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Equality – Finding Space in the Environmental Discourse

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Abstract

This paper explores the relationship between the environment and human rights values such as equality and dignity, including the equality of dignity. It argues that environmental impacts cannot be divorced from these values and that equality and dignity can be very useful tools in interrogating the impacts of policies aimed at protecting environmental resources of marginalised individuals and groups of people.

Key words

Environment; human rights; equality; dignity

Resumen

Este artículo analiza la relación entre el medio ambiente y los valores de los derechos humanos, como la igualdad y la dignidad, incluyendo la igualdad de la dignidad. Se argumenta que los impactos ambientales no pueden separarse de estos valores y que la igualdad y la dignidad pueden ser herramientas muy útiles en el interrogatorio de los impactos de las políticas destinadas a proteger los recursos ambientales de los individuos y grupos de personas marginadas.

Palabras clave

Medio ambiente; derechos humanos; igualdad, dignidad

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Table of contents

Oñati Socio-Legal Series, v. 3, n. 5 (2013), 877-892
ISSN: 2079-5971

1. Introduction

In 2011, a series of 'wars' erupted in South Africa. Branded as the "toilet wars" this series of disputes essentially formed a rallying issue during local elections.[1] At the center of it all was a policy adopted by two local governments, each controlled by two different political parties, to provide communal toilets without any enclosures to people living in informal settlements.[2] As part of this policy, local government provided the basic infrastructure, i.e. the toilets and underground connections to the sewage systems, and the beneficiaries were expected to provide the enclosures for the toilets.

The toilet wars highlight the ways in which thousands of poor South Africans live in conditions of dismal sanitation, with poor access to water and other services. The implementation of these policies furthermore emphasizes the disproportionate treatment of this impoverished group vis-à-vis the rest of South African society, for which water appears at the turn of a tap and the majority of whom never have to face the anxiety of using a communal toilet enclosed by a blanket. Whilst the policy adopted by both municipalities was in essence an attempt to address the lack of/upgrading of sanitation infrastructure in these settlements (and represented bona fide attempts at service delivery) the toilet wars became symbolic of the indignity suffered by poor and marginalised communities in South Africa – an indignity that is certainly not shared across the socio-economic spectrum. The popular protests that erupted around the policy eventually led to an enquiry by the South African Human Rights Commission[3] as well as to a court case decided in the Cape High Court,[4] to which I will refer later in this paper.

In this paper, I use the toilet wars narrative, amongst others, to illustrate the challenges presented by the relationship between human rights and the environment. It is a relationship that, despite very vocal protests from the deep ecologist movement, must necessarily consider human beings, perhaps most especially those human beings placed on the margins. The issues under consideration here place a focus upon the inadequacy of substantive quality standards to regulate pollutants and toxins deployed without a consideration of the ways in which these pollutants and toxins impact disproportionately on different human groupings. Inevitably, such analysis confronts the acceptability of confining regulatory attention to escalating rates of environmental degradation and the exhaustion of natural resources without considering the impact of such exigencies upon indigent human communities.

Right at the infancy of the now maturing interrogation of the nature and extent of their relationship, Dinah Shelton (1991) suggested that human rights and the environment represent different, yet overlapping societal values.[5] I would suggest, however, that the relationship is even closer that this and that the absence of certain human rights values (such as equality and dignity) can profoundly impact on people's entitlements to environmental goods and services – and indeed – that if we construct 'environment' to the exclusion of these values, we succeed in sustaining structural disadvantage. I would therefore suggest that human rights and the environment are more than simply overlapping values: Within certain contextual relationships they are in fact symbiotic.

[1] For some insights into the toilet wars, see the Mail and Guardian (2011).
[2] In Cape Town, the Democratic Alliance (DA)-controlled local government provided these toilets to an informal settlement called Makhaza, in Khayelitsha, and in the township of Rammulotsi in the Free State the African National Congress (ANC)-controlled municipality of Moqhaka similarly supplied such toilets.
[3] See the South African Human Rights Commission Report titled "Free State Open Toilet Finding May 2011".
[4] Beja and Others v Premier of the Western Cape and Others [2011] 3 All SA 301 (hereafter Beja).
[5] Deliberations on the conceptual relationship between human rights and the environment have been taking place for a considerable amount of time. For a narrative on the proposals for an environmental right, see Melissa Thorme (1991, p. 301-305).

This implies, moreover, that the relationship between human rights and the environment is not a universally identical one. Taking as the point of my departure the theory that poverty should be defined relatively,[6] I would suggest that a society such as South Africa, which is steeped in a history of racial discrimination and in a present of continuing systemic inequalities, offers a relatively distinctive context for this relationship. It is a context which obviously differs from one where resources are more equally divided and also differs from the context of less stark forms of poverty, but South Africa may also differ from other countries that also battle poverty and the inequality perpetuated by binaries such as race and gender. South Africa is, therefore, relatively distinctive, yet at the same time, I recognise that even in affluent societies some resemblances between them and the South African situation may become apparent: research has shown, for example, certain patterned similarities between societies – such as the almost universal fact that women are generally poorer and have fewer opportunities for employment than men do (Fredman 2012).

Central to my 'contextual' interpretation of the relationship between human rights and the environment is the concept of equality. Equality is, however, a loaded term and prone to numerous interpretations. As such, I will offer for contemplation a particular version of equality that has emerged over the last 20 years of constitutional jurisprudence in South Africa, tracing some of the roots of the broad concept of equality and setting out how it has come to be understood in the South African context. This paper also addresses challenges in applying equality in the context of the environment and in addressing claims to natural and scarce resources.

2. A narrative context

At the outset, I should clarify that my own conception of the term 'environment' is somewhat anthropocentric in nature. However, I understand 'environment' as something which is interrelated with humans rather than separate from humans. The conception I deploy challenges the hierarchy in nature that places humans at the top of the pyramid and supports the notion that each species is equal to and interconnected with other species.[7] I do, however, recognise that humans have the ability to transform nature. This human capacity is not unlimited and is counteracted by nature's ability to transform humans, which demonstrates interdependence between humans and nature. I also understand that there is a nexus between poverty and the degradation of the environment and that in many countries, including South Africa, there remains (unashamedly so) a related nexus between race, poverty and the burdens of environmental degradation – and that this betrays the universal human rights promise of a life lived in dignity and equality for all.

As an environmental lawyer living in a country permeated by wide chasms between rich and poor I am reminded of this betrayal every time I drive on a major highway in my hometown and am confronted by the massive shanty towns carving out spaces in our precious wetlands or every time I open the newspaper and am challenged by narratives detailing the misery of poor people's lives in unsanitary conditions. I was reminded of this whilst researching for this paper, when I came across the following excerpt:

At around two o'clock in the morning on 27 March 2005, Phiri resident Vusimuzi Paki awoke to the shouts of a tenant, who was trying to put out a fire in one of the other backyard shacks on Paki's property. Assisted by neighbours, the first crucial minutes were spent trying to extinguish the fire using the pre-paid water meter supply that the Johannesburg Water company had recently installed to control the

[6] For a discussion of a relativist definition of poverty, see Sen (1983, p. 153-169).
[7] For further reading on the inter-connection between human and the environment, see Bookchin (1982) and Merchant (1992).

Oñati Socio-Legal Series, v. 3, n. 5 (2013), 877-892
ISSN: 2079-5971

residents' water supply. However, the water pressure was insufficient to make much impact on the fire and, after a while, the pre-paid meter water supply automatically disconnected due to insufficient water credit. Residents were then forced to scoop up ditch water with buckets in a desperate attempt to put out the fire. More minutes passed. One neighbour tried to telephone the police at Moroka police station but no one answered the phone. After battling for an hour, residents finally put out the fire, but not before the shack had burnt to the ground. It was only after Paki's tenant returned home from her night shift that everyone discovered to their horror that her two small children had been sleeping in the shack. They both died in the fire (Bond and Dugard 2008, quoted in Dugard 2008, p. 593).

Such narratives play a central role in understanding the link between human rights and the environment. Such realities confirm that poverty is often a driver behind environmental destruction, and that the competing claims emerging between environmental protection and the restoration of equality and dignity are layered with complexities – but also that the claims of the indigent to basic environmental rights are not often prioritised. Moreover, such narratives fly in the face of the ideal of transformative social justice which is pivotal to South Africa's constitutional project.[8]

Recently, Du Plessis (2011) made a very convincing argument for an expansive reading of section 24 of the Constitution, which sets out the environmental right. She argues that an expansive view requires recognition of an interface between the spirit and meaning of the substantive constitutional environmental right, poverty, and people's health and well-being (Du Plessis 2011). In particular, she cogently makes the case for a contextual consideration of the goal of alleviating poverty as part of achieving transformative social justice when interpreting the environmental right (Du Plessis 2011). In doing so, she details the intricate relationship between poverty and the environment and upon which the present argument is based. There is neither need, nor space,[9] to re-make that case so well established by Du Plessis, but the narratives cited above provide an undeniably vivid image of the ways in which poverty implicates human rights to equality and dignity. I argue therefore that the relationship between human rights and the environment cannot ignore this reality, and moreover, that equality and dignity values are fundamental to questions the questions of environmental justice lying at its heart. Accordingly, I turn now to the concept of equality and will start by alluding to some of the earlier conceptual roots that have paved the way for the particular vision of equality that has evolved in the South African context.

3. The many faces of equality – Aristotle and Rawls as a basis

One of the earliest attempts at unpacking the concept of equality is Aristotle's account of distributive justice, which is concerned with the distribution of "… honours or wealth or anything else that can be divided among members of a community who share in a political system, [in which it is possible] … for one member to have a share equal or unequal to another's" (Solomon and Murphy 1990, p.44). In formulating a distributive concept of justice, Aristotle treats equality as a manifestation of justice. In order for a state to distribute goods such as wealth or honour (or environmental goods such as sanitation services) in a just manner, it should do so equally, according to the principle of geometric equality. Equality, however, is determined on a proportionate basis based on the assertion that people who are equal will receive equal shares and those who are not equal will not receive equal shares (Solomon and Murphy 1990). Aristotle concludes that the basis for

[8] For a discussion on 'transformative constitutionalism', see Klare (1998, p. 146-188). See also, Mureinik 1994, p. 31-48). For a response to Klare, see Roux (2009, p. 258-285).

[9] There is a growing collection of literature on the relationship between the environmental right and other values and this paper does not focus on the right to the environment itself. See for example Feris (2000, 2009), Woolman and Bishop (2009) and Du Plessis (2010).

distribution should be merit, where goods are distributed according to that which one deserves. However, conceived of as the founding criterion for distribution of goods, merit is problematic. Given that merit and achievement result from skills and virtues that are a consequence of hereditary endowment or social structure, not everyone is equally situated in terms of the skills and virtues required for the distribution of social goods. This has the effect that not everyone has an equal opportunity to acquire a good. Furthermore, according to Aristotle's conception of justice, people can only lay claim to a value if they deserve it. However, it is impossible to decide who *deserves* to benefit from a restored wetland and who does not. It is similarly impossible to decide who *deserves* to be burdened by the effects of environmental degradation and who does not. I would suggest that it is, accordingly, unreasonable to distribute environmental benefits and burdens on the basis of merit.[10]

Despite its limitations (especially in the contemporary environmental context) Aristotle's formulation of justice does provide, however, a point of departure. His use of the concept of equality as an element of justice is particularly important. Various Western countries have in fact based their legal systems on the Aristotelian maxim that like should be treated alike, while those who are different should be treated differently in proportion to their difference (Albertyn and Kentridge 1994). Nonetheless, the central Western liberal reliance upon formal equality (i.e. formally equal treatment of all individuals in society) tends to assume that all people are similarly situated and are unequal only to the extent that they are treated differently to other people in a same situation. The greatest flaw of this approach is that it ignores the social context of structural inequality and, for this reason, is open to critique – a point with profound relevance, as I will argue below, for the particular relationship between equality and dignity in the context of the relationship between human rights and the environment.

Departing to a certain degree from the Aristotelian maxim, Rawls (1971, p. 303), in his principled understanding of justice, also emphasises equality. His central thesis is that inequalities in birth, natural abilities and historical circumstances are *undeserved* and therefore morally arbitrary (Kukathas and Pettit 1990). Justice therefore demands that people who are disadvantaged as a result of historical and biological contingencies should be treated in a way that would diminish or eradicate arbitrary inequalities, so that individuals who are unequally situated in society should not be unfairly disadvantaged as a consequence. To the extent that they *are* disadvantaged, moreover, justice requires that their unequal position be remedied. In view of the systemic inequities pervading South African society, Rawls offers an appealing theory. Equally appealing is his view that social and economic inequality is acceptable only if it is arranged so that the inequalities are to the greatest benefit of those who are systemically the least advantaged.

Rawls identifies the voluntary principles upon which justice should be based in the rational society as the following:

- First Principle

Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

- Second Principle
  - Social and economic inequalities are to be arranged so that they are both:
  - to the greatest benefit of the least advantaged, consistent with the just savings principle, and
  - attached to offices and positions open to all under conditions of fair equality and opportunity (Rawls, p.302).

[10] Natural resources are generally viewed as a public good, the use of which should be equally beneficial to everyone, regardless of status or standing in life.

Oñati Socio-Legal Series, v. 3, n. 5 (2013), 877-892
ISSN: 2079-5971

Rawls (1971) explains that fairness looks at the welfare of the least advantaged group in society and ensures that this group fares well without endangering the liberty of other groups. No member of society is therefore required to accept a lesser liberty for the sake of the greater good of others. Secondly, fairness generates its own support and is thus stable, because every person's liberty is secured (Rawls, p. 302). Thirdly, fairness implies respect for others, thereby not only increasing social co-operation, but also instilling a sense of personal value into people (Rawls, p.302).

The second principle, the first part of which is often referred to as 'the difference principle' (Miller 1976, p.41), requires, therefore, that goods be distributed in a way that will advantage the most vulnerable members of society. Preference will only be allowed to the extent that it maximises benefits to the most disadvantaged in society. The second part of the principle, the so-called 'principle of fair equality of opportunity' (Miller 1976, p.41), requires that people with equal competencies and abilities should have equal access to the relevant social and economic positions. Rawls (1971) suggests that these principles should be applied in a specific lexical order. The first principle must be fully satisfied before the second can be invoked. Similarly, the principle of fair equality of opportunity is to take precedence over the difference principle. This ordering establishes a strict preference among the different demands of Rawls' theory. Equal liberty has first priority, followed by the demand for fair equality of opportunity. Once these have been fully satisfied, the arrangement of social and economic inequalities can be addressed in order to benefit the least advantaged in society.

Rawls thus goes beyond the notion of formal equality. The second principle, for example, requires that, in addition to maintaining the usual kinds of social overhead capital, the government should ensure equal access to education and culture through subsidised or public schooling, and should promote equality of opportunity in economic activities by policing the conduct of corporations, by preventing monopolies, and by guaranteeing a social minimum income. He focuses, therefore, on the welfare of the individual in society, as opposed to the utilitarian approach, which focuses on the welfare of society as a whole.

Rawls' theory of justice serves to justify an equal distribution of environmental costs and benefits. His theory is also one that generates rights. It can consequently be argued that every individual in society has an equal right to the benefits derived from the environment. Rawls would similarly argue for the maximisation of environmental benefits and the minimisation of environmental burdens for all. To the extent that people are disadvantaged by contingencies such as gender, race and class, they should not, according to his theory, be treated unequally. If people of colour, women and poor people disproportionately bear the burdens of environmental degradation, it should be considered to be unjust and unfair.

Rawls rejects the Aristotelian assumption that all people are equally situated, arguing that inequalities may be derived from birth, natural ability or historical or social circumstances. He takes the context of individuals and groups of people into account. As such, his theory provides a suitable background for an examination of the concept of equality and its relationship to the environment.

4. Equality: a South African formulation

In view of South Africa's history, it is not surprising that the concept of equality has taken the spotlight in human rights jurisprudence. 'Equality' is included in the Constitution both as a central constitutional value and as a right.[11] As a value,

[11] As a value it appears in several constitutional provisions. Section 1 of the Constitution declares that South Africa is a sovereign, democratic state founded on certain values. Amongst others, these values included human dignity, the achievement of equality and the advancement of human rights and freedoms. The Bill of Rights is described in section 7(1) as "a cornerstone of democracy [that] … affirms the democratic values of human dignity, equality and freedom". Section 36 concerns the limitation of

equality gives substance to one of the prime objectives of the Constitution, namely the transformation of the country into a democratic state (Albertyn and Goldblatt 1998). As a right, equality provides legal mechanisms for achieving *substantive* equality, thereby entitling groups and persons to claim the fulfilment of the right to equality as well as the means to achieve it (Albertyn and Goldblatt 1998). Over the last 19 years of constitutional jurisprudence, equality has taken on some very significant features, addressing context, group nature, socio-economic dimensions and dignity.

In shaping the transformative ideal embedded in the South African Constitution, the South African Constitutional Court has adopted a contextual interpretative approach to interpreting the right to equality. A very elementary explanation of 'context' is set out by Curry and De Waal who explain that "[t]he meaning of the words depends on the context in which they are used. The provisions of the Constitution must therefore be read in context in order to ascertain their purpose. 'Context' here has a narrower and a wider signification. The wider sense of context is the historical and political setting of the Constitution. The narrower sense is the constitutional text itself" (Curry and De Waal 2005, p. 153). So what then is the meaning of equality in the South African historical and constitutional context?

In *President of the Republic of South Africa v Hugo* [1997] 6 BCLR 708 at para 41,[12] the South African Constitutional Court noted that equality cannot be achieved if it is reduced to the notion of identical treatment for all:

> We need … to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not be unfair in a different context.

Hugo confirms that Aristotle's formal equality is not appropriate and that context, as alluded to by Rawls, matters. This more substantive approach was reiterated by Justice Ngcobo in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* [2004] 4 SA 490 at para 74[13] who emphasised that

> The achievement of equality is one of the fundamental goals that we have fashioned for ourselves in the Constitution. Our constitutional order is committed to the transformation of our society from a grossly unequal society to one 'in which there is equality between men and women and people of all races'. In this fundamental way, our Constitution differs from other constitutions which assume that all are equal and in so doing simply entrench existing inequalities. Our Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid legal order cannot be eliminated without positive action being taken to achieve that result. We are required to do more than that. The effects of discrimination may continue indefinitely unless there is a commitment to end it.

Historically, distribution of social goods, including natural resources, in South Africa occurred on an inequitable basis – indeed, continuing structural inequities characterising the natural resource industry means little has changed – a point emphasised by Justice Ngcobo in a dissenting opinion *Bato Star*, when addressing the issue of quotas for marine living resources and the deeply contentious issue of overhauling the fishing industry:

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rights and states that rights may only be limited if the limitation is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom." Finally, the interpretation clause, section 39, instructs courts, tribunals and other forums that in the interpretation of the Bill of Rights they must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. (Writer's own emphasis throughout).

[12] Hereafter, Hugo.

[13] Hereafter, Bato Star.

Oñati Socio-Legal Series, v. 3, n. 5 (2013), 877-892
ISSN: 2079-5971

> A foundational principle of the Act is the transformation of the fishing industry. This is an industry that has been and continues to be dominated by a few so-called pioneer companies. These companies were and continue to be controlled and owned predominantly by members of the community that were privileged under apartheid and had exclusive access. There was, and still is, therefore a need to ensure that access to this industry is opened to those newly created companies mostly controlled and owned by communities that were previously excluded from this industry ([2004] 4 SA 490 at para 78).

A substantive vision of equality is thus one that assesses separate claims to social goods such as natural resources, but not exclusively through the formal lens of merit or on the basis of assumed similarity. The South African approach is one that pays explicit heed to historic and to present social conditions as being an indispensable analytical foundation for the substantively equal distribution of such goods.

Another important feature of this substantive equality approach is that it is geared towards protecting not only individuals, but groups. The Constitutional Court has recognised that groups are often the targets of discrimination. In interpreting the right to equality under the Interim Constitution,[14] O' Regan J, for example, held:

> Section 8 was adopted … in recognition that discrimination against people who are members of disadvantaged groups can lead to patterns of group disadvantage and harm. Such discrimination is unfair: it builds and entrenches inequality amongst different groups in society (*Brink v Kitshoff NO* [1996] 6 752 at para. 42).

The primary purpose of the Constitutional equality provision is to prohibit such patterns of discrimination (*Brink v Kitshoff NO* [1996] 6 752 at para. 42). This view thus takes into account that structural inequalities are often group-based and suggests that a substantive equality approach must take cognisance of the systemic nature of prejudice and disadvantage experienced by people as a group and not just as individuals. This is particularly apt in the environmental human rights context. Denial of environmental rights such as access to water or access to clean energy or access to sanitation often attaches to a particular community or residential area. Whilst rights to water, energy or sanitation are arguably rights to environmental goods, they are also rights of a socio-economic nature – suggesting their intimate relationship with more traditional distributive justice concerns. The relationship between the nature of the interests in play inevitably means that a denial of environmental human rights to a group indicates that the equality analysis is closely connected to an analysis of socio-economic rights – and to conceptions of equality operative in that context.

De Vos (2001, p. 258) explains the relationship between socio-economic rights and equality as follows:

> At the very least it implies that any determination of the constitutional acceptability of state action or inaction regarding the realisation of social and economic rights must be conducted with reference to the impact of that act or omission on the group under discussion. This in turn would require an understanding of the structural inequalities in society in general and the specific inequalities between groups in the specific context within which the determination is to take place.

Equality in this context has an instrumental value in that it is used as a yardstick in measuring the reasonableness[15] of the State's measures in relation to socio-economic rights. The case of *Khosa and Others v Minister of Social Development and Others* [2004] 6) SA 505,[16] which dealt with denial of social security to

[14] Constitution of the Republic of South Africa Act 200 of 1993.
[15] The Constitutional Court has, through a series of cases related to socio-economic rights, developed a "reasonableness review" in terms of which it assesses the action or inaction of the state in accordance with the constitutionally permissive restraints in socio-economic rights, i.e. "progressive realisation" of such rights and in accordance with "available resources." The court would test therefore whether a failure to fulfil a duty under any of the socio-economic rights are reasonable in the circumstances.
[16] Hereafter, Khosa.

permanent residents, further illustrates the relationship between equality and socio-economic rights. The court specifically enquired whether denial of these rights to permanent residents amounted to unfair discrimination in terms of s9 (3) of the equality clause. The court noted that permanent residents are a vulnerable 'group', which nevertheless contributes to the welfare system through the payment of taxes ([2004] 6 SA 505 at para. 74). Yet, the court said, "the lack of congruence between benefits and burdens created by a law that denies benefits to permanent residents almost inevitably creates the impression that permanent residents are in some way inferior to citizens and less worthy of social assistance" ([2004] 6 SA 505 at para 74). The Court explicitly noted the *group* impact of such exclusion, in that it places an undue burden on the families, friends or communities of the permanent residents. The Court concluded that the denial of social security benefits to a marginalised group constituted unfair discrimination in terms of section 9(3) of the Constitution.

The court in the *Khosa* case also alluded to a fourth aspect of equality which relates to its relationship with dignity, namely the 'equality of dignity'. Dignity is has developed as a strong normative concept in the context of international human rights law. In a relative sense, dignity has been defined as being

> the particular cultural understandings of the inner moral worth of the human person and his or her proper political relations with society. Dignity is not a claim that an individual asserts against society; it is not for example, the claim that one is worthy of respect merely because one is a human being. Rather, dignity is something that is granted at birth or on incorporation into the community as a concomitant of one's particular ascribed status, or that accumulates and is earned during life of an adult who adheres to his or her society's values, customs and norm: the adult, that is, who accepts normative cultural constraints on his or her particular behaviour (Howard 1991, p. 81).

However, in South African jurisprudence, dignity adheres to everyone, equally so, and in *Hoffmann v South African Airways* [2001] 1 SA 1; [2000] 11 BCLR 1211, the Constitutional Court held that "at the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded *equal dignity*" ([2001] 1 SA 1; [2000] 11 BCLR 1211 at para. 27) (Own emphasis). Dignity is therefore one of the considerations to be taken into account when assessing unfair discrimination.

The centrality of dignity also arose in the case of *Beja* where the court had to address the City of Cape Town policy of providing toilets without enclosing structures. The case dealt with the right to adequate housing[17] which is guaranteed by section 26 of the Constitution. In noting the impacts of this policy on dignity the court at one point vividly describes its own observations during an inspection *in loco:*

> Most of the self-enclosed toilets were unsatisfactory to satisfy dignity and privacy. E.g. I observed a toilet, pointed out by a woman occupier that had no door. The opening faced a public thoroughfare. She indicated she could not afford a door. There was no provision made for the disabled, the elderly and other vulnerable groups. I was particularly disturbed by the conditions observed in the case of an elderly, wheelchair bound, gentleman who had to use a makeshift enclosure. It was constructed with pieces of wood and no roof. Access with a wheelchair was almost impossible. The only access to water for use to him was from the cistern above the toilet bowl ([2011] 3 All SA 301 at para. 29).

The Court came to the conclusion that any housing development which does not provide for toilets with adequate privacy and safety would be inconsistent with the right to housing and moreover would be in violation of the constitutional rights to privacy and dignity ([2011] 3 All SA 301 at para. 143-144). Former Justice Sachs

[17] The South African Constitution does not include a right to access to sanitation. The right to housing has, however, in this case been interpreted to include the right to sanitation.

Oñati Socio-Legal Series, v. 3, n. 5 (2013), 877-892
ISSN: 2079-5971

eloquently explains the role of dignity in a society riddled with structural inequalities. He says: "Respect for dignity is the unifying constitutional principle for a society that is not only particularly diverse, but extremely unequal. This implies that the Bill of Rights exists not simply to ensure that the 'haves' can continue to have, but to help create conditions in which the basic dignity of the 'have nots' can be secured" (Sachs 2009, p. 213). The intimate relationship between inequality and dignity is relatively clear, and the inequitable distribution of natural resources and inequitable burdens of pollution and degradation exacerbates, as well as instantiating new forms of, the structural injustices captured by the notion of inequality of dignity.

Over the last 19 years, in the South African context, we have witnessed the birth of a concept of equality which goes beyond formal equality, and to the extent that social and economic claims arise from systemically disadvantaged individuals and groups, equality has also become an instrumental value in deliberating upon socio-economic rights. We have also been reminded that everyone should be able to lay equal claim to dignity and equality. The picture is not, however, all rosy, and we have faced some substantial challenges in fulfilling this ideal version of equality. The deepest challenges most often arise when we address the provision of access to scarce resources to a sector of the community which in the past was denied access to those same resources. How then in the face of dwindling fish stocks, for example, do we ensure that we meet the transformation concerns raised by Justice Ngcobo in the Bato Star case? How do we provide redress when we are faced with the almost futile obligation to divide a dwindling pie amongst numerous claimants?

5. Equality and the environment – an attainable ideal?

The magnitude of this challenge was illustrated in *Mazibuko and Others v City of Johannesburg and Others* [2010] 4 SA 1. The case concerned the right to access to sufficient water, as guaranteed by section 27(1) (b) of the Constitution. A poor, unemployed community challenged a City of Johannesburg policy which required the City to put in place a so-called pre-payment water system. In accordance with this system, the City supplied 6 kilolitres of free water per household per month. Once the 6 kilolitres were consumed and in the absence of any top-up by the customer, the water supply was automatically shut off and the consumer had to buy water credits in order to be supplied with water again. The applicants were too poor to buy water credits and argued that 6 kilolitres would "with extreme care" last for no more than 15 days. The Court had to decide whether the City's policy for the supply of six kilolitres of free water per month to every account-holder in the city (the Free Basic Water policy) was in conflict with section 27 of the Constitution or section 11 of the Water Services Act,[18] and whether the installation of prepaid water meters by the City in Phiri was lawful.

In dismissing the claim, the Court used 'the reasonableness review'[19] to find that section 27 "does not require the state upon demand to provide every person without sufficient water with more; rather it requires the state to take reasonable legislative and other measures progressively to realise the achievement of the right of access to sufficient water, within available resources" ([2010] 4 SA 1 at para 50). The Court also refused to entertain the applicants' argument that determining the content of section 27 required the Court to quantify an amount of water sufficient for a dignified life. The Court reasoned that this would require it to

[18] Act 108 of 1997. Section 11 of the Act places a duty on every water services authority to progressively ensure efficient, affordable, economical and sustainable access to water services to all consumers or potential consumers in its area of jurisdiction.

[19] The South African Constitutional Court has had the opportunity to decide a number of socio-economic rights cases. In deciding these cases the Court has rejected the "minimum core" approach as the basic threshold for assessing compliance by the State with its duties in terms of the various socio-economic rights. Instead on each occasion, it has elected to evaluate whether the State's conduct was reasonable under the specific set of circumstances. This approach has been dubbed "reasonableness review".

determine the minimum core of the right to sufficient water. This, the Court viewed as inappropriate, as "[f]ixing a quantified content might, in a rigid and counter-productive manner, prevent an analysis of context" ([2010] 4 SA 1 at para 50). The Court furthermore held the view that it was institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps the government should take to ensure the progressive realisation of the right. In adopting a highly deferential approach, the Court stated that this function should be fulfilled by the legislature and executive, i.e. by the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights ([2010] 4 SA 1 at para 61).

The community in Phiri is undeniably poor. In fact, they live in circumstances of abject poverty. The first applicant, Lindiwe Mazibuko, described in her affidavit how she lived in a household of 20 unemployed, elderly and young people and relied largely on her mother's old age pension of approximately R820 per month. In the supporting affidavits, the applicants also detailed the impact of the lack of sufficient water on the lack of sanitation and by implication, on their dignity. Furthermore, the case raised issues of dissimilar treatment amounting to unfair discrimination, as in middle-class (historically white) suburbs no similar policy was applied and residents there were provided with a monthly water bill. It is no surprise then that the outcome of this case was severely criticised, with some authors arguing that we are now at the point of retreating from the socio-economic rights promises contained in the Constitution (Kapindu 2010).[20]

On the other hand, South Africa is a severely water scarce country.[21] Its fresh water resources are in short supply and disproportionately spread. To make matters worse, climate change will potentially impact significantly on both the availability of, and the need for, water in South Africa (National Water Resources Strategy 2004, p. 50), and modelling studies have shown that the region will become significantly drier (Engelbrecht 2010). Whilst the decreasing quantity of water has been a concern for decades, more recently these concerns have been compounded by water quality issues resulting from water pollution caused by numerous activities, such as mining, industrial processes and run-off from agriculture. So given these constraints in the quantity and quality of water, and given the uncertainty created by climate change for future water prospects, can one really expect government to guarantee a fixed amount of water to poor people? Louis Kotze (2010, p.155-156) argues that "[t]he availability of water and all of the conditions which might influence this availability are highly variable, unpredictable, and in a constant state of flux. The flexible, adaptive and accommodative interpretative model that 'reasonableness review' offers in this instance would also be particularly conducive to an environmental policy milieu, which must be equally adaptive and accommodative of the variable effects of climate change on water resources in South Africa. In short: uncertainty necessitates manoeuvrability." He goes on to suggest that in this manner the Court has (unintentionally) protected water as a resource (Kotze 2010). Should one therefore guarantee access to scarce resources such as water, even if such guarantee serves to protect marginalised groups?

The *Phiri* case illustrates the difficulty of consistently infusing environmental concerns about resource protection and degradation with 'substantive group based

[20] This argument was most robustly made by Kapindu (2010). For more critique on this case see also Dugard (2007) and Wesson (2011).

[21] Kader Asmal in introducing the Department of Water Affairs and Forestry (now the Department of Water Affairs) White Paper on a National Water Policy for South Africa (WPNWPSA) described the situation as follows: "South Africa is an arid country with rainfall less than the world average which is unevenly distributed across the country. With just over 1200Kl of available freshwater for each person each year at the present population of about 42 million, we are on the threshold of the international definition of 'water stress'" (WPNWPSA 2007, p14).

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equality as dignity' considerations. It certainly raises the question of whether we should continue to protect a resource such as water through the denial of a basic constitutionally guaranteed socio-economic right to poor communities. The implication of this case is that groups who already occupy a disadvantaged position in society must bear an additional burden, in that they should sacrifice their claim to sufficient water so as to protect a scarce resource for future generations. At the same time, middle class and wealthy South Africans are not similarly restricted with respect to water use. In *Phiri* this point was raised in the context of the ability of advantaged suburbanites to pay water by way of a billing system. Similarly, provinces continue to provide environmental authorisations for the development golf estates that use copious amounts of water. The failure, furthermore, to interrogate the very real conditions of poverty and to measure them up against the conditions of middle-class and wealthy suburbanites is a denial of the substantive equality which requires precisely such contextual considerations. It is in this respect that the Constitutional Court floundered. In assessing the prepayment system the Court relinquished the substantive equality jurisprudence so carefully carved out over the last two decades and failed to consider ways in which scarce resources can be allocated within the boundaries of distributive justice.[22]

Surely a human rights approach to the environment requires something more than a dichotomous approach rigidly separating a necessary flexibility of response in the face of environmental pressures from socio-economic contextual considerations. Liebenberg (2010) argues, for example, that the development of a normative content of socio-economic rights does not necessarily imply the setting of fixed, quantitative standards in a "rigid as counter-productive manner" (Liebenberg 2010, p. 471). Pricing of water, for example, cannot be set at a fixed scale applicable to both low and high income households. Nor can businesses and households be billed at the same rate. Policies aimed at the management of natural resources must, therefore, use a broader and more nuanced lens and should interrogate ways in which the need for environmental protection does not negate notions of substantive equality or impair dignity. At a minimum, the starting point cannot be, as it seemed to have been in the *Beja* case, that poor people are so devoid of even the barest modicum of dignity allowing them happily to defecate in public.

As a watchdog, it is the role of the Court to ensure adherence to the application of human rights values in the adjudication of scarce natural resources. These values include equality and dignity, and whilst the relevant policy choices may on the face of it be consistent with acceptable goals of resource protection and conservation, the application of policy responses in a way that erodes these underlying values cannot be acceptable and relies upon a false perception concerning the nature of distributive socio-economic considerations.

6. Conclusion

Twelve years ago, whilst we South Africans were still in the throes of our young democracy, I made the point that South Africa's environmental right is an essential requirement for the advancement of environmental justice (Feris 2000)[23]. A South African formulation of environmental justice, so I argued, is essentially captured in the relationship between the environmental right and its relationship with other rights in the Constitution, both substantive and procedural, but primarily in relation to substantive rights to equality and dignity. Now, years on, I still believe that the environmental right, if interpreted broadly to safeguard the environmental concerns of marginalised communities, may play a role in advancing environmental justice,

[22] For a discussion the application of distributive justice in the environment, see Kaswan (2003, p. 1044).
[23] For a discussion the application of distributive justice in the environment, see Kaswan (2003, p. 1044).

but I also believe in the *central* relevance of equality and dignity considerations for the environmental context.

The narratives detailed earlier in this paper remind us that environmental impacts cannot, in any case, be divorced from the human rights values of equality and dignity. At the same time, these values can be a very useful tool in interrogating the impacts of policies aimed at protecting environmental resources on marginalised individuals and groups of people. Protecting the environment in the absence of human rights values such as equality and dignity will only serve to sustain structural disadvantage in unequal societies. It is time, therefore, that we find explicit space for 'equality as dignity' in environmental discourse.

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