

# Are some taxpayers treated more equally than others? A theoretical analysis to determine the ambit of the constitutional right to equality in South African tax law

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## ABSTRACT

The general ambit of the South African constitutional right to equality in revenue matters in general and taxation matters in particular is not defined. Thus, taxpayers, their advisors and even the revenue authorities themselves experience difficulty in deciding whether revenue legislation or the practices of the revenue authorities actually violate the constitutional right to equality. The aim of this study was to analyse the ambit of the right from a theoretical point of view using Constitutional Court decisions and other literature relevant to the study. The conclusion reached is that the right must be widely and liberally interpreted. There are still many provisions in the Income Tax Act and the practices of the revenue authorities that, *prima facie*, violate the right to equality, and these provisions and practices still need to be evaluated against the theory discussed in this study.

**Key words:** Bill of Rights, Constitution, Income Tax Act, human dignity, discrimination, right to equality

## Introduction

George Orwell (1945), in Chapter 10 of *Animal Farm*, his satirical work on communism, wrote: “All animals are equal, but some animals are more equal than others”. The Income Tax Act (Act No. 58 of 1962) (hereafter ‘the Act’) is littered

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with sections that treat certain taxpayers or groups of taxpayers “more equally” than others. The question that arises is whether the “more equal” treatment of certain taxpayers or groups of taxpayers violates a person’s or group’s constitutional right to equality, as guaranteed by the Constitution of the Republic of South Africa (Act No. 108 of 1996) (hereafter ‘the Constitution’).

The ambit of the right to equality is generally contained in Section 9 of the Constitution. Section 9(1) states: “Everyone is equal before the law and has the right to equal protection and benefit of the law”. Section 9(2) provides that “equality includes the full and equal enjoyment of all rights and freedoms”. It also provides for the promotion of and “achievement of equality” by the adoption of “measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination”. In fact, Section 9(4) specifically stipulates one of the measures to be taken, namely “[n]ational legislation must be enacted to prevent or prohibit discrimination”. Any other measures may also be taken to prevent or prohibit unfair discrimination (Section 9(2)).

In addition, Section 8(1) of the Constitution provides that the “Bill of Rights binds the legislature, the executive, the judiciary and all organs of state”, while Section 7(2) states that the “state must respect, protect, promote and fulfil the rights in the Bill of Rights”. Sections 8(1) and 7(2) read together with Sections 9(2) and 9(4) of the Constitution indicate that there is a positive obligation on the state and, by extension, the revenue authorities, to promote and protect a taxpayer’s right to equality. It is therefore not merely a negative mechanism that can be used to protect its subjects against the abuse of power by the government and its organs of state (Devenish 1999: 9). Section 2 of the Constitution reinforces the aforementioned and confirms that “[t]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”.

Although the general public have a vague notion of the meaning of the phrase “right to equality” as described in Section 9 of the Constitution, their understanding of it is not necessarily the interpretation attributed to it by the judiciary. It is only by analysing the South African judicial interpretation of the right to equality that its ambit, in a revenue context, can be understood.

Unlike other areas of the law, there are few judicially decided cases specific to taxpayers’ rights in terms of the Constitution in general, and there are no reported South African cases dealing with a taxpayer’s right to equality in particular. In addition, not much research has been conducted in this area. Consequently, those provisions that still remain in the Act and that, *prima facie*, violate the right to equality, have neither been analysed in any great detail nor have they been challenged judicially by affected taxpayers to establish their validity in terms of the Constitution. Recently,

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however, Croome (2010) published a textbook on taxpayer's rights in South Africa in which he devotes a full chapter to the right to equality (73–121). It was considered beyond the scope of this study to analyse his work in this regard, as his emphasis is more on the identification and application of the taxpayer's right to equality than on an analysis of the ambit of the right from a theoretical point of view. It will be an interesting exercise for a future study to compare the provisions of the Act that he identifies as potentially violating the right to equality by applying the theoretical analysis set out in this article to the scenarios posed in his book. A study comparing the results obtained in the two approaches could stimulate further academic debate on the matter.

## Objective and scope of study

The objective of this study was to attempt, from a purely theoretical point of view, to delineate the ambit of the right to equality of taxpayers in the South African context.

The theoretical analysis developed in this study would not pass muster if it did not have any practical application. Thus, although it is not intended to cover the practical application of the theoretical framework in this study, the theory and practical application are so interwoven that some discussion is inevitable. However, the identification, recognition and understanding of the practical application of the right to equality in its fullest sense would require a further detailed study.

Aspects considered beyond the scope of this study will be mentioned during the course of the discussion, as and where appropriate.

## Research method

The research method adopted comprised a literature review and an analysis of the relevant provisions of the Act, the Constitution and the reported decisions of the various courts together with published articles and textbooks that relate directly to the objective.

## General principles used to interpret the Bill of Rights in general and the right to equality in particular

The principles to be used to interpret our fundamental rights as contained in the Constitution are a prerequisite for determining the general ambit of our fundamental rights. Thus, this paragraph sets out what the Constitution and the judiciary have to

say in this regard. Thereafter, an attempt is made to reconcile the principles so arising in order to understand the process to be followed in interpreting fundamental rights.

## What the Constitution has to say about the interpretation of the right to equality

The Constitution of the Republic of South Africa (Act No. 200 of 1993) (hereafter the ‘Interim Constitution’) came into effect on 27 April 1994 and included a Bill of Rights. The Final Constitution superseded it, with minor changes to the Bill of Rights, with effect from 4 February 1997.

In order to determine the ambit of the fundamental right to equality, it is necessary to analyse the provisions of Section 39(1) of the Constitution, as it gives specific instructions on how to interpret the fundamental rights included in the Bill of Rights. It compels the judiciary to “promote the values that underlie an open and democratic society based on human dignity, equality and freedom”. The section also directs that, where applicable, the interpretation must have regard to public international law applicable to the protection of the right as entrenched in the Bill of Rights and may consider foreign case law. Furthermore, the preamble to the Constitution directs that, in interpreting a fundamental right, recognition is given to “the injustices of our past”.

In spite of these specific instructions, the interpretation of a fundamental right included in the Bill of Rights is a task fraught with difficulties for the judiciary.

## What the judiciary has to say about the interpretation of the right to equality

In *S v Makwanyane and Another* (1995 (6) BCLR 665 (CC)), the Constitutional Court gave some guidelines on how the Bill of Rights should be interpreted. Although this case dealt with the right to life in the context of the constitutionality of the death penalty, the guidelines set out by the Court for the interpretation of the right to life are the same as for the interpretation of the other fundamental rights guaranteed in terms of the Constitution.

In the *Makwanyane* case, Chaskalson P (676) referred, with approval, to the previously decided Constitutional Court decision of *S v Zuma* (1995 (6) BCLR 665 (CC)) on the approach to be adopted in the interpretation of a fundamental right, namely an approach that is “generous” and “purposive” and gives expression to the underlying values of the Constitution while paying due regard to the language that has been used. It was considered beyond the scope of this study to discuss the “generous”

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and “purposive” approach to the interpretation of legislation. Nevertheless, it is appropriate to point out that the “generous” and “purposive” approach can have far-reaching consequences in determining the ambit of the right to equality in a revenue context, especially if the principle of recognising “the injustices of our past” can be applied in a given situation.

The fact that the right to equality is being interpreted in a revenue context does not mean that it should be interpreted any differently from other legislation. Prior to the adoption of the Interim Constitution, there was a well-documented notion that revenue laws must be interpreted “literally” and “strictly”, that is, differently from other legislation, but this notion has now been dispelled in favour of the purposive approach to interpreting legislation, including revenue legislation (see Goldswain 2008: 107–121).

The part played by public international law and foreign law in the interpretation of South African fundamental rights is also instructive. Although there is an injunction to consider applicable public international law, Currie (Currie & de Waal 2005: 160) states that “in its early jurisprudence the Constitutional Court seldom referred to public international law, with the exception of the jurisprudence of the European Court of Human Rights” and that “references to international law that are made do not appear to be as persuasive to the Constitutional Court as comparative foreign case law”.

In the *Makwanyane* case, Chaskalson P (687) indicated that foreign law is of importance “particularly in the early stages of the transition when there is no developed indigenous jurisprudence in this branch of the law on which to draw”. The judge warned that the use of foreign case law will not necessarily offer a safe guide to the interpretation of the Bill of Rights. Although the courts may “have regard to” foreign law, “there is no injunction to do more than this” (687).

Furthermore, the judge was of the opinion that in dealing with foreign law, “we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country” (687). It is of importance that due regard be paid to “our legal system, our history and circumstances, and the structure and language of our own Constitution” (687–688).

He concluded that Section 35(1) of the Interim Constitution (now embodied in Section 39(1) of the Constitution) requires a court, in its interpretation of a fundamental right, to evaluate all the dimensions of the evolution of South African law that may help us in our task of promoting freedom and equality, namely “our common law” as well as “traditional African jurisprudence” (787). The “traditional African jurisprudence” that the judge referred to is the concept of “*ubuntu*”.

The judiciary also had a chance in the *Makwanyane* case to explain and expand on how the *ubuntu* concept, a concept incorporated in the post-amble to the Interim Constitution, affects the interpretation of the Bill of Rights. The word *ubuntu* was not incorporated into the Final Constitution, but the spirit, purport and objective of the Constitution, as detailed in the preamble, are similar to the concept of *ubuntu*, and thus remain a cornerstone in the interpretation of the Constitution (see Section 39(2) and also *Dikoko v Mokhatla* [2006] JOL 18035 (CC)).

Section 39(2) read with Section 39(3) indicates that in interpreting the Constitution, “customary” law must also be considered and developed, provided that such law is consistent with the Bill of Rights. Langa J describes *ubuntu* as “the values we need to uphold” and as a concept that “recognises a person’s status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of” (751) and states that any treatment that is “cruel, inhuman or degrading is bereft of *ubuntu*” (752). Mokgoro J (771) describes *ubuntu* as “humaneness” and integrates it into the Western fundamental rights culture.

Thus, in interpreting the ambit of a fundamental right as described in the Bill of Rights, the judiciary must instil the spirit of humaneness and include such virtues as compassion, forgiveness and human dignity. Furthermore, the judiciary must, where appropriate, carry out the stated objective of the preamble to the Constitution to “recognise the injustices of our past”. These principles of interpretation apply equally and especially to the right to equality, which is one of the cornerstones on which the fundamental constitutional rights are built. In fact, the right to equality is the first substantive right listed in the Bill of Rights. It overlaps in many instances with all the other rights, but especially the right to human dignity, as guaranteed by Section 10 of the Constitution.

**Reconciliation between the use of foreign law (and decisions), the concept of *ubuntu*, Western culture fundamental rights (common law) principles and the stated objective of the preamble to the Constitution to recognise the injustices of the past as they relate to the interpretation of the right to equality**

As already mentioned, the politics and history of South Africa play an important part in the interpretation of a fundamental right. In the *Makwanyane* case, the historical and political background to the right being contested was examined in order to establish the ambit of the right. As O’Regan J indicated in the *Makwanyane* case, Section 39(1) of the Constitution (formally Section 35(1) of the Interim Constitution)

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provides instruction in interpreting the Constitution “to look forward not backward, to recognise the evils and injustices of the past and to avoid their repetition” (775).

It was considered beyond the scope of this study to discuss in detail the origins and even the development of the idea of so-called Western culture fundamental rights prior to the introduction of the Interim Constitution. The values embodied in the Bill of Rights are not merely an import of the Western culture of fundamental rights, but also of the African concept of *ubuntu* and the stated objective in the preamble to the Constitution to “recognise the injustices of our past”. Nevertheless, some discussion on the origins of the fundamental rights can be instructive in determining the ambit of the South African constitutional right to equality in tax matters.

One of the foundations of the so-called Western culture of fundamental human rights and constitutional democracy is the theory of the 17th-century English philosopher John Locke. Locke’s *Two Treatises of Government* (1690) suggested that every person has the inalienable rights to life, liberty and property, which are derived from natural law. By definition, inalienable rights can never be taken away from a person. He indicated, however, that the community could agree to limit but not surrender their inalienable rights to a government for the public good. The one exception to this limitation is the right to judge and punish his fellow man, which is in the domain of the government. His work inspired the authors of the US Constitution (*Encyclopaedia Britannica* 2010).

The human liberty principles enunciated in the French *Déclaration des Droits de l’Homme et du Citoyen* (translated as ‘Declaration of the Rights of Man and of the Citizen’ and adopted by France’s National Assembly in 1789) inspired the French Revolution and served as the preamble to the French Constitution in 1791. The Declaration was based on the principle that “all men are born free and equal in rights”, and the rights were specified as liberty, private property, the inviolability of the person and resistance to oppression. The best of the theories and thoughts of philosophers such as John Locke, Montesquieu, Jean-Jacques Rousseau and Voltaire were incorporated into the Declaration. They specified the principles that are fundamental to man and therefore universally applicable (*Encyclopaedia Britannica* 2010).

The concept of *ubuntu* accords generally with the Western fundamental rights culture (common law). However, the incorporation of the principle of recognising “the injustices of the past” as a stated objective in the preamble to the Constitution to determine the ambit of fundamental rights is a potential problem area particularly where it relates to a tax provision.

Although, as already mentioned, there are no reported South African judicial decisions specifically on the right of a taxpayer to equality, there have been South

African landmark decisions on the right to equality in other areas of law similar or comparable to revenue laws, such as the law of insolvency and the ability of local government (municipalities) to impose rates and taxes on landowners, that will assist in this process. Although the interpretation section in the Constitution stipulates that the judiciary “may” use foreign cases that have comparable constitutions to that in South Africa, it is submitted that the courts would be reluctant to rely exclusively on such judgements, as transplants from foreign precedent require careful management. This view was supported by the Constitutional Court in *Sanderson v Attorney-General, Eastern Cape* (1998 (2) SA 38 (CC)). Firstly, South Africa has a very liberal constitution compared to other countries. Secondly, the interpretation must take into account the spirit and purport of the Constitution, including the concept of *ubuntu* and the novel objective of “recognising the injustices of the past”. Finally, with numerous decisions already having been given by the Constitutional Court on the interpretation of the right to equality (some of which are discussed later), there is no necessity to turn to foreign decisions for further help in its interpretation. Based on the South African *stare decisis* principle of following precedent, there now appears to be a trend away from using foreign decisions, especially in the case of the right to equality. This trend accords with Chaskalson P’s view in the *Makwanyane* case, namely that the use of foreign law is of importance “particularly in the early stages of the transition when there is no developed indigenous jurisprudence in this branch of the law on which to draw” (687). This decision was handed down some 15 years ago when the transition period was still in its infancy. It is submitted that the South African Constitution and its interpretation is no longer in its infancy. It has matured over the past 15 years to such an extent that it is time to break free of these shackles in the appropriate circumstances.

## The interpretation of the constitutional right to equality: Analysis of its ambit

The concept of *ubuntu*, the principles of common law fundamental rights, the stated objective of the preamble to the Constitution to “recognise the injustices of the past” and the use of foreign law and decisions are now applied to interpret the general ambit of the right to equality.

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## Placing the right to equality in its constitutional context

### *General*

Section 9(1) of the Constitution provides that “everyone is equal before the law and has the right to equal protection and benefit of the law”. Section 9(3) continues as follows:

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.

If any legislative provision discriminates on one or more of the 17 grounds listed in Section 9(3) of the Constitution, then it “is unfair unless it is established that the discrimination is fair” (Section 9(5) of the Constitution). However, some of the more important questions that arise from a reading of the Section 9 right to equality provisions are the following:

- Whether discriminatory and/or unfair legislation that does not violate one or more of the 17 grounds listed in Section 9(3) of the Constitution can also violate the right to equality
- Whether the right to equality is limited to natural persons only or whether it extends to juristic persons
- Whether specific discriminatory legislation based on one or more of the 17 grounds listed in Section 9(3) of the Constitution (for example taxing a previously disadvantaged group of persons, based on race or gender, at a lower rate of tax than a previously advantaged group of persons) may be promulgated into law in the Act as a positive measure demanded by sections 9(2) and (4) of the Constitution to right the wrongs and injustices of the past (as a remedial or restitutionary function)
- Whether the state in general and the revenue authorities in particular have taken positive measures to achieve equality in tax matters
- Whether the Section 36 limitation of rights clause of the Constitution can restrict the right to equality
- Whether it can be expected that the interpretation of the right to equality, in the light of the demands of the Constitution, can change over time.

A brief discussion of these questions should provide a solid foundation on which a fuller discussion and analysis of the ambit of the right to equality in revenue matters can be based.

*Whether discriminatory and/or unfair legislation that does not violate one or more of the 17 grounds listed in Section 9(3) of the Constitution can also contravene the right to equality*

This debate is neatly set out by Devenish (1999: 49–52), who is of the opinion that the right to equality should be extrapolated to cover discrimination that is neither listed nor analogous “if a human attribute is involved that requires protection in accordance with the spirit and ethos of the constitution”. He nevertheless comments that the “human attribute” criterion is not a satisfactory test, as it would then exclude the protection of juristic persons. He concludes that “in each case the court would have to consider the intrinsic merit of the claim, rather than endeavouring to bring the claim within the ambit of a particular criterion” (Devenish 1999: 51). He also comments that the conceptions of society as to what constitutes legitimate discrimination change and develop over time. What may constitute legitimate discrimination today may not constitute discrimination in 20 years’ time and *vice versa*. Perhaps the Latin phrase “*tempora mutantur et nos mutamur in illis*” (‘times change and we change with them’) is an apposite conclusion in this regard.

Section 10 of the Constitution specifically provides that “everyone has inherent dignity and the right to have their dignity respected and protected”. The Section 9 right to equality also covers the dignity characteristic. The Constitutional Court in *Harksen v Lane, NO and Others* (1997 (11) BCLR 1489 (CC)) repeatedly mentioned that where a person’s dignity is violated, his or her right to equality is also violated. The decision confirmed that discrimination based on a ground other than one of the 17 listed grounds falls within the ambit of the right to equality.

The central, but not the exclusive, role of dignity in the right to equality was reaffirmed in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* (2000 (1) BCLR 39 (CC)) when it was said that the respondents have a right to reasonable action by the state in all circumstances and with particular regard to human dignity. See also *President of the Republic of South Africa and Another v Hugo* (1997 (6) BCLR 708 (CC)) and *Harksen v Lane* (*supra*) where the same sentiments were expressed.

Albertyn (2007: par 4.8.22(h)) argues for a very wide meaning to be given to the concept of human dignity. Her opinion is that vulnerability emerging from social or material disadvantage, such as distinctions made on the basis of working status, poverty or geographic location, fall within the ambit of impaired dignity. She further argues (par 4.8.22(h)) that the judiciary has begun to address the relationship between dignity and a classification that “causes or perpetuates social and/or economic systematic disadvantage” results in a “comparable effect” to the impairment of dignity. Support for her view is found in the minority judgement by O’Regan J in the

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*Harksen* decision. Albetyn concludes (par 4.8.22(h)) that “distinctions made on the basis of working status or poverty/socio-economic status or geographic location could be shown to be prohibited grounds”. It is submitted that her views are in accordance with the concept of *ubuntu* and the stated objective of the Constitution of “recognising the injustices of the past”.

Thus it may be concluded that the ambit of the Section 9 right to equality encompasses discrimination based on grounds wider than the 17 grounds listed as discriminatory in Section 9(3).

*Whether the right to equality is limited to natural persons only or extends to juristic persons*

The wording of the right to equality clause in the Constitution appears to limit the right to natural persons. However, Section 8(2) of the Constitution gives clear guidance that a provision of the Bill of Rights binds a natural or a juristic person to the extent that it is applicable, taking into account the nature of the right and any duty imposed by that right.

Nevertheless, the 17 grounds of discrimination listed in Section 9(3) of the Constitution all contain a “human attribute” and thus do not extend to juristic persons. Thus, the juristic person must rely on other grounds of discrimination to institute a claim of discrimination in terms of Section 9 of the Constitution.

*Whether discriminatory legislation based on one of the 17 grounds listed in Section 9(3) can be introduced in the Income Tax Act as a positive measure demanded by sections 9(2) and (9)(4) of the Constitution to right the wrongs and injustices of the past (as a remedial or restitutionary function)*

The wording of Section 9(2) calling for “legislative and other measures” to be taken “to promote and advance” categories of persons disadvantaged by unfair discrimination, read together with Section 9(4) of the Constitution mandating that “national legislation must be enacted to prevent or prohibit unfair discrimination”, lends itself to the interpretation that remedial and restitutionary legislative measures can and should be taken to address the wrongful discriminations of the past. In *Minister of Finance and Another v Van Heerden* (2004 (11) BCLR 1125 (CC)), the Constitutional Court held that the Constitution recognised that decades of systematic racial discrimination could not be eliminated without positive action being taken to achieve equality. Such positive action taken by the legislature does not necessarily constitute unfair discrimination.

The facts in the case of *City Council of Pretoria v Walker* (1998 (3) BCLR 257 (CC)) provide a good example of positive measures taken by a local city council to redress the wrongs of the past. Although it did not deal specifically with a taxation measure, it nevertheless covered a revenue issue. It involved the imposition of levies on residents for municipal services provided and the collection of such levies. Two constitutional issues relating to the right to equality were involved, but only the aspect dealing with positive measures in the form of legislation introduced to right the wrongs of the past is discussed in this paragraph. The other issue, relating to the “conduct” of the municipal officials in the manner in which the levies were collected or not collected, as the case may be, is discussed briefly in the paragraph on whether the Section 36 limitation of rights clause of the Constitution can restrict the right to equality.

A resident of a former so-called white suburb (in the “apartheid era”) of Pretoria took the Pretoria City Council to court on the basis that he and his fellow residents were being charged more for municipal services than the residents of the former black townships of Pretoria. He contended that the different basis of charging the municipal services levy amounted to discrimination on a racial basis. The Constitutional Court, although ruling that there was indirect discrimination on the basis of race, held in favour of the Pretoria City Council. The white complainant had not been adversely impacted in any material way. He was not from a disadvantaged group and in fact had benefited economically from apartheid, while the black people of the townships suffered economic disadvantage and were still being deprived, to some extent, of the provision of basic municipal services. The positive cross-subsidisation measure introduced did not violate the right to equality. The Cape Provincial Division reached a similar decision on similar facts in *Rates Action Group v City of Cape Town* (67 SATC 73, 2004 (12) BCLR 1328 (C)).

The Constitutional Court in both *Van Heerden’s* and *Walker’s* cases confirmed the acceptability of introducing positive legislation or other measures to right the wrongs and injustices of the past. The question, however, is whether the introduction of similar discriminatory legislation in the Act is appropriate. Such a question has political overtones and was considered beyond the scope of this study. Nevertheless, it is interesting to note that the state, together with the revenue authorities, have so far not introduced such far-reaching legislation in the Act since the adoption of the Constitution. Perhaps the principle of progressive rates of taxation for individuals (which have been there since before the adoption of the Constitution) can fall within this category of legislation.

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*Whether the Section 36 limitation of rights clause of the Constitution can restrict the right to equality*

The right to equality is already limited in terms of Section 9(3) of the Constitution. The section provides that “discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair”. Where discrimination is found by the judiciary to be fair, that is then the end of the enquiry (*Harksen v Lane (supra)*). Such legislation is regarded as constitutional. If, however, the discrimination on one of the 17 grounds is found to be unfair and thus *prima facie* unconstitutional, then it may still be open for the state and the revenue authorities to argue that the Section 36 limitation of rights clause as contained in the Constitution applies. However, Currie and De Waal (2005: 165) are of the opinion that Section 9(3) contains an internal demarcation that “repeats the phrasing of section 36 or that makes use of similar criteria” and accordingly that the enquiry stops there. If the legislation is found to be unfair based on one of the 17 listed grounds of discrimination, then it should not be able to be found reasonable and justifiable for the purposes of the Section 36 limitation of rights clause (see further discussion on this point in the paragraph on the comments and conclusions on the *Harksen* decision).

Section 36(1) of the Constitution provides that any right in the Bill of Rights may be:

... limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors.

If the wording of this clause is closely examined, it is clear that the limitation is only applicable to fundamental rights contained in the Bill of Rights (Sections 7 to 36 of the Constitution) and to a “law of general application”. Therefore, it applies neither to any constitutional provision not contained in the Bill of Rights nor to any unreasonable, irrational or unjustifiable “conduct” on the part of the revenue authorities (*Premier Mpumalanga v Executive Committee of the Association of the Governing Bodies of State-aided Schools, Eastern Transvaal* (1999 (2) SA 91 (CC)). Thus, the Section 36 limitation clause can restrict or limit the right to equality, even if a legislative provision discriminates unfairly, provided that the provision is “reasonable and justifiable in an open and democratic society”.

It was considered beyond the scope of this study to discuss, in detail, the constitutionality or otherwise of the “conduct” of the revenue authorities in this context, as this is more of an application of this analysis than a theoretical problem. Nevertheless, it is instructive to discuss briefly the second constitutional issue raised in the *Walker* decision, namely the Pretoria City Council’s selective enforcement policy involving a moratorium on the recovery of debts owed by defaulting residents

of the formerly black townships while taking strong action to recover debts owed by defaulting residents of the formerly so-called white areas of Pretoria. The Court held that such conduct amounted to unfair discrimination, and stated as follows (262):

No members of a racial group should be made to feel that he or she was not deserving of equal concern, respect and consideration and that the law was likely to be used against him or her more harshly than others who belonged to other race groups.

It was a bittersweet victory for the taxpayer on this second point. Although the conduct of the Council officials was found to constitute unfair discrimination, the Court concluded that Walker had sought the wrong relief. The breach of the taxpayer's right to equality could not be a defence to the Council's claim for arrear levies withheld by him. He should rather have applied for a *mandamus* (declaration of rights). In this way, he could have ensured that the Council first put its house in order and eliminated the unfair discrimination by collecting arrear levies from the disadvantaged communities as well.

The lesson to be learned from *Walker's* case is that even if a person's right has been violated by unfair or discriminatory "conduct" of an official, the correct relief must also be sought so that the unfairness or discrimination is eliminated. The correct relief to be sought by a taxpayer when his or her constitutional right is violated is an aspect that requires further detailed study.

***Whether the state in general and the revenue authorities in particular have taken positive measures to achieve equality in tax matters***

Prior to 1994, the Act contained several discriminatory provisions with a gender, racial or religious bias. With the enactment of the Interim Constitution, several changes were made to the Act to conform to the Bill of Rights in general and the right to equality in particular. For example, the Act had provided for a wife's income to be included with that of her husband's for the purposes of calculating her tax liability. This discriminatory method of calculating a wife's tax liability resulted in a higher tax burden for the married woman than the single woman who was earning the same income. The Act was amended to provide for each spouse to be taxed at the same rate of tax as any other individual in order to preclude a challenge under the right to equality provision of the Bill of Rights.

Similarly, the retirement age for both men and women for certain provisions of the Act, for example Sections 10(1)(x) and 7A(4A), were synchronised at the age of 55 instead of 50 for women and 55 for men, as was previously the case. Both these sections have now been deleted with effect from 1 March 2011. In addition, a donation to the Bible Society of South Africa, a Christian organisation, which had

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previously been allowed as a special deduction against taxable income in terms of Section 18A(2)(c) of the Act, was deleted with effect from 1996 so that it could not be contended that other religious bodies of a non-Christian nature were being unfairly discriminated against. Furthermore, the definition of “married” in Section 1 of the Act was deleted and replaced with the definition of “spouse” to encompass same-sex or heterosexual unions. Croome (2010: 74–76) gives several more examples of other discriminatory provisions in the Act that have been amended or removed to prevent discrimination.

The conclusion is that the right to equality provision has resulted in positive amendments to the Act, at least in the areas of gender, marital status, sexual orientation and religion. There are still a few provisions in the Act that discriminate on the basis of age, for example Section 10(1)(i)(xv)(bb) (interest exemption) and Section 18 (medical deductions), but these provisions are probably constitutional as there is specific national legislation that has been introduced to protect the elderly, namely the Older Persons Act (Act No. 13 of 2006). Its objective is to empower older persons to continue to live meaningfully and constructively in a society that recognises them as important sources of knowledge, wisdom and expertise.

*Whether it can be expected that the interpretation of the right to equality, in the light of the demands of the Constitution, can change over time*

A section in the Act may appear to be neutral, yet a narrow interpretation by the judiciary may lead to unequal treatment or “more equal” treatment of a taxpayer or group of taxpayers. Albertyn (2007: par 4.8.22(h)) gives a stimulating example in this regard. She discusses the principle that could permit the deduction for tax purposes (in terms of Section 11(a) of the Act) of entertainment or health club membership as a business expense incurred in the production of income. She contrasts these possible deductions to the denial of a similar deduction to working women for child care costs while at work and earning income.

She is of the opinion (par 4.8.22(h)) that should a claim for the violation of the right to equality be made in such circumstances on the basis of gender, the judiciary “would have to examine the social and economic position of women in society and the social and economic costs of child care that women bear”. Her argument continues along the line that a women’s responsibility for child care has been a source of social and economic disadvantage and has created barriers to equal participation in the workplace and that the “gendered public/private division has also meant that the ‘private’ expenses of childcare have been ignored in defining certain deductions in tax laws” (par 4.8.22(h)). She concludes (par 4.8.22(h)) that “a clear understanding of

the systemic roots of gender bias in the law is required to adjudicate this claim fairly”. This is a good example of how the judiciary can carry out its mandate to recognise the injustices of the past.

### ***Harksen v Lane*: The principles and tests used to determine whether legislation violates the constitutional right to equality**

#### ***The facts***

In order to obtain a better understanding of the principles and tests arising from the *Harksen* decision in determining whether legislation violates the right to equality and to extend the principles so arising to tax legislation, a brief discussion of the facts of the case was considered helpful. Mrs Harksen’s property was attached by the Master of the Supreme Court in terms of Section 21(1) of the Insolvency Act (Act No. 24 of 1936), which provides for the estate of the solvent spouse to vest in the Master when the other spouse’s estate is sequestrated. She was the solvent spouse, married out of community of property to the insolvent, whose estate had been sequestrated. Such attached property could be released under certain circumstances, for example if she could prove that she had inherited the property from her parents and was thereby excluded from the joint estate. However, the Master in this case refused to release any property owned by the solvent spouse.

Mrs Harksen contended that her right to equality was violated under the Interim Constitution on the basis that there was discrimination between the solvent spouse of an insolvent (based on “marital status”) and other persons who might have had an even closer business relationship with the insolvent. It should be recorded that discrimination on the basis of “marital status” was not, in terms of the Interim Constitution, one of the listed grounds of discrimination. It was only when the Final Constitution was adopted that “marital status” was included as one of the 17 grounds listed as discriminatory. However, as already indicated in the paragraph on whether discriminatory and/or unfair legislation that does not violate one or more of the 17 grounds listed in Section 9(3) of the Constitution can also contravene the right to equality, not being a listed ground does not, and did not, prevent the *prima facie* claim of discrimination and thereby the protection of the Section 9 right to equality.

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*The Constitutional Court's three-step approach to determine whether legislation violates the right to equality*

In the *Harksen* case, Goldstone J, presenting the majority decision, set out a three-step approach to determine whether legislation violates a person's right to equality. The three-step approach can be described as follows (1511–1512):

- Does the provision differentiate between people or categories of people? If it does and it is not rationally connected to a legitimate governmental purpose, then there is a violation of the right to equality. Nevertheless, even if the differentiation is considered rational, it might still amount to discrimination.
- Does the differentiation amount to unfair discrimination? This is tested by a two-stage analysis:
  - If the discrimination is based on a specified ground, then discrimination will have been established. If it is not on a specified ground, then the discrimination is tested objectively, taking into account attributes and characteristics that have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
  - If the differentiation amounts to “discrimination”, it must be tested to establish whether such discrimination amounts to “unfair discrimination”. 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 the enquiry, the differentiation is found to be fair, then there will be no violation of the right to equality and that would be the end of the enquiry. If the discrimination is found to be unfair, then a determination has to be made as to whether the provision can be “justified” under the limitation of rights clause (now Section 36 of the Constitution).

*The differences in the application of the three-step approach to the facts between the majority and the minority decisions*

Goldstone J (in the *Harksen* case), writing the majority judgement, found that there was patent differentiation between solvent spouses and other closely connected persons, but that such differentiation was “rational” and not “arbitrary”. It was connected to the legitimate governmental purpose of protecting the public interest by protecting the rights of creditors of insolvent estates. In any event, in his view, other legal remedies were available to Mrs Harksen to obtain relief from the automatic

vesting of the property in the Master. Nevertheless, the Court still had to determine the fairness or otherwise of the discrimination.

The judge then looked at the factors that had to be taken into account in determining whether there was unfair discrimination, namely the position of the complainant in society (the solvent spouse was neither a person or group that suffered discrimination in the past, nor was she or the group vulnerable), the nature of the provision (duty of parliament to protect the public interest by protecting the rights of creditors of insolvent estates) and the effect of the discrimination on the solvent spouse (the Master will be presumed to act reasonably and honestly and release attached property when appropriate).

The conclusion reached by Goldstone J was that Section 21 of the Insolvency Act does not constitute “unfair discrimination” but rather a “kind of inconvenience and burden that any citizen may face when resort to litigation becomes necessary” (1515). Thus, Section 21(1) of the Insolvency Act was found not to violate Mrs Harksen’s right to equality.

O’Regan J, writing one of the minority judgements in the *Harksen* case (Sachs J wrote a similar minority judgement) supported by two other judges of the Constitutional Court, agreed with the finding of the majority of the Court that the discrimination was rational. However, in testing whether the discrimination was fair or not, she gave powerful reasons for coming to a different conclusion from the majority decision. She compared the automatic vesting of the property of a solvent spouse in the hands of the Master to the non-vesting in relation to other family members and close business associates. She concluded in this respect that the automatic vesting of the solvent spouse’s property in the hands of the Master merely because she was married to the insolvent spouse was contrary to the Constitution’s commitment to human dignity. The impairment was “substantial and sufficient to constitute unfair discrimination” (1527). The option of using other remedies to have her property released only mitigated the discriminatory effect of the legislation.

Having found “unfair discrimination”, O’Regan J, following the final step of the three-step approach as set out in Goldstone J’s majority decision, had to consider whether the infringement occasioned by Section 21 of the Insolvency Act was “reasonable and justifiable” in terms of the limitation of rights clause of the Interim Constitution. It is submitted that this part of the minority judgement is considered important for the purposes of determining the test for “justification” as required by the present Section 36 limitation of rights clause in the Constitution. This interpretation, agreed to by three other concurring judges of the Constitutional Court, is, after all, also a decision of the Constitutional Court and has a powerful persuasive influence

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on the interpretation of the meaning of “justifiable”. It is submitted that it is unlikely that a court would take a contrary position to this interpretation in the future.

O’Regan J used the test of “proportionality between the invasion caused by the infringing provision and the importance, purpose and effects of that provision” to determine whether such provision was “reasonable and justifiable” as required by the limitation of rights clause. She argued that Section 21 of the Insolvency Act catches within its net all spouses of insolvents, even those spouses innocent of collusion, but does not attempt to catch a range of people who may be in a similarly questionable relationship with the insolvent. She concluded (1528) that the section is “over broad given its purpose in relation to spouses and their property and too narrowly drawn in relation to other people”.

She also mentioned that no evidence was placed before the Court to show that the section achieved its aim of frustrating collusion between partners. She pointed out that the United Kingdom, Canada, Australia, New Zealand and Germany all do not have a similar provision to Section 21 of the Insolvency Act. Therefore, she was of the opinion that a variety of other mechanisms could be used to achieve similar objectives to those that motivate Section 21 of the Insolvency Act. Automatically vesting a solvent spouse’s estate in the hands of the Master is “not an essential component of insolvency law” (1530). She concluded (1530) that “the balance between the interests of the spouse of the insolvent and the interests of the creditors of the insolvent estate seems to favour the interests of creditors disproportionately” and that no proper balance has been achieved.

### *Comments and conclusions on the Harksen decision*

Five judges, constituting the majority of the Court, found that Section 21 of the Insolvency Act, although discriminatory, was rational as well as fair. Four judges supported the minority decision given by O’Regan J, who found that Section 21 of the Insolvency Act, although rational, was patently discriminatory, was “unfair” and could not be “justified” as required by the limitation of rights clause in the Interim Constitution.

The judgement (including both majority and minority opinions) makes it clear that there is a difference between the “rationality” enquiry under Section 9(1), the “unfair” examination in terms of Section 9(3) and the “justification” test under Section 36 of the Constitution. Even if there is a “rational” reason for the discrimination, that is not the end of the enquiry. The discrimination provision must not be “unfair” (Section 9(3) of the Constitution). If the legislative provision is found to be “unfair”, it can only be saved by its being found “reasonable and justifiable” in terms of the

Section 36 limitation of rights clause. The arguments based on administrative capacity, alternative methods less invasive to achieve the same results and whether other countries have similar discriminatory provisions enter the argument at the justification stage.

It is submitted that where legislation is found to be irrational or arbitrary under the Section 9(1) enquiry (*Harksen's* first step), it probably cannot be saved under the reasonable and justifiable clause of Section 36 of the Constitution. Support for this view is given in *First National Bank of SA Ltd t/a Wesbank v CIR and Another* (64 SATC 471, 2002 (7) BCLR 702 (CC)) when the Constitutional Court had a further opportunity to examine the Section 36 limitation of rights provision of the Constitution. In coming to its decision, the Court examined the meaning and scope of the word “arbitrary” as used in Section 25(1) of the Constitution relating to property rights. It held that the word “arbitrary” as used in that section was a far narrower concept than the words “reasonable and justifiable” as used in Section 36 of the Constitution. Accordingly, the Court was of the opinion that it was an unavoidable conclusion that an “arbitrary” deprivation of property was also not reasonable and justifiable in an open and democratic society. *Albertyn* (2007: par 4.8.22(h)) is also of the opinion that “it is difficult to conceive of a situation where arbitrary or irrational action by the state will be justified by section 36 and the courts have yet to find one”.

It is further submitted that this principle can be extended to all provisions of the Income Tax Act – if the provisions permit arbitrary action against a taxpayer, then such provisions can never meet the requirements of reasonableness and justifiability as required by Section 36 of the Constitution and will thus be invalid to that extent. However, if the discrimination is found to be rational and fair, that is the end of the enquiry. The provision would not violate the right to equality.

Goldstone J, in setting out the three-step approach in *Harksen*, mentioned a “legitimate governmental purpose” as justification for a limitation of a person’s right to equality or any other fundamental right. It was considered beyond the scope of this study to discuss this aspect, as it can only be examined in detail when dealing with an application of the theory to a set of facts. The meaning and scope of this phrase require a further detailed study.

### **The onus of proving the unconstitutionality of legislation on the basis that a person’s right to equality has been violated**

The burden of proof is a shifting burden. In the first instance, the burden of proof rests on the taxpayer to make out a *prima facie* case of discrimination, that is, that his or her right to equality has been violated or infringed in some way. If discrimination

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did take place based on one of the 17 grounds listed in the Constitution, there is a *prima facie* case for discrimination. It is regarded as unfair unless the revenue authorities prove that it is fair. If there is discrimination on an unlisted ground, then the taxpayer must prove that the discrimination is unfair.

If the provision is found to be unfair, the burden of proof is on the revenue authorities to establish that any restriction on a taxpayer's right is "reasonable and justifiable in an open and democratic society", as provided for in terms of Section 36 of the Constitution.

### Constitutional remedies to the violation of a fundamental right

It was considered beyond the scope of this study to discuss the constitutional or other remedies available to a taxpayer when any of his or her fundamental rights in general and the right to equality in particular have been violated. Depending on the type of violation that has occurred, the appropriate remedy (constitutional or otherwise as per the *Walker* case) must be pursued. As already mentioned, the practical application of the theoretical analysis in this study requires a further detailed study.

### Identification of a few provisions of the Act that appear, *prima facie*, to be discriminatory and that need to be tested in a future study using the theoretical analysis as discussed

The following are examples of provisions of the Act that, *prima facie*, may violate the right to equality. This list should not be considered an exhaustive list, as there are many other provisions that also, *prima facie*, may violate the right to equality:

- The denial of deductions to employees who earn their remuneration other than mainly in the form of commission – Section 23(m) of the Act
- The different tax treatment of restraint of trade receipts and deductions for an individual as opposed to a company – para (cA) of the definition of "gross income" in Section 1 and Section 11(cA) of the Act
- The taxation of farmers as opposed to any other businessman – farmers being taxed under the favourable special provisions of the First Schedule of the Act
- The taxation of Small Business Corporations as opposed to the taxation of other companies – the application of Section 12E of the Act.

Croome (2010: 84) also lists provisions of the Act and other aspects of a revenue nature that may be considered, *prima facie*, discriminatory. However, some of these provisions need to be tested in a future study using the theoretical analysis

as discussed to determine the extent of their constitutionality. As a preliminary observation, several of the examples given in this article and by Croome may be saved by the Section 36 limitation of rights clause.

## Conclusion

The ambit of the fundamental right of the taxpayer to equality in tax matters as provided for in Section 9 of the Constitution has, as yet, still to be determined by the judiciary. There is no case law, as such, pertaining directly to revenue issues relating to the right to equality. However, there have been several landmark Constitutional Court decisions in other branches of the law on the interpretation of the right to equality in general that indicate the ambit of the right. For example, in *S v Makwanyane (supra)*, the concept of Western culture fundamental rights, the African philosophy of *ubuntu*, the objective of the preamble to the Constitution to “recognise the injustices of the past” and the part played by foreign decisions in determining the ambit of the right to equality were discussed and integrated for the purpose of interpreting our fundamental rights. Other Constitutional Court decisions, especially those from similar branches of the law, such as insolvency (*Harksen v Lane (supra)*) and the ability of local government to impose rates and taxes on landowners (*City Council of Pretoria v Walker (supra)*), have been analysed from a theoretical point of view in order to give further indication of the ambit of the right to equality in revenue matters.

The following conclusions were reached:

- Everyone is equal before the law and any provision (even dealing with revenue issues) that violates this right is, *prima facie*, unconstitutional (Section 9 of the Constitution).
- Unequal treatment by the state or any other person does not only refer to discriminatory legislation but extends to discriminatory practices or conduct of a state official. Furthermore, the Section 36 limitation of rights clause can never save an action or conduct by a state official that is discriminatory if it is unfair (*City Council of Pretoria v Walker (supra)*).
- The violation of the right to equality is not limited to one or more of the 17 grounds of discrimination listed in Section 9(3) of the Constitution. This is especially the case where human dignity is involved (*Harksen v Lane (supra)*).
- The right to equality extends to juristic persons in the appropriate circumstances.
- It appears permissible that the state may introduce legislation in terms of Section 9(2) of the Constitution as a positive measure to right the wrongs and injustices of the past (*City Council of Pretoria v Walker (supra)*). The Income Tax Act is not

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excluded from this positive measure. However, to date, no such legislation has been introduced in the Act.

- The Section 36 limitation of rights provision in the Constitution can restrict the right to equality if the legislation is found to be “reasonable and justifiable in an open and democratic society”. The minority judgement of O’Regan J in *Harksen v Lane (supra)* is considered a precedent for determining how to apply the Section 36 limitation of rights clause in the Constitution relating to equality challenges for legislative provisions. Unreasonable or unfair “conduct” on the part of the revenue authorities when carrying out the provisions of the Act that violates a fundamental right is not covered by the Section 36 limitation of rights provision (*Premier Mpumalanga v Executive Committee of the Association of the Governing Bodies of State-aided Schools, Eastern Transvaal (supra)* and *City Council of Pretoria v Walker (supra)*). Furthermore, “arbitrary” legislation has been found not to be “reasonable or justifiable” and thus cannot be saved by the Section 36 limitation of rights provision (*First National Bank of SA Ltd t/a Wesbank v CIR and Another (supra)*).
- Unequal taxation on the basis of gender, marital status, sexual orientation and religion has been removed from the Act. A few sections relating to age remain. However, there are good reasons for some of these discriminatory sections to remain (Older Persons Act, Act No. 13 of 2006).
- The South African concept of “equality” may evolve over time, and what is now considered fair discrimination may be regarded as unfair discrimination in the future.
- Foreign decisions from countries with similar constitutions to that of South Africa have played a huge part in interpreting fundamental rights in South Africa while the Constitution was in its infancy. However, the South African Constitution and its interpretation are no longer in their infancy. It was submitted that the South African judiciary is increasingly refraining from using foreign decisions to interpret the right to equality. The South African Constitution is more liberal than most foreign constitutions, and it is difficult to match the spirit of *ubuntu* and the object of recognising the injustices of the past to foreign constitutions. However, foreign decisions still remain a starting point if there is no South African decision on the point.

The core of the right to equality for a natural person is human dignity (*Harksen v Lane (supra)*), and a wide meaning should be attributed to human dignity. Albertyn’s (2007: par 4.8.22(h)) view that distinctions made on the basis of working status, poverty or geographic location impair a person’s dignity is endorsed. It accords with the stated objective of the Constitution to recognise the injustices of the past.

The mere theoretical analysis of the ambit of the right to equality from a taxpayer's point of view would be an exercise in futility unless the analysis could be translated to a real-life application. Unfortunately, the scope of this study has precluded such an exercise. However, a few examples of provisions of the Act have been identified as, *prima facie*, violating the right to equality. Croome (2010: 84) has also identified several tax scenarios that potentially violate the taxpayer's right to equality. Some of the examples listed in this article and by Croome could be used as a starting point for a proposed future study. The differences in approach between the analysis of Croome and the analysis as described in this study may, or may not, lead to different results. Further academic debate could be stimulated by such a study.

Another area identified as requiring further study is the scope of the term "legitimate governmental purpose". For example, can the violation of a person's right to equality be justified because the revenue authorities have a staff shortage or because the revenue authorities wish to cut costs? Is this a legitimate governmental purpose that can be used by the revenue authorities to discharge the onus that such actions are reasonable and justifiable in an open and democratic society to limit a person's right to equality?

Finally, the remedies available, constitutional or otherwise, to a taxpayer whose right to equality has been violated either by discriminatory legislation or by the arbitrary, irrational or unfair "conduct" of the revenue authorities need to be examined. The Constitutional Court in *City Council of Pretoria v Walker (supra)* indicated that a constitutional remedy is not the correct route to follow in the first instance.

The right to equality is, theoretically, a very valuable right to a taxpayer. In the South African context, it must be interpreted widely and liberally. It is up to the affected taxpayer to pursue his or her right to equality by seeking the correct remedy through the judicial system.

Perhaps George Orwell's satirical comment is not only applicable to communism but also to a constitutional democracy and can be adapted to read "all people are equal but some still appear to be more equal than others". In a tax context, this is a real possibility.

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