ, Kriegler J, Madala J, Du Plessis AJ and Skweyiya AJ concurred with the judgment of Ngcobo J.

114 *Jordan* (n 14 above) para 58, *per* O'Regan J and Sachs J.

115 *Jordan* para 72.

116 *De Vos* (n 106 above) 7 8.

transformative than a formalistic approach, is not radical enough to dismantle white supremacy in South Africa and that, even if courts adopt a substantive approach, it will not quite 'walk the extra mile'.¹¹⁷ In this context, Roithmayr warns 'activists who are committed to dismantling persistent racial and class inequality'¹¹⁸ about the benefits of using a rights-based approach 'as a strategy to advance their interests'.¹¹⁹ Instead, Roithmayr advocates an alternative approach, an approach which is a 'decisive shift'¹²⁰ from rights-based litigation to a 'sustained political conversation about the commons'.¹²¹ Roithmayr explains the 'commons' as a¹²²

[f]ramework that emphasises common interests and networks of relationship that connect wealthy whites and poor blacks in South Africa ... The commons reinforces the notion that people collaboratively create neighbourhoods, cities and countries, often for reasons other than market motivation, and that no group should have unfairly-privileged access to the best that these common spaces have to offer.

In circumstances where inequalities are deeply entrenched due to the 'injustice[s] and inequit[ies]'¹²³ of apartheid and when the substantive approach does not 'walk the extra mile',¹²⁴ Roithmayr's 'common-based approach'¹²⁵ may be more beneficial than a rights-based approach if the 'deep scars'¹²⁶ of the legacy of apartheid are to be adequately addressed.

4 Conclusion

The adoption of a South African Bill of Rights has been described as a 'monumental achievement'.¹²⁷ Can we say the same about the Constitutional Court's approach in these select cases? On the one hand, when the Constitutional Court adopts a 'formal, abstract and categorical'¹²⁸ approach as they did in the *Jordan* and *Prince* cases, these cases were far from 'monumental achievement[s]'. One could

117 C Barclay 'Toward substantive equality: A feminist critique on the notion of difference in the Canadian and South African equality tests' (2001) 5 *International Journal of Discrimination and the Law* 167; *Prince* (n above 12) para 149.

118 D Roithmayr 'Lessons from Mazibuko: Persistent inequality and the commons' (2010) 3 *Constitutional Court Review* 317.

119 As above.

120 Roithmayr (n 118 above) 319.

121 As above.

122 As above.

123 *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1696 (CC) para 38.

124 *Prince* (n 12 above) para 149.

125 Roithmayr (n 118 above) 345.

126 *Brink* (n 37 above) para 40.

127 H Webb 'The Constitutional Court of South Africa: Rights interpretation and comparative constitutional law' (1998-1999) 1 *University of Pennsylvania Journal of Constitutional Law* 205.

128 A Sachs 'Social and economic rights: Can they be made justiciable?' (2000) 53 *Southern Methodist University Law Review* 1381 1388.

go so far and say that there were monumental failures. When the Constitutional Court or any court adopts such an approach, they should be respectively criticised. Indeed, it was the dissenters in these cases that had the better of the argument and, had their approach been followed, these cases would have been 'monumental achievement[s]'. This approach requires judges to embrace a thick, substantive, 'holistic [and] value-based' thinking to equality rights adjudication as the Constitutional Court did in the *Pillay*, *National Coalition* and *Du Toit* cases.¹²⁹ When they do so, judges should be applauded and commended as champions of achieving the constitutional goal of equality.

These cases also provide a further insight, namely, where equality cases involve direct discrimination (such as in the *National Coalition* and *Du Toit* cases), in most cases the Constitutional Court is more willing to find a violation than in indirect discrimination cases. Indeed, the very first equality case – adjudicated under the interim Constitution, the *Brink* case¹³⁰ – was a factually extremely straightforward direct discrimination case. This case dealt with the issue of institutionalised inequality in the guise of section 44 of the Insurance Act 27 of 1943, which deprived married women, in certain circumstances, of some or all of the benefits of life insurance policies. However, married men did not lose the benefits of insurance policies ceded to them or made in their favour by their wives. The Constitutional Court subsequently held that section 44 was unconstitutional as it violated the equality clause. The case did not raise any problematic issues as it was basically a claim for formal equality, in the sense that it was based on statutory provisions that treated women and men differently.¹³¹ That said, at times the Constitutional Court has shown that indirect discrimination is not beyond judicial oversight. The *Pillay* case is one example where the Constitutional Court granted an exemption to what appeared to be facially-neutral regulations serving a valuable purpose but which had a marginalising effect. In this context, the *Pillay* case is an exception where indirect discrimination was condemned and which can be categorised as 'jurisprudence of difference'.¹³² Due to the Constitutional Court's willingness to address indirect discrimination, the Court permitted the accommodation and recognition of 'the other',¹³³ a valuable lesson for other courts to do the same.

In stark contrast, despite Justice Sachs's plea for tolerance in his dissenting judgment in the *Prince* case, the majority judgment in

129 *Coetzee v Government of the Republic of South Africa* 1995 (10) BCLR 1382 (CC) para 46.

130 *Brink* (n 37 above).

131 In this regard, the case has been described as a 'bit of a damp squib'. See G Carpenter 'Motifs inscribed on our social fabric: Equality in *Brink v Kitshoff* (1997) 13 *South African Journal on Human Rights* 304.

132 *Du Plessis* (n 47 above) 26.

133 *Pillay* (n 16 above) para 65.

Prince failed to recognise the 'other' and can be categorised as jurisprudence of indifference. This raises interesting questions: Why did the Constitutional Court successfully address indirect discrimination and grant an exemption in the *Pillay* case but failed to do the same in the *Prince* case? Two possible reasons can explain the Constitutional Court's approach. The first is to do with the 'nuanced and context-sensitive form'¹³⁴ approach the Constitutional Court adopted in the *Pillay* case. This is in contrast to the myopic and formal approach in the *Prince* case where the majority approach favoured the 'legal authoritative reason' over the 'substantive reason'.¹³⁵ Secondly, in the *Prince* case, the Constitutional Court was dealing with legislation serving an important governmental purpose in the 'war against drugs'¹³⁶ and the Court seriously thought what the possible implications would be of allowing the use of cannabis which was conventionally regarded as illegal for religious purposes. In the *Pillay* case, although the Constitutional Court had to deal with a similar question about exemptions, the context and the community were different. The exemption related to school uniforms and the community was more limited (applied to a school). In this context, the Constitutional Court was able to hand down a judgment allowing exemptions for religious and cultural purposes as they would not undermine, unlike the *Prince* case, the objectives of the school's Code regarding school uniform.¹³⁷

This leads to a third point. The different outcomes in the *Prince* and *Pillay* and other cases show the pendulum characteristic of bills of rights. At times they can swing in one direction where rights are made real, and at other times they can swing in the opposite direction where rights remain on the periphery for some, particularly the marginalised and those 'living on the outer reaches rather than in the mainstream of public life'.¹³⁸ Due to the vulnerability and 'politically powerless [ness]'¹³⁹ of groups such as Rastafarians, it is these groups that bills of rights ought and should be protecting. To achieve this requires¹⁴⁰

[t]he maximum harmonisation of all the competing considerations, on a principled yet nuanced and flexible case-by-case basis, located in South African reality yet guided by international experience, articulated with appropriate candour and accomplished without losing sight of the ultimate values highlighted by our Constitution.

134 *Prince* (n 12 above) para 28.

135 Z Eloff 'The significance of a philosophical approach in constitutional adjudication with reference to the *Prince* case' (2003) 6 *Potchefstroom Electronic Law Journal* 47 48.

136 *Prince* (n 12 above) para 114.

137 *Pillay* (n 16 above) para 101.

138 *Prince* (n 12 above) para 157.

139 As above.

140 *Prince* (n 12 above) para 100.

This is an important lesson for all judges to ensure that courts can play a pivotal role in social transformation. However, it is important to note that judicial enforcement is rarely the sole mechanism for the recognition and protection of human rights. On the contrary, this requires the following: people being aware of their rights, access to independent and effective institutions of governance responsible for implementing and enforcing the rights (most notably the judicial and political institutions and national human rights bodies), strong human rights activists and groups and, above all, a commitment from everyone to respect, protect and to fulfil the rights and values in bills of rights. Roithmayr's 'common-based approach'¹⁴¹ referred to earlier can also potentially play an important role, given the emphasis on collectivity and participation among groups or communities. Indeed, the judiciary itself has acknowledged that they are only but one of the institutions sharing the responsibility for the realisation of rights: 'The judiciary cannot of itself correct all the systematic unfairness to be found in our [South African] society.'¹⁴² However, for the specific purposes of this article, when talking about judicial enforcement, this article is a clarion call for the judiciary to adopt a contextual, robust and vigilant approach to equality and other rights adjudication. If such an approach is adopted, it will help mitigate against missed opportunities and contribute to helping to achieve the constitutional goal of equality which will 'allow all people to participate and enjoy all their rights equally'.¹⁴³

141 Roithmayr (n 118 above) 345.

142 *Port Elizabeth Municipality* (n 123 above) para 38.

143 *Pillay* (n 16 above) para 73.