



## The Right to Equality under South Africa's Transformative Constitutionalism: A Myth or Reality?

Mashele RAPATSA<sup>1</sup>

**Abstract:** This article examines the notion of the right to equality, considerate of South Africa's perspective of constitutional democracy which has embedded human rights philosophy at the bedrock of its redistributive justice. The article derives strength from Aristotelian view on equality, and examines how transformative constitutionalism envisioned advancing substantive equality with the view of restoring society's sound social and economic relations. It has been observed that equality, in its formal or substantive form, will remain a distant dream owing to spiraling triple social challenges of unemployment, poverty and inequalities. These social problems have been given added impetus by pervasive trends of dualistic public-private services existing across all sectors of society. This public-private service is class-based, and largely perpetuates inequalities. Thus, South Africa's legal normative framework, often globally commended, is yet to meaningfully infuse into everyday social realities.

**Keywords:** equality; human rights; transformative constitutionalism social transformation

### 1. Introduction

The epilogue to the 1993 Interim Constitution posited the notion of 'equality' as one of fundamental ideals that epitomized South Africa's constitutional project of transformation. This would augment the process of transforming the nation from a deeply divided past, a society that was characterized by strife, conflict, untold suffering and injustices, to that which is grounded on democratic values, social justice and protection of fundamental human rights (Small and Grant, 2000). This it pursues by affirming that a future founded on recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans irrespective of race, class, colour, belief or sex, is indispensable to the

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<sup>1</sup> Lecturer, School of Law, University of Limpopo (South Africa). PhD in progress, "Globalisation Studies and Humanitarian Action" University of Groningen, Netherlands. Address: Marktstraat 2, 9712PC Groningen, Tel.: +31618672558. Corresponding author: m.j.rapatsa@rug.nl

new democratic dispensation (Langa, 2006). Thus, equality evolves as an all-encompassing norm which covers wide ranging aspects in society, inclusive of social interfaces, gender, religion, racial, tribal, economic and political landscapes amongst others. Indeed, this has been given added impetus by South Africa's polarized past which was factually characterized by exclusivity premised on patriarchal tenets founded mainly to bestow exclusive enjoyment of secure livelihood to minority race group in society. Hence, the right to equality is an integral part of South Africa's history, present jurisprudence and shall continue to play a crucial function in modelling the country's transformation agenda, its friendliness towards the human rights ideology, social settings and people's relations and legal developments at large.

In perspective, it has been twenty one years since South Africa made a groundbreaking transition and leaped into a democratic dispensation premised on constitutional supremacy. This 1994 democratic dispensation officially brought an end to apartheid, a long-standing repressive regime which retains the status of dismal human rights record in the history of South Africa (Sarkin, 1999; Landsberg and Mackay, 2006). The apartheid regime embedded widespread systems of political, economic and social discrimination and disenfranchisement (Klotz, 1995), thereby rendering the right to equality a dispensable theory. This enabled structural inequalities on race, economic and geographical grounds to be a common phenomenon (Ngwena, 2000). Therefore the 1994 transition explicitly culminated in high optimism that all citizens would from then onward be afforded the right to equality, which would be fully respected and protected under law. Perhaps, it is significant to note that the majority of South Africans supported the broader cause of fighting to eliminate apartheid because in principle, they yearned for equality before the law, and that was in accordance with aspirations of safeguarding and advancing preservation of human worth. The primary goal was arguably to seek an end to inequalities and unjustifiable discrimination (Currie & de Waal, 2005), which were prevalent in both public and private domain, as were discernible in the content and application of the law itself (Albertyn, 2007).

## **2. Rationale and Methodology**

At the center of attention in this article is the notion of the 'right to equality'. It is written from social, economic and legal perspectives. The primary purpose of this article is to consider the importance of the right to equality within the context of

South Africa's process of redress which has mainly been pursued through the phenomenon of transformative constitutionalism. The article illustrates that indeed South Africa has succeeded in founding an appealing human rights normative framework which excellently embraced international Bill of Rights (which includes, the Universal Declaration of Human Rights - *UDHR*, the International Covenant on Civil and Political Rights – *ICCPR* (*first generation rights*), and the International Covenant on Economic, Social and Cultural Rights – *ICESCR* (*second generation rights*)). This enabled the right to equality to infuse swiftly in the post 1994 constitutional dispensation. This article also seeks to show the inherent significance of law and humanitarian values/beliefs in safeguarding human worth. The article attempts to respond to a question whether the right to equality has been realized in meaningful terms? And whether equality is still achievable considering the context of South Africa's notable challenges of persistent poverty, soaring levels of unemployment and widespread socio-economic inequalities? The article analyses equality as a value in moral, social, legal and political perspectives. It is argued that South Africa's transformative constitutionalism require more than just an appealing normative value system. It indicts that more be done to translate the right to equality into reality. Hence, the extent to which second generation (socio-economic rights) and third generation rights are realized (*the right to development*) is used for assessing progress of equality right.

This article is descriptive and adapts to qualitative style of research. It utilized primary and secondary sources, as data derived from written texts which includes statutes, policies, international instruments and scholarly publications. The author also relied on his personal experiences, and insights obtained from interacting with the people inhabiting the areas of Mopani and Capricorn Districts, Limpopo Province.

### **3. The Meaning of Equality and its Right Content**

The starting point rightfully vests in obtaining a clearer understanding on what is meant by the notion of equality, and as a right. Equality has been noted to connote the need to modelling a certain kind of relationship between beings and/or entities that are deemed same and equal in nature and form (Sen, 1980). However, it is crucial to note first and foremost that, the Constitution of the Republic of South Africa, 1996 (*hereinafter, the Constitution*), does not provide a definition on what

constitute equality. Instead, the Constitution essentially provides a normative framework within which to ascribe the meaning of equality, both as a value and as a right. Does being equal require that people should be the same, identical or have corresponding elements of being? In response, the implicit meaning of equality as derived from the Constitution is that every South African should benefit in an equal manner from the tenets of legal imperatives. This entails that the post 1994 regime has had to ensure that everyone receives equal protection of the law and is similarly afforded unhindered equal opportunities which otherwise would not have been realized under apartheid. Recognizing the diverse nature of the country's population demographics, the Constitution does not define equality as a means to attempt to render people uniform or similar in skin pigmentation. Rather it defines equality within the context of addressing matters of access to justice, socio-economic entitlements and development, issues of race, gender, ethnicity and so forth. The Constitution further implores everyone to recognize that diverse as we are, we should unite, with the understanding that we are all humans, worth of respect, protection and better livelihood. Therefore, in terms of section 9(3), the Constitution places upon everyone, a moral obligation to treat every other person equally and fairly, and not to discriminate unfairly against anyone on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth.

The fact that human beings can never be identical is indisputable. This entails that there is often a way of differentiating between people depending on what is intended and what purposes are served by such differentiation. This then invokes the need to differentiate mechanisms of differentiating humans; that is, formal and substantive equality. This assists in understanding the practical application of the right to equality and its social impact.

### **3.1. Formal Equality**

Formal equality simply connotes sameness, equal and/or similar treatment to people in the same situation. It requires that the law must treat people in the same manner irrespective of circumstances they may find themselves in (Westen, 1982; De Waal, 2002; Currie and De Waal, 2005; Smith and McLaughlin, 2011; Smith, 2014). The formal conceptualization of equality entails that inequalities can be eliminated by extending the same rights and entitlement to all people in accordance with common acceptable standards. In terms of section 9(2), the Constitution states

that equality necessitates full and equal enjoyment of all other rights and freedom. Hence, when literally interpreted, formal equality fails to advance the wishes of transformative constitutionalism. For instance, such an approach to equality would often make it difficult or impossible for people with special needs to realize equality. The right to equality will not be achieved if all children, including those with impaired eyesight (disability of vision), were to attend school and conduct their lessons in the same manner. It is for this reason that it may be necessary to treat such children with disability differently, in an attempt to bring them at a level where they will easily cope and catch-up with learning and its inherent challenges.

### **3.2. Substantive Equality**

The essence of substantive equality vests in the fact that it requires the law to take into account people's varied circumstances which needs special attention to ensure similar favourable outcome to all. This was emphasized in *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & others* 1999 (1) SA 6 (CC): paras 60-62. The substantive idea of equality takes into account the social and economic conditions of individuals and historically disadvantaged groups in society. Substantive equality asserts that even though we are different, unique, with various talents, law in the Constitution ought to be utilized to mitigate adverse effects of such inherent differences. According to Albertyn and Kentridge (1994), the substantive approach to equality is among tenets that underpin the vision of South Africa's democracy as embodied in the Constitution, 1996. In its expansive outlook, substantive equality seeks to accommodate and address social and economic disparities that may exist between individuals and/or group of persons with the view to redressing subordination and inequality among a people (Loenen, 1997).

### **4. Context of Equality: Theoretical Framework**

Rightfully, the prominence of the notion of equality has embedded its moral, legal, socio-economic and political significance in society as a guiding tenet of life. This is discernible particularly through a variety of disciplines of academic scholarship, including but not limited to law and legal studies, politics, philosophy, humanities and various other areas of social sciences studies. It is for this reason that literature containing essential narratives with regard to the right to equality is reasonably widespread. For purposes of this article, attention is on existing literature that

reflects on equality in its historical context, from constitutional and democratic perspectives, as a transformative and justice restoration tool, and more importantly, as a human rights normative value which is interlinked with the right to dignity and development of persons. This review reflects on equality from moral, legal, political and social perspectives.

The historical conceptualization of equality can be traced through philosophical thoughts of Aristotle. According to Aristotle, the presence of equality constitutes a manifestation of justice in its expansive form. He posited equality as an effective tool premised on the theory of distributive justice. This distributive justice is also referred to as “equality of resources”, which places special emphasis on people’s responsibility for the choices they make, as it aspires to a political morality that make sense in terms of citizen’s internal practices of moral and ethical criticism, including self-criticism (Dworkin, 2002). Aristotle argued that equality embodies and advocates equal distribution of wealth and resources, within a political system designed to affirm sustainable livelihood. Aristotelian formula of right to equality primarily postulated that “like should be treated alike”, which insists that individuals should at all times be treated alike regardless of attributes such as race, gender and so forth (Wesson, 2007). Thus, Aristotle subscribes more to formal equality. The Aristotelian view has the effect of accepting selective equalization and some inequalities to prevail, as long as such does not encumber the ultimate desire of having equality to serve justice even under diverse situations. Although his conceptualization tended to be more on formal equality which is not considered preferable for constitutionalism, Aristotle accepted that equality constitute an effective tool which makes democracy functional (Gurin, et al 2002).

The scholarly works of Ronald Dworkin with regards to interpretation methods cannot escape attention, especially with regards to matters that derive strength from constitutional law, as is the case with the right to equality. Dworkin’s interpretive theory of putting the Constitution in its best light is important because it proffers greater clarity on what effect the right to equality has in safeguarding and advancing fundamental constitutional values. So, linking Aristotle’s theory on equality of resources, Dworkin’s (2001) interpretive technique posits this theory as a tenet which requires equality of treatment even with regards to any resources that are owned privately by individuals. However, he expounded equality of resources (distributive justice) as an isolated theory from equality of political power especially pertaining to publicly or commonly owned resources. His reasoning was that from a perspective of sophisticated economic theory, individual’s command

over public resources is part of his private resources. Thus, a theory of equality must find a way of integrating private resources and political power.

From a constitutional perspective, South Africa subscribes to the theory of constitutionalism, which is a doctrine governing the legitimacy of government action (Burns, 2003) in the interest of its citizens, and in order to protect right to equality amongst others (De Villiers, 1994). Constitutionalism entails that government derives its existence or powers from the Constitution (Currie and De Waal, 2005). Consequently, how does equality infuse into this system? Smith (2008) shed some light by examining the difficulties encountered in constitutionalizing equality, taking into account South Africa's choice of constitutional supremacy premised on constitutionalism. This contribution reflected on the importance of taking into account, real policy (social) and political issues in the formulation and entrenchment of equality clause in the Constitution. Smith emphasized that the right to equality must occupy a key role in any Bill of Rights, and stated that this is practically discernible in the case of South African Constitution in which equality clause appear as the first right in the Bill of Rights. She however pointed out that while we might yearn for absolute equality, it is not possible to achieve absolute equality by legal formulation. This postulated that legal normative framework should go as far as inculcating an ideology that is socially responsive in conscientizing society about equality as a value and right. Only then would meaningful realization of equality emerge.

The theory of equality also comes across as a social moral value. This concerns a recognition that all humans are born with equal worth or value. Arising out of such an understanding is inherent interrelatedness between equality and dignity of persons, ideals which are essentially strategic for South Africa's transformation agenda. This is necessitated by the fact that human dignity is an inviolable doctrine whose social value towards human kind is self-enduring and unparalleled (Rapatsa, 2015). Thus, it is considered as a humanist imperative, that refer to worthiness or excellence of humans by virtue of being humans (De Crunchy, 2011). According to Grant (2007), dignity provides a properly grounded theory derived from its rich tradition that has been accepted as being capable of underpinning an appropriate approach to equality. Grant posits that using dignity to safeguard equality is crucial because it helps us avoid excessive individualism and fully recognizes the interplay between individuals' sense of self and community needs. Thus, dignity-based approach to human rights augment progressive frameworks that work to remedy instances of discrimination, while creating a society where all persons are valued

equally. When dignity of persons is appropriately safeguarded, humans are able to assert their anchored freedom and equality in real terms (Pufendorf, 1958). In *S v Makwanyane* 1995 (6) BCLR (CC): 28, Justice Kate O'Regan emphasized that human dignity is a tool through which humans can recognize that everyone is worth of equal respect and protection, in both social and legal terms.

Cowen (2001) also examined whether South Africa's connotation of 'dignity' could be utilized to guide jurisprudence on equality. In the main, Cowen defends the use of human dignity as a value in developing better progressive frameworks for equality jurisprudence. She showed that dignity's central role in developing jurisprudence of quality manifest in three ways, namely; *first*, that dignity is essential in determining whether there is discrimination on a ground not specified in section 9(3) of the Constitution. *Second*, whether such discrimination is fair or unfair, and *third*, if found to be unfair, whether such discrimination, in terms of a law of general application, is nevertheless justifiable under the section 36 (limitations clause). The inherent interrelatedness of dignity and equality is seen through widespread anti-discrimination jurisprudence which has been given added impetus by the need to uphold these fundamental values. In accordance with Kant's theory, humans occupy a special place in creation, and an intrinsic worth of dignity incomparable to that of any creatures (Rachels, 1986; Shell, 2008). According to Liebenberg (2005), Kant theory entails that all humans should relate to each other as having intrinsic worth as persons, and therefore afford each other the desired equality. In a nutshell, dignity as a right and a value has been central in the interpretation and application of all rights in the Bill of Rights. This was emphasized in *Dawood and Another v Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8; 2000 (3) SA 936, that dignity informs how all other rights ought to be viewed. Succinctly, Evadne Grant and Susie Cowen illustrates that dignity safeguards and advances equality, and correspondingly, equality augment efforts to realize protection of human dignity, all in accordance with transformative ideals that resonate precepts of preserving human worth.

Kalula and Leslie, (2001) provided an editorial with regards to examining South Africa's achievement of equality since the dawn of democracy. This was drawn from social and economic (labour) perspectives. They posited equality right as a key-stone which sits as a bedrock to South Africa's democracy. They also argued that equality is pivotal to the success of the country's transformation and its restructuring programmes, without which the other rights in the Bill of Rights will become hollow and devoid in meaning. They further illustrated that equality is



inherently linked with rights to dignity, life and socio-economic rights, while similarly highlighting worries that the slow progress of transformation has a potential to inhibit progressive achievement of equality in meaningful terms thereby rendering normative framework less effective. In actual fact, they acknowledged that the route towards realizing equality has been very slow and thus remain distant. In this regard, what is discernible is that there have been some unexplained difficulties in terms of shifting from words on paper to effective implementation (Pereira, 2014). It was further shown that South Africa desperately need a candid exchange and flow of information that can be utilized to foster subsistence of equality, while halting discrimination in all spectrums of society.

The role of judiciary in shaping human rights discourses cannot be understated. It is for this reason that courts have been and continue to play significant function in modelling equality as a value and a right. Courts have had to grapple with this question; does the right to equality necessitates that people be treated equally at all times? According to Justice Albie Sachs and Kate O'Regan (former judges of the Constitutional Court of South Africa), the right to equality does not necessarily mean that every person must be treated equally in all circumstances (*President of the Republic of South Africa v Hugo* (1997) 4 SALR 1 (CC): para 41; *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC)). Biased to substantive approach, they reasoned that our constitutional imperative on equality is premised on redistributive justice which is essentially concerned with bettering circumstances of the underprivileged majorities. This is because class has been accepted as a primary signifier of inequality within the capitalist economic order (Albertyn, 2011).

As argued by Faraday et al (2006), the context of this framework illustrates that the notion of equality forms an integral part of the widely cherished rights indispensable for a proper functionality of any constitutional and human rights respecting system. Because South Africa adapted to constitutionalism, it is essential to establish how the 1994 transition envisaged effectuating transformation, to fulfill the right to equality among others?

## **5. The post-1994 Regime: Transformative Constitutionalism on Equality**

The 1994 transition can best be described as a watershed moment. This era was essentially marked by a process of notable paradigm shift in as far as advancing

human rights was concerned. It culminated in a system of constitutional supremacy that would fundamentally be grounded in law in the Constitution. At the center of attention was the need to ensure a comprehensive realization of espoused social and substantive justice, and building a nation grounded on protecting established democratic values and fundamental human rights (Rapatsa, 2014). It is important to establish how transformative constitutionalism envisioned achieving equality, and the premise upon which such would be modelled, formal or substantive equality?

### **5.1. What is Transformative Constitutionalism?**

The phraseology of transformative constitutionalism comprises two distinct concepts; transformation and constitutionalism. Plainly, transformation connotes 'change'. Thus, because the post-1994 regime adapted to constitutionalism, the doctrine governing legitimacy of government action, it had to bring about change. This change would be frontrunner in constructing a new legal order, creating equal opportunities for all, and space for dialogue where the idea of change is constant, and embraces social, economic and legal concerns (Langa, 2006).

Subsequently, the notion of transformative constitutionalism was coined by Karl Klare. He posited it as a "long-term project of constitutional enactment, interpretation and enforcement committed to transforming a country's political, legal and social institutions, and power relations in a democratic, participatory and egalitarian direction" (Klare, 1998). This project has since been touted as a tool that induces society's major social and economic change through non-violent processes that are grounded in law. This change had to be made discernible from new distinct norms (such as the Bill of Rights in chapter 2 of the Constitution) and institutional framework (chapter 9 institutions) established to protect such rights and support democracy. According to Karin van Marle (2009), transformative constitutionalism enables appropriate constitutional interpretations that foster fulfillment of the Constitution's transformative agenda. This had to also be reflected in the manner in which the agenda attempts to reach out to various disciplines of scholarship, nurturing the realization of human rights. The central function of transformative constitutionalism is notably that, it has to redress injustices of the past and guide the nation to a better future (Langa, 2006; Bohler-Muller, 2007). Moseneke (2007) argued that, if meaningfully applied, transformative constitutionalism is capable of ensuring that a comprehensive

realization of substantive equality and protection of human dignity of persons becomes a reality.

The crux of transformative constitutionalism can be summed up to be centered on the following; It entrenched normative value system and institutional framework that aspires to realize equality. It obligated the state to ensure equal access to social services (education, health, water, sanitation), equal access to justice (lawful arrest, legal representation, fair trial), sustainable development and equal participation in public affairs. Therefore, transformative constitutionalism is more inclined to achieving substantive equality than formal equality. That is, it seeks to ensure that all persons have equal access to sustainable livelihood, even if it means at the expense of the state. It envisaged achieving substantive equality in two ways. *First*, by eliminating existing discrimination or discriminatory practices, and *second*, by designing measures, such as affirmative action, to protect and advance previously disadvantaged groups of persons (Dupper, 2002).

## 5.2. Legislative Framework

To augment efforts of realizing equality in society, legislative framework is indispensable as it essentially provides guidance to civil society and courts for implementing all rights in the Bill of Rights. As a starting point, discourses on the concept of equality derive strength from the constitutional provisions in section 9.<sup>1</sup> To effectuate this right to equality, section 9 enshrined it both as a legal right and as a value (Small & Grant, 2000). As a legal right, equality is given procedural and remedial force. Within this context, it stipulates that everyone is equal before the law, and has the right to equal protection and benefit of the law. The legal nature of equality is therefore premised on recognizing it as an entitlement to all persons, requiring state respect, protect and enable realization of such right. As a value, it finds proponent from the preamble of the Constitution which formulated it in such

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<sup>1</sup> **Equality clause** - (1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

a way as to advocate that ‘there be equality between men and women and people of all races, where everyone is afforded space to exercise and enjoy fundamental rights and freedoms’. This constitute a contrivance to ensure that equality provides substance to transformative constitutionalism, as it embodies the hope of transforming the past and present, to build a better future.

Section 9(2) of equality clause entrenched the need for state to design corrective measures through statutory and policy initiatives to promote the achievement of equality. This became indispensable as a means to particularly address continued imbalances and/or discriminatory practices occurring in various spectrums of society, which effectively maintained disadvantage over other persons or categories of persons. Dupper (2002) considers this extension as the real substantive ambition of the Constitution. Subsequently, dedicated legislations were promulgated to effectuate equality in society. This refers specifically to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA; also referred to as the Equality Act) and Employment Equity Act 55 of 1998 (EEA). Equality Act is regarded as a central statutory mechanism tasked with advancing transformation in all spheres of society to fundamentally redress the legacy of apartheid (Liebenberg & O’Sullivan, 2001). This includes supporting the state to alter and avert socio-economic difficulties plaguing the majority of inhabitants in under-developed villages. In general, Equality Act places a positive obligation on the state, non-governmental organizations, community-based organizations, traditional institutions and all persons to promote equality. On the other hand, EEA was designed to transform employment relations, with the primary objective of normalizing the relationship between employers and employees. This was given added impetus by the known historical inequalities that characterized labour relations, where bargaining power was constantly skewed in favour of employers. EEA seeks to ensure redistribution of resources, to mitigate and avert untold income disparities in society.

## **6. Why Equality Remain A Distant Dream? Challenges**

The 27<sup>th</sup> of April features in South Africa’s history as that distinct day upon which attainment of democracy is commemorated. This period regularly indicts us to review progress and assess the impact that has been made by transformative constitutionalism with regards to achieving equality in society. This is particularly important because transformative constitutionalism envisioned achieving equality

in its substantive form. In principle, this encompassed the idea of addressing socio-economic challenges plaguing the majority of previously disadvantaged population groups. In the main, this included eliminating the plights of poverty, unemployment and inequalities. Indeed, it has been twenty one years since the advent of democracy. Thus, have we succeeded in translating equality into reality? In this section, major aspects that appear as findings on equality are presented. These factors inherently determine whether equality, both as social value and legal right, has effectively infused into the system, and meaningfully altered the lives of the majority.

Notwithstanding the presence of appealing and comprehensive normative framework on the right to equality, it has been observed that South Africa is far from realizing equality in meaningful terms. Social and economic factors are conspicuously responsible for this. In fact, it is worth awakening to the reality that South Africa's democratic government is struggling to eradicate the socio-economic deprivations inherited from apartheid (Sarkin, 1999). Although the legacy of apartheid continues to haunt South Africa, and will do so for some decades (Vogt, 2001; Liebenberg & O'Sullivan, 2001), it should never be exploited as an excuse by the present regime for its failures. Issues of poverty, unemployment and inequalities are intrinsic social challenges that remain central in determining the nature and extent of access to social services such as education, health care and (social) justice. It is for this reason that substantive approach to equality is configured on redressing poverty, which lies at the heart of the South Africa's constitutional order. However, poverty has been and remain one of the biggest problems in South Africa (Reddy & Sokomani, 2008; Frye, 2013; Lehohla, 2014).

The problem of poverty is worsened by high unemployment rate, which has been found to affect youth in magnitude. The official unemployment rate is 26.4%, whereas expanded unemployment rate is 36.1% (Statistics SA, 2015). The official estimate refer only to unemployed work force and active job seekers who are willing to work, whereas expanded definition includes those that have abandoned job searching efforts, lost hope, and therefore categorized squarely as unemployed. Because of pervasive poverty and unemployment, inequalities continue to thrive (Mattes, 2012; Kings, 2014). How does inequality manifest in South Africa? Inequality appear in a variety of ways, the most common being through pervasive disparities of wealth between the rich and the poor. Under such circumstances, almost all essential public services have come to be commodified. This effectively

entails that people need money in order to secure quality public service. Thus, poverty, unemployment and inequalities are responsible for widespread social injustices in society (Spren & Vally, 2006: 352; Coovadia et al, 2009: 824). Sadly, the indigent people suffer most, and therefore may never be able to assert their right to equality in a meaningful way.

Compounding these socio-economic problems is the issue of attitudinal theories, which is somewhat linked with government policy that play a crucial role in determining the fate of equality. This refers to widespread (dualistic) public-private service phenomena and the emerging theory of VIPsm. The substantive approach to equality entails that transformative constitutionalism had intended to ensure that quality public service is accessible to all people. This encompasses unhindered access to education, health care, social protection, safety and security and justice. Ironically, all these essential public services have been commodified, which means that people require huge financial capabilities to fund access to quality essential public services. This is arguably resultant from privatization which has effectively deprived indigent people in rural communities of access to quality public services. For instance, South Africa continues to have a tale of two schools; private schools which are considered properly functional, wealthy and able to educate learners/students effectively, and public schools which are dysfunctional, poor, under-resourced and incapable of equipping learners with necessary numeracy and literacy skills (Spaull, 2013). The quagmire facing public schools evidently appear in *Section 27 and Others v Minister of Education and Another* (24565/2012) [2012] ZAGPPHC 114 in which the government failed to provide textbooks to affected schools even after Kollapen J (High Court) ordered the department of basic education to do so. Similar problems are widespread with regards to access to quality health care. Public hospitals are dysfunctional, whereas private hospitals offer the best of quality health care services, but only accessible to the rich few. The problem of dualistic public service system has been given added impetus by the growing theory of VIPsm. Human beings have been distinguished into *very important persons*. The disheartening reality is that government spends over R2 billion to provide safety and security of few individuals, all in pursuit of VIPsm (Van Onselen, 2015). Subsequently, this has been embedded in all segments of society, effectively rendering equality, both as a value and a right, a mere hollow rhetoric.

## **7. Conclusion**

This article has intended to illustrate that South Africa's post 1994 regime embraced equality as one of the founding values of constitutional democracy. Thus, that transition from apartheid to democracy was conceivably an excellent phenomenon, which culminated in a system that would resonate with the spirit and purport of international bill of rights. This it achieved by entrenching human rights philosophy at the bedrock of the Constitution. This resulted in South Africa having a reasonably good normative value system and institutional framework to support constitutional democracy. It is for this reason that South Africa boost global recognition as a human rights respecting state. It has been shown that equality augments efforts of creating socially admirable livelihood and South Africa's egalitarian aspirations as espoused by transformative constitutionalism, which pursues substantive equality. A solid relationship between equality and dignity has also been found to be significant in serving distributive justice. This is the essence of transformative constitutionalism which is essentially centered on creating a system in which law in the Constitution reigns supreme, and pledges to bury wounds of the past, to transform the country's social, moral, legal and political landscape. Thus, people are recognized as vital beings that should be afforded space to participate fully in shaping democracy in an equitable manner.

Nonetheless, this article also reveals that South Africa's chances of achieving meaningful change that enables comprehensive realization of substantive equality is invariably under threat. This is perceived to originate from persistent classification of people (low, middle and high class), a problem which has been compounded by triple challenges of poverty, unemployment and incomparable inequalities. It is worsened by the fact that essential public service has been commodified, essentially being replaced somewhat by a dualistic private-public service which notably always serves the rich. Under these circumstances, it has been proven that those plagued by poverty in particular, have the slightest opportunity to assert and realize their dignity, therefore enjoy other guaranteed freedoms and right to equality. It is argued that formal equality has instead flourished, because the indigent people have their own level of equality, which is evidently incomparable to that of the wealthier people. Succinctly, South Africa's appealing human rights norms are yet to meaningfully be translated into reality, and so is the right to equality.

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