

Introduction

Your trainer is: _____

This training workshop was developed by **Cheadle Thompson & Haysom** and **Resolve Trainingworks** for the **Commission on Gender Equality**.

Cheadle Thompson & Haysom has grown from a small law practice, started by three legal academics from the University of the Witwatersrand, into a leading South African law firm with offices in Johannesburg and Cape Town, providing a diverse range of legal services. Initially specialising in human rights law and labour law, we have since 1994 broadened our areas of expertise along with our growing client base. These include:

- constitutional law
- public sector law, including the drafting of laws
- labour law
- commercial, corporate and competition law
- telecommunications, media and information technology law
- plain languaging of legal documents

Commission on Gender Equality is one of the six State Institutions Supporting Constitutional Democracy called for in the 1996 Constitution. The aim of the Commission, as set out in section 187 of the Constitution is to promote gender equality and to advise and make recommendations to Parliament or any other legislature with regard to any laws or proposed legislation which affects gender equality and the status of women.

The CGE is independent and subject only to the Constitution and the law. It must be impartial and must exercise its powers and performance functions without fear, favour or prejudice.¹ It is governed by the Commission on Gender Equality Act, 1996² which sets out its wide-ranging powers and functions. The main powers and functions of the CGE are:

- monitoring and evaluating the policies and practices of both government and private sector institutions;
- public education and information;
- making recommendation to government to promote gender equality, including recommending changes to existing legislation and proposing new legislation;
- resolving gender-related disputes through mediation, conciliation or negotiation;
- investigating gender inequality; and
- monitoring compliance with international instruments promoting gender equity.³

¹ Section 181(2), Constitution.

² Act 39 of 1996.

³ Section 11, Commission on Gender Equality Act 39 of 1996.

Resolve Trainingworks is a wholly-owned subsidiary of the **Resolve Group**, a leading human resource and industrial relations consultancy, which offers strategic human resource and labour relations advisory services. We are a medium-sized, values-based South African company with approximately 40 professionals and a wide network of partners to ensure the right mix of substantive expertise, comparative experience and local knowledge. **Resolve Trainingworks** offers specialist services related to the design and delivery of short learning programmes, including skills programmes and both credit bearing and non-credit bearing short courses. These specialist services are undertaken in a way that is aligned to organisational strategy and/or complements broader organisational change.

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Section 1

Introduction

At the end of this section you will be able to:

- ◆ Describe the housekeeping details applicable to this workshop
- ◆ Describe the outline of this workshop
- ◆ Identify your own objectives for this workshop
- ◆ Locate the glossary of useful terms

Workshop housekeeping

 Notes

◆ Starting times and ending times	
◆ Tea and lunch breaks	
◆ Toilets	
◆ Speaking rules and group work	
◆ Language	
◆ Use of cellular phones	
◆ Smoking	
◆ File and materials	

Workshop objectives

As a result of this workshop, you will be able to:

- ◆ Explain what tradition, culture and religion are
- ◆ Describe different types of traditional practices that hinder gender equality
- ◆ Describe different types of religions practice that hinder gender equality
- ◆ Explain the link between tradition, culture, religion and gender inequality
- ◆ Describe constitutional provisions that promote gender equality in tradition and religion
- ◆ Describe the legal and policy framework around tradition, culture and religion
- ◆ Identify the origin of the Equality Act
- ◆ Describe the limitation of rights
- ◆ Describe the implications of the right to equality in the Bill of Rights
- ◆ Describe the objectives, interpretation and guiding principles of the Equality Act
- ◆ Identify the scope of the Equality Act
- ◆ Describe the structures and institutions of the Equality Act
- ◆ Describe the role of the Commission on Gender Equality in terms of the Equality Act
- ◆ Describe the enforcement mechanisms of the Equality Act

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3. The legal and policy framework	International Instruments Regional Instruments South African legislation and case law	
4. An introduction to the Equality Act	The origin of the Equality Act The Bill of Rights and the right to equality Limitations on rights	
5. Key provisions of the Equality Act	The scope of the Equality Act The prohibition on unfair discrimination The institutions and structures of the Equality Act Enforcement of the Equality Act	
6. Final reflection, evaluation and closure	Review of your learning objectives Evaluation of the workshop	
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Glossary of useful terms

Bridewealth	The giving of property by a husband or his guardian to his wife's family as part of the process of marrying.
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women, 1979.
CGE	Commission on Gender Equality.
Culture	Customs, civilisation and achievements of a particular time or people. ⁴ The system of shared beliefs, values, customs, behaviours, and artefacts that the members of society use to cope with their world and with one another, and that are transmitted from generation to generation through learning.
Discrimination	Any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly- a) imposes burdens, obligations or disadvantage on; or b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds.
Direct discrimination	Occurs when a person is treated less favourably than another is in a comparable situation because of their racial or ethnic origin, religion or belief, disability, age or sexual orientation, or any of the prohibited grounds. An example of direct discrimination is a job advert, which says, "no women need apply."
Gender	Social roles allocated respectively to men and women in particular societies and at particular times. Gender is different from sex which is biologically determined.
Religion	A system of beliefs and values through which people define themselves, their reason for being or why they exist and their purpose in life. It both reflects and shapes a perception of reality and as such, it is bound to culture ⁵ . It is a search to explain and order existence.
Sharia	Muslim code of religious law
Tradition	A custom, belief or opinion handed down to all succeeding generations orally or by practice.

⁴ The Concise Oxford Dictionary of current English. Clarendon Press.

⁵ Jakubiak & Murphy 1987

Section 2

An introduction to culture, tradition and religion

At the end of this section you will be able to:

- ◆ Describe tradition, culture and religion
- ◆ Describe various traditional practices
- ◆ Explain how these traditional practices impact on gender
- ◆ Explain how religion impacts on gender
- ◆ Describe the legal and policy framework, including international and regional instruments and South African legislation and case law.
- ◆ Identify examples of discrimination against women as a result of traditional and cultural practices and religious practice

Worksheet

Culture, tradition and religion quiz



Individually and then in small groups, read the information below and then record your responses to the questions which follow.

Introduction

Resistance to change in the status of women might be explained by cultural factors – whether one grows up as an African, whose tribal laws treat women as children, or as an Afrikaner whose church teaches that men must rule the home.⁶ Traditional laws and religion are both elements of gender formation in society and methods by which oppression and subjugation of women are expressed and perpetuated. This manual will explore how tradition, cultural practices and religion impact on gender.

What is tradition?

Tradition is defined as the passing down of elements of a culture from generation to generation, especially by oral communication. Tradition has been described as:

- A mode of thought or behaviour followed by a people continuously from generation to generation; a custom or usage.
- A set of such customs and usages viewed as a coherent body of precedents influencing the present: *followed family tradition in dress and manners*

It is as a result of tradition that various cultural practices are handed down and followed by succeeding generations. In every culture, important practices exist which celebrate life-cycle transitions, perpetuate community cohesion or transmit traditional values to subsequent generations. These traditions reflect norms of behaviour based on age, life stage, gender and social class.

Effects of harmful traditions on women

While many traditions promote social cohesion and unity, others erode the physical and psychological health and integrity of individuals particularly girls and women. Factors such as limited access to education, information and services allow those that may be most harmful to persist.

Harmful traditions exist in many different forms but they share origins in the historically unequal social and economic relationships between men and women. Female genital cutting, early marriage, no property rights are accorded to women and childbearing have received global attention due to their gender bias and severe negative impact on the health and well-being of females.

Efforts to alter or eradicate these practices are often met with suspicion or hostility from the communities practising them particularly when efforts originate from outside the community. For many

⁶ Media and Gender in Africa, T Reddy. African Media Debates: Seminar Paper

members of these societies ending their traditions is unimaginable as such practices constitute an integral part of the socio-cultural fabric.

Female Genital Cutting

Female genital cutting is also referred to as female genital mutilation. This is practised in approximately 28 countries in Africa as well as in some Arab and Asian countries.⁷

Genital cutting is the excision of part or all of the female external genitalia for non-medical reasons. Cutting ranges from removal of the clitoral hood to its most extreme form, infibulation involving the removal of the clitoris as well as some or all of the labia minora. The labia majora are then sealed, leaving only a small opening to allow the flow of urine and menstrual blood. Between 100 million to 132 million girls now living have undergone genital cutting.⁸

In some societies genital cutting marks an important rite of passage into womanhood, in others it is believed to be aesthetically pleasing and to guarantee virginity, curb female sexual desires, maintain hygiene, prevent promiscuity and increase fertility. Men may refuse to marry a woman who has not undergone the procedure. Although communities commonly believe that genital cutting is religiously prescribed, no basis for it exists in either the Koran or the Bible.

While the reasons for practising female genital cutting vary, its negative outcomes are clear and well documented. Ordinarily performed without anaesthesia and using unhygienic methods and instruments, its consequences include sickness or death due to infection, haemorrhage, tetanus or blood poisoning. In Sudan 10 to 30 percent of girls die from infibulation. Genital cutting makes sexual intercourse very painful and difficult for women. Pregnant women who have undergone genital cutting frequently experience prolonged labour and complications in delivery.

To expose women to such severe health violates her right to health as protected by Article 16 of the African Charter on Human and Peoples' Rights ("ACHPR"). Female genital cutting violates a woman's rights to family. The family which is afforded particular status within African culture and is recognised in article 18 of the ACHPR as the natural unit of society is either weakened or destroyed by genital cutting. Women who have been rendered infertile or for whom childbirth is extremely difficult as a result of genital cutting cannot fulfil their important reproductive role.

Marriage and child bearing are important to most women and rejecting genital cutting carries with it potential loss of status and acceptance within the community. As a result, women are important teachers of cultural traditions and often the procedure's strongest proponents.

The view that to object to genital cutting is a western perspective fails to take cognisance of the African conception of Human rights. The prohibition against torture is contained in Article 5 of the ACHPR. Genital cutting is a form of cruel, inhuman and degrading treatment. It is a form of discrimination against women and therefore violates both articles 2 and 18 of the ACHPR.

⁷ Berhane Ras –work: *Violence against women as a traditional practice*;
www.iued.unige.ch/information/publications/pdf/

⁸ Advocates for Youth. www.advocatesforyouth.org Lauren Hersh, 'Giving Up Harmful Practices, Not Culture.'

The duty to strengthen African cultural values cannot be interpreted as a justification for genital cutting. The wording of ACHPR article 29(7) is instructive because it places a duty on individuals only to strengthen positive African cultural values and by implication therefore not to promote negative African cultural values.

Virginity testing

Virginity testing is done in different ways, depending upon the country. Girls between the age of seven and 26 lie on a mat in front of the women doing the test. Often the vagina is examined to establish whether or not the girl's hymen is intact. Girls who pass get white stars posted on their forehead and a certificate confirming their virginity. Virginity testing is seen as a way of curbing women's sexual activity before marriage and keeping them "pure" until then.

In Durban, before the royal reed dance each year, hundreds of young women are tested in Umlazi and KwaMashu. Girls line up on the weekend to undergo virginity testing conducted by older women.

The simultaneous growth of the AIDS pandemic has provided a ground for the revival of interests in the past. In South Africa the testing of girls for virginity has been underway and growing steadily since the mid 90's.

This form of HIV/AIDS testing seeks to monitor and control women's sexuality as a solution to containing the growth of HIV/AIDS and may do more harm than good as it is marked by gender inequalities and ensures the maintenance of African women's long 'tradition' of illness and exploitation.⁹

Supporters of virginity testing claim the practice to be traditional. It is significant that the trend towards virginity testing is most notable in societies currently and primarily organised along the lines of patrilineal descent.

The concern raised about the practice of virginity testing is that it violates constitutional laws that protect the rights of privacy and bodily integrity. Furthermore, the practice is discriminatory in that it is usually only girls who are tested.

Violation of property rights

Many men and some women in Kenya believe that women should not be entitled to property rights, at least not on an equal basis with men. These attitudes influence the interpretation of customary laws, and vice versa. This cycle legitimises women's subordination and inequality.

Interview with Emily Owino, Siaya, November 2, 2002

Shortly after Emily Owino's husband died, her in-laws took all her possessions—including farm equipment, livestock, household goods, and clothing. The in-laws insisted that she be "cleansed" by having sex with a social outcast, a custom in her region, as a condition of staying in her home. They paid a herdsman to have sex with Owino, against her will and without a condom. They later took over her farmland. She sought help from the local elder

⁹ Protecting girlhood? Virginity revivals in the era of AIDS. Suzanne Leclerc-Madlala.

and chief, who did nothing. Her in-laws forced her out of her home, and she and her children were homeless until someone offered her a small, leaky shack. No longer able to afford school fees, her children dropped out of school.¹⁰

Women's rights to property are unequal to those of men in Kenya. Their rights to own, inherit, manage, and dispose of property are under constant attack from customs, laws, and individuals including government officials who believe that women cannot be trusted with or do not deserve property.

The devastating effects of property rights violations including poverty, disease, violence, and homelessness harm women, their children, and Kenya's overall development.

Women's property rights violations are not only discriminatory, they may prove fatal. The deadly HIV/AIDS epidemic magnifies the devastation of women's property violations in Kenya, where approximately 15 percent of the population between the ages of fifteen and forty-nine is infected with HIV. Widows who are coerced into the customary practices of "wife inheritance" or ritual "cleansing" (which usually involve unprotected sex) run a clear risk of contracting and spreading HIV. The region where these practices are most common has Kenya's highest AIDS prevalence; the HIV infection rate in girls and young women there is six times higher than that of their male counterparts. AIDS deaths expected in the coming years will result in millions more women becoming widows at younger ages than would otherwise be the case. These women and their children (who may end up AIDS orphans) are likely to face not only social stigma against people affected by HIV/AIDS but also deprivations caused by property rights violations.¹¹

Customary marriages

Status of women

Women married under customary law are considered as minors. These women are afforded the status of minors under the full control of fathers, then husbands and on widowhood, husband's brothers or even their own sons.

Lobola

Bridewealth or lobola is synonymous with marriage in African tradition. Once a husband has fulfilled his obligations under a bridewealth agreement he and his family would have full rights to any children born to the wife. Hence if a divorce were granted the children would remain under the care and guardianship of the father. Mothers were allowed custody but they did not acquire a right equivalent to that of the father.

The effect of a husband's entitlement to guardianship of children as right of payment of lobola violates equality under s9 of the Constitution and the Guardianship Act, which provides that both spouses should have equal rights and power over minor children. In the recent case of *Hlophe v Mahlalela and another*¹², the court dealt with the issue of custody of a minor child within a customary union. The

¹⁰ Human Rights Watch 2003 Vol 15 No 5(A). Summary at 1

¹¹ Human Rights Watch 2003 Vol 15 No 5(A). Summary at 1

¹² 1998 (1) SA 449 (T)

Court held that issues relating to the custody of a minor child could not be determined by the mere delivery or non-delivery of a certain number of cattle

Any doubt as to the applicable legal principles that might have existed in this regard were effectively removed by s 30(3) of the Constitution which provided that 'in all matters concerning (children) his or her best interest shall be paramount'. The Court held that it was in the best interest of S for her to be reunited with the applicant.

Dowry Deaths

Dowry is described as the property that a woman brings to her husband at the time of the marriage. The dowry apparently originated in the giving of a marriage gift by the family of the bridegroom to the bride and the bestowal of money upon the bride by her parents.

Generally the husband has been compelled to return the dowry in case of divorce or the death of the wife when still childless¹³.

Dowry deaths occur where women are killed for not bringing enough dowry with them when they get married. Mostly commonly practised in some countries where marriages are based on a financial contribution from the women's family to the man's family.

In societies where the dowry system is practised, dowry deaths are a problem because dowry paid in marriage is sometimes returnable if the marriage ends. If the husband is unable to repay the dowry, the death of the bride is the only way to end the obligation. As a result the dowry system has been regarded as an oppressive practice under patriarchal systems.

It has been a short cut for indicating low status for women, the argument being that the callous and mundane efficiency of "dowry deaths" indicates the low value of women's labour and the high cost of their marriages, making women a liability for their natal families and a source of lucre for their marital families. There is ample evidence that the phenomenon of dowry is expanding, spreading to communities where it had never existed, and that the value of dowries is rising to untenable limits; there are horrific reports of fathers selling kidneys to cover dowry payments, or collective suicides in families with multiple daughters. The Indian government's Department of Women and Child Development reported 6,006 dowry deaths for 1997¹⁴.

Polygamy

In many patriarchal communities, men are allowed to take more than one wife. Often it has little to do with religion but rather it is a way of measuring a man's wealth or prestige.

Traditional society also recruited many women into their families through marriages. Polygamous marriages besides being as agents of reproduction were a labour force base. Husbands with many wives had not only status and standing in the community but also expected to reap from their wives much economic benefit through exploitation of their cheap labour.

¹³ <http://www.infoplease.com/ce6/society/A0816030.html>

¹⁴ <http://www.boloji.com/wfs/wfs159.htm>

Consent to marriage

Under pre-colonial customary law marriage was an agreement between kin groups rather than individuals and consent of spouses was strictly speaking unnecessary. Girls would often be promised as brides possibly even before they were born. A woman's marital destiny could be determined by lineage politics, kinship or simply the need to recoup bridewealth that her guardian had already paid over to contract other marriages. In customary law parental consent is normally taken to be consent of senior male members in the family.

Divorce

In customary law husbands enjoyed a privileged position in relation to divorce. On the one hand they needed no specific reason to divorce and on the other if they sought a reason they had a wider range available than wives. For instance bearing offspring was seen as a wife's primary duty therefore wives who failed to produce children could be blamed for obstructing the purpose of marriage.

By contrast a wife had to have an especially good reason to end her marriage because she had to convince her guardian to support her case. Women would seldom have reason for complaining about her husband's sexual misconduct. A wife's most reliable reasons for leaving her husband were that he did not support her or had exceeded his powers of chastisement.

Succession

The customary law of succession is based on the principle of primogeniture. The general rule is that only a male who was related to the deceased through a male line qualified as intestate heir. It discriminates against women, children and family members other than the male heir by excluding them from accessing inheritable property.¹⁵

Religion and Gender

Religion is the human enterprise by which a sacred cosmos is established¹⁶. Religion has also been defined as "a system of beliefs and practices by means of which a group of people struggle with the ultimate problems of human life"¹⁷.

Religion can be used as a marker of difference to allow for social exclusion and marginalisation and the ordering of social groupings into a hierarchy. This was particularly true of the apartheid state, where Christianity was regarded as superior to other religions. Today, the role played by religion in ordering the social hierarchy has declined somewhat, and that there are two possible ways of explaining the role of religion in the current South African context. On the one hand, religion can be viewed as a centripetal force aimed at acknowledging and respecting diversity and working towards reconciliation. On the other, 'religious and cultural difference has absolute value and constitutes the basis for absolute claims in the public sphere. Therefore, it is also the basis for absolute divisions and absolute choices'¹⁸.

¹⁵ See the recent Constitutional Court decision of *Bhe v Magistrate, Khayelitsha & others* discussed below.

¹⁶ Peter L Berger, 1967, *A sacred canopy*, New York, p 26.

¹⁷ J Milton Yinger, 1971, *The scientific study of religion*, New York, p 7.

¹⁸ <http://wiserweb.wits.ac.za/PDF%20Files/wirs%20-%20dawson.PDF>

The role of woman in society is largely influenced by the role of woman prescribed in the religious tenets. The interpretation of the religion is unfortunately in the hands of the religious representatives who are often predominantly male. The role of the religious institutions in our society has dominated the perception of the ordinary public on defining the respective gender roles. The perception of the ordinary public is still coloured by what they hear repeatedly at prayer sermons delivered by priests and pastors who often denounce every form of female independence and prominence.¹⁹

The role of women in society is definitely attributable to the beliefs, norms, and values of the society. These beliefs may be formed on the basis of historical religious beliefs or perceived on future economic needs. In the underdeveloped countries where the historical role of women is confined to the four walls of the parents or husband's house, the female member is perceived as an economic burden. Lack of education and lack of earning power makes these societies wish for male offspring since they can share the economic burden of the family. Parents believe that the female job opportunities are limited and once they are married they will stop supporting them. This perception is coloured by religious beliefs and by the pressure of social norms.

The analysis of the relationship between gender and religion is very important and particularly relevant when considering how religion or religious discourse has been used to marginalise women. It is argued that "religion has been and is still one of the root causes of women's subordination and marginalisation"²⁰ mainly because of its value and its absolute persuasive claims in the public sphere.

¹⁹ <http://sachet.org.pk>

²⁰ Shrock 1984:56 -The mandate is clear that the suppression of women is a reality, and that from a historical perspective, religion has been substantially responsible for the devalued position of women.

1. Which factors allow harmful traditions to persist?

2. Name some of the harmful traditional practices

3. What concerns does virginity testing raise?

4 Name some gender inequality issues that arise within customary marriages

5 Why is the analysis of the relationship between religion and gender important to gender equality?

Handout

Culture, tradition and religion quiz worksheet

Question	Suggested answer
1 Which factors allow harmful traditions to persist?	Factors such as limited access to education, information; services allow those that may be most harmful to persist.
2 Name some of the harmful traditions	Harmful traditions exist in many different forms but they share origins in the historically unequal social and economic relationships between men and women. Female genital cutting, early marriage, no property rights accorded to women and childbearing and gender bias have received global attention due to their severe negative impact on the health and well-being of females.
3 What concerns does virginity testing raise?	<p>There is concern about the practice of virginity testing. Virginity testing represents a breach of constitutional laws that protect the rights of privacy and bodily integrity. Further the fact that the practice is discriminatory in that it is usually only girls who are tested.</p> <p>This form of HIV/AIDS testing seeks to monitor and control women's sexuality as a solution to containing the growth of HIV/AIDS and may do more harm than good as it is marked by gender inequalities and ensures the maintenance of African women's long 'tradition' of illness and exploitation</p>
4 Name some gender inequality issues that arise within customary marriages	<ul style="list-style-type: none"> • Status of a women- perceived as a minor • Dowry deaths • Polygamy • Consent to marriage • Ownership of property • Succession • Divorce
5 Why is the analysis of the relationship between religion and gender important to gender	The analysis of the relationship between gender and religion is very important and particularly relevant when considering how religion or religious discourse has been used to

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equality?	marginalise women. It is argued that "religion has been and is still one of the root causes of women's subordination and marginalisation" ²¹ mainly because of its value and its absolute persuasive claims in the public sphere.
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²¹ Shrock 1984:56 -The mandate is clear that the suppression of women is a reality, and that from a historical perspective, religion has been substantially responsible for the devalued position of women.

Section 3

The legal and policy framework

At the end of this section you will be able to:

- ◆ Identify the international instruments which promote the rights of women within their culture, tradition and religion
- ◆ Identify the regional instruments which promote the rights of women within their culture, tradition and religion
- ◆ Describe relevant laws and cases in South Africa which promote the rights of women within their culture, tradition and religion.

Worksheet

International instruments promoting the rights of women concerning their culture, tradition and religion



Individually and then in small groups, read the document on international instruments below and then record your responses to the questions which follow.

The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 by the UN General Assembly, is often described as an international bill of rights for women. Consisting of a preamble and 30 articles, it defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination. By accepting the Convention, States commit themselves to undertake a series of measures to end discrimination against women in all forms.

Countries that have ratified or acceded to the Convention are legally bound to put its provisions into practice. They are also committed to submit national reports, at least every four years, on measures they have taken to comply with their treaty obligations.

CEDAW sets out in legally binding form internationally accepted principles on the rights of women which are applicable to all women in all fields. It prohibits all forms of discrimination against women. It gives positive affirmation to the principle of equality by requiring states to take all appropriate measures including legislation to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men (**Article 3** of the Convention).

Article 1 of CEDAW provides that "discrimination against women" means any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 8 obliges State Parties to take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organisations.

CEDAW provides a comprehensive framework for challenging the various forces that have created and sustained gender discrimination. As at 26 March 2004, 177 states were party to the convention. South Africa signed and became party to the convention on 29 January 1993.

The convention aims to enlarge understanding of the concept of human rights as it gives formal recognition to the influence of culture and tradition on restricting women's enjoyment of their fundamental rights. State parties are obliged to work towards the modification of social and cultural patterns of individual conduct in order to eliminate 'prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotypical roles for men and women.

Article 2(f) requires that state parties take all appropriate measures including legislation to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.

Article 5 provides that state parties must take all appropriate measures to modify the social and cultural patterns of conduct of men and women with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either sex or stereotypical roles for men and women.

Article 16 provides that state parties must take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular ensure equality between men and women on various issues surrounding marriage, parenting and dissolution of marriage.

The Beijing Platform for Action

The Beijing Platform for Action constitutes an agenda for the empowerment of women. This UN fourth world conference on women was held in Beijing in September 1995.

A declaration and a platform for action were adopted by consensus at the Conference. The platform for action calls upon governments, the international community and civil society to take strategic action in 12 critical areas of concern. The declaration addresses three principles:

- The empowerment of women;
- The promotion and protection of the human rights of women; and
- The reaffirmation of women's rights as human rights.

Implementing the platform is primarily the responsibility of governments. The countries that are signatories undertake to amongst others intensify efforts to ensure equal enjoyment of all human rights and fundamental freedoms for all women and girls who face multiple barriers to their empowerment and advancement because of such factors as their race, age, language, ethnicity, culture, religion or disability or because they are indigenous people.

1. When was the convention on the elimination of all forms of discrimination against women adopted by the UN General assembly?

2. When did South Africa become a party to the convention?

3. What measures must States parties to the Convention take to eliminate discrimination against women and to ensure that women are on equal terms to men?

4. When and where was the UN and Conference on women held?

Handout

Worksheet on international instruments

Questions	Suggested answers
1 When was the Convention on the Elimination of all Forms of Discrimination against Women adopted by the United Nations General Assembly?	The Convention was adopted in 1979 and is often described as an International Bill of Rights for Women.
2 When did South Africa become a party to the Convention?	South Africa signed and became party to the Convention on 29 January 1993. As at 26 March 2004, 177 States were party to the Convention.
3 What measures must States parties to the Convention take to eliminate discrimination against women and to ensure that women are on equal terms to men?	Article 7 requires the State parties to the Convention to take all appropriate measures to eliminate discrimination against women in the political and public life of their countries and, in particular, to ensure that women are on equal terms with men, by according to women the rights- <ul style="list-style-type: none">• to vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;• to participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;• to participate in non-governmental organisations and associations concerned with the public and political life of the country.
4 When and where was the United Nations 4 th World Conference on Women held?	The United Nations 4 th World Conference on Women was held in Beijing in September 1995. Its platform for action is known as the Beijing Platform for Action.

Worksheet

Regional instruments promoting the the rights of women concerning their culture, tradition and religion



Individually and then in pairs, read the document on international instruments below and then record your responses to the questions which follow.

African Charter on Human and Peoples' Rights

In this charter the African states that are party to the convention reaffirmed their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instruments adopted by the Organisation of African Unity, the Movement of Non-Aligned Countries and the United Nations. They also are firmly convinced of their duty to promote and protect human and peoples' rights and freedoms and taking into account the importance traditionally attached to these rights and freedoms in Africa. South Africa is a signatory to the Charter.

Article 2 provides that every individual must be entitled to the enjoyment of the rights and freedoms exercised and guaranteed in the present charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.

Article 18 of the Charter provides that:

"The state shall ensure the elimination of every discrimination against women and also ensure that protection of the rights of women and child as stipulated in international declarations and conventions."

Protocol to the African Charter on Human and Peoples' Rights on the rights of Women in Africa.

This protocol is based upon article 66 of the African Charter on Human and Peoples' Rights and provides for special protocols or agreements to supplement the provisions of the African Charter.

Article 2 of the Protocol provides for the elimination of discrimination against women. Article 2(1)(b) in particular provides that state parties must enact and effectively implement appropriate legislative or regulatory measures including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women.

Article 2(2) provides that state parties must commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies with a view to achieving the elimination of harmful cultural and traditional practices.

Article 17 provides that women must have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies.

Article 21 sets out the rights to inheritance and provides as follows:

A widow must have the right to an equitable share in the inheritance of the property of her husband and the right to continue to live in the matrimonial home. In the case of remarriage she should retain the house as though she had inherited it.

Women and men must have the right to inherit in equitable shares their parents' properties.

The Southern African Development Community Declaration on Gender and Development, 1997

Southern African Development Community ("SADC") policies generally promote gender equality and require member states to do the same. In February 1997, the SADC Council of Ministers passed a Declaration on Gender and Development that established a policy framework for mainstreaming gender in all SADC activities and strengthening the efforts of member countries to achieve gender equality. The Declaration stipulates that "gender equality is a fundamental human right" and resolves to "ensure the eradication of all gender inequalities in the region." It includes a redistribute component, including a commitment to improving women's access to and control over productive resources. It also contains a revaluation or recognition component, including commitments to ensure women's political representation and to change laws and social practices that discriminate against women

Declaration of the Sixth African Regional Conference on Women

The Sixth African Regional Conference on Women met in Addis Ababa from 22 to 26 November 1999. This declaration noted the progress that has been made with regard to implementing of the platforms of action but raises concern that shortcomings still exists. Areas were identified where some progress has been made. These areas are amongst others the following:

- That in several countries land tenure reform processes have led to legislation which provides for women to use, own and inherit land.
- Strong advocacy around female genital mutilation has led to the decrease of the practice or its replacement with new positive rites of passage.

Question 1: Where and when was the 6th African Regional Conference on Women held?

—

Question 2: What are the duties of the African States in terms of the African Charter on Human and Peoples' Rights?

Handout

Suggested responses to exercise on Regional instruments promoting the the rights of women concerning their sexual orientation

Questions	Suggested answers
1 Where and when was the 6 th African Regional Conference on Women held?	The 6 th African Regional Conference on Women met in Addis Ababa from 22-26 November 1999.
2 What are the duties of the African States in terms of the African Charter on Human and Peoples' Rights?	In this charter the African states that are party to the convention reaffirmed their adherence to the principles of human and peoples' rights and freedoms contained in the declarations, conventions and other instruments adopted by the Organisation of African Unity, the Movement of Non-Aligned Countries and the United Nations. They also are firmly convinced of their duty to promote and protect human and peoples' rights and freedoms and taking into account the importance traditionally attached to these rights and freedoms in Africa.

Worksheet

South African legislation and cases dealing with tradition, culture and religion and gender equality



Individually and then in pairs, read the document on South African legislation and case law below and then record your responses to the questions which follow.

Constitution of the Republic of South Africa Act 108 of 1996 (“the Constitution”)

The relevant provisions of the Constitution to be discussed below are as follows:

Section 9 –right to equality

The right not to be discriminated against in regard to succession may be justified in terms of section 9 of the Constitution which deals with the right to equality and provides that:

- “9(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.”*

Section 9 of the constitution first provides for the principle of equality before the eyes of the law. it also confers the right to equal protection and benefit of the law to everyone. The section also prohibits unfair discrimination on the listed grounds. The section makes the prohibition of unfair discrimination

to apply horizontally, i.e. between private individuals. The last part of the section presumes that discrimination on any of the listed grounds is unfair.

The constitutional court has held that the right to equality is premised on the idea that everyone possesses equal human dignity and that unfair discrimination against a person denies that person their right to human dignity.

Section 10 – right to dignity and section 14 – right to privacy

Section 10 sets out the right in respect of human dignity and provides that everyone has inherent dignity and the right to have their dignity respected and protected. The practice of virginity testing represents a breach of the Constitution in that it violates the rights of privacy, dignity and bodily integrity.

Section 14 of the Constitution deals with the right to privacy and provides that everyone has the right to privacy, which includes the right not to have-

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed.

Section 15 – freedom of religion, belief

Section 15 of the Constitution sets out the rights in respect of freedom of religion, belief and opinion and provides that:

- 15 (1) *Everyone has the right to freedom of conscience, religion, thought, belief and opinion.*
- (2) *Religious observances may be conducted at state or state-aided institutions, provided that a. those observances follow rules made by the appropriate public authorities; b. they are conducted on an equitable basis; and c. attendance at them is free and voluntary.*
- (3)(a) *This section does not prevent legislation recognising*
 - i marriages concluded under any tradition, or a system of religious, personal or family law; or*
 - ii systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.*
- (b) Recognition in terms of paragraph (a) must be consistent with this section and the other provisions of the Constitution.*

Further the Constitution provides that this section does not prevent legislation recognising-
Marriages concluded under any tradition, or a system of religious, personal or family law; or
systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

Section 25 – property rights

Section 25 of the Constitution sets out the rights in respect of property. This section provides amongst other things that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

Sections 30 and 31 – rights in respect of language and culture

Section 30 sets out the rights in respect of language and culture and provides that everyone has the right to use the language and to participate in the cultural life of their choice.

Section 31 sets out the rights in respect of cultural, religious and linguistic communities and provides that persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community:

- to enjoy their culture, practise their religion and use their language; and
- to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

The Communal Land Rights Act of 2004

The Communal Land Rights Act of 2004 is a statute that promotes gender equality in property rights and section 4 state:

- (2) *a right to land held by a married person is despite any law, practice, usage or registration to the contrary deemed to be held by all spouses in a marriage in which such person is a spouse jointly in undivided shares irrespective of the matrimonial property regime applicable to the marriage.*
- (3) *a woman is entitled to the same legally secure tenure rights in or to land and benefits from land as is a man. No law, community or other rule, practice or usage may discriminate against any person on the ground of the gender of such person.*

The Act has been criticised by some sectors that it has not been conventionally considered from the perspective of gender. Yet, as land is considered paramount to survival in an agro based economy such as South Africa, it is important to address the injustice that resulted from the colonialists' dispossessing Africans of their land. Such measures were primarily based on race; but ultimately had an impact on the right to ownership by women. Women are generally disadvantaged, compared with men of the same race and class in access to land. The result is that in general women often find themselves insecure in their rights of access to land. Access often largely depends on their link to a man and married women are placed in even a greater dilemma as they are often forced to remain in unfavourable marriages to secure the income and resources that come with land control and ownership.

As with the struggle to obtain any of the other Constitutional rights, rural black women find themselves consigned to inferior positions, while men hold the exclusive power to "use and control the profits on all land."²² It is women who are often in the first line of attack when housing, land and basic needs are threatened, and in these instances women mobilise themselves across the community, yet as Small and Kempe²³ have observed, it is the very same community political structures that prevent active

²² Alexander *op cit* at 61.

²³ Referred to with approval by S. Meer "Introduction" in Meer (ed) *Women, Land and Authority: Perspectives from South Africa*, 1997:4.

involvement by women in decision making. The existence of married women's right to land depended on consent to such an arrangement, or on the "altruistic" nature of the male heir to the land. Either way, the woman was dependent on someone else.

An awareness of the difficulties women experience in relation to land has led to implementation of policy decisions implemented first within the ANC framework and in government.²⁴ Shamim Meer lists them as follows:

- that women must participate in decision-making structures from local to national level;
- that women's demands must be taken up so that their priorities get addressed in community and national decision making forums; and
- that women must be organised and empowered at community level.

Employment Equity Act 55 of 1998

Section 6 of the Employment Equity Act also prohibits unfair discrimination and it provides that:

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

This means that people cannot be discriminated against within the employment context based on their gender, sex, religion or culture.

The Recognition of Customary Marriages Act²⁵ ("Customary Act")

The Recognition of Customary Marriages Act recognises customary marriages and equalises the status of men and women within customary marriages. This law was also enacted in order to give effect to the principle of equal treatment as contained in section 9 of the Constitution.

The Recognition of Customary Marriages Act was enacted in order to:

²⁴ This same commitment to an equitable land policy is reflected in both the Green Paper on South African Land Policy, 1996 and the White Paper on South African Land Policy, April 1997. In this vision of the Department of Land Affairs includes among others the acknowledgement that traditional communal land tenure systems are discriminatory to women and the need to break down these systems. It includes as one of its four basic objectives the need to "ensure that all reforms reflect the values of basic human rights and equality as required by the Constitution." D.L Carey Miller, 2000:459. M. Robertson "Land and Post-Apartheid Reconstruction in South Africa" in Bright and Dewar (eds) *Land Law: Themes and Perspectives*, 1998 quotes from the preamble to the R.D.P which among its many objectives was the need to encourage "the profound transformation of all levels of government and society", by giving equal opportunity to women in land access. The R.D.P was replaced by the Growth, Employment and Redistribution policy, better known as GEAR. See below for a discussion of how GEAR has affected African women.

²⁵ 120 of 1998

- make provision for the recognition of customary marriages;
- specify the requirements for a valid customary marriage;
- regulate the registration of customary marriages;
- provide for the equal status and capacity of spouses in customary marriages;
- regulate the proprietary consequences of customary marriages and the capacity of spouses of such marriages;
- regulate the dissolution of customary marriages.

The requirements for a valid customary marriage

The Customary Act provides that for a customary marriage entered into after the commencement of the Act to be valid the prospective spouses:

- must both be above the age of 18 years; and
- must both consent to be married to each other under customary law; and
- the marriage must be negotiated and entered into or celebrated in accordance with customary law.

If either of the prospective spouses is a minor, both his or her parents, or if he or she has no parents, his or her legal guardian, must consent to the marriage.

Equal status and capacity of spouses within the Customary Act

The Customary Act sets out provisions relating to equal status and capacity of spouses. This section provides that a wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity, including the capacity to acquire assets and to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law.

Dissolution of customary marriages within the Customary Act

The Customary Act provides that for dissolution of customary marriages

A customary marriage may only be dissolved by a court by a decree of divorce on the ground of the irretrievable breakdown of the marriage.

A court may grant a decree of divorce on the ground of the irretrievable breakdown of a marriage if it is satisfied that the marriage relationship between the parties to the marriage has reached such a state of disintegration that there is no reasonable prospect of the restoration of a normal marriage relationship between them.

The Customary Act while acknowledging polygamy seeks to protect the interests of women that are party to a polygamous marriage.

Witchcraft Suppression Act²⁶

In some African countries women are accused of witchcraft and burnt to death. It is mostly elderly women who are accused of being witches. The result is that they are ostracised by their communities,

²⁶ 3 of 1957

physically and mentally abused and may end up being burnt to death. In many cases these women are called witches by virtue of the fact that they live alone and are not dependant on a male partner something that is frowned upon by traditional African households where the role of men is held in high esteem.

The Witchcraft Suppression Act 3 of 1957 makes it an offence for any person to impute to any other person the causing by supernatural means of:

- any disease;
- injury; or
- damage to any person or thing
- or who names or indicates any other person as a wizard.

A person guilty of this offence and where the person in respect of whom the allegation was made has been killed is liable on conviction to imprisonment for a period not exceeding 20 years.

Cases dealing with culture, tradition and religion and gender inequality

Many aspects of customary law that generally endorses the patriarchal traditions of African communities conflict with the provisions of the constitution. Cases that have dealt with customary practices that are discriminatory are set out below.

Bhe and others v Magistrate, Khayelitsha, and others²⁷.

In *Bhe and others v Magistrate, Khayelitsha, and others*, the High Court noted that intestate succession in terms of African customary law was based on the principle of primogeniture. The general rule was that only a male who was related to the deceased through a male line qualified as intestate heir.

The court held that in terms of s 9(3) of the constitution the state is obliged to not discriminate unfairly on grounds of, inter alia, race or gender.

The provisions of Regulation 2(e) of the regulations promulgated in terms of the Black Administration Act dictated that the first two applicants could not inherit because of their gender and race. They were female and black.

In this regard the court held that the only reason why the first two applicants could not inherit from their father's estate was because they were black and they were females. This was discrimination on grounds of race and gender. It was unfair and therefore offended the provisions of s 9(1) and (3) of the Constitution. The court was thus bound to declare such law unconstitutional and invalid.

The matter was referred to the Constitutional Court for confirmation of invalidity. The Constitutional Court delivered its decision on 15 October 2004. The court held that section 23 of the Black Administration Act which created a separate system of succession of black people was violated rights of black people. The court held that the section and its regulations are manifestly discriminatory and

²⁷ 2004 (2) SA 544 (C)

violated both sections 9 (equality clause) and section 10 (right to dignity) of the Constitution. The Court also held that the customary rule of primogeniture is discriminatory against women and illegitimate children and accordingly declared unconstitutional.

The Court ordered that in the interim estates of black people which were regulated by the Black Administration Act devolve according to the rules provided for in the Succession Act and that in future the Master of the Supreme Court administer estates which were previously administered by magistrates²⁸.

The order of the court has been made retrospective to April 1994, except for cases where transfer of ownership has been completed.

Hlophe v Mahlalela and another²⁹

In this case the court held that issues relating to the custody of a minor child could not be determined by the mere delivery or non-delivery of a certain number of cattle.

Any doubt as to the applicable legal principles that might have existed in this regard were effectively removed by s 30(3) of the constitution which provided that 'in all matters concerning (children) his or her best interest shall be paramount'. The court held that it was in the best interest of the child for her to be reunited with the applicant.

Amod v Multilateral Motor Vehicle Accidents Fund ("MVA") (Commission for Gender Equality intervening)³⁰

In Amod v Multilateral Motor Vehicle Accidents Fund, the court held that while there was no legislation that regulated Muslim marriages the MVA was liable to compensate the widow in terms of the common law.

Rylan v Edros³¹

The court held that the failure to recognise Muslim marriages would violate the right to equality between religious or cultural groups.

Changing longstanding cultural practices, the traditions that sustain and reproduce gender inequalities is therefore fundamental to the agenda of women's movements worldwide. Cultural traditions are powerful and only careful efforts will alter or eliminate harmful ones. Deep-seated cultural perceptions of women as inferior to men continue to be a major hindrance for women's advancement.

²⁸ The order that the estates must be administered by the Master of the Supreme Court is not retrospective.

²⁹ 1998 (1) SA 449 (T)

³⁰ 1999 (4) SA 1319 (SCA)

³¹ 1997 (1) BCLR 77 (C)

Question 1: List the provisions in the Constitution that are important in the promotion of gender equality in culture, tradition and religion?

Question 2: List some of the statutes that have dealt with cultural and religious rights and gender equality.

Question 3: List some of the cases that are relevant to gender equality and culture, tradition and religion?

Handout

Suggested answers to worksheet on South African legislation and case law

<p>1 List the provisions in the Constitution that are important in the promotion of gender equality in culture, tradition and religion?</p>	<p>The relevant provisions of the Constitution to be discussed below are as follows:</p> <ul style="list-style-type: none">• Section 9 –right to equality• Section 10 – right to dignity• Section 14 – right to privacy• Section 15 – freedom of religion, belief...• Section 25 – right to property• Section 30 , 31 – rights in respect of language and culture
<p>2 List some of the statutes that have dealt with cultural and religious rights and gender equality</p>	<ul style="list-style-type: none">• Communal Land Rights Act• Employment Equity Act
<p>3 List some of the cases that are relevant to gender equality and culture, tradition and religion?</p>	<ul style="list-style-type: none">• Bhe & Others v Magistrate, Khayelitsha & Other• Hlophe v Mahlalela• Amod v Multilateral Motor Vehicle Accident Fund• Rylan v Edros

Section 4

An introduction to the Equality Act

At the end of this section you will be able to:

- ◆ Describe the origin of the Equality Act
- ◆ Explain the right to equality in the Bill of rights
- ◆ Describe examples of the application of the right to equality
- ◆ Explain the limitations of rights

Worksheet

An introduction to the Equality Act

 **Individually, and then in pairs, read the press cutting below and record your responses to the questions which follow:**

Sunday times 12 August 2001
Carmel Rickard

When the case of Judge Kathleen Satchwell against the President and the minister of justice was called in the Pretoria High Court this week, she was notably absent from the public gallery. It was just as well. The two-day hearing should have been prefaced with a health warning: that attendance would be dangerous to the blood pressure of anyone serious about lesbian and gay rights or, indeed, any other of the Constitution's anti-discrimination promises.

To start with, why was it necessary for Judge Satchwell to have had to resort to litigation?

She was appointed to the Bench in October 1996, and almost immediately began correspondence with the minister of justice about the wording of the law dealing with the benefits due to a judge's "spouse".

She pointed out that, since the law did not allow partners of the same sex to marry, she and her partner were not able to become "spouses" and were thus excluded from these benefits - including a pension for the surviving partner if the judge died first.

It was a clear enough message from an employee to an employer, one might have thought, particularly as the employee is a judge and the right not to be discriminated against on the grounds of sexual orientation is enshrined in a Constitution the boss has solemnly sworn to uphold.

But an examination of the letters exchanged between judge and minister reveals such tardiness in dealing with her problem that he could hardly have avoided censure had the matter gone to the Labour Court.

He said the whole question of domestic partnerships, heterosexual and homosexual, had been passed on to the South African Law Commission, whose report was expected by the end of 2000, and the Cabinet was likely to consider new legislation dealing with the question before the end of 2000. In the meantime, the government was against "piecemeal" amendments.

In fact, however, the commission's project on domestic partnerships only met for the first time last month - a full six months after the minister had estimated its report would be complete. In any case, the government has made at least 13 "piecemeal" legislative changes to deal with anti-gay discrimination and it's unclear why this couldn't become the 14th.

It is now four years since Judge Satchwell first raised this problem and there has been zero progress. To quote Johannesburg advocate Paul Jammy, who appeared for her in court this week: "If she were to die tomorrow, her partner would get absolutely nothing. No pension, nothing."

So Judge Satchwell decided the time had come for legal action.

Even at this stage the minister could have acted to avert litigation. Or he could have decided not to oppose the application, as he did in the case argued immediately before in which Judge Anna-Marie de Vos and her partner, Suzanne du Toit, challenged sections of the adoption laws discriminating against same-sex couples.

He could even have ensured that the arguments put up in court would be conducive to the dignity of those involved.

Instead, there was a sea-change in the ministerial line. Initially, through his correspondence, it appeared he had made a reasonable concession that the legislation discriminated against judges in same-sex partnerships, and had restated that his ministry was committed to removing such discrimination. Once the matter came to court, however, it was a different story.

Johannesburg advocate Ishmael Semenya SC claimed that, if Judge Satchwell had her way, the state would be flooded with similar applications and could not afford the costs.

He also argued that, in any case, the legislation did not discriminate against judges in same-sex relationships. While there was a distinction on the grounds of marital status, this was justified.

It would be "simplistic", Semenya argued, to say that only heterosexuals could marry. There was nothing to stop "a [male] judge from marrying a lesbian", he submitted, and such a couple would then automatically be entitled to the benefits offered "spouses" under the law.

Judge Satchwell was treated the same way as all other unmarried judges not because of her sexual orientation, "but because of her marital status".

He also said that, while Judge Satchwell had noted in her affidavit that the law prevented her from marrying her partner, she had not stated they would want to marry if the law changed.

He said that the judge's right to dignity was not impaired by the law: the decision not to give benefits to couples, including those in same-sex relationships, who had not entered a civil marriage in no way infringed on their dignity or indicated they were regarded as having lesser value.

But perhaps the argument with the most potential to raise blood pressure levels was that offered to explain that the law served a legitimate purpose.

It was needed to attract top legal practitioners away from lucrative private practice to the Bench, explained Semenya. To do this, you had to offer them some financial attractions such as those included in the disputed law.

He said this need to "incentivise practitioners" by helping them discharge their obligation to support their spouses, was a legitimate purpose. Without it the government could not appoint top practitioners to the Bench.

Does this mean only the married are top practitioners, that no lawyer who lives alone or in an unmarried relationship is worth attracting?

If that is the message then perhaps the minister should spell it out: where the Constitution says, "any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer", what it really means is this: "Only married heterosexuals need apply."

1. Why was the Equality Act passed?

2. Who bears the onus of proving discrimination in terms of the Act?

3. What process does a victim of discrimination follow in order to pursue a case in terms of the Act

4. What kind of remedies can the equality courts order?

An introduction to the Equality Act

1. Why was the Equality Act passed?

The Act was passed in order to give legislative effect to the right to equality contained in section 9 of the constitution. Its objectives are broadly to eliminate unfair discrimination and promote equality by providing user-friendly mechanisms for the processing of complaints.

2. Who bears the onus of proving discrimination in terms of the Act?

Once the applicant has made out a *prima facie* case of discrimination, the **onus of proof** lies with the respondent to prove that the discrimination did not take place as alleged or that the conduct is not based on one or more of the prohibited grounds.

3. What process does a victim of discrimination follow in order to pursue a case in terms of the Act

Proceedings instituted in terms of the Act, may be instituted by a person acting in their own interest or on behalf of another who cannot act in their own name, a person acting as a member of or in the interests of a group or class of persons, a person acting in the public interest, any association acting in the interests of its members or the South African Human Rights Commission or the Commission for Gender Equality.

A victim of discrimination may approach the clerk of the equality court directly and lodge a complaint using the prescribed form. The clerk will assist the victim in processing the complaint.

4. What kind of remedies can the equality courts order?

The Courts have the power to make an enquiry in respect of an application under the Act and to make an appropriate order in the circumstances after such enquiry. The possible orders include interim and declaratory orders, making a settlement between the parties an order of court, ordering a payment of damages and ordering that an unconditional apology be made.

These key features of the Act will be dealt with in greater detail as the course progresses. Before this is done, the Act should be seen in the broader context of the human rights culture.

A Human Rights Culture

The origin of human rights

The Universal Declaration of Human Rights which was adopted and promulgated on 10 December 1948 by the General Assembly of the United Nations, marks the real beginning of the international recognition of human rights. The Declaration also marks the end of the notion that sovereign states can exist in splendid isolation from the world community and perpetrate or preside over violations of human rights without any concern being expressed by any other state. The Declaration was an historical response to the Second World War and in particular to the atrocities committed in Nazi Germany.

The declaration is not intended to have a binding legal effect on countries which adopt it. It rather represents a common expression of opinion of states subscribing to the declaration. It has become the yardstick by which constitutions can be measured and alleged human rights violations can be assessed. It has also heralded the birth of the so-called “human rights culture” in terms of which ordinary people appeal to universal notions of just treatment.

What is a human right?

Human rights are one of the hallmarks of democracy. They have been defined as “generally accepted principles of fairness and justice” or “universal moral rights that belong equally to all people simply because they are human beings.”³² Human rights are generally divided into the following categories:

Civil and political rights (e.g. equality, speech, vote etc.)

Social and economic rights (e.g. education, labour, property) and

Environmental and developmental rights (e.g. safe and healthy environment, health care, food, water).

A right must be distinguished from a freedom although both rights and freedoms usually exist in a Bill of Rights. A right is an entitlement to be given, something which the law recognises as yours (e.g. equality, dignity). A freedom is an entitlement to expect that those things/values which society recognises as good, are not taken away from you (e.g. movement).

Generally people are entitled to exercise their human rights to the extent that they do not unreasonably infringe on someone else’s human rights. In the words of the American Judge, Oliver Wendell Holmes: “The right to swing my fist ends where another person’s nose begins.”

³² David McQuoid-Mason, Mandla Mchunu, Karthy Govender, Edward O’Brien, Mary Curd Larkin
Democracy for All Juta 63

The Bill Of Rights

Who does the Bill of Rights apply to?

The South African Bill of Rights was introduced as part of the Constitution (Chapter 2). It begins with a section on the nature of rights (section 7) and the application of the Bill (section 8). The application section reads as follows:

- “(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
- (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the rights and the nature of any duty imposed by the right.
- (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court -
 - (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
 - (b) may develop rules of the common law to limit the right provided that the limitation is in accordance with section 36(1).
- (4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.”

An enquiry into the application of the Bill of Rights rests on three inter-related elements:

- the beneficiaries of the Bill (i.e. who is it intended to benefit/protect?)
- the duties imposed by the Bill, and
- time.

Who is protected by the Bill?

Most of the rights in the Bill of Rights refer to “everyone” (when the right is stated positively), or “no one” or “no person” (when the right is stated negatively). For example: “Everyone is equal before the law” and “No one may be subjected to slavery, servitude or forced labour.” Some rights refer to narrower categories such as citizens (e.g. every citizen is free to make political choices...), or adult citizens (e.g. “Every adult citizen has the right- to vote...”), or workers (e.g. “Every worker has the right – to form and join a trade union...”). Clearly anyone seeking benefit from the Bill of Rights in respect of a particular right, would have to fall into the category to which the Bill ascribes the right.

When the Bill refers to “juristic persons” it requires the application to be considered in relation to the nature of the right and the nature of the juristic person. The following rights are more likely to be applied to juristic persons than others:

- equality,
- privacy,

- freedom of expression,
- freedom of association,
- the right to engage in collective bargaining,
- the property right,
- the right to access to information,
- just administrative action, access to court, and
- a fair trial.

Who is bound by the Bill?

The primary aim of any Bill of Rights, is generally to protect people from capricious actions by the state since the state is more powerful than individuals. This is called the **vertical relationship** and it is clear from Section 8(1) above that the Bill of Rights binds the state.

However, in addition to the vertical relationship, the Bill of Rights in certain circumstances protects people from abuses by other people. This is called the **horizontal relationship** and it is clear from Section 8(2) above that in certain circumstances the Bill of Rights protects individuals from abuses by other individuals.

When does the Bill apply?

The Bill of Rights is not retrospective in its application. The effect of this is that a person can only approach the court for protection in respect of an alleged violation which took place once the Bill was in place.

Limitation of rights

The limitation clause

Since basic rights and freedoms are not absolute, the Bill of Rights contains a general limitation clause which is as follows:

“Limitation of rights

- 36 (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

In order to determine whether a limitation of a right is justifiable under this section, a two-stage enquiry is required:

- 1) the applicant would have to show that her right was protected by the Constitution and that it had been violated, and
- 2) the state would have to show that the violation amounted to a justifiable infringement of her right.

The limitation clause is also composed of two parts:

- 1) the law must be of general application, and
- 2) the limitation must be reasonable and justifiable in an open and democratic society etc.

Law of general application

In order to comply with this description, the instrument in question needs to be law. The court has found that administrative action does not constitute law³³ but rules of legislation, delegated legislation, common law and exercises of executive rule-making authorized by the Constitution, do constitute law.³⁴ It is not clear whether internal orders or directives of state agencies constitute law. It is likely that policy would not constitute law. The law will be “of general application” if it applies across-the-board, and not to a specific individual or individuals only and if it is not arbitrary in nature.

³³ *Premier of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-aided Schools: Eastern Transvaal* 1999 (2) SA 91 (c)

³⁴ *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC)

In the education sector, an example of the implication of this is as follows: if a public school were to conduct body searches of its learners in order to check for weapons entering school premises, this is likely to violate the right to human dignity and privacy of the learners. However, if a law/regulation were to set out the circumstances under which body searches could be conducted, and if this law/regulation were to pass the test of reasonableness and justifiability (e.g. only female guards searching female learners etc.), it would not be unconstitutional to limit these rights in this way.

Reasonableness and justifiability in an open and democratic society based on human dignity, equality and freedom

This qualification means that the reasons for the limitation must be ones which are acceptable in an open and democratic society etc. In addition, the limitation must be the minimum in order to achieve its purpose. In applying the limitation clause, the constitutional court said the following:

“The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of s 33(1) (36(1) in the final Constitution). The fact that different rights have different implications for democracy, and in the case of our Constitution, for “an open and democratic society based on freedom and equality” means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests.”

S v Makwanyane 1995 (3) SA 391 (CC) 104

In addition to the limitations clause, there are inherent limitations in certain rights contained in the Bill. For example, the right to assembly is limited by the requirement that those who assemble do so “peacefully and unarmed”, the right to access to information is limited if disclosing that information would place someone’s life in danger.

The origin of the Equality Act

Although the drafting of the Act was the primary responsibility of the Department of Justice, because of the constitutional and public significance of the Act, an inclusive approach was adopted to the drafting. In May 1998 the Equality Drafting Unit (EDU) was launched as a joint project of the Human Rights Commission and the Department. A detailed framework for the Act was drafted by the EDU drawing on the expertise of a number of individuals, research institutions and NGO's as well as a number of expert conferences, public awareness workshops and a national consultative conference held in July 1999. This National Framework document was presented to the Minister and a drafting team appointed by the Minister prepared a draft bill for cabinet.

The draft bill was published on 25 October 1999 and a Joint Committee on the promotion of Equality and the Prevention of Unfair Discrimination was appointed to deal with the bill. After substantial redrafting by this committee, based on written and verbal submissions from a range of organizations, the bill was finally passed at the end of 2000.

Section 5

Key provisions of the Equality Act

At the end of this section you will be able to:

- ◆ Identify key aspects of the objects, interpretation and guiding principles of the Act
- ◆ Differentiate between the scope of the Equality Act, Employment Equity Act and Labour Relations Act
- ◆ Describe the landscape of institutions dealing with complaints of discrimination
- ◆ Describe key provisions relating to the equality courts
- ◆ Explain the procedure for laying a complaint
- ◆ Decide when to use the Equality Act
- ◆ Describe the factors to consider when deciding whether to use the Act

Worksheet

Identifying key issues in the objects, interpretation and guiding principles of the Act

 Individually, and then in pairs, read sections 2,3 and 4 of the Act which is in the Resources section of your files and record your answers to the following statements:

Statement	True?	False?	Why? (Refer to the relevant section of the Act)
1. One of the primary objects of the Act is to give effect to part of the Constitution.			
2. One object of the Act is to give effect to the actual wording of the Constitution only.			
3. The specific constitutional rights referred to in the objects of the Act are the right to equality and the right to human dignity.			
4. The objects of the Act are both proactive and reactive.			
5. The objects of the Act relate only to South African law and imperatives.			
6. The context in which a dispute arises is not relevant when interpreting this Act			
7. Any person interpreting the Act is not obliged to take account of			

international law.			
8. The Act places a premium on the participation of parties in the processing of cases.			
9. Remedies under the Act should be aimed purely at deterring perpetrators of unfair discrimination and others from committing acts of unfair discrimination.			
10. Persons applying the Act should have special skills and capacity.			
11. The Act specifically recognises the role of patriarchy in causing discrimination.			
12. The Act recognises that measures to eliminate discrimination should be taken primarily at government level.			

Handout

Key Issues in the objects, interpretation and guiding principles of the Act

Statement	True?	False?	Why? (Refer to the relevant section of the Act)
1. One of the primary objects of the Act is to give effect to part of the Constitution.	✓		Section 2(a) of the Act indicates that one of the objects is to enact legislation required by section 9 of the Constitution.
2. One object of the Act is to give effect to the actual wording of the Constitution only.		✓	Section 2(b) of the Act indicates that the Act is to give effect to both the <i>letter and spirit</i> of the Constitution.
3. The specific constitutional rights referred to in the objects of the Act are the right to equality and the right to human dignity.	✓		Sections 2(b)(ii) and 2(b)(iv) refer to these rights. Section 2(b)(v) refers to "incitement to cause harm" in section 16(2)(c) of the constitution. This is not a right but a limitation on the right to freedom of expression.
4. The objects of the Act are both proactive and reactive.	✓		Examples of "reactive" objects are those designed to deal with unfair discrimination after it has occurred (e.g. section 2(b)(f)). Examples of "proactive" objects are those designed to promote equality (section 2(b)(ii) or educate the public (section 2(b)(e)).
5. The objects of the Act relate only to South African law and imperatives.		✓	Section 2(h) refers to international law and instruments in the form of conventions.
6. The context in which a dispute arises is not relevant when interpreting this Act		✓	Section 3(3) expressly provides that any person applying or interpreting the Act must take account of the context of the dispute and the purpose of the Act.
7. Any person interpreting the Act is not obliged to take account of international law.	✓		Section 3(2) states that a person interpreting the Act <i>may</i> be mindful of international law (and other law).
8. The Act places a premium on the participation of parties in the processing of cases.	✓		Sections 4(1)(a), 4(1)(b) and 4(1)(c) indicate an intention to encourage participation of parties in proceedings under the Act.

9. Remedies under the Act should be aimed purely at deterring perpetrators of unfair discrimination and others from committing acts of unfair discrimination.		✓	Section 4(1)(d) is clear that corrective and restorative measures should be used in conjunction with measures of a deterrent nature.
10. Persons applying the Act should have special skills and capacity.	✓		This is clear from Section 4(1)(e).
11. The Act specifically recognises the role of patriarchy in causing discrimination.	✓		Section 4(2)(a) refers to patriarchy with colonialism and apartheid as causes of systemic discrimination and inequalities.
12. The Act recognises that measures to eliminate discrimination should be taken primarily at government level.		✓	Section 4(2)(b) refers to the need to take measures <i>at all levels</i> to eliminate discrimination and inequalities.

Worksheet

The scope of the Equality Act

The Equality Act applies as follows:

- “5. (1) This Act binds the State and all persons.
- (2) If any conflict relating to a matter dealt with in this Act arises between this Act and the provisions of any other law, other than the Constitution or an Act of Parliament expressly amending this Act, the provisions of this Act must prevail.
- (3) This Act does not apply to any person to whom and to the extent to which the Employment Equity Act, 1998 (Act No. 55 of 1998), applies.”

It is therefore clear that:

- The *State* is bound by the Act. The state is defined in the Act to include:
 - “- any department of State or administration in the national, provincial or local sphere of government,
 - any other functionary or institution -
 - exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
 - exercising a public power or performing a public function in terms of any legislation or under customary law or tradition.”
- All *persons* are bound by the Act (e.g. this would include citizens and non-citizens)
- *Persons covered by the Employment Equity Act* (and this would include juristic persons) are not covered by the Equality Act to the extent that the Employment Equity Act covers them

Chapter 2 of the Employment Equality Act applies to all employees and employers.

Except where chapter 3 provides otherwise, chapter 3 applies only to designated employers and people from designated groups.

'designated employer' means-

- (a) an employer who employs 50 or more employees;
- (b) an employer who employs fewer than 50 employees, but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of Schedule 4 to this Act;
- (c) a municipality, as referred to in Chapter 7 of the Constitution;

- (d) an organ of state as defined in section 239 of the Constitution, but excluding local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service; and
- (e) an employer bound by a collective agreement in terms of section 23 or 31 of the Labour Relations Act, which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement;

'designated groups' means black people, women and people with disabilities;

Although the Employment Equity generally covers acts of discrimination which take place between employers and employees and in the workplace, it nevertheless expressly excludes discriminatory dismissals. These are covered by the Labour Relations Act which covers all dismissals. Unfair discriminatory dismissals are defined as "automatically unfair dismissals" in the Labour Relations Act (section 187). The relevant section reads as follows:

187 Automatically unfair dismissals

- (1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5* or, if the reason for the dismissal is-
 - (f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility

Note: The Employment Equity Act covers acts of discrimination, *other than dismissal*, committed by employers or Temporary Employment Services acting on the express or implied instructions of employers. Discriminatory dismissals are covered under the Labour Relations Act (section 187) as "automatically unfair dismissals". The application of the Equality Act does not expressly exclude those persons covered by the Labour Relations Act. The potential implication of this is that an employee claiming that his/her dismissal is unfair because it is discriminatory, could opt to process the dispute *either* via the Labour Relations Act procedures *or* via the Equality Act procedures. It remains to be seen whether the equality courts will entertain such a dispute given the fact that an established and prescribed channel exists in terms of the Labour Relations Act.



Individually, and then in pairs, sort the cards given to you by the trainer into three piles: those situations in which the Equality Act would apply, those situations in which the Employment Equity Act would apply and those situations in which the Equality Act and the Labour Relations Act would apply. Record the letters of the cards in the columns below

Equality Act (8 cards)	Employment Equity Act (5 cards)	Labour Relations Act/Equality Act (3 cards)

Handout

Equality Act	Employment Equity Act	Labour Relations Act/Equality Act
<p>C</p> <p>Mr Daniels, who dies without leaving a will, was married to Mrs Daniels by Muslim ceremony prior to his death. In terms of the law of intestate succession, Mrs Daniels is not entitled to the house they lived in as their marriage is not recognised in law.</p>	<p>A</p> <p>Ntabiseng Dlamini is not appointed to a position she applied for because she is a single mother and the employer assumes that she has to collect her children from school during working hours.</p>	<p>K</p> <p>Susan du Plessis, a white woman was dismissed by her employer (African Textiles) because her employer wanted to create a vacancy for an affirmative action candidate.</p>
<p>E</p> <p>Susan Pillay, a coloured woman is refused entry to a nightclub on the grounds that she is not properly dressed. She suspects that she was refused entry because of her race.</p>	<p>B</p> <p>Rachel Ntsabo resigns from her job because she claims she has been continually sexually harassed by her supervisor and although she had complained to management, the company had done nothing about the harassment.</p>	<p>O</p> <p>Mavis Kekana is a domestic worker. She is dismissed by her employer when her employer discovers that she is pregnant.</p>
<p>F</p> <p>Nosipho Mkhize is attacked in her school playground by a classmate, the classmate's boyfriend and mother. She believes that the attack was racially motivated.</p>	<p>D</p> <p>The black employees at Africa Holdings claim that they have been indirectly discriminated against in that the company forces them to join the provident fund while white employees may join the pension fund.</p>	<p>P</p> <p>Martha Stevens is sexually harassed at her workplace in the security industry. She raises a grievance but her employer does nothing about the harassment and eventually she has no option but to resign. She claims that her resignation is in fact a "constructive dismissal".</p>

Equality Act	Employment Equity Act	Labour Relations Act/Equality Act
<p>G</p> <p>The National Coalition for Gay and Lesbian Equality claim that the inclusion of sodomy as an offence in the Criminal Procedures Act is unconstitutional.</p>	<p>H</p> <p>Naledi Nhlapo applies for a promotion but is unsuccessful. She claims that it is because she is an African female.</p>	
<p>I</p> <p>Ms J claims that the twins she has conceived through artificial insemination and is raising with her same-sex partner should be registered as the couple's children by the Department of Home Affairs.</p>	<p>L</p> <p>Noeleen Brits is a bomb disposal expert in the South African Police Service. She claims that she has been unfairly discriminated against because she is not promoted even though she is due for promotion, because she is a white woman.</p>	
<p>J</p> <p>Corporal Dlamini is gay. She claims that she is being discriminated against in the SANDF by not being promoted.</p>		
<p>M</p> <p>Vera Petersen works for the National Intelligence Agency. She claims that she has been discriminated against by not being promoted because she has children and prefers not to travel extensively.</p>		
<p>N</p> <p>General Kekana is dismissed by the SANDF when the SANDF discovers that she is a lesbian.</p>		

Discrimination

In terms of Section 1 of the Act:

“discrimination means any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly –

- (a) imposes burdens, obligations or disadvantage on; or
 - (b) withholds benefits, opportunities or advantages from,
- any person on one or more of the prohibited grounds.”

Implications of the definition:

- discrimination may be caused by a *positive action* (i.e. “any act”) or by a *failure to act/inaction* (i.e. “omission”). Examples of positive actions include the refusal of accommodation, the denial of a mortgage bond, refusing medical treatment. Examples of omissions include: failure to install facilities for disabled people, failing to meet the needs of nursing mothers (such as breastfeeding or nappy-changing facilities),
- discrimination may arise in *policy* (e.g. a school admissions policy), *law* (e.g. act of parliament), *rule* (e.g. a restaurant rule prohibiting certain clothing), *practice* (e.g. regular habit of an organization), *condition* (e.g. condition of a contract) or *situation* (e.g. “once off” event),
- discrimination may be *direct or indirect*: *Direct discrimination* consists of unfavourable or differential treatment on the basis of one of the grounds listed in section 1³⁵ of the Act. *Indirect discrimination* is discrimination which does not explicitly distinguish between people on the basis of any listed ground (and possible grounds that are not listed in the Act) but nonetheless has a discriminatory effect on particular groups or individuals,
- discrimination has the effect of *causing disadvantage* (by imposing burdens, obligations or disadvantage) or *limiting advantage* (by withholding benefits, opportunities or advantages). Examples of causing disadvantage include: requiring women to retire at 60 while men retire at 65, requiring HIV positive people to pay higher premiums for medical insurance.. Examples of limiting advantage include: pardoning prisoners who were mothers and not those who were fathers, denying HIV-positive people access to benefits.
- discrimination affects any *person* (i.e. as opposed to organization).

³⁵ “prohibited grounds are:

- (a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or
- (b) any other ground where discrimination based on that other ground –
 - (i) causes or perpetuates systemic disadvantage;
 - (ii) undermines human dignity; or
 - (iii) adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).”

Prohibited Grounds

“Prohibited grounds are:

- (a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or
- (b) any other ground where discrimination based on that other ground –
 - (i) causes or perpetuates systemic disadvantage;
 - (ii) undermines human dignity; oradversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).”

Race

Race is one of the three grounds which the Act pays special attention to. Section 7 lists examples of race discrimination although this list is not exhaustive. Race can overlap with the other prohibited grounds of colour and ethnic origin but it primarily refers to the distinction between “black” and “white” as well as to the apartheid classifications of “African”, “coloured”, “Asian” and “white”.

Gender and sex

As in the case of race, gender is given a special focus in the Act. Section 8 lists examples of gender discrimination although the list is illustrative rather than exhaustive. The listed examples cover both gender and sex discrimination. “Examples of biological difference are physical strength and reproductive capacity (sex). Examples of socially constructed features of masculinity and femininity are aggression and nurturing (gender).”³⁶

Pregnancy

Although pregnancy is covered under gender and sex discrimination, it is mentioned separately because of the importance attached to this form of discrimination. Pregnancy is defined to include any condition related to pregnancy, intended pregnancy, potential pregnancy or termination of pregnancy.

Marital Status

This ground “includes the status or condition of being single, married, divorced, widowed or in a relationship, whether with a person of the same of the opposite sex, involving a commitment to reciprocal support in a relationship.” (section 1(1)(v) of the Act). Examples of discrimination on this ground include single people being denied state housing subsidies, a man being prevented from attending a course run by a church organization because he is a divorcee, a widow being accused of being a witch and being expelled from her community.

Sexual Orientation

Although sexual orientation is not defined in the Act, the Constitutional Court has accepted the following definition:

“Sexual orientation is defined by reference to erotic attraction: in the case of heterosexuals, to members of the opposite sex, in the case of gays and lesbians, to members of the same sex.

³⁶ Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act Edited by Cathi Albertyn, Beth Goldblatt and Chris Roederer p 60

Potentially, a homosexual or gay or lesbian person can therefore be anyone who is erotically attracted to members of his or her own sex.”³⁷

Age

Section 1(1)(i) of the Act defines age follows:

“Age includes the conditions of disadvantage and vulnerability suffered by persons on the basis of their age, especially advanced age.”

Religion

Freedom of religion and the prohibition on religious discrimination are closely related. Unfair discrimination on the basis of religion can extend to unfair discrimination for conduct in fulfillment of religious beliefs. For example: students being prohibited from wearing clothes in accordance with Islam, not providing meals in accordance with dietary laws in a university or school canteen.

A questions which arises in connection with discrimination on the basis of religion, is whether religious institutions can themselves discriminate in accordance with the dictates of their religion. For example, a Christian school dismisses its headmaster (a married man) when it is discovered that he is having an affair. In such cases, freedom of religion is likely to be balanced with freedom of religion and some discriminatory practices are likely to be allowed in accordance with the beliefs of that religion.

Conscience and belief

These grounds overlap with religion but derive from non-religious values and beliefs rather than religious doctrine. An example of discrimination on this ground is forcing health care professionals to perform abortions.

Culture and language

Nether of these terms are defined in the Act: the former because it is very difficult to define and the latter because it does not require a definition. An example of discrimination on the basis of culture would include ignoring the food, music and other practices of a certain culture at functions of an organisation. An example of discrimination on the basis of language would be only catering for classes in one particular language at a government school located in an area dominated by another language group.

Ethnic or social group

This ground is said to “combine a biological group that shares a common descent, with a common cultural heritage and, sometimes, a territorial base.”³⁸ In South Africa examples of ethnic groups would include Venda, Sotho, Chinese, Greek or Italian. An example of discrimination on the basis of ethnic group would be to recognise the land claims of a dominant ethnic group in a particular geographical area and ignore the similar claims of a smaller ethnic group in the same area.

Social group refers to social origin or status (e.g. persons of a particular socio-economic status). Ethnic and social group can be combined in acts of discrimination. For example only distributing food aid to members of a particular ethnic and social group in an area in which all groups are affected by famine or disaster.

³⁷ National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & others 1999 (1) SA 6 (CC) para 20

³⁸ Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act Edited by Cathi Albertyn, Beth Goldblatt and Chris Roederer p 79

Birth

Birth is not defined in the Act and may overlap with grounds such as nationality, race, ethnicity and family status. On its own, it is likely to refer to the status of a person at birth (i.e. “legitimate” or “illegitimate”). An example of discrimination on this ground is discrimination against illegitimate children regarding inheritance.

Additional grounds

Although the grounds of HIV/AIDS status, socio-economic status, nationality, family responsibility and family status were included in the original draft Bill, they were excluded from the final draft. After pressure from lobby groups, parliament added the following clause to cater for these grounds:

“34 (1) In view of the overwhelming evidence of the importance, impact on society and link to systematic disadvantage and discrimination on the grounds of HIV/AIDS status, socio-economic status, nationality, family responsibility and family status –

- (a) special consideration must be given to the inclusion of these grounds in paragraph (a) of the definition of “prohibited grounds” by the Minister;
- (b) the Equality Review Committee must, within one year, investigate and make the necessary recommendations to the Minister.”

Section 34(2) of the Act makes it clear that the section does not prevent the courts from deciding cases based on these grounds, a person bringing a complaint based on these grounds, or a court deciding that these grounds can be brought within the definition of unlisted prohibited grounds or being included within one or more of the listed prohibited grounds.

Family responsibility is defined as “responsibility in relation to a complainant’s spouse, partner, (dependant), child or other members of his or her family in respect of whom the member is liable for care and support.” (Section 1(1)(xi)). An example of discrimination on this basis would be excluding a woman from consideration of promotion because she cannot work long hours in the office as she has to attend to her children.

Family status is defined to include “membership in a family and the social, cultural and legal rights and expectations associated with such status” (section 1(1)(xii)). An example of discrimination on this basis would be prohibiting members of the same family from being employed by the same employer.

Socio-economic status is defined to include “a social and economic condition or perceived condition of a person who is disadvantaged by poverty, low employment status or lack of or low-level educational qualifications.” (Section 1(1)(xxvi)). An example of discrimination on this basis would be excluding people from bank loans on the grounds that they constitute a credit risk because of their low economic status.

“**Nationality** means ethnic or national origin and include practices associated with xenophobia and other adverse assumptions of a discriminatory nature but does not include rights and obligations normally associated with citizenship.” (Section 1(1)(xvii)). An example of discrimination on this basis would be refusing to employ people of a particular nationality.

Fair and Unfair Discrimination

In terms of Section 6 of the Act, “Neither the State nor any person may unfairly discriminate against any person.” Sections 7,8 and 9 provide examples of discrimination on the grounds of race, gender and disability respectively. Section 10 deals with hate speech which will be covered in more detail below.

Implications of the prohibition:

- the prohibition applies to the State and to people (i.e. it applies both *vertically* (as between the State and people) and *horizontally* (as between people).

- only unfair discrimination is prohibited which implies that *fair discrimination* is recognised. This is established in section 14(1) which states that “It is not unfair discrimination to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.” Section 14(2)(c) also implies that discrimination may be fair if it “reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.”

With the exception of hate speech, which by definition cannot be fair, the determination of whether an act or omission is fair discrimination is made based on the consideration of the following factors (section 14(2)(a)) which must be considered:

- “(a) the context;
- (b) the factors referred to in subsection (3);
- (c) whether the discrimination reasonably and justifiably differentiated between persons according to objectively determinable criteria, intrinsic to the activity concerned”

The Act does not indicate the order in which these factors must be considered, nor whether priority is given to any of them.

The specific factors referred to in 14(3) are as follows:

- (a) whether the discrimination impairs or is likely to impair human dignity;
- (b) the impact or likely impact of the discrimination on the complainant;
- (c) the position of the complainant in society and whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage;
- (d) the nature and extent of the discrimination;
- (e) whether the discrimination is systemic in nature;
- (f) whether the discrimination has a legitimate purpose;
- (g) whether and to what extent the discrimination achieves its purpose;
- (h) whether there are less restrictive and less disadvantageous means to achieve the purpose;
- (i) whether and to what extent the respondent has taken such steps as being reasonable in the circumstances to-
 - address the disadvantage which arises from or is related to one or more of the prohibited grounds; or

- accommodate diversity;

The Onus of Proof

As we saw from the very first exercise of the workshop, once a prima facie case of discrimination has been made out by the complainant, the onus of proof lies with the respondent. The reasons for this are that discrimination is notoriously difficult to prove, not least because the proof of discrimination often lies in the hands of the respondent.

A prima facie case

A prima facie case is proof “which, if uncontradicted and believed at trial, would establish his right.”³⁹ To establish a prima facie case in terms of the Equality Act, the complainant would have to prove that:

- there was an act or omission,
- which caused harm (i.e. withholding benefit or imposing disadvantage),
- on a prohibited ground.

The onus of proof

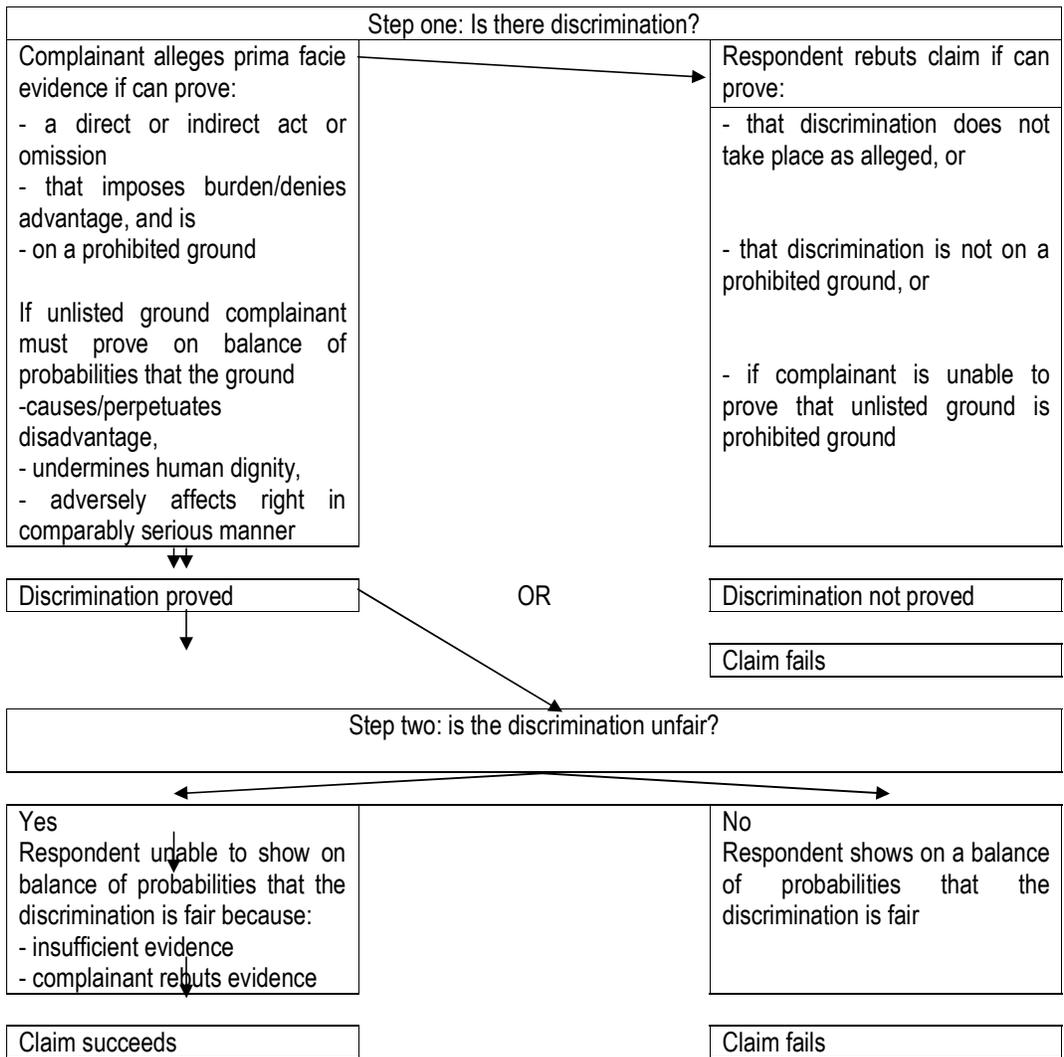
If the complainant establishes the above, the respondent can only rebut this by either:

- proving that the discrimination did not take place, or
- proving that the conduct is not based on one or more of the prohibited grounds.

The one exception to the process described above, is in circumstances in which the complainant alleges that discrimination took place on an unlisted ground. In such circumstances the complainant would have to prove on a balance of probabilities that the listed ground falls within the definition of prohibited grounds. If the complainant was able to do this, the process would continue as indicated (i.e. the complainant would have to make out a prima facie case of discrimination on this additional ground and the respondent would then have to rebut this).

³⁹ Webster v Mitchell 1948 (1) SA 1186 (W) at 1189 cited in Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act Edited by Cathi Albertyn, Beth Goldblatt and Chris Roederer p 50

An overview of this procedure can be illustrated as follows:⁴⁰



⁴⁰ this diagram is adapted from Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act Edited by Cathi Albertyn, Beth Goldblatt and Chris Roederer p 52

Hate speech, harassment and dissemination of Information

Hate speech

The prohibition on hate speech in the Act has to be balanced with the right to freedom of expression, also contained in the constitution. The prohibition is contained in Section 10 and a proviso balancing this right against freedom of expression is contained in Section 12.

“Prohibition of hate speech

- 10 (1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to–
- (a) be hurtful;
 - (b) be harmful or incite harm;
 - (c) promote or propagate hatred.
- (2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in section (1), to the Directorate of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation.

Hate speech and harassment

15. In cases of hate speech and harassment section 14 does not apply.”

Some of the implications of these sections are:

- the prohibition goes beyond disseminating words to communicating words. The implication of this is that hate speech may occur between two people,
- the medium of communicating the hatred is through words,
- the Act requires that a reasonable person *could* construe the intention to be hurtful (i.e. not that a reasonable person *would* construe a hurtful intention),
- the test is not the intention of the person allegedly using hate speech but whether a reasonable person could construe their words to be hate speech.

The proviso in Section 12 reads as follows:

“Provided that *bona fide* engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section.”

Harassment

“11. No person may subject any person to harassment”

“1 (1)(xiii) Harassment” means unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to –

- (d) sex, gender or sexual orientation; or
- (e) a person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group."

Some of the implications of these sections are:

- the emphasis is on the person being harassed rather than the harasser (i.e. intention is not relevant);
- conduct can be verbal, physical or non-verbal;
- conduct can be persistent (e.g. a number of small acts which collectively constitute harassment), or serious (e.g. one major act which constitutes harassment);
- harassment can be any unwanted conduct;
- harassment must relate to one of the prohibited grounds (in other words, it must relate to the victim's membership of a particular group;
- the victim need not actually belong to a particular group but be perceived to belong to the group for discrimination to take place.

Dissemination and publication of information that unfairly discriminates

"12. No person may –

- (a) disseminate or broadcast any information;
- (b) publish or display any information or notice that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person: provided that *bona fide* engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section."

According to Albertyn, Goldblatt and Roederer⁴¹, this section raises a number of problems:

- does the conduct in question involve publication or dissemination as described in s12(a) or (b); if so
- could this conduct reasonably be understood to demonstrate a clear intention to discriminate unfairly against any person, if so
- can the discrimination in question be justified under s 14 as being fair and if not
- is the conduct exempted by way of falling under the protection of the s12 proviso?

In essence, it would appear as if the very actions which section 12(a) seeks to prohibit, section 12(b) permits in terms of freedom of expression. In summary therefore, section 12 only prohibits the following information:

- information which both could reasonably be understood to demonstrate a clear intention to discriminate unfairly against a person, and

⁴¹ Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act Edited by Cathi Albertyn, Beth Goldblatt and Chris Roederer p 100

- amounts to either propaganda for war, incitement of imminent violence, or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.⁴²

⁴² Ibid p100

The landscape of institutions dealing with equality and discrimination complaints

The Constitutional Court
is empowered to hear complaints in terms of section 9 (the equality clause) of the Constitution

The Human Rights Commission
is empowered in terms of its enabling Act to hear complaints related to discrimination and is recognised as an “alternative forum” by the Act

The Supreme Court of Appeal
is empowered to hear complaints in terms of section 9 (the equality clause) of the Constitution

The Labour Appeal Court
has jurisdiction over discriminatory dismissals (automatically unfair dismissals) and acts of unfair discrimination which occur in the workplace

The Gender Commission
is empowered in terms of its enabling Act to hear complaints related to discrimination and is recognised as an “alternative forum” by the Act

The High Court
is empowered to hear complaints in terms of section 9 (the equality clause) of the Constitution
The High Court is also empowered to sit as an **Equality Court** in terms of the Act

The Labour Court
has jurisdiction over discriminatory dismissals (automatically unfair dismissals) and acts of unfair discrimination which occur in the workplace

The Land Claims Court
hears disputes about land

The Magistrates’ Courts
is empowered to hear complaints in terms of section 9 (the equality clause) of the Constitution
Magistrates’ Courts are also empowered to sit as **Equality Courts** in terms of the Act

The Commission for Conciliation, Mediation and Arbitration (CCMA)
has jurisdiction over discriminatory dismissals (automatically unfair dismissals) and acts of unfair discrimination which occur in the workplace for conciliation only

The Public Protector
Receives and hears complaints from aggrieved persons against government agencies or officials

Worksheet

Key provisions relating to the Equality Courts



The extracts from the Act below describe the key provisions relating to the Equality Courts. Individually, and then in pairs, having read the extracts, record your responses to the questions which follow

“Guiding principles

4. (1) In the adjudication of any proceedings which are instituted in terms of or under this Act, the following principles should apply:

- (a) The expeditious and informal processing of cases, which facilitate participation by parties to the proceedings;
- (b) access to justice to all persons in relevant judicial and other dispute resolution forums;
- (c) the use of rules of procedure in terms of section 19 and criteria to facilitate participation;
- (d) the use of corrective or restorative measures in conjunction with measures of a deterrent nature;
- (e) the development of special skills and capacity for persons applying this Act in order to ensure effective implementation and administration thereof.

...

Equality courts and presiding officers

16(1) For the purpose of this Act, but subject to section 31 –

- (a) every magistrate’s court and every High Court is an equality court for the area of its jurisdiction; and
- (b) any magistrate, additional magistrate and judge may be designated by the Minister, after consultation with the Judge President or the head of an administrative region defined in terms of section 1 of the Magistrates’ Courts Act (Act No. 32 of 1944), concerned, as the case may be, as a presiding officer of the equality court of the area in respect of which he or she is magistrate, additional magistrate or judge, as the case may be.

...

Rules and court proceedings

19(1) Except as is otherwise provided in this Act, the provisions of the Magistrates' Courts Act, 1944...and the Supreme Court Act, 1959...and of the rules made thereunder as well as the rules made under the Rules Board for Court of Law Act, 1985...apply with the necessary changes required by the context to the equality courts, in so far as these provisions relate to -...

(f) jurisdiction, subject to subsection (3)...

...

(3) (a) Subject to paragraph (b), nothing in this Act precludes a magistrates' court sitting as an equality court from making an order contemplated in section 21(2), which exceeds the monetary jurisdiction of a magistrates' court, in which case the order must be submitted in the prescribed manner to a judge of the High Court having jurisdiction for confirmation.

(b) The operation of paragraph (a), relating to the confirmation of an order, is suspended until any appeal contemplated in section 23 is finalised.

...

20. (3) (a) The clerk of the equality court must, within the prescribed period of receiving such notification, refer the matter to a presiding officer of the equality court in question, who must, within the prescribed period, decide whether the matter is to be heard in the equality court or whether it should be referred to another appropriate institution, body, court, tribunal or other forum (hereafter referred to as an alternative forum) which, in the presiding officer's opinion, can deal more appropriately with the matter in terms of that alternative forum's powers and functions."

When referring the matter the clerk must take all relevant circumstances into account including:

"20(4)(a) the personal circumstances of the parties and particularly the complainant;

(b) the physical accessibility of any contemplated alternative forum;

(c) the needs and wishes of the parties and particularly the complainant;

(d) the nature of the intended proceedings and whether the outcome of the proceedings could facilitate the development of judicial precedent and jurisprudence in this area of law;

(e) the views of the appropriate functionary at any contemplated alternative forum

1. Are the equality courts bound to hear all cases referred to them?

2. Under what circumstances would an equality court refer a case to an alternative forum?

3. What considerations would the clerk of the equality court take into account when referring a case to an alternative forum?

4. Does a magistrate's court, sitting as an equality court have authority to make an order exceeding the normal monetary jurisdiction of a magistrate's court, and if so, what is the procedure involved?

5. Which principles should be applied when deciding cases in the equality courts?

Handout

Suggested responses to exercise on key provisions relating to the Equality Courts

1. Are the equality courts bound to hear all cases referred to them?

No, the equality courts are not bound to hear all cases referred to them. They may refer cases to an alternative forum as listed in the Act (section 20(3)(a)).

2. Under what circumstances would an equality court refer a case to an alternative forum?

The presiding officer of an equality court would refer a case to an alternative forum if the alternative forum could deal with the case more appropriately in terms of its powers and functions (section 20(3)(a)).

3. What considerations would the clerk of the equality court take into account when referring a case to an alternative forum?

The presiding officer would take all relevant circumstances into account including:

- the personal circumstances of the parties and particularly the complainant;
- the physical accessibility of any contemplated alternative forum;
- the needs and wishes of the parties and particularly the complainant;
- the nature of the intended proceedings and whether the outcome of the proceedings could facilitate the development of judicial precedent and jurisprudence in this area of law;
- the views of the appropriate functionary at any contemplated alternative forum (section 20(4))

4. Does a magistrate's court, sitting as an equality court have authority to make an order exceeding the normal monetary jurisdiction of a magistrate's court, and if so, what is the procedure involved?

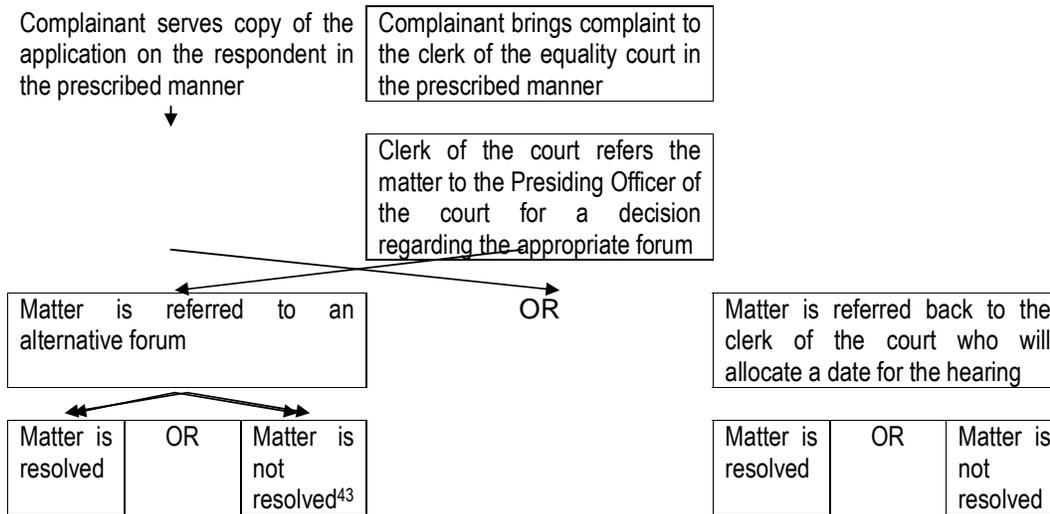
Yes, the magistrate's court, sitting as an equality court does have the power to exceed the normal monetary jurisdiction of the court. Such an order would have to be submitted to a judge of the High Court, in the prescribed manner, for confirmation (section 19(3)(a)).

5. Which principles should be applied when deciding cases in the equality courts?

The following principles should apply when deciding cases in the equality courts:

- The expeditious and informal processing of cases, which facilitate participation by parties to the proceedings;
- access to justice to all persons in relevant judicial and other dispute resolution forums;
- the use of rules of procedure in terms of section 19 and criteria to facilitate participation;
- the use of corrective or restorative measures in conjunction with measures of a deterrent nature;
- the development of special skills and capacity for persons applying this Act in order to ensure effective implementation and administration thereof. (section 4(1))

Procedure for laying a complaint



⁴³ If the matter is not resolved in the alternative forum, it may be re-referred to the equality court. It may also be re-referred to the equality court if the alternative forum is unable to resolve the matter within the prescribed period.

Remedies

Appeals and reviews

Remedies

Section 21(2) sets out the range of remedies available to the equality court:

- (a) an interim order;
- (b) a declaratory order;
- (c) an order making a settlement between the parties to the proceedings an order of court;
- (d) an order for the payment of any damages in respect of any proven financial loss, including future loss, or in respect of impairment of dignity, pain and suffering or emotional and psychological suffering, as a result of the unfair discrimination, hate speech or harassment in question;
- (e) after hearing the views of the claimant in the matter, an order for the payment of damages in the form of an award to an appropriate body or organisation;
- (f) an order restraining unfair or discriminatory practices or directing that specific steps be taken to stop the unfair discrimination, hate speech or harassment;
- (g) an order to make specific opportunities and privileges unfairly denied in the circumstances, available to the complainant in question;
- (h) an order for the implementation of special measures to address the unfair discrimination, hate speech or harassment in question;
- (i) an order directing the reasonable accommodation of a group or class of persons by the respondent;
- (j) an order that an unconditional apology be made;
- (k) an order requiring the respondent to undergo an audit of specific policies or practices as determined by the court;
- (l) an appropriate order of a deterrent nature, including the recommendation to the appropriate authority, to suspend or revoke the license of a person;
- (m) a directive requiring the respondent to make regular progress reports to the court or to the relevant institutions institution regarding the implementation of the court's order;
- (n) an order directing the clerk of the equality court to submit the matter to the Director of Public Prosecutions having jurisdiction for the possible institution of criminal proceedings in terms of the common law or the relevant legislation;
- (o) an appropriate order of costs against any party to the proceedings;
- (p) an order to comply with any provision of the Act.

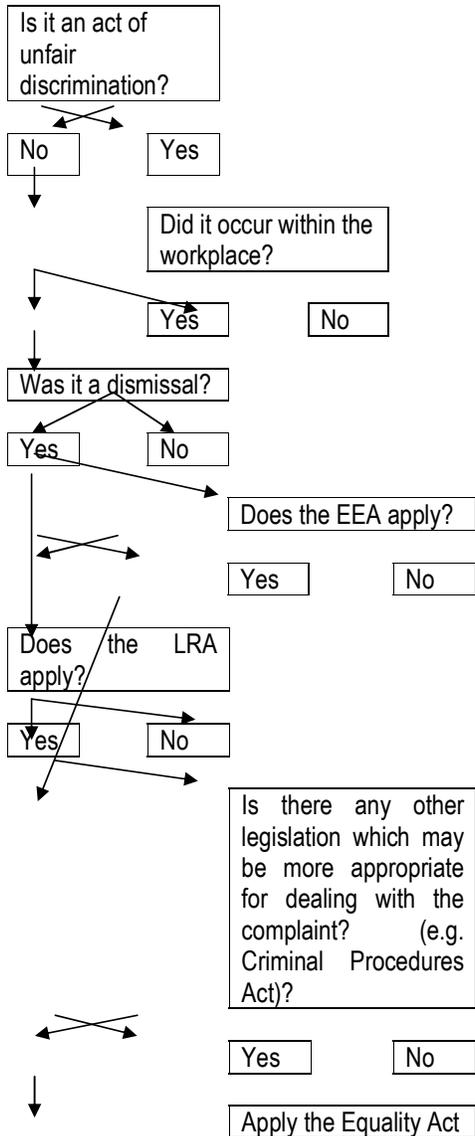
Orders of the equality court have the same status as orders in a civil action and are subject to institution.

Appeals and reviews

Appeals may be made by any person "aggrieved by any order made by an equality court in terms of or under the Act" (section 23(1)). Appeals lie to the High Court and thereafter to the Supreme Court of Appeal. In certain cases, subject to the rules of the Constitutional Court, an appeal may be made directly to that court.

Reviews to the relevant High Court may be based on a determination relating to a ground of discrimination made in terms of section 23(5)(a).

Deciding when to use the Equality Act



Handout

Considerations when deciding whether to use the Equality Act

The following factors should be considered when deciding whether to use the Equality Act or not:

- the cost of the alternative
- the time it would take to use an alternative route
- the efficacy of the alternative route
- the remedies provided for in the Act
- the different forums which are provided for in the Act
- the relatively informal process of the Act
- the mediation option in the Act

The Promotion of Equality

The Act adopts an approach to equality which is both reactive (prohibiting unfair discrimination) and proactive/substantive (promoting equality). The appropriateness of this approach was confirmed by the Constitutional Court in *National Coalition for Gay and Lesbian Equality & another v Minister of Justice & others* 1999 (1) SA 6 (CC) at para 62 as follows:

“Substantive equality is envisaged when s 9(2) unequivocally asserts that equality includes ‘the full and equal enjoyment of all rights and freedoms’. The State is further obliged ‘to promote the achievement of social equality’ by ‘legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination’, which envisages remedial equality.”

Relevant provisions giving effect to the promotion of equality as are follows:

24. (1) The State has a duty and a responsibility to promote and achieve equality.
 - (2) All persons have a duty and a responsibility to promote equality.

- 25 (1) The State must, where necessary with the assistance of the relevant constitutional institutions (such as the Human Rights Commission and the Commission on Gender Equality)
 - (a) develop awareness of fundamental rights in order to promote a climate of understanding, mutual respect and equality;
 - (b) take measures to develop and implement programmes to promote equality; and
 - (c).where necessary or appropriate –
 - (i) develop action plans to address any unfair discrimination, hate speech or harassment;
 - (ii) enact further legislation that seeks to promote equality, and to establish a legislative framework in line with the objectives of the Act;
 - (iii) develop codes of practice to promote equality, and develop guidelines, including codes in respect of reasonable accommodation;
 - (iv) provide assistance, advice and training on issues of equality;
 - (v) develop appropriate internal mechanisms to deal with complaints of unfair discrimination, hate speech and harassment;
 - (vi) conduct information campaigns to popularise this Act.

Section 26 provides that persons contracting directly with the state or exercising a public power must promote equality through a number of measures. These include adopting:

- equality plans,
- codes, and
- regulatory mechanisms

In terms of the regulations to the Act, they are also required to monitor progress in implementation of their equality plans and to report on progress to the relevant monitoring authorities.

27. (1) (A) All persons, non-governmental organisations, community-based organisations and traditional institutions must promote equality in their relationship with other bodies and in their public activities.

In terms of section 27(2) the Minister of Justice *must* develop regulations in terms of the Act; and Other Ministers *may* develop regulations in relation to other Acts to require companies, close corporations, partnerships, clubs, sports organisations, corporate entities and associations to – prepare equality plans, or abide by prescribed codes of practice or report to a body or institution on measures to promote equality.

Section 28 specifically emphasises unfair discrimination on the grounds of race, sex and disability. In terms of section 28(1) if it is proved that unfair discrimination on the grounds of race, sex or gender played a part in a criminal offence, this must be seen as an aggravating factor for the purposes of sentencing.

In terms of Section 28(3)(b), the state and institutions performing public functions must:

- (a) audit laws, policies and practices to identify and eliminate discrimination;
- (b) develop laws, policies and codes of practice to eliminate discrimination;
- (c) adopt action plans to promote and achieve race, gender and disability equality; and
- (d) give priority to eliminating unfair discrimination and promoting equality in respect of race, gender and disability.

Worksheet

Final Reflection

 Individually, record your responses to the questions which follow::

1. What have you learned on this workshop?

2. How will you apply what you have learned?

3. Have you met the learning objectives you set for yourself at the beginning of the workshop?

Resources

Publications

1. The Concise Oxford Dictionary of current English. Clarendon Press.
2. Advocates for Youth. [www.advocatesfor youth.org](http://www.advocatesfor-youth.org). Lauren Hersh, 'Giving Up Harmful Practices, Not Culture.'
3. PHD thesis – 'The identity of Young muslims in Britain and France'
4. Protecting girlhood? Virginity revivals in the era of AIDS. Suzanne Leclerc-Madlala.1998 (1) SA 449 (T)
5. Media and Gender in Africa, T Reddy. African Media Debates: Seminar Paper

Cases

6. Bhe and others v magistrate, khayelitsha, and others 2004 (2) SA 544 (c)
7. Hlophe v Mahlalela and another 1998 (1) SA 449 (T)
8. Rylan v Edros 1997 (1) BCLR 77 (C)
9. Amod (born Peer) v Multilateral Motor Vehicle 1999 (4) SA 1319 (SCA)

Legislation

10. Witchcraft Suppression Act 3 of 1957
11. Constitution of the Republic of South Africa Act 108 of 1996
12. Labour Relations Act 66 of 1995
13. Commission on Gender Equality Act 39 of 1996
14. The Recognition of Customary Marriages Act 120 of 1998
15. Employment Equity Act 55 of 1998

16. The Promotion of Equality and Prevention of Unfair Discrimination Act 52 of 2000
17. The Convention on the Elimination of All Forms of Discrimination against Women
18. The Beijing Platform for Action
19. African Charter on Human and Peoples' Rights
20. Protocol to the African Charter on Human and Peoples' Rights on the rights of Women in Africa
21. Declaration of the Sixth African Regional Conference on Women