EQUALITY AND NON-DISCRIMINATION: SOME ANALYTICAL THOUGHTS

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ABSTRACT

Much of the disagreement and still prevalent confusion about the legal and constitutional meaning of concepts such as ‘equality’, ‘equal,’ or ‘unequal’ is due to inadequate linguistic analysis. These concepts, in order to be meaningful, cannot be used as predicative nouns or adjectives but only as attributive nouns or adjectives (‘predicative’ and ‘attributive’ being used in the logical rather than the grammatical sense). The correct approach requires an object to be specified (for example, ‘strength’, ‘musicality’, ‘intelligence’ or ‘human dignity/ worth’) in order that the appropriateness of the attributive term (‘equal’, ‘un equal’, ‘equality’) be judged. Those who would reject ‘human worth’ (‘dignity’, ‘menswaardigheid’, ‘Menschenwurde’) as the object and the answer, ought at least to come up with an alternative.

I INTRODUCTION

A lack of linguistic and other analysis has made the debate on equality and non-discrimination in the law more complex, and the neglect of such analysis has caused confusion. This article deals with a limited and preliminary, but vital, aspect of equality and non-discrimination as constitutional and legal concepts and rights. It does not deal with wider aspects of constitutional equality jurisprudence; particularly not with the achievement of restitutinal equality,1 nor with the horizontal application of the Bill of Rights, nor with any detailed analysis of the South African Constitutional Court’s equality jurisprudence to date. The narrow contention being advanced is that in law (as in ethics) the words ‘equality’, ‘equal’, or ‘unequal’ — in order to be meaningful — can only be used as attributive parts of speech and not as predicative nouns or adjectives. In this respect, the terms ‘attributive’ and ‘predicative’ are not used in a strictly grammatical sense, but in a special logical sense that requires the object referred to be specified (eg, human dignity) in order

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1 As to what is meant by restitutinal equality under the Constitution of the Republic of South Africa, 1996 see National Coalition for Gay & Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC) paras 60-61.
that the appropriateness of the attributive term (equal or equality) can be judged.

Before developing this argument, I will touch on some of the confusion and uncertainty that, I suggest, still reign as to the ‘true’ meaning of equality and non-discrimination. Although the Constitutional Court has, for South Africa, clearly established that equality of human dignity (human worth) lies at the heart of these concepts, this is not universally accepted, and there are aspects of such an approach that are not yet fully appreciated.

Following a methodology of conjecture and refutation,2 the problem I wish to address is the confusion or uncertainty which exists as to the meaning of equality in legal postulates such as ‘equality before the law’, ‘equal treatment by the law’ and in relation to ‘unfair discrimination’ which could be paraphrased as ‘unfair un-equal treatment’ or ‘unfair differentiation’.

II THE CONSTITUTIONAL COURT

Both the South African Constitutional Court and the Canadian Supreme Court have, broadly stated, considered that equality and non-discrimination are concerned with human dignity (human worth), that equality before the law means that all people should be treated equally with respect to their human dignity (human worth), and that the law should not differentiate in its treatment of persons in a way that impacts negatively on their human dignity.3 Although the word ‘dignity’ and on occasion ‘human dignity’ is used in the Constitution to describe the right as well as the value of dignity,4 there can be no doubt (in my view) that in the context of the Constitution ‘dignity’ means ‘human worth’ or ‘inherent human worth’. This makes the expression synonymous with ‘menswaardigheid’ in the Afrikaans text and with ‘Menschenwürde’ and ‘Würde des Menschen’ in the equivalent art 1(1) of the German Basic Law. This is the view taken by the Constitutional Court.5 This is not the place to consider whether the distinction between the ‘right’ to and the

3 For the South African law see Prinsloo v Van der Linde 1997 (3) SA 1012 (CC) and Harksen v Lane NO 1998 (1) SA 300 (CC). For the Canadian Law see Law v Minister of Human Resources Development [1999] 170 DLR (4th) 1.
4 See in particular s 1(a) of the Constitution (‘the value... [of] human dignity’); s 7(1) (the democratic values of human dignity); s 10 (everyone has inherent dignity and the right to have their dignity respected and protected); s 36(1) (an open and democratic society based on human dignity... ); s 39 (1) (must promote the values that underlie an open and democratic society based on human dignity, equality and freedom).
5 See, for example National Coalition v Minister of Justice (note 1 above) para 28 (the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals).
‘value’ of human dignity has always been properly appreciated by scholars or the courts.6 I am also, in retrospect, concerned by the fact that, from the beginning, the Constitutional Court, while pointing to the centrality of the value of dignity in the concept of equality and unfair discrimination, has added the following obiter qualification:

Other forms of discrimination, which in some other way affect persons adversely in a comparably serious manner, may well constitute a breach of section 8(2) as well.7

This qualification, although obiter, is not justified and detracts from the fact that as a matter of clear principle, the value of human dignity, and nothing else, is what gives meaning in the law to the concepts of equality and non-discrimination. I hope that this obfuscatory qualification does not prove to have been too high a price to pay in order to have secured a unanimous judgment. Fortunately the Court has never, to the best of my knowledge, had occasion to base any finding of unfair discrimination on the above qualification. One can but hope that it will, with the passage of time, become an anachronism.

I do not propose dealing here with the precise legal methodology employed in applying this test, nor with the fact that South African Courts clearly apply an objective test in determining whether human dignity has been impacted on negatively by the law,8 or whether the Canadian Courts do the same.9 I limit my inquiry to the confusion and uncertainty that, to my mind, is still to be found among certain lawyers with regard to the legal (and ethical) concepts of equality and non-discrimination. This is in large measure due, I suggest, to the fact that the various forms of the word ‘equal’ used to express these concepts,
positively or negatively, cannot (in the special logical sense I have already explained) be used *predicatively*, but only *attributively*.

### III ‘The empty idea of equality’?

Aristotle is commonly said to have defined equality on the basis that equals ought to be treated equally and unequals treated unequally in proportion to their inequality; that proportion is the equality of ratios; and that ‘just’ is that which is proportional and ‘unjust’ that which violates proportionality. Aristotle is not, for present purposes, helpful in determining the particular quality shared by persons who are said to be equal. Not because ‘it is stated at too high a level of generality’ but for the reason already advanced. It is therefore not too surprising that so much confusion and disagreement exists amongst lawyers as to what

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> The just, therefore, involves at least four terms; for the persons for whom it is in fact just are two, and the things in which it is manifested, the objects distributed, are two. *And the same equality will exist between the persons and between the things concerned*; for as the latter the things concerned are related, so are the former; if they are not equal, they will not have what is equal, but this is the origin of quarrels and complaints when either equals have and are awarded unequal shares, or unequals equal shares. Further, this is plain from the fact that awards should be according to merit; for all men agree that what is just in distribution must be according to merit in some sense, though they do not all specify the same sort of merit, but democrats identify it with the status of freeman, supporters of oligarchy with wealth (or with noble birth), and supporters of aristocracy with excellence.

> The just, then, is a species of the proportionate...

This, then, is the proportional; the unjust is what violates the proportion.’

The passage that I have emphasised above is rendered as follows by J A K Thompson *The Ethics of Aristotle: The Nicomachean Ethics* (trans JAK Thompson, rev H Tredennick, introduction & bibliography J Barnes, 1976) 177-178:

> And there will be the same equality between the shares as between the persons, because the shares will be in the same ratio to one another as the persons; for if the persons are not equal, they will not have equal shares; and it is when equals have or are assigned unequal shares, or people who are not equal, equal shares, that quarrels and complaints break out.

> This is also clear from the principle of assignment according to merit. Everyone agrees that justice in distribution must be in accordance with merit in some sense, but they do not all mean the same kind of merit: the democratic view is that the criterion is free birth; the oligarchic that it is wealth or good family; the aristocratic that it is excellence.

By contrast, the above emphasised passages are rendered as follows by John Gillies *Aristotle’s Ethics: Comprising his Practical Philosophy* (1893) 252:

> If the persons are exactly equal, so ought to be their shares; but of the persons are unequal, the shares ought also to be equal in the same proportion: for complaints and strife always will arise, when either persons of unequal worth meet with the same treatment; or when persons of nearly equal worth are distinguished from each other by too considerably differences. This is universally acknowledged; but mens notion of worth vary with their political principles. In democracies it is measured by liberty; in oligarchies, by wealth or birth; in aristocracies, by virtue.’

I have chosen to follow the first two translations above.

‘equal’ means in the concept of equal protection (and benefit) of the law, or what the circumstances are that render differentiation (used in this context as a neutral term) constitutionally objectionable. Aristotle was well aware of the difficulties and touches on some of them in his *Politics*:12

The good in the sphere of politics is justice; and justice consists in what tends to promote the common interest. General opinion makes it consist in some sort of equality. . . . It holds that justice involves two factors—things, and the persons to whom things are assigned—and it considers that persons who are equal should have assigned to them equal things. But here there arises a question which must not be overlooked. Equals and unequals—yes; but equals and unequals in what? This is a question which raises difficulties, and involves us in philosophical speculation in politics.

If you were dealing with a number of flute players who were equal in their art, you would not assign them flutes on the principle that the better born should have a greater amount. Nobody would play the better for being better born; and it is to those who are better at the job that the better tools should be given. If our point is not yet plain, it can be made so if we push it further. . . . Let us suppose a man who is superior to others in flute playing, but far inferior in birth and beauty. Birth and beauty may be greater goods than ability to play the flute, and those who possess them may, on balance, surpass the flute player more in these qualities than he surpasses them in his flute playing; but the fact remains that he is the man who ought to get the better supplies of flutes.13

I do not propose to survey the literature on the confusion regarding the use and meaning of equal, unequal, equality etc, referred to above. For illustrative purposes, however, I mention one or two paradigmatic examples. One of the best known attempts to demonstrate that equality has no substantive content and is not an independent right, is Peter Westen’s article ‘The Empty Idea of Equality’.14 Contending that equality was becoming the ‘argument of first choice’ that ‘threatens to swallow ‘rights’ that once ranked far above it’,15 and after adopting the Aristotelian definition of equality, Westen postulates that ‘[equality] . . . is an idea that should be banished from moral and legal discourse as an explanatory term’ on the basis of two propositions that he seeks to establish:

(1) that statements about equality logically entail (and necessarily collapse into) simpler statements of rights; and
(2) that the additional step of transforming simple statements of rights into statements of equality not only involves unnecessary work but also engenders profound conceptual confusion.16

I do not doubt that confusion abounds, but will argue that it is for reasons differing profoundly from those that Westen asserts. Moreover, I

12 *The Politics of Aristotle* (trans E Barker 1946) Book III Chapter XII.
13 Ibid paras 1-2 & 4-5.
15 Ibid 538.
16 Ibid 542.
believe that he errs fundamentally in asserting that all statements about equality ‘logically entail and necessarily collapse into’ simpler statements of rights. In developing his argument\textsuperscript{17} that the Aristotelian proposition that likes should be treated alike ‘is tautological’, Westen advances arguments which, I will in due course endeavour to demonstrate, lack an important analytical step in considering both the philosophical and legal meaning of equality. He raises many well-known arguments seeking to demonstrate the absurdity of trying to explain what it means to call two people alike. Dealing with ‘alike’ as meaning ‘alike in every respect’ he points out the obvious that no two people are exactly alike in every respect and that ‘the only things that are completely alike in every respect are immaterial symbols and forms, such as ideal numbers and geometric figures, which are not themselves the subject of morals’.\textsuperscript{18} The logic is unassailable, but only if Westen’s (and others’) undisclosed and unsubstantiated major premise is granted, namely that the only characteristics of humans which are relevant to a comparative equality enquiry are their biological ones. If one were to postulate that a fundamental characteristic of humans is their dignity (fundamental human worth), that humans are endowed with equal dignity, and that dignity is the only relevant comparator, the same conclusion is far from obvious.

I would define human dignity as follows. Human dignity (worth) is the capacity for and the right to respect as a human being, and arises from all those aspects of the human personality that flow from human intellectual and moral capacity; which in turn separates humans from the impersonality of nature, enables them to exercise their own judgment, to have self-awareness and a sense of self-worth, to exercise self-determination, to shape themselves and nature, to develop their personalities and to strive for self-fulfilment in their lives.\textsuperscript{19}

\textsuperscript{17} Ibid 543-558.
\textsuperscript{18} Ibid 544.
\textsuperscript{19} I have, with additions of my own, modelled this on the generally accepted German formulation by Günter Dürig in the 1950s in ‘Der Grundrechtssatz von der Menschenwürde’ (1956) 81 AGR 81, 117: ‘Jeder Mensch ist Mensch kraft seines Geistes, der ihn abhet von der unpersönlichen Natur und ihn aus eigner Entscheidung dazu befähigt, seiner selbst bewußt zu werden, sich selbst zu bestimmen und sich und die Umwelt zu gestalten’. (All humans are human by virtue of their intellectual capacity [kraft seines Geistes] which serves to separate them from the impersonality of nature and enables them to exercise their own judgment, to have self-awareness, to exercise self-determination and to shape themselves and nature. My translation.)

Dealing with ‘alike’ as meaning people who are alike in some but not all respects Westen asserts:

[While the previous definition excludes every person in the world, the present definition includes every person and thing because all persons and things are alike in some respect; and one is left with the morally absurd proposition that ‘all people and things should be treated alike’.20]

It ceases to be absurd if, as argued above, the proposition is changed to ‘all people should be treated alike with respect to their human dignity (worth)’.

Dealing with ‘alike’ as referring to people who ‘are morally alike in a certain respect’ Westen remarks that

[to say that people who are morally alike in a certain respect ‘should be treated alike’ means that they should be treated in accord with the moral rule by which they are determined to be alike . . . more simply, people who by a rule should be treated alike should by the rule be treated alike,

and, seemingly gleefully, concludes:

So there it is: equality is entirely ‘[c]ircular’. . . . Equality is an empty vessel with no substantive moral content of its own. Without moral standards, equality remains meaningless, a formula that can have nothing to say about how we should act. With such standards, equality becomes superfluous, a formula that can do nothing but repeat what we already know.21]

It is not, however, my purpose here to point out the circular reasoning of this very attack. I merely want to highlight that Westen does not deal at all with how different the argument would be if ‘alike’ referred ‘alike with respect to their innate human dignity’ and that like treatment referred to ‘like treatment with respect to such innate dignity’. Westen cites,22 with apparent approval, the following: ‘The idea of equality or non-discrimination is essentially a value judgment which cannot be derived from any assertions or speculations regarding the nature of man.’23

Apart from asking why it cannot be so derived, one must point out that the proposition dismisses, in one fell swoop, virtually the entire body of Kant’s work on ethics.

At the heart of Westen’s criticism of equality as a moral or legal norm or right is his repeated assertion that equality is ‘an entirely formal concept’, a ‘“form” of discourse with no substantive content of its own’.24 He moreover contends that

[a]s a form of analysis, equality confuses far more than it clarifies, for at least four reasons: (1) by masquerading as an independent norm, equality conceals the real nature of the substantive rights it incorporates by reference; (2) by framing a person’s

20 Note 14 above, 544.
21 Ibid 547.
22 Ibid 544-5 n 23.
23 D Lloyd Introduction to Jurisprudence 3 ed (1972) 87.
24 Note 14 above 557-9, for example.
entitlements in terms of his equivalence to others, equality misleadingly suggests that one person’s right vis-à-vis another’s are identical in all contexts; (3) by encouraging use of monolithic levels of judicial scrutiny undifferentiated by the importance of the underlying fundamental right, equality erroneously suggests that all questions of equality are to be scrutinised under a single (or sometimes, a two tier) standard of justification; and (4) by emphasizing that some issues of equality entail dual remedies, equality erroneously implies that it entails uniquely flexible remedies.25

I refrain from commenting on the correctness of Westen’s analysis and criticism of American equality jurisprudence or on the different ‘standards of review’ developed in such jurisprudence. My contention is a more fundamental one. Equality and its correlative, unfair discrimination (unfair non-equal treatment) do not — properly understood — lead to the negative consequences detailed by Westen. There is an understanding of equality, namely equality of dignity of all human beings, that does not

camouflage [. . .] rights under a formula that makes no explicit reference to the substantive rights it incorporates from elsewhere. . . . [or] produce [. . .] unnecessary confusion, because it does circuitously what could be done directly;26 that does not

limit itself to ‘a search for equivalences’ with a ‘tendency to assume that what makes for equality in mathematics also makes for equality in law and morals;27

and that does not

mystify and . . . skew moral and political discourse . . . [because] it is an empty form having no substantive content of its own.28

Although Westen, in a subsequent book, Speaking of Equality,29 has modified his original views in several respects,30 he has not yet, in my view, discovered the key to unlocking the confusion. In the following passage he moves closer to the solution, but skirts past it:

In order to declare people identical in ‘relevant respects, therefore, one must possess a standard of comparison that is an appropriate measure of the state of affairs one wishes to bring about. To declare people identical in normatively relevant respects, one must possess a standard of comparison that is a normatively appropriate measure of the state of affairs one wishes to bring about. . . . The concept of equality does not itself contain criteria for judging standards of comparison; it presupposes them. Equality is a relationship that obtains amongst persons or things by reference to such standards of

26 Ibid 580-1.
27 Ibid 581-4.
28 Ibid 596.
30 Ibid xxi where, in the preface, he states: ‘I now believe that equality in mathematics may differ fundamentally from equality elsewhere; that a certain class of rights may indeed be usefully viewed as equality rights; that the so-called presumption of equality has plausible force; and that the inherent ambiguities of equality, which I once considered solely a vice, may be a virtue in some contexts.’
comparison as have been independently established as appropriate to the states of affairs one wishes to bring about.\footnote{Ibid (emphasis in the original).}

This still deprives equality of substantive content, even in the context of its use in relation to the treatment of human beings. As Westen describes it, it not a right or an end in itself, but something dependant ultimately on a state of affairs ‘one wishes to bring about’. Unless of course one postulates (which Westen does not) that the state of affairs one wishes to bring about is one where the dignity of all is equally respected and protected.

IV SOUTH AFRICAN DEBATES ON EQUALITY AND DIGNITY

In South Africa, Cathi Albertyn and Beth Goldblatt, in an admirable early contribution,\footnote{‘Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality’ (1998) 14 SAJHR 248. When this article was published the Constitutional Court had delivered only five judgments on equality: Brink v Kitshoff NO 1996 (4) SA 197 (CC); Prinsloo and Harksen (note 3 above); President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC) and City Council of Pretoria v Walker 1998 (2) SA 363 (CC).} refer to the ‘shifting and contested meanings of equality’ \footnote{Ibid 250.} and claim that what the Constitution requires is ‘substantive equality’. Since the publication of this and other articles, the Constitutional Court has pointed out that ‘substantive equality’ is an imprecise and contested expression not found in the Constitution, and has held that, apart from establishing formal equality, the Constitution envisages ‘remedial or restitutionary equality’.\footnote{National Coalition v Minister of Justice (note 1 above) paras 60-61.} The authors themselves (rightly) state that one of the purposes of the equality rights is remedial’.\footnote{Note 32 above, 253.} This is not to suggest that other aspects of equality are not still debated such as, for example, whether equality means equality of opportunity (to be achieved if necessary by remedial or restitutionary measures) or equality of outcomes, but this is not my present focus.\footnote{Although by now, nearly two decades after the collapse of Soviet communism, one would have thought that the idea or ideal of equality of outcomes would have come to be regarded as entirely utopian, in the pejorative sense of the word, and that any serious attempt to achieve such a state of affairs would require a dictatorial regime, the destruction of freedom, and would be doomed to ultimate failure.} Albertyn and Goldblatt correctly point out that ‘the Constitutional Court has sought to define equality by placing the value of dignity at the centre of the equality right’.\footnote{Note 32 above, 254.}

My concern, however, is with the proposition they advance in the next sentence: ‘We do not agree with this, and argue for the right to substantive equality to be given a meaning independent of the value of dignity, primarily informed by the value of equality’,\footnote{Ibid (my emphasis).} and later: ‘Equality
has been defined in some of the judgments with reference to another value, dignity, rather than through attempting to distil its own, admittedly elusive, meaning.\textsuperscript{39} I do not here wish to elaborate my profound disagreement with their proposition that the Constitutional Court has erred by its 'conflation of dignity with equality' and erred by its 'conceptualisation and interpretation of the right to equality in relation to dignity'.\textsuperscript{40} I do not, of course, disagree with their insistence that contextual analysis is at the centre of the equality enquiry,\textsuperscript{41} nor with much else in this incisive and thought-provoking article. I shall attempt to demonstrate, however, that in the passages highlighted above, the authors incorrectly believe that the word 'equality' can perform a function that it is incapable of doing.

I have similar problems with certain passages in the articles by Anton Fagan\textsuperscript{42} and by Dennis Davis,\textsuperscript{43} apart from other problems that are not relevant here. Fagan argues that no connection exists between unfair discrimination and dignity and that the Constitutional Court simply 'got it wrong'.\textsuperscript{44} He is wrong in singling Goldstone J out as the miscreant 'who first placed dignity where it does not belong'.\textsuperscript{45} The three judicial authors of \textit{Prinsloo}\textsuperscript{46} must shoulder equal and simultaneous blame\textsuperscript{47} if Fagan is right. Fortunately for the quartet he is not. I focus on the following comments of Fagan:

Differentiation is unfair if it infringes an independent constitutional right \textit{or a constitutionally grounded egalitarian principle}.\textsuperscript{48}

An act unfairly discriminates if and only if it confers benefits or imposes burdens on some but not on others, and in doing so it infringes either an independent constitutional right \textit{or a constitutionally grounded egalitarian principle}.\textsuperscript{49}

In addition, his arguments closely follow Westen's thesis,\textsuperscript{50} for example, stating that 'a proper understanding of equality reveals it to be superfluous' and that 'in so far as our concern is to establish the appropriate action in any given situation, the right to equality has

\textsuperscript{39} Ibid 272.
\textsuperscript{40} Ibid 260.
\textsuperscript{41} Ibid 260-1.
\textsuperscript{42} 'Dignity and Unfair Discrimination: A Value Misplaced and a Right Misunderstood' (1998) 14 \textit{SAJR} 220.
\textsuperscript{43} 'Equality: The Majesty of Legoland Jurisprudence' (1999) 116 \textit{SALJ} 398. This article was written and accepted for publication when the author, now a judge of the High Court, was a professor of law at the University of Cape Town.
\textsuperscript{44} Note 42 above, 220.
\textsuperscript{45} Ibid.
\textsuperscript{46} Note 3 above.
\textsuperscript{47} \textit{Prinsloo}'s case was argued some time prior to \textit{Hugo} (note 32 above). The two judgments were delivered on the same day. The two judgments should therefore be viewed as a simultaneous precedent and be read as one, in the same way as one would read a single judgment disposing of two cases.
\textsuperscript{48} Note 42 above, 226.
\textsuperscript{49} Ibid 233.
\textsuperscript{50} Ibid 237-241.
nothing to offer us. We might as well dispense with it.\textsuperscript{51} Davis also refers to Westen’s article and observes that

[when we consider that equality is central to our Constitution, Westen’s argument makes somewhat disturbing reading, particularly as the Constitution clearly intended that \textit{a definite content be given to the concept of equality}}.\textsuperscript{52}

After the author’s confidence in the Constitutional Court has been shaken by its judgment in \textit{Hugo},\textsuperscript{53} the Court having failed (in the author’s view) ‘to develop a substantive concept of equality which would \textit{give clear content} to a foundational value’,\textsuperscript{54} he bemoans the Court’s

uncritical borrowing from the minority judgment of L’Heureux Dubé J in the decision of the Supreme Court of Canada in \textit{Egan v Canada} . . . Equality is never defined or explained.\textsuperscript{55}

After a rather slighting reference to O’Regan J’s concurrence in \textit{Hugo} as causing him ‘particular . . . surprise’, and voicing his dismay at the fact that ‘[s]uddenly equality has become an abstract notion without any use of a comparator’, he then asserts the following:

The clear problem in the application of . . . [the Constitutional Court’s] own test for equality must have concerned the Court, for it quickly seized the opportunity to clarify its position, in a most unlikely factual context in the case of \textit{Prinsloo}.\textsuperscript{56}

As previously indicated, \textit{Prinsloo} was argued before \textit{Hugo}, the judgments were delivered simultaneously, and they have to be read together as a composite whole.\textsuperscript{57}

After expressing certain further misgivings, Davis, as part of his conclusion, states the following in robust fashion:

The Constitutional Court has rendered meaningless a fundamental value of our Constitution and simultaneously has given dignity both a content and a scope that makes for a piece of jurisprudential Lego land to be used in whatever form is required by the demands of the judicial designer.

Equality is too central a concept to be relegated to a secondary meaning. The Court needs to look at equality as a value which seeks to promote a democratic society that recognises and promotes difference and individual as well as group diversity and thereby exhibits a commitment to ensuring that all within society enjoy the means and conditions to participate significantly as citizens.\textsuperscript{58}

\textsuperscript{51} Ibid 238.
\textsuperscript{52} Note 43 above, 400 (my emphasis).
\textsuperscript{53} Note 32 above.
\textsuperscript{54} Note 43 above, 404. In passing I refer to the subsequent judgment of the Constitutional Court in \textit{National Coalition v Minister of Justice} (note 1 above, paras 60-1) where it rejects the unqualified use of the term substantive equality in favour of remedial or restitutionary equality. It would be helpful if those persisting in the unqualified use of substantive equality would indicate whether for them it encompasses the concept of equality of outcomes.
\textsuperscript{55} Ibid (my emphasis).
\textsuperscript{56} Ibid 407 (my emphasis).
\textsuperscript{57} See note 47 above.
\textsuperscript{58} Note 43 above 413-4 (my emphasis).
By contrast I think that Susie Cowen has ‘got it (substantially) right’ in her well-reasoned article ‘Can “dignity” guide South Africa’s equality jurisprudence?’, although not specifically in the logico-grammatical terms I have advanced. In regard to the narrow issue with which I am dealing, she rightly comments: ‘To value equality without saying more does not explain what outcome it is that we value. In Amartya Sen’s language, it does not answer the question, “equality of what?”’.60

At the root of the concerned and troubled thinking on equality that I have — as selective examples — referred to above, and at the root of similar approaches to equality, equal treatment and non-equal treatment in the context of ethics and law, is the mistaken analytical assumption I have referred to. It is to regard the word ‘equal’ in phrases such as ‘equal before the law’, ‘equal treatment by the law’, ‘non-equal treatment’, and even when used as a noun in an expression like ‘equality before the law,’ as a predicative adjective or a predicative noun, instead of as an attributive adjective or noun (in the special logical sense that I have used throughout).

V EQUALITY AS ATTRIBUTIVE

It is the sort of mistaken assumption that philosophers Peter Geach and Philippa Foot have identified in the work they have done on the concept ‘good’ as opposed to ‘bad’. It is also a mistaken assumption, I contend, in much of the debate on equality and non-discrimination. Geach uses the terms ‘predicative adjective’ and ‘attributive adjectives’ in a special logical sense. In this sense he points out, by way of example, that

‘big’ and ‘small’ are attributive; ‘x is a big flea’ does not split up into ‘x is a flea’ and ‘x is big’, nor ‘x is a small elephant’ into ‘x is an elephant’ and ‘x is small’; for if these analyses were legitimate, a simple argument would show that a big flea is a big animal and a small elephant a small animal.62

On the other hand:

[In the phrase ‘a red book’ ‘red’ is a predicative adjective in my sense although not grammatically so, for ‘is a red book’ logically splits up into ‘is a book’ and ‘is red’.]

Geach concludes that ‘good’ and ‘bad’ are always attributive, not predicative adjectives’ and invites us to consider the contrast in such phrases as ‘red car’ and ‘good car’. Person A, with poor eyesight, can at a distance see that an object that is red and B, a colour-blind friend with keener eyesight, can merely see it is a car. By pooling information it can be established that the object is a red car. But, says Geach —

59 (2001) 17 SAIHR 34.
60 Ibid 40 (footnotes omitted).
61 P T Geach ‘Good and Evil’ in P Foot (ed) Theories of Ethics (1967).
62 Ibid 64-5.
63 Ibid.
there is no such possibility of ascertaining that a thing is a good car by pooling information that it is good and that it is a car. This sort of example shows that ‘good’ like ‘bad’ is essentially an attributive adjective. Even when ‘good’ or ‘bad’ stands by itself as a predicate, and is thus grammatically predicative, some substantive has to be understood; there is no such thing as being just good or bad, there is only being a good or bad so and so.64

Foot65 affirms the foregoing with the following examples:

Peter Geach puts ‘good’ in the class of attributive adjectives, to which, for example, ‘large’ and ‘small’ belong, contrasting such adjectives with ‘predicative’ adjectives such as ‘red’. Such a colour word operates in independence of any noun to which it is attached, but whether a particular F is a good F depends radically on what we substitute for ‘F’. As ‘large’ must change to ‘small’ when we find that what we thought was a mouse was a rat, so ‘bad’ may change to ‘good’ when we consider a certain book of philosophy first as a book on philosophy and then as a soporific.66

The same can be said of ‘equality’ or ‘equal’ when applied to human beings and the application to them of the law. They are also words which, in the Geach and Foot sense, are attributive expressions. The expression that person A ‘is equal’ to person B is on its own meaningless. Something has to be added to ‘equal’ to give it meaning. It must be ‘equal’ with respect to something else. My argument is that this something else is ‘dignity’ as meaning ‘human worth’. To say that people are ‘equal before the law’ and that they enjoy the ‘equal protection and benefit of the law’ means that the law must protect and benefit all people equally with respect to their human dignity. So too, it is the fact that differential treatment impacts negatively on human dignity that ‘converts’ differentiation (as a neutral term) into unfair and hence unconstitutional discrimination.

This approach is implicit in Immanuel Kant’s categorical imperatives.

For example:

In the kingdom of ends everything has either a price or a dignity. What has a price can be replaced by something else as its equivalent; what on the other hand is raised above all price and therefore admits of no equivalent has a dignity.

What is related to general human inclinations and needs has a market price; that which, even without presupposing a need, conforms with a certain taste, that is, with a delight in the mere purposeless play of our mental powers, has a fancy price; but that which alone something can be an end in itself has not merely a relative worth, that is a price, but an inner worth, that is, dignity.67

64 Ibid.
65 Natural Goodness (2001).
66 Ibid 2-3.
67 Mary J Gregor (trans and ed) Immanuel Kant: Practical Philosophy (in The Cambridge Edition of the Works of Immanuel Kant, 1996) 84. [Groundwork of the Metaphysics of Morals AK 4:434-435]. The reference in square brackets is throughout to the Berlin Academy Edition (AK) of Kant’s writings, citing the name (in English) of the work cited, and the volume and page.
And:

[A] human being regarded as a persona, that is, as the subject of a morally practical reason, is exalted above any price; for as a person (homo noumenon) he is not to be valued merely as a means to the ends of others or even to his own ends, but as an end in itself, that is, he possesses a dignity (an absolute inner worth) by which he exacts respect for himself from all other rational beings in the world. He can measure himself with every other being of this kind and value himself on a footing of equality with them.68

The contemporary Kantian scholar, Allen Wood,69 when emphasising certain crucial features of Kant’s ethical thought, the centrality of which, he says ‘is not fully appreciated or whose very presence is often barely recognised’, succinctly states: ‘At the top of that list is Kant’s conception of human dignity: the absolute, hence equal, worth of all rational beings’.

Bernard Williams,70 although disavowing reliance on Kant, implicitly adopts a logico/analytical approach similar to the one I suggest and is implicit in Kant’s reasoning. He advances a number of considerations that can help to save the political notion of equality from [the] extremes of absurdity and of triviality.71 The absurdity, says Williams correctly, relates to the factual statement that humans are equal in respect of, for example, physical, intellectual, emotional, creative gifts, and the triviality to the political statement that humans ‘should be equal, as at present they are not’.72 Although his solution to the problem does not explicitly embody the points made by Geach and Foot, to which I have referred, his very statement of the problem and the content of his solution do affirm that the unavoidable question to be asked is ‘with respect to what are humans equal’ and that the answer to such question comes close to being ‘with respect to their human worth’.

One consideration that Williams alludes to is ‘common humanity’ whose features include the anatomical membership of the species Homo sapiens, the capacity to speak a language, to feel pain (both from immediate physical causes and from ‘various situations represented in perception and in thought’) and the capacity to feel affection for others and ‘the consequences of this, connected with the frustration of this affection, loss of its objects, etc.’. He correctly points out that likeness in the possession of these characteristics is not trivial, and reminds us that there are political and social arrangements that systematically neglect these characteristics in the case of some groups while acknowledging and protecting them in others.73 He rightly rejects as false the suggestion that the different treatment of persons in regard to these human character-

69 Kant’s Ethical Thought (1999) xiv.
71 Ibid 111.
72 Ibid 110-111.
73 Ibid 112-3.
istics, merely on grounds of colour, rests on some special sort of moral principle. Such a view, he maintains is a purely arbitrary assertion of will, like that of some Caligulan ruler who decided to execute everyone whose name contained three ‘R’ s. . . .

[T]hose who neglect the moral claims of certain men that arise from their human capacity to feel pain etc., are overlooking or disregarding those capacities; and are not just operating with a special moral principle, conceding the capacities to such men, but denying the moral claim. . . .

There are other, however, other and less definable categories universal to humanity, which may be neglected in political and social arrangements. . . . [T]here seems to be . . . a certain human desire to be identified with what one is doing, to be able to realize purposes of one’s own, and not to be the instrument of another’s will unless one has willingly accepted such role.74

Another respect in which, according to Williams, humans are equal, is with regard to certain sorts of moral ability or capacity, the capacity for virtue or achievement of the highest kind of moral worth. . . .

[T]here is a powerful strain of thought that centres on a feeling of ultimate and outrageous absurdity in the idea that the achievement of the highest kind of moral worth should depend on natural capacities, unequally and fortuitously distributed as they are; and this feeling is backed up by the observations that these natural capacities are not themselves the bearers of the moral worth, since those that have them are as gifted for vice as for virtue.75

In this regard Williams refers to Kant, in whom he believes this strain of thought is to be found ‘in its purest form’.76 Not only does Kant carry ‘to the limit the notion that moral worth cannot depend on contingencies’ but, as Williams puts it, Kant also emphasizes in his Kingdom of Ends the idea of respect as a moral agent and, since men are equally such agents, is owed equally to all, unlike admiration and similar attitudes, which are commanded unequally by men in proportion to their unequal possession of different kinds of natural excellence.77

But I trespass again on work in progress. If my contention is correct, namely, that ‘equal’, ‘equality’ and similar expressions are attributive words or expressions in the Geach and Foot sense, then the real debate should centre around the question ‘in what respects are all humans equal’ and ‘in what respects should all humans be treated equally’. My contention is that the attribute in respect of which all humans are equal, must be treated equally and may not be discriminated against, is their common and immeasurable human worth (dignity). This still needs full

74 Ibid 113-4.
75 Ibid 114-5.
76 Ibid 115.
77 Ibid.
exploration and elaboration, as does the meaning and import of the concept of human worth in the twenty-first century. However, those who would reject ‘human worth’ (‘dignity’, ‘menswaardigheid’, ‘Menschenwürde’) as the correct attribute, with regard to the understanding of equality, ought at least to come up with an alternative.