

EQUALITY

IN SOUTH AFRICA:

A FIVE-YEAR PERSPECTIVE



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Introduction

Equality is a very complex notion and there is no single meaning regarding its substantive content or practical application in terms of law and politics. The meaning of equality and a consideration thereof include notions such as political, economic, social and racial equality, as well as equality in respect of gender. Broken down even further, equality can be viewed from the perspectives of outcome, opportunity or simply formal equality.

Our Constitution embraces a notion of substantive equality, as interpreted and applied by the Constitutional Court, which requires an asymmetrical approach to the matter as well as facilitating or helping to create equality of opportunity (eliminating barriers that 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).¹ Our courts therefore endorsed the concepts of affirmative action and its related, yet distinct, corollary, transformation² as measures that pass muster under the Constitution and that, according to the courts, are imperative for the realisation of the founding values of our democratic society.

In this article we will adopt a focused approach to evaluating the “status” of equality in South Africa, confined to recent developments immediately prior to 2020, with reference to certain racially discriminatory incidents and court judgments that dealt with the aforementioned, and essentially by evaluating how citizens treated each other and how government treated its citizens during this period. This approach was adopted for two main reasons: First, because discrimination is the antithesis to equality; second, because affirmative action (substantive equality) by necessary consequence infringes upon the rights of another³ – albeit legitimately so – and therefore constitutes fair discrimination⁴ and requires scrutiny to ensure that it fulfils a legitimate purpose.

In Part I we will set out the South African legal framework that protects the right to equality and impels the pursuit of substantive equality. In Part II we will focus on incidents, judgments and reports relating to unfair discrimination. In Part III in conclusion we will discuss whether, having regard to the law and the conduct of citizens and those of government, we are in fact moving closer to an egalitarian society.

¹ For further discussion on substantive equality as viewed by the South African Courts, see: Smith, A. 2014. Equality constitutional adjudication in South Africa. In *African Human Rights Law Journal* 14(2), 609–632. Available at <http://www.saflii.org/za/journals/AHRLJ/2014/30.pdf>. Accessed on 3 June 2020.

² As will be noted from the discussion below, these measures are mainly focussed on achieving some form of equality in respect of either race gender and/or financial or economic status.

³ As will be noted below, this stems from either not receiving preference and/or being excluded from certain measures that were adopted in terms of law, policy or practice.

⁴ See for example Section 6(2)(a) of the Employment Equity Act 55 of 1998 (the EEA), which confirms that it will not be unfair discrimination to implement affirmative action measures that are consistent with the purpose of the Act.

PART I

All laws and conduct in South Africa are subject to the Constitution, which is the supreme law of the country. It is therefore essential to firstly have regard to the provisions of the Constitution that establish the right to equality.

Section 1 of the Constitution sets out the founding values of our democracy and confirms:

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism

As per these values, equality is still something which we as a people seek to achieve.

Section 9, the equality clause, provides as follows:

- (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 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.

Within the employment context, Section 6 of the Employment Equity Act 55 of 1998 (the EEA) provides further protection against unfair discrimination and states that –

- (1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the PEPUDA) is a further example of legislation flowing from the Constitution in this regard. Section 6 of the PEPUDA confirms that “neither the State nor any person may unfairly discriminate against any person”. The Act then specifically prohibits unfair discrimination on the grounds of race,⁵ gender,⁶ disability,⁷ or in the form of hate speech,⁸ harassment⁹ and the dissemination and publication of information that unfairly discriminates.¹⁰

Our Constitution, as supported by the EEA and the PEPUDA and many other implicit and other explicit provisions in statute, therefore confirms that neither the state nor any person may discriminate against another. Evident from the terminology used in the EEA as well as the PEPUDA, however, is that not all discrimination are considered unfair. This is so because Section 9(2) of the Constitution confirms:

To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

Affirmative action, remedial measures or restitutionary measures – all used interchangeably, depending on the nature of the measures adopted – are therefore

⁵ Section 7 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the PEPUDA).

⁶ Section 8 of the PEPUDA.

⁷ Section 9 of the PEPUDA.

⁸ Section 10 of the PEPUDA.

⁹ Section 11 of the PEPUDA.

¹⁰ Section 12 of the PEPUDA.

legitimate measures to be taken, except for some limitations¹¹ as expressed by our courts, to achieve substantive equality. The Constitutional Court stated:¹²

[1] Restitutory measures are a vital component of our transformative constitutional order. The drafters of our Constitution were alive to the fact that the abolition of discriminatory laws and the guarantee of equal rights alone would not lead to an egalitarian society envisaged in the Constitution. Something more had to be done in order to dismantle the injustices and inequalities arising from the apartheid legal order. Hence the Bill of Rights, which is a cornerstone of our democratic order, includes remedial measures.

The EEA – as one such legislative measure so enacted – is a pertinent example of how such measures work in practice. The Act aims to ensure that suitably qualified people from the designated groups¹³ are equitably represented within all occupational levels of the workplace.¹⁴ The EEA therefore obliges certain employers to implement affirmative action measures that are consistent with the purpose of the Act, and sanctions those who are not compliant under certain circumstances.

Numerous other legislative measures also saw the light in pursuit of and/or in consequence of the empowering provisions of Section 9(2) of the Constitution and in an attempt to achieve substantive equality. Most well-known among these is certainly the Broad-Based Black Economic Empowerment Act 53 of 2003 (the B-BBEEA).¹⁵

In determining if measures taken in pursuit of the objective of Section 9(2) will pass muster under the Constitution and will therefore not be regarded as constituting unfair discrimination, the Constitutional Court established a threefold test (the Van Heerden test).¹⁶ The first requirement relates to whether the

measure targets persons or categories of persons who were disadvantaged by unfair discrimination; the second, whether the measure is designed to protect or advance such persons or categories of persons; and the third, whether the measure promotes the achievement of equality.¹⁷ Once the measure in question passes the test, it is neither unfair nor presumed to be unfair.¹⁸

The fact that these measures can and by consequence do impact or infringe upon the rights of others who do not fall within the said category or persons to be protected or advanced (most often white individuals), has been correctly observed by our courts¹⁹ in amongst other the matter of *Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs and Tourism and Others*.²⁰ Justice Ngcobo observed:

The measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from the previously advantaged communities.

In sum: In protecting the right to equality, our Constitution and supporting legislation outlaw any form of discrimination except for measures that pass muster in terms of Section 9(2) of the Constitution and the Van Heerden test. Such internal tension amongst its provisions – which creates both a negative (refraining from infringing on the right to equality) and positive (taking measures to create equality) duty on government – has been a hallmark feature of all litigation regarding equality. The impact has been felt keenly across all sections of South African society. It remains to be seen whether such an approach is sustainable.

¹¹ Section 15(3) of the EEA outlaws quotas. In *Minister of Finance and Other v. Van Heerden* (CCT 63/03) [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 [2004] 12 BLLR 1181 (CC) (29 July 2004) the Constitutional Court ruled that these measures are unlawful.

¹² *Minister of Constitutional Development and Another v. South African Restructuring and Insolvency Practitioners Association and Others* (CCT13/17) [2018] ZACC 20; 2018 (5) SA 349 (CC); 2018 (9) BCLR 1099 (CC) (5 July 2018).

¹³ In terms of the EEA the designated group is comprised of black people, which is a generic term and which includes African, Coloured and Asian people, women and people with disabilities.

¹⁴ Section 2(b) of the EEA.

¹⁵ As well as the Broad-Based Black Economic Empowerment Amendment Act 55 of 2013.

¹⁶ See *Minister of Finance and Other v. Van Heerden* (CCT 63/03) [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) ; [2004] 12 BLLR 1181 (CC) (29 July 2004).

¹⁷ At paragraph 37.

¹⁸ See *South African Police Service v. Solidarity obo Barnard* (CCT 01/14) [2014] ZACC 23; 2014 (6) SA 123 (CC); [2014] 11 BLLR 1025 (CC); 2014 (10) BCLR 1195 (CC); (2014) 35 ILJ 2981 (CC) (2 September 2014).

¹⁹ See also Van Heerden judgment where the Constitutional Court stated that “It must be accepted that the achievement of this goal may often come at a price for those who were previously advantaged.”

²⁰ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* (CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (12 March 2004).

PART II

On 21 March 2019 – the anniversary of the Sharpeville Massacre and now known as Human Rights Day – the South African Human Rights Commission (SAHRC) released its *Annual Trends Analysis Report*.²¹ Based on data for the period 2012/2013 to 2016/2017, the SAHRC declared that with 705 complaints in this period, the right to equality on the basis of race had been the most consistently violated right in the country. The SAHRC's spokesperson told the media:²²

The right to equality is based on unfair discrimination. There are various grounds for unfair discrimination in South Africa and we have found that the right to equality, on the basis of race, has been the most violated human right.

The second most complaints received was in the category of the right to health, water and food.

2019 would see many examples of more such complaints and the judiciary, as opposed to the SAHRC, was often called upon to adjudicate these matters under the broad framework of justifiable limitation as set out above. Some of these cases attracted intense coverage in the media and elicited furious academic and social debate, often far removed from the legalese discourse of the courts. As such, it is difficult for the lay person to distinguish between the various classes of equality that apply in South Africa. Equality, after all, informs what the lay person thinks of as fairness – and so it inherently underpins various legal disputes, from the status of immigrant citizens²³ to judgements through which the judiciary seeks to combat gender-based violence by entrenching the controversial doctrine of common purpose in cases of gang rape.²⁴

These cases are significant, but do not necessarily touch on the heart of the broader transformational equality debate; the debate centres around the legacy of apartheid and the measures purported to address

this. Plainly stated, the enquiry has always regarded where the limits of fair discrimination lay. In this arena, the goalposts are far more fluid. A highly pertinent case is that of the language debate at Stellenbosch University.

In mid-2019 a recently established group, Gelyke Kanse, brought an application to the Western Cape High Court in Cape Town to have the University's newly promulgated language policy set aside and the previous policy reinstated. Gelyke Kanse argued that – following the recommendations of a working group, which had itself been established pursuant to the #FeesMustFall and Open Stellenbosch campaigns – the new policy “downgraded” Afrikaans as a language of tuition. Gelyke Kanse based its challenge squarely on the constitutional right to be educated in a language of choice, as read with the constitutional guarantee contained in Section 6, which promises the protection and advancement of indigenous and minority languages – and, in particular, **equitable treatment** of such languages. Afrikaans is, after all, the most widely spoken language in the Western Cape.²⁵ There is a common-sense argument to be made with this fact in mind that Afrikaans-medium tuition balances the right to education in a mother-tongue language with the need to broaden access to education fairly well.

The case turned on what was reasonably practicable²⁶ for the University to do in order to facilitate education in a language of choice. In establishing what is reasonably practicable under this enquiry, it was held by the Court a quo that the test “requires an assessment of what is fair, feasible and satisfies the need to remedy the results of past discriminatory laws and practices.” In this enquiry we see the language of fairness once more; though it is unclear from whose definition of the concept it is derived.

²¹ South African Human Rights Commission. 2019. *Annual Trend Analysis Report 2016/2017* Braamfontein: SAHRC. Available at <https://www.sahrc.org.za/home/21/files/SAHRC%20Trend%20Analysis%202016%20-%202017.pdf>. Accessed on 3 June 2020.

²² Maduna, M. 2019. *Equality is the most violated human right in SA: SAHRC*. Power987. Available at <https://www.power987.co.za/news/equality-is-the-most-violated-human-right-in-sa-sahrc/>. Accessed on 4 June 2020.

²³ *Nandutu and Others v. Minister of Home Affairs and Others* (CCT114/18) [2019] ZACC 24; 2019 (8) BCLR 938 (CC) ; 2019 (5) SA 325 (CC) (28 June 2019).

²⁴ *Tshabalala v. S; Ntuli v S* (CCT323/18;CCT69/19) [2019] ZACC 48; 2020 (3) BCLR 307 (CC) (11 December 2019).

²⁵ See https://www.westerncape.gov.za/your_gov/70. Accessed on 7 June 2020.

²⁶ Section 29(2)(a) of the Constitution.

If the University's conduct met this threshold, then the limitation of the right was valid, echoing the provisions of the Van Heerden test. The University succeeded with its argument that the cost of establishing a full dual-medium tuition programme was excessive and therefore not reasonably practicable within the meaning of the Constitution. As Judge Cameron put it:²⁷

A different way to pose the dilemma Gelyke Kanse brings before us is this: is it permissible under section 29(2), where tuition is being offered in an official language of choice at a public educational institution, to diminish that offering (while not extinguishing it) in order to enhance equitable access for those not conversant in that language, when the institution judges the cost of non-diminution too high? In my view the answer is 'Yes'.

In his concluding paragraphs, Judge Cameron notes that the new policy would indeed come at a cost to Afrikaans. He notes that the High Court did not engage with Gelyke Kanse's Section 6 argument at all.²⁸

Gelyke Kanse implored the Court to set aside the 2016 Language Policy. Upholding the University's policy change, counsel urged, would signal the end of Afrikaans as a language of tertiary instruction. While counsel's plea on behalf of indigenous languages other than Afrikaans may have seemed opportunistic, the dire entreaty compels reflection. Endorsing the University's 2016 Language Policy as conforming with section 29(2) comes at a cost. Our judgment must acknowledge it ... But that is not the University's burden, as little is the fact that Afrikaans has all but vanished at other tertiary institutions, barring only one other. And the dilemmas the global march of English poses is not the question before the Court. Yet we should not miss the cost that the diminution of Afrikaans at the University entails not only for Gelyke Kanse and its adherents, but for our world, and for ourselves.

The judgement underscores the entrenched approach: Rights are guaranteed, subject to circumstantial limitation as adjudged by the judiciary. The actions of the University were damaging and discriminatory, but justifiable; much like discrimination in the context of employment equity, because while one group loses out, another – one which has in the past been at a disadvantage – is privileged.

The Gelyke Kanse and Van Heerden cases demonstrate the prevailing approach to disputes of equality in various arenas. However, in assessing the state of equality in 2019, due regard must also be had to the temporal aspects of the debate. In other words: Would the same criteria that impel fair discrimination be valid a generation from now?

2019 had been in many respects the year of the land debate, as several governmental groups, committees and panels went about the business of amending the Constitution to pave the way for what has been loosely termed "expropriation without compensation".

In assessing the land reform process thus far, much is made of the fact that, since its inception, there has yet to be a transparent, accessible, broadly understandable document that guides government in terms of the beneficiaries of land reform programmes – whether in the form of grants or preference in land allocation.²⁹

The Executive responded via the Department of Rural Development and Land Reform by publishing the draft *National policy for beneficiary selection and land allocation* on 9 November 2019,³⁰ for which the public commentary process closed on 2 March 2020. Under this document, what had been the de facto situation was put into writing, subject to public comment and potential revision. At paragraph 7.4, under the heading "Who does not qualify?"; the document reads: "Non South [sic] African citizens including the previously advantaged South African citizens." Suspect grammar aside, such a clause is patently discriminatory. Whether it is justifiable is another question that will likely be taken to court for Constitutional scrutiny. The evidence suggests that the provision will be deemed justifiable discrimination due to the pursuit of historical redress in terms of land-ownership patterns and statistics – the majority of landowners in South Africa are unquestionably white. But, whilst on the face of it the binary categories of "previously advantaged" and "previously disadvantaged" seem clear given the

²⁷ *Gelyke Kanse and Others v Chairperson of the Senate of the University of Stellenbosch and Others* (CCT 311/17) [2019] ZACC 38; 2019 (12) BCLR 1479 (CC); 2020 (1) SA 368 (CC) (10 October 2019) at paragraph 38.

²⁸ *Id.*, at paragraphs 47–49.

²⁹ Advisory Panel on Land Reform and Agriculture. 2019. *Final report of the Presidential Advisory Panel on Land Reform and Agriculture*. Available at http://pmg-assets.s3-website-eu-west-1.amazonaws.com/panelreportlandreform_1.pdf. Accessed on 4 June 2020.

³⁰ Department of Rural Development and Land Reform. 2019. *National policy for beneficiary selection and land allocations (draft)*. In *Government Gazette* No. 42939. Available at <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/BSLA.pdf>. Accessed on 4 June 2020.

legislative unambiguity of the apartheid regime, it must be asked at which point a tightening of the analytical framework becomes necessary. If one conceives of historical disadvantage as a broad circle, when does it start becoming smaller in conjunction with gains made by the previously disadvantaged group during the intervening quarter of a century of democracy?

By its own admission, government's land reform programme has been an ineffective failure,³¹ which logically implies that the disadvantaged group has yet to achieve parity, or substantive equality. The rhetoric associated with land reform legislation is redolent of appeals to past inequities. It seems unlikely that any limitation enquiry will consider factors beyond these (for example the potential imperilment of food security) because that is not what the purely legal test, broadly stated under Section 9(2) of the Constitution and its attached criteria, requires. Although historical disadvantage remains the ultimate determinative in establishing justification for discrimination, does this give the Executive carte blanche in its failure to address the disadvantage? On the path to the trajectory of substantive equality, surely it is feasible that certain groups become less and less affected by their historical disadvantage. Stated otherwise, as long as government fails to improve the lot of its disadvantaged citizens, will the historical disadvantage requirement remain static and unchanging? If this were to be true, then it creates a situation where at some point government can justify discrimination in perpetuity due solely to its own failure in service delivery. It does not appear that such a consideration currently forms part of the judicial enquiry, as an overly generous interpretation of the stated requirements would infringe on legislative decision-making.

The above cases are but few of many. Recent years have seen disputes that tested the limitation of the right to equality in diverse arenas – particularly in labour disputes in terms of the EEA. Of particular importance in this regard is the notion of demographic

representativeness for purposes of determining whether an employer complies with the EEA. With so many different regions comprising varying population groups, it seems patently obvious that applying a statistics-based approach and forcing national demographics onto a regional context would be inappropriate in South Africa, and particularly in the Northern and Western Cape, where the majority population is coloured.³² And yet, many people had to go to court to make this argument. At times, they succeeded, as in the case of *Solidarity and Others v. Department of Correctional Services and Others*,³³ wherein the Applicant – aggrieved by non-promotion on the grounds of affirmative action – won against the Department. The Court concluded that demographic representation had to play a role and that the state had applied the “wrong benchmark” – the so-called Barnard principle.

The case of *Minister of Constitutional Development and Another v. South African Restructuring and Insolvency Practitioners Association and Others*³⁴ is one of the most recent legal disputes that demonstrates the contours and limits of the above. In this case – which was heard in mid-2018 – the Applicant had formulated a policy seeking to transform the insolvency industry by regulating who the Master of the High Court may appoint to act as a trustee in such proceedings. The High Court, where the application was originally brought, ruled that the policy amounted to imposing racial quotas on the selection process, and the policy was therefore adjudged invalid. The state appealed the matter all the way to the Constitutional Court, where the appeal was dismissed; the Supreme Court of Appeal had also dismissed the appeal, holding that the system sought to be created was “arbitrary and capricious”, and that remedial measures “must be implemented progressively”. The Supreme Court of Appeals stated:

Such remedial measures must not, however, encroach, in an unjustifiable manner, upon the human dignity of those affected by them. In particular, as stressed by Moseneke J in para

³¹ High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change. 2017. *Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change*. Available at https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf. Accessed on 4 June 2020.

³² As defined in terms of the EEA.

³³ *Solidarity and Others v. Department of Correctional Services and Others* (CCT 78/15) [2016] ZACC 18; (2016) 37 ILJ 1995 (CC); 2016 (5) SA 594 (CC); [2016] 10 BLLR 959 (CC); 2016 (10) BCLR 1349 (CC) (15 July 2016).

³⁴ *Minister of Constitutional Development and Another v. South African Restructuring and Insolvency Practitioners Association and Others* (CCT13/17) [2018] ZACC 20; 2018 (5) SA 349 (CC); 2018 (9) BCLR 1099 (CC) (5 July 2018).

41 of Van Heerden, '...remedial measures must not be arbitrary, capricious or display naked preference. If they do they can hardly be said to achieve the constitutionally authorised end. One form of arbitrariness, caprice or naked preference is the implementation of a quota system, or one so rigid as to be substantially indistinguishable from a quota.'

It should be stressed that in this matter the state again sought to defend the impugned policy by invoking Section 9(2) of the Constitution, as was so often done successfully in other matters in which the equality of certain groups was allegedly infringed upon. In this case, however, the state failed, in part due to the same manner of reasoning as in the Van Heerden matter. It should not be thought, however, that the Court placed the entirety of its reasoning in this category. It further held that the policy as it was would likely not have served to effectively transform the industry in any case, as the defective and arbitrary nature of the policy would have led to the appointment of largely white male practitioners in a certain category (category D of the proposed schedule), and that the interests of creditors (those served by the insolvency industry) had not been

sufficiently considered – though this last point was not agreed upon by the majority in the Constitutional Court. The Constitutional Court put it as follows:

Therefore category D perpetuates the disadvantage which the policy seeks to eradicate. It lumps African, Coloured, Indian, and Chinese practitioners with the advantaged white males who dominate the entire industry in terms of numbers and affords everybody in this category an equal opportunity of being appointed.

Indeed, in a minority judgement by Judge Madlanga for the Constitutional Court, it was held that the policy had indeed been valid and that the Minister had the right to promulgate it in its current form (except for one notable exception relating to a certain category dealing with temporal criteria). In essence, the Court had not found the policy invalid because it discriminated unfairly against certain groups, but precisely because the discrimination as sought to be implemented would not have achieved the goals of transformation. The respondents won the day, but perhaps not in the shape or form those totally opposed to affirmative action would have preferred.

PART III

What are the commonalities to be drawn from the above cases? It is readily apparent that the notion of equality as a right capable of lawful limitation has been consistently applied by the Courts and will continue to be so applied for the foreseeable future.

It is also apparent that challenges to the application of this notion have remained equally consistent. It is perhaps inevitable that a concept so charged with prima facie contradiction – and so far removed from general lay discourse – would be constantly tested by groups affected by it. The application of a limited right of equality will remain patently unfair to large sections of society when it is not placed in the light of legal philosophical analysis.

It is neither clear what the end-goal of substantive equality looks like. It appears presumed that the courts – and society at large – will recognise it once it comes about; whenever that may be. Whilst there have been some successful challenges to the arguably dogmatic application of fair discrimination, every single case has been hard-fought and opposed at every turn.

Cases like that of the Department of Correctional Service and SARIPA (referred to above) indicate some measure of vindication for those who bear the brunt of the state's remedial efforts. And many of these cases indicate that the judiciary takes its duty very seriously to diligently and carefully weigh up the competing interests at stake. With that being said, South Africa is still very far from the point where it appears that the judiciary will pause to reconsider the validity of the criteria it is impelled to apply.

Ostensibly, the reasoning behind a limited right remains the transformation of South African society. This is a murky definition. By what are we to measure its finality? Or stated plainly: At which point can society objectively be said to have been transformed? While 2019 provided ample opportunity for the judiciary and society at large to further test the disordered business of a limited right to equality, we do not seem to be

any closer to establishing just when this limitation will fall away. The Constitution in its very language does not envision the limitation of equality in perpetuity. The successes earned by litigants who challenged transformative practices have all turned on technical defects in the processes applied by the state (for example defective wording or a failure to consider regional demographic representation) by which fair discrimination is to be applied. The overarching shape of the matter has not changed. The right to equality remains limitable when the state words its policies and legislation appropriately.

We have heard that, at its core, the ultimate objective of transformation and the substance of Judge Ngcobo's statement as above is that of substantive equality between all South Africans. Is there any society on earth that has achieved this aim? South Africa is a unique country, specifically in terms of the shape and effect that colonialism had on it. Most rational persons would agree that an abnormal situation requires an abnormal solution. And yet the current approach seems at times to go beyond abnormal, and certainly gives pause when the literal definition of fairness is considered. The passing of time has not tempered such abnormality.

What the legal enquiry as to the limitation of the right to equality currently informs us, is that the right to equality for certain minority groups is indeed infringed upon repeatedly and vigorously, but in almost all cases justifiably. Substantive equality is difficult to quantify, arguably an ideal rather than a tangible and measurable goal. There is very little in current jurisprudence to indicate when exactly the judiciary will halt the justification of discrimination, or what a provision would have to entail outside of technical defects to not pass constitutional muster. Can society be truly equal when the very notion of equality is unclear to the majority of its participants? Suffice it to say that whilst equality is one of the most debated and engaged-with topics in modern South Africa, there is precious little indication of its ultimate trajectory at present.