

THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT 4 OF 2000: HOW TO BALANCE RELIGIOUS FREEDOM AND OTHER HUMAN RIGHTS IN THE HIGHER EDUCATION SPHERE

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ABSTRACT

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act) was *inter alia* promulgated to create a caring South African society. To achieve this goal, the Equality Act prohibits unfair discrimination, hate speech and harassment on a number of prohibited grounds, including religion, conscience, belief and culture. The Bill of Rights in the 1996 Constitution also prohibits unfair discrimination on these and other grounds. In addition, the Bill of Rights also contains rights such as the right to freedom of association and the right to freedom of expression. All laws, including the Equality Act, must be interpreted in accordance with the spirit, purport and objectives of the Bill of Rights. This article identifies possible challenges in applying the Equality Act where the alleged perpetrator attempts to justify the discrimination based on his/her religious beliefs, freedom of expression and/or freedom of association.

Key words: Equality, Bill of rights, discrimination, religion, challenges

INTRODUCTION

The recent wave of student protests in South Africa, interpreted in a *bona fide* way, seem to be a cry for socio-economic justice – how to achieve a fair distribution of resources in a resource-constrained environment. However socio-economic injustice is but one of many instances of individual and systemic disadvantage playing out in South Africa presently. Discrimination based on race, sex, gender, sexual orientation and other prohibited grounds is also prevalent in different spheres of South African society. This article will primarily focus on discrimination based on religion and religious views. Discrimination based on religion or religious views can play out in different ways. Christianity is arguably the dominant religion in South Africa. Some student political groups have attempted to link Christianity with ‘academic standards’. Is this

hate speech? Is it acceptable to open university meetings with prayer to the Christian God while students and academics with minority views are allowed to leave the meeting at that point? Some religions hold the Sabbath in high esteem. May university tests be scheduled on these days, or on religious holidays? May lectures be scheduled during Friday prayer time? If a religious fast is being broken and a test or lecture is presented at that time, may the affected student be allowed to bring food into the lecture hall? May a rule to prevent exam fraud that targets headgear, be applied to religious headgear? There could be many other examples. This article will analyse how these kinds of disputes may play out in South African equality courts. A general introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act (Act 4 of 2000; hereafter ‘the Act’ or ‘the Equality Act’) follows directly below. (Also see Kok 2008 on which this general introduction is based.) Thereafter I consider how a claim of religious discrimination will probably be resolved in an equality court.

THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT

Since the dawn of democracy in South Africa, the South African government has endeavoured to address colonialism’s and Apartheid’s legacy of the extremely unequal allocation of resources, wealth and power.¹ One of the most important Acts passed since 1994 to to undo the effect of centuries of race-based oppression and marginalisation is the Equality Act. This Act has been described as second only to the Constitution (Gutto 2001),² illustrating its importance to the new order. The Equality Act explicitly targets the effects of past discrimination, which arguably is the reason for the vast differences in wealth, income and resources in South Africa.

The Act is much more ambitious than its counterpart in other countries – what is usually referred to as ‘anti-discrimination legislation’ (Currie and De Waal 2005).³ The Act prohibits unfair discrimination⁴ in almost every sphere of society:⁵ labour and employment, education, health care services and benefits, housing, accommodation, land and property, insurance services, pensions, partnerships, professions and professional bodies, provision of goods, services and facilities, and clubs, associations and sport.⁶ The Act also aims at preventing and prohibiting harassment⁷ and hate speech.⁸

Based on an analysis of the existing literature, I have previously identified the following purposes that have been suggested why anti-discrimination laws are passed (Kok 2008):

- (a) The anti-discrimination Act is passed as symbolic legislation. The legislature intends to illustrate its ostensible abhorrence of discrimination but does not take it further than that

(Lustgarten 1986, 84–85; Lacey 1987, 419–420).

- (b) The goal of the new law could be to set up forums where discrimination complaints may be lodged and decided (cf. Chemerinsky 1998, 193). This commitment does not necessarily amount to much more than that of passing a symbolic law. These forums could be inadequately resourced, or little publicity may be given to the existence of these forums, or little publicity may be given to positive results for plaintiffs (Bailey and Devereux 1998, 303). An idealistic legislature may hope that many complaints are lodged at these tribunals and that many matters will be decided in favour of the complainants (Lustgarten 1992, 455–457).
- (c) The aim of the anti-discrimination law may be to cause a major realignment in the distribution of income and unemployment rates of vulnerable and marginalised groups, so that these figures become proportionately equivalent to the most privileged group (usually white, heterosexual males) (Lustgarten 1992, 455–457).
- (d) Parliament may wish to change the hearts and minds of the country's inhabitants and cause thorough-going changes in basic social relationships (Gutto 2001, 7). This is the lawmaker at word at it most ambitious and idealistic.

The Equality Act arguably aims to achieve all four of these goals (Albertyn, Goldblatt and Roederer 2001, 3; Gutto 2001, 7).⁹

Transformative laws, in the context of contemporary South Africa, could be described as laws that have the following aims:

- (a) Transformative laws' purpose is to create a more egalitarian society where socio-economic differences are eradicated or at least softened. In the short term these laws would aim at the proportional representation across income, wealth and resource categories of black and white, male and female, and other social categorisations. In the long term the legislature would have in mind a society where all residents lead dignified lives, free from hunger and want (Albertyn and Goldblatt 1998, 249; Pieterse 2005, 159; Moseneke 2002, 316; Bohler-Muller and Tait 2000, 407).
- (b) Transformative legislation aim to change the hearts and minds of South African society so that all forms of discrimination and social exclusion become anathema (cf. Brand 2000, 13; Moseneke 2002, 319; Dror 1958, 788; Klare 1998, 150).

The aims of transformative laws and of anti-discrimination laws can clearly overlap.¹⁰ Arguably both of the types of transformation as described directly above may be recognised in different sections in the Equality Act.

Referring to the first goal as stated above, the Preamble of the Equality Act speaks of the ‘eradication of social and economic inequalities, especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and patriarchy’, as well as ‘systemic inequalities and unfair discrimination’ that ‘remain deeply embedded in social structures [and] practices’. This, in turn, ‘implies the advancement, by special legal and other measures, of historically disadvantaged individuals, communities and social groups who were dispossessed of their land and resources’. Section 2(g) contains as one of the objects of the Act, ‘to set out measures to advance persons disadvantaged by unfair discrimination’. When applying the Act, it must be done in such a manner as to give effect to ‘the Constitution, the provisions of which include the promotion of equality through legislative and other measures designed to protect or *advance persons disadvantaged by past and present unfair discrimination*’ (my emphasis).¹¹ Section 4(2) of the Act contains the following directive (my emphasis):

‘In the application of this Act the following should be recognised and taken into account:

- (a) The *existence of systemic discrimination and inequalities*, particularly in respect of race, gender and disability in all spheres of life as a result of past and present unfair discrimination, brought about by colonialism, the apartheid system and patriarchy; and
- (b) the need to take measures at all levels *to eliminate such discrimination and inequalities.*’

The Equality Act contains a number of examples in sections 7, 8 and 9 of the kinds of discrimination the legislature wished to address when the Act was promulgated. Some of these examples very clearly have socio-economic transformation in mind, notably sections 7(d),¹² 7(e),¹³ 8(c),¹⁴ 8(e),¹⁵ 8(g),¹⁶ 8(h),¹⁷ 8(i),¹⁸ and 9(c).¹⁹

It is clear from an analysis of the Act that Parliament also intended for this law to bring about changes in the hearts and minds of South Africans. The Preamble implicitly expresses the wish that the Act will remove the ‘pain and suffering’ brought ‘to the great majority of our people’, as well as the ‘systemic inequalities and unfair discrimination’ that ‘remain deeply embedded in social structures, practices and *attitudes*’ (my emphasis), and that the Act will restore people’s lost dignity. The Preamble explicitly notes that ‘this Act endeavours to facilitate the transition to a democratic society, united in its diversity, *marked by human*

relations that are caring and compassionate' (my emphasis). Some of the examples in sections 7 and 8 at least implicitly speaks to attitudinal discrimination.²⁰ The chapter in the Act that speaks to the promotion of equality also, at the very least implicitly, addresses anticipated attitudinal changes.²¹

The Act also clearly has as one its goals the establishment of forums where discrimination disputes may be raised and resolved. A number of provisions in section 2 of the Act (which contains the objects of the Act) may be read to create this aim. Section 2(b)(i) states that the Act aims at giving effect to the letter and spirit of the Constitution, in particular 'the equal enjoyment of all rights and freedoms *by every person*' (my emphasis). This subsection anticipates a procedure whereby individual claimants will be able to ensure the enjoyment of their human rights. Section 2(b)(iv) contains another object of the Act: 'the prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the Constitution'. This subsection, read with sections 2(d),²² 2(f),²³ 4(1)(b),²⁴ 16 and the regulations to the Act,²⁵ make it clear that the Act aims at the creation of inexpensive, accessible, informal dispute resolution mechanisms (equality courts).

The Equality Act's reach should be properly understood. The Act defines discrimination as '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' (my emphasis).²⁶ If a litigant argues that a particular Act of Parliament is unconstitutional, the ordinary High Court must be approached. Similarly, if a litigant argues that a particular common law rule must be reinterpreted in line with the Bill of Rights, the ordinary High Court must be approached. However, if the underlying legislation or common law rule is stated in neutral terms but applied in a discriminatory manner, the equality courts must be approached. In cases of religious discrimination, a particular university policy or practice may be the cause of the discrimination. In these cases, the Equality Act clearly applies.

RELIGIOUS DISCRIMINATION IN TERMS OF THE EQUALITY ACT

As stated above, the Act prohibits unfair discrimination, hate speech and harassment. It may well happen that a claim based on one or more of these causes of action is built around or defended on the basis of a plaintiff's or a defendant's religious views. Put bluntly, the aim of the Act to facilitate the creation of a caring South African society may be frustrated if deeply held religious views are allowed to trump the Act's egalitarian ethos in all circumstances. On the other hand, the Constitution protects the right to freedom of association and the right to

freedom of religion and it is equally clear that some freedom must be created for individuals to hold views that could be objectionable to others. By way of example, Canadian anti-discrimination tribunals have dealt with the following matters, among others. In *Chilliwack Anti-Racism Project Society v Pastor Charles Scott and the Church of Christ in Israel* TD 6/96 1996/04/30 the defendant's telephone message *inter alia* claimed that 'the Church of Christ in Israel is laying the groundwork for a revolution which will return power to the white race'. In *Nijjar v Canada 3000 Airlines Limited* TD 3/99 1999/07/09 the complainant, an initiated member of the Khalsa order of the Sikh faith was denied permission to board an airplane because he carried a ceremonial dagger. (Such a dagger is carried by initiated members of the Sikh faith.) In *Kane and The Jewish Defence League of Canada v Papez et al and The Silver Bullet* Complaint File No S9509094 the complaint related to material contained in a magazine that *inter alia* referred to a 'Jewish Mafia', 'Jewish gang' and contained a superimposed swastika over the Canadian flag. *Akiyama v Judo BC* 2002 BCHRT 27 dealt with a complaint by a mother born and raised in Japan who did not raise her children to any particular religious belief. She laid a complaint against the organisation for judo in British Columbia. She argued that the judo organisation required participants in competitions to perform certain bows, which she argued contravened the particular law's prohibition against religion-based discrimination. In *Dhillon v Her Majesty in Right of the Province of British Columbia as represented by the Ministry of Transportation and Highways, Motor Vehicle Branch* 1999/05/11 the complainant, a male of the Sikh religion argued that section 218 of the *Motor Vehicle Act* was discriminatory because it made it an offence for a passenger on a motorcycle to not wear a safety helmet but did not exempt Sikhs who wear turbans. *Jones v CHE Pharmacy Inc et al* 2001 BCHRT 1 concerned a complainant who does not celebrate Christmas. His supervisor requested him to put up poinsettias as part of Christmas decorations. He refused and was dismissed. In *Korcz v Mr Cool Ice Cream Ltd* 1998/01/05 the complainant alleged that when she started working for the respondent, it was agreed that she would not work on Sundays to observe her religion. She was later asked to work on Sundays. *Roosma & Weller v Ford Motor Company of Canada and the CAW Local 707* 1995/07/14 dealt with complainants who were members of the Worldwide Church of God which prohibited work from Friday at sunset to Saturday at sunset. The complainants were progressively disciplined for missing Friday night shifts.

The South African equality courts have not had many opportunities to resolve a direct clash between the right to religious freedom and the right not to be unfairly discriminated against. I am aware of only three reported High Court cases – *MEC for Education, Kwazulu-Natal v Pillay*,²⁷ *Woodways CC v Vally*²⁸ and *Strydom v Nederduitse Gereformeerde Gemeente*,

Moreleta Park.²⁹ *Pillay* is the well-known nose stud case. *Strydom* revolved around a gay music teacher whose contract was terminated when it became known that he was involved in a homosexual relationship. *Vally* concerned a devout and practicing Muslim who was requested to remove his fez when he entered a wholesale supplier of wood and wood products.

Somewhat simplified, the Act defines discrimination as a harmful act or omission based on a prohibited ground. However, it is not discrimination per se that is prohibited but rather *unfair* discrimination.

Anti-discrimination legislation usually contains very explicit exclusions, which is not the case in the South African version. Instead the Act employs the concept of ‘fair’ and ‘unfair’ discrimination. Presiding officers have been given some guidance in section 14 of the Act as to the determination of fairness or unfairness but until a large number of cases have been decided, and until very clear parameters have been laid down by the equality courts, violators of the Act will have ample room to argue that they committed ‘fair’ discrimination. Conversely, complainants will not be able to easily establish whether they have been discriminated against ‘unfairly’.

The prohibition against unfair discrimination is not qualified in the Act – in principle and on a strict literal interpretation the Act applies everywhere, anywhere and to all cases of ‘private’ and ‘public’ discrimination. The Act contains no (sector-specific) exclusions or defences,³⁰ except the general ‘fairness’ defence. Equality courts will have to develop principles over time as to what constitutes ‘fair’ discrimination in particular contexts.

Section 14 sets out the criteria that a court must analyse to decide whether a respondent has proven that the discrimination was fair. As this section is the heart of the Act’s prohibition of unfair discrimination, I quote it in full in the text:

- ‘(1) It is not unfair discrimination to take measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination or the members of such groups or categories of persons.
- (2) In determining whether the respondent has proved that the discrimination is fair, the following must be taken into account:
 - (a) The context;
 - (b) the factors referred to in subsection (3);
 - (c) whether the discrimination reasonably and justifiably differentiates between persons according to objectively determinable criteria, intrinsic to the activity concerned.
- (3) The factors referred to in subsection (2)(b) include the following:
 - (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—
 - (i) address the disadvantage which arises from or is related to one or more of the prohibited grounds; or
 - (ii) accommodate diversity.’

I discuss below these factors in the sequence that they appear in section 14.

Section 14(1) mirrors section 9(2) of the Constitution and seems to create a complete defence to a claim of unfair discrimination. Albertyn, Goldblatt and Roederer (2001, 38) argue that section 14(1) does not set up an independent test, but should be read as part of a single section 14 inquiry.

However, in *Minister of Finance v Van Heerden*³¹ the Constitutional Court held that if a measure properly falls within the ambit of section 9(2) of the Constitution it does *not* constitute unfair discrimination. Section 9(2) of the Constitution is less explicit about the nature of the defence than section 14(1) in the Act. Section 9(2) of the Constitution only states that legislative and other measures ‘may’ be taken while section 14(1) of the Act clearly states that ‘it is not unfair discrimination’ to take such measures. Section 14(1) is unlikely to feature prominently in religious discrimination litigation.

Section 14(2) contains a large number of factors that a Court needs to take into account when deciding whether the alleged discrimination was ‘unfair’.

In terms of section 14(2)(a), each equality court complaint will be a contextual enquiry. This context includes the existing South African social, economic and political circumstances when the specific case is heard (De Vos 2000, 19). This approach is also in accordance with Constitutional Court judgments – see *President of the Republic of South Africa v Hugo*³² for example. (Bohler 2000, 291) interprets a contextual approach to equality as ‘individualised justice’:

‘Judges should focus more on the context – the results in *this* case to *these* parties – and less on formal rationality – squaring this with results in other cases. This means that the law must be more open-ended’.³³

Section 14(2)(c) contains a number of factors that will be of assistance to a respondent

who wishes to disprove that he unfairly discriminated against the applicant: if the discrimination was 'reasonable' and 'justifiable', followed 'objectively determinable criteria' and if the discrimination was 'intrinsic to the activity', such discrimination may be found to be fair. This subsection is the result of a very clumsy attempt by the drafters of the Act to address the concerns of mainly the insurance industry and to distinguish between 'discrimination' and '(mere) economic differentiation'.³⁴ This section is also unlikely to feature in religious discrimination cases.

Section 14(2)(b) refers the reader to section 14(3) which in turn lists a number of criteria, most of which has their origin in *Harksen v Lane NO*.³⁵

Section 14(3)(a): If the discrimination impairs or is likely to impair dignity such discrimination will most likely be held to be unfair (Albertyn, Goldblatt and Roederer 2001, 40).

Section 14(3)(b): The more severe the impact of the discrimination on the applicant, the more likely that the discrimination will be held to be unfair (Loenen 1997, 412).

Section 14(3)(c): A powerful or privileged applicant will have to make out a very strong case that he is the victim of unfair discrimination. Section 9 of the Constitution does not protect 'pockets of privilege'.³⁶ The more disadvantaged the particular group that the applicant belongs to, the more likely that the discrimination will be held to be unfair. (Albertyn and Kentridge 1994, 162).³⁷

Section 14(3)(d): If the discrimination is of a minor nature or of small extent such discrimination will more likely be found to be fair. Recurring discrimination is more likely to be unfair. (De Waal 2002, 155).

Section 14(3)(e): Systemic discrimination will more likely be unfair than discrimination that is not systemic.

Section 14(3)(f): If the discrimination has a worthy goal, such as the furthering of equality for all,³⁸ it will most likely be fair (De Waal 2002, 154).

Section 14(3)(g): If no rational link exists between the discrimination and its (worthy) purpose, the discrimination will most likely be unfair (In equality litigation based on section 9 of the Constitution, this factor overlaps with the threshold 'rational connection' test for differentiation - Rautenbach 1997, 578 and Rautenbach 2001, 332. The Act does not seem to prohibit irrational private differentiation.) If the discrimination did not achieve the alleged purpose, the discrimination is also more likely to be unfair.

Section 14(3)(h): This section has its origin in section 36(1)(e) of the Constitution. If the respondent could have achieved its (worthy) purpose in a less restrictive way, the discrimination

is more likely to be found unfair. In theory, it is almost always possible to think of less serious ways of achieving the same purpose. This factor should therefore not be used to mark almost all instances of discrimination as unfair. A value judgment must be made taking into account all relevant factors. If an entirely inappropriate method had been used to achieve a (legitimate) purpose, such discrimination is more likely to be unfair.

Section 14(3)(i) rewards discriminating respondents who take steps to alleviate the damage caused by the discrimination. When a respondent takes such steps, the discrimination is less likely to be found to be unfair. If the respondent did nothing to minimise the disadvantage, it is more likely that the discrimination was unfair.

An argument could possibly be raised that the Act does not provide sufficient protection to a respondent in an equality dispute because it does not offer a respondent the opportunity to argue that *unfair* discrimination may still be *justifiable* – section 14 only contains a defence based on fairness.³⁹ The Constitution (at least in theory) allows a respondent to argue that unfair discrimination is still justifiable - section 9 read with section 36). Two counterarguments may be raised:

- It is very difficult to distinguish between factors that establish whether discrimination was ‘fair’ in terms of section 9 of the Constitution, and factors that establish whether unfair discrimination was ‘justifiable’ in terms of section 36 (Carpenter 2001(a), 626; De Waal 2002, 156; Loenen 1997, 410).⁴⁰ Currie and De Waal (2005, 237) argue that section 36 probably does not have any meaningful application to section 9. Van der Vyver (1998, 391) is of the view that the ‘interpretational embarrassment’ of having to distinguish between fairness and reasonableness will be resolved by courts by more or less ignoring the fairness criterion and focusing on reasonableness. Courts have actually tended to do the opposite – they have focused on fairness/unfairness and have tended to ignore reasonableness/justifiability.
- The threshold requirement in section 36 of the Constitution is that any limitation of a fundamental right must be ‘law of general application’ (Albertyn and Goldblatt 1998, 270). In cases of private discrimination, where law of general application is not likely to apply,⁴¹ (cf. Van der Vyver 1998, 376) a ‘reasonableness’ defence will not be available and the discriminator will only be able to argue that the discrimination was fair. The Act does not make a distinction between state discrimination and private discrimination and both these kinds of discrimination are subject to the same test as set out in section 14. Section 14 incorporates some of the elements of section 36. In cases of private

discrimination brought in terms of the Equality Act, a discriminator will therefore implicitly be able to argue that the discrimination was fair, alternatively that it was reasonable and justifiable – using the language of ‘fairness’ all the time. Therefore, in effect the Act provides *more* protection to respondents in *private* discrimination complaints than the Constitution does.

Despite the explicit list of factors to be considered, the test remains relatively indeterminate (Van der Walt and Botha 1998, 35).⁴² What could be stated with some confidence is that the right to equality is privileged in the Equality Act – other rights such the rights to religious freedom and the right to freedom of association are at best implicitly recognised in the Act. Where there is a clear conflict between the right to equality and the right to religious freedom, the Equality Act is clear – the right to equality enjoys priority. Whether this balance is constitutional is another matter and not the focus of this article. This remainder of this article takes the Equality Act as it stands and predicts how religious discrimination cases may play out in equality courts.

Pragmatic judges will to a large extent be able to take what they want from the fairness test as set out in section 14 test (cf. Kende 2000, 770).⁴³ Consider the following factors as set out in section 14:

- The impact or likely impact of the discrimination on the complainant. It is easy enough to state that the more severe the impact, the more likely that the discrimination will be unfair, but *how* should a court decide when the cut-off is reached between permissible and impermissible harm? To take the examples from the introduction of this article: How should the impact on religious minorities be described if university meetings are opened with prayer to the Christian God while students and academics with minority views are allowed to leave the meeting at that point? Is this a serious affront to minorities’ dignity or a trivial affront? The same goes for university tests being scheduled on religious holidays or lectures being scheduled during Friday prayer time.
- The position of the complainant in society whether he or she suffers from patterns of disadvantage or belongs to a group that suffers from such patterns of disadvantage. Barring white, able-bodied, heterosexual males, the other members of South African society may all be described as suffering in one way or the other from patterns of past disadvantage: women, blacks, Indians, coloureds, gays and lesbians, disabled people of all races, HIV-positive people, poor people, rural people, and in the context of this article,

members of minority religions (Jagwanth 2003, 738).⁴⁴ It may be easy enough to state, as the Constitutional Court has done,⁴⁵ that black women has been the most disadvantaged group in South African society, and it would follow from this statement that discrimination against (rural) black women would almost always be unfair,⁴⁶ but how to decide about the relative disadvantage of other vulnerable groups in South African society? (Carpenter 2001(a), 634)⁴⁷

- Whether the discrimination is systemic in nature. The same argument applies to this factor: The vast majority of South Africans have been victims of systemic discrimination in one way or the other and it is not necessarily helpful to state that systemic discrimination is more likely unfair than non-systemic discrimination.
- Whether the discrimination has a legitimate purpose. How is a court to decide when a discriminatory purpose would be ‘legitimate’? Whose views should be taken into account? How is this value judgment to be exercised? Take the opening of a (secular) university meeting with prayer to the Christian God – what would the purpose be of such a prayer? Would all equality court presiding officers describe this purpose in the same way and would they hold the purpose to be legitimate? Scheduling tests on religious holidays or Friday lecturers during prayer time would probably be explained with recourse to logistical reasons such as an overcrowded timetable. Prohibiting students from wearing hats or other headgear would probably be explained with reference to concerns about students cheating and so on. Are these concerns legitimate and do these concerns trump deeply held religious views?
- Whether there are less restrictive and less disadvantageous means to achieve the purpose. It is almost always possible to think of a less extreme way to achieve a particular result. How is a court to decide on the cut-off point?

Two judgments of the Constitutional Court strikingly illustrate the indeterminacy of the ‘fairness’ test (cf. Carpenter 2002a, 58).⁴⁸ The factors set out in section 14 of the Act have largely been extrapolated from the Constitutional Court’s equality jurisprudence. It is therefore illuminating to consider the marginal victories of the state in *S v Jordan*⁴⁹ and the applicant in *Harksen v Lane NO*.⁵⁰ In the *Jordan* case, six of the 11 presiding judges held that the sex or gender discrimination complained of was fair, and five judges dissented and held that it was unfair discrimination. In *Harksen* five of the nine presiding judges held that the discrimination based on marital status was fair while four judges held that the discrimination was unfair. If the application of the fairness/unfairness test had been an easy, straightforward or determinate task,

there would not have been so much divergence among the judges.⁵¹

COURTS' TREATMENT OF THE 'FAIRNESS' TEST IN CASES OF RELIGIOUS DISCRIMINATION

I will briefly discuss the *Strydom* and *Vallie* cases to illustrate how courts have grappled with the fairness enquiry in the context of religious discrimination. Strydom's contract as music teacher was terminated by a church when it became known that he was involved in a homosexual relationship. The church argued that it was its stated belief that that marriage can only validly exist between one man and one woman and that Strydom should therefore have stayed celibate and not have become involved in a homosexual relationship.⁵² The church argued further that persons in leadership positions in the church cannot live in a homosexual relationship as it was an inherent requirement that a spiritual leader must support church doctrine.⁵³ The court held against the church, arguing as follows:

- Strydom was not in a position of spiritual leadership; did not teach Christian doctrine and had no religious responsibilities at all.⁵⁴
- Strydom was neither a member nor an employee of the church. He was therefore in a sense removed from the church and did not participate in its activities.⁵⁵
- It was not part of Strydom's job description that he was to become a role model for Christianity. At best, he was a mentor for his students on a personal level, not a spiritual level.⁵⁶
- The impact on the religious freedom the church would have been minimal, had Strydom stayed on, while the impact on Strydom's rights to equality and dignity was enormous.⁵⁷

The judgment implies that had any of these factors been present, the outcome of the case could have been different. In other words, had Strydom been in a position of leadership in the church, if he had the responsibility to teach church doctrine, if he was a member or employee of the church or if it was part of his job description to be a so-called role model for Christianity, the church may have been found to have acted fairly when it dismissed him.

The defendants in the *Vallie* matter argued that the fez worn by male Muslims is a religious expression of their faith, which to the owners of the wood supplier shop embodied offensive religious doctrines. They argued that it was incumbent upon them to express their own beliefs by requesting any person displaying the fez to remove it when entering the shop.⁵⁸ When an employee asked Mr Vallie to remove his fez and he asked why he had to do so, the employee

answered ‘this is a Christian company’.⁵⁹ It was in dispute whether the request to remove the fez was a so-called mere request or a precondition to being served.⁶⁰

The court held in favour of Vallie. The court argued that irrespective of whether the request to remove the fez was a precondition to being served or not, Vallie was burdened in that it called on him to make a hard choice – he had to choose between complying with the request or observing his religious faith.⁶¹ The court rejected the respondent’s argument that the employee was legitimately exercising her rights to freedom of religion and freedom of expression. The court held that the request to remove the fez was made in a commercial context where expression of religious beliefs was irrelevant and inappropriate.⁶² Furthermore Vallie was a member of a historically disadvantaged group and belonged to a religion that suffered from marginalisation in the past.⁶³

CONCLUSION

It could be argued that *Vallie* and *Strydom* were easy cases to decide. *Strydom* was a music teacher, on contract, not being a member of the church. *Vallie* was a customer in a wood supplier shop, i.e. far removed from a religious setting. The more direct the perceived assault on a particular religion’s core beliefs, the more difficult it would be for a court to arrive at the appropriate balance. Section 14 of the Equality Act contains a pragmatic list of factors to consider and compare with one another. I would argue that the Act’s aims should be kept firmly in mind when making the value judgment on whether a particular instance of discrimination was fair or unfair, namely eradicating socio-economic inequality and creating a caring South African society. In other words, in cases of significant doubt, or where there are equally persuasive reasons on both sides, the equality court should give preference to the outcome that will facilitate the creation of a more egalitarian society, or a more caring society. In the religious sphere, this would in most cases then probably entail that measures be taken to privilege diversity and different viewpoints rather than adhering to the dominant religious group’s practices, even if these decisions would have significant budgetary implications. I immediately concede that in the area of religion and deeply held religious views, any court decision is likely to be deeply contested. I think Woolman (1997, 121) gets it right when he states:

‘What our gut tells us and what we choose to do after extended reflection are sometimes two very different things ... The difference between storytelling and cryptic justifications for hard choices is the difference between a good explanation and a bad explanation for the decisions that we take: the better the explanation, the more persuasive it will be – for those who need persuading; the more persuasive the decision, the more legitimate it will be deemed to

be.’

NOTES

1. The following Acts have been passed, among others: The Restitution of Land Rights Act 22 of 1994, the Land Administration Act 2 of 1995, the Development Facilitation Act 67 of 1995, the Land Reform (Labour Tenants) Act 3 of 1996, the Extension of Security of Tenure Act 62 of 1997, the Housing Act 107 of 1997, the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998, the National Water Act 36 of 1998, the Labour Relations Act 66 of 1995, the Basic Conditions of Employment Act 75 of 1997 and the Employment Equity Act 55 of 1998.
2. E.g. c.f. the Minister of Justice’s speech at the second reading debate of the Act, 26 January 2000, as reproduced in Gutto (2001, 25): ‘No doubt, this is yet another legislative milestone and in some circles, indeed, this Bill is regarded in importance as only second to the Constitution’. See also the speech by Dr EH Davies, delivered at the same occasion, reproduced in Gutto (2001, 39): ‘This afternoon we are debating a major piece of transformatory legislation. This Bill, when it is enacted, will stand second only to the Constitution as a mechanism for preventing discrimination and promoting equality’.
3. Anti-discrimination legislation typically prohibits ‘private discrimination’, i.e. discrimination committed by individuals or institutions such as clubs or restaurants, and usually consists of conduct Currie and De Waal (2005, 267). The Act also prohibits state discrimination.
4. S 6 read with ss 13 and 14 and the definitions of ‘discrimination’ and ‘prohibited grounds’.
5. Lane (2006, 28) (internet version) seems to argue that the Act applies to ‘privately owned yet publicly used spaces’ but not to private homes. The Act does not contain any explicit exclusions, but will probably not be utilised to combat instances of ‘intimate discrimination’ – male friends’ bridge club, for example.
6. See the Schedule to the Act that contains an ‘Illustrative list of unfair practices in certain sectors’. The Schedule to the Act ‘is intended to illustrate and emphasise some practices which are or may be unfair, that are widespread and that need to be addressed’ (read with s 29(1)).
7. S 11 read with the definition of ‘harassment’ in s 1(xiii).
8. S 10.
9. Albertyn, Goldblatt and Roederer (2001, 3) seem to argue that the Act aims at providing a legal mechanism with which to address and remedy discrimination, and to address structural or systemic discrimination. These authors do not seem to read the fourth possible purpose of anti-discrimination legislation into the Act. Gutto (2001, 7) defines ‘social legislation’ as ‘laws directed at (a) normalising the abnormalities of the past and/or (b) extending the boundaries of policies, law and practices in line with the national agenda of building a progressive and caring society where social inequalities are reduced to a minimum *and democratic values permeate all social relations*’ (my emphasis). At 8 he refers to the Act as ‘one of the most important pieces of social legislation in the new democratic South Africa’. Gutto (2001) clearly reads the fourth possible purpose of anti-discrimination legislation into the Act.
10. Also cf. Gutto (2001, 7) where he refers to ‘social legislation’.
11. S 3(1)(a).
12. ‘[T]he provision or continued provision of inferior services to any racial group, compared to those of another racial group.’
13. ‘[T]he denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons.’
14. ‘[T]he system of preventing women from inheriting family property.’

15. '[A]ny policy or conduct that unfairly limits access of women to land rights, finance, and other resources.'
16. '[L]imiting women's access to social services or benefits, such as health, education and social security.'
17. '[T]he denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons.'
18. '[S]ystemic inequality of access to opportunities by women as a result of the sexual division of labour.'
19. '[F]ailing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons.'
20. Consider ss 7(a) ('the dissemination of any propaganda or idea, which propounds the *racial superiority or inferiority of any person*, including incitement to, or participation in, any form of racial violence'); 8(a) ('gender-based violence'); 8(b) ('female genital mutilation'); and 8(d) ('any practice, including traditional, customary or religious practice, *which impairs the dignity of women* and undermines equality between women and men, including the *undermining of the dignity* and well-being of the girl child') (my emphasis).
21. Ss 2(b)(ii); 2(e); 3(1)(a); and 24–28.
22. '[T]o provide for procedures for the determination of circumstances under which discrimination is unfair.'
23. '[T]o provide remedies for victims of unfair discrimination, hate speech and harassment and persons whose right to equality has been infringed.'
24. 'In the adjudication of any proceedings which are instituted in terms of or under this Act, the following principles should apply: (b) access to justice to all persons in relevant judicial and other dispute resolution forums.'
25. GN No R764, *Government Gazette* No 25065, 2003-06-13.
26. S 1 of the Act.
27. 2008 (1) SA 474 (CC).
28. 2010 (6) SA 136 (WCC)
29. 2009 (4) SA 510 (EqC).
30. By way of example, s 36 of the ACT Discrimination Act allows for single sex educational institutions and s 46 allows for religious educational institutions. S 51 of the Northern Territory Anti-Discrimination Act provides that the Act does not apply to the ordination of priests. S 43 of the Queensland Anti-Discrimination Act provides that educational institutions may set a minimum qualifying age.
31. 2004 (6) SA 121 (CC) at para 36.
32. 1997 (4) SA 1 (CC) at para 41.
33. 'Open-ended' could mean indeterminate. (Cf. Van der Walt and Botha 1998, 35).
34. Liebenberg and O'Sullivan (2001, 37) are concerned about the possible effect of this subsection: If market generated inequalities are regarded as reasonable and justifiable differentiation in all circumstances, the goal of substantive equality for women will become increasingly remote. The weight that courts give to this factor in relation to other factors in subsections (2) and (3) is 'critical'. They even raise the possibility that this subsection is unconstitutional as it may be argued that this subsection subtracts from the protection offered by the Constitution in s 9.
35. 1998 (1) SA 300 (CC).

36. *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 48.
37. Alibertyn and Kentridge (1994, 162); Loenen (1997, 408, 411, 412); De Waal (2002, 154); *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 64. This factor perhaps best illustrates the asymmetrical nature of discrimination. Loenen (1997, 411–412); Kende (2000, 751).
38. *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) may be used as an example. President Mandela freed a number of female prisoners who had children under 12. The respondent was a male prisoner with a child under 12 and complained that the President unfairly discriminated against him. The Court held that the discrimination was fair, *inter alia* because the purpose of the discrimination was to create a more equal society.
39. Vogt is of the view that ‘unfairness’ and ‘justification’ should have been kept apart. She believes that by combining the two concepts in one section, the drafters broadened the understanding of ‘unfairness’ to an unacceptable degree and makes the guarantee of (racial) equality ‘practically worthless’. She reads s 14 as allowing a respondent to escape censure by ‘simply testifying that there was a legitimate purpose and that there was no less-restrictive means to reach that purpose’ (Vogt 2001, 201–202).
40. However compare the comments of Kriegler J in *President of the Republic of South Africa v Hugo* para 78. Alibertyn and Kentridge (1994, 175) sees the fairness/unfairness enquiry as dealing with conduct that ‘finds no justification in the political morality embraced by the Constitution’ and the reasonable/justifiable enquiry as focusing on ‘whether incursions into the freedom from discrimination are permissible because they serve a legitimate social purpose in a way which is proportionate to the end which they seek to achieve’. Alibertyn and Goldblatt (1998, 271) admits that the Constitutional Court’s formulation of the unfairness test has led to the ‘two stages of justification ... to have become confused’. At 272 they ‘acknowledge that the line between evidence in support of the ‘unfairness’ justification stage and evidence in support of the limitations justification stage can become relatively blurred since both enquiries may consider similar issues relating to the underlying intention in the enactment of the impugned measure’.
41. It is not clear to what extent the requirement of ‘law of general application’ applies in cases of private discrimination. Van der Vyver (1998, 376) is of the view that ‘law’ of general application includes the internal conduct rules of social entities such as a church association, sport body, mercantile company and so on. He refers to the *Barthold Case* 1985 PECHR Series A vol 90 par 46 where it was held that the internal rules of the veterinary board forms part of ‘law’. The Constitutional Court has not yet had the opportunity to express itself on the relationship between s 9 and s 36 in the context of private discrimination. In *Hoffmann*, the Constitutional Court held that the SAA was an organ of state (para 23) and further held that its employment practice of refusing to employ HIV positive cabin stewards was not law of general application. (Para 41.) In *Walker*, where decisions by the City Council of Pretoria’s officials were under scrutiny, the Court held that the justification query also did not arise as the respondent council’s conduct was not authorised, expressly or by necessary implication, by a law of general application (para 82.) Rautenbach (2001, 340) points out that if the ‘fairness’ and ‘justifiability’ defences are not kept strictly apart, the ‘law of general application’ requirement is likely to be subverted. That is exactly what happened when the Act was drafted – fairness/ justifiability was seen as one step and the ‘law of general application’ threshold requirement fell away, although some of the other factors listed in s 36 have been incorporated into s 14.
42. Van der Walt and Botha (1998, 35). The authors contend that the indeterminacy follows from ‘the margin for contextualisation’ allowed by this approach. Any test is likely to be indeterminate. Consider the test suggested by Bohler-Muller (2000, 640): A court must consider all circumstances ‘and listened to all voices before reaching a conclusion which is the least harmful to the most vulnerable party or group’. How are different harms to be compared? How are degrees of vulnerability ascertained?
43. Cf. Kende (2000, 770) and Davis (1999, 413): ‘The Constitutional Court has rendered meaningless a fundamental value of our Constitution and simultaneously has given dignity both a content and a scope that make for a piece of jurisprudential Legoland – to be used in whatever

form and shape is required by the demands of the judicial designer'. Carpenter (2002(a), 58), discussing the *Walker* case, believes that 'race issues in particular may turn out to be essentially "undecidable"'. Kentridge (1996, 250): 'It would be naïve to imagine that there is a single "right" answer to all the issues which the court will have to decide. Some may say that the search for objective standards is an illusion'. In the context of discrimination complaints, s 14 would make many answers possible.

44. Cf. Jagwanth (2003, 738): '... the only group which does *not* qualify for preferential treatment is able bodied white men, a group which, at 4.64%, comprises a relatively small percentage of the population'.
45. *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) para 44.
46. Cf. *Fourie v Minister of Home Affairs* 2005 (3) SA 429 (SCA) para 7 and *Bhe v Magistrate Khayelitsha* 2005 (1) SA 580 (CC) para 118.
47. To complicate matters even more, the Constitutional Court has said that the prohibition on unfair discrimination was not designed solely to avoid discrimination against people who are members of disadvantaged groups: Carpenter (2001a, 634); *Hugo* para 41; *Harksen* para 50. Where a previously disadvantaged group is treated less favourably than another previously disadvantaged group, the issue becomes even more vexed. (Cf. *Motala v University of Natal* 1995 (3) BCLR 374 (D)). The Indian Supreme Court in *State of Kerala v Thomas* AIR 1976 SC 490 argued that the 'deserving sections' from designated groups should be the benefactors of affirmative action policies – see Nair (2001).
48. Carpenter (2002a, 58) goes so far as to describe race issues as 'undecidable'.
49. 2002 (6) SA 642 (CC).
50. 1998 (1) SA 300 (CC).
51. Compare Goldstone J's remark in *Van Der Walt v Metcash Trading Ltd* 2002 (4) SA 317 (CC) para 19: '[R]easonable minds may well differ on the outcome of similar or even identical cases'. Also see Schutz JA in *ABSA Bank Ltd v Fouche* 2003 (1) SA 176 (SCA) 185I: 'Notoriously the views of Judges as to what the ordinary man expects sometimes differ. This happens when value judgments have to be made ...'
52. Par 12.
53. Par 15.
54. Par 17.
55. Par 20.
56. Par 22.
57. Par 25.
58. Par 8.
59. Par 16.
60. Par 24.
61. Par 63.
62. Par 69.
63. Par 72.

REFERENCES

- Albertyn, C. and B. Goldblatt. 1998. Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality. *South African Journal on Human Rights* 14(2): 248–276.

- Albertyn, C. and J. Kentridge. 1994. Introducing the right to equality in the interim constitution. *South African Journal on Human Rights* 10(2): 149–178.
- Albertyn, C., B. Goldblatt and C. Roederer. 2001. (Eds.). *Introduction to the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000*. Johannesburg: Witwatersrand University Press.
- Bailey, P. and A. Devereux. 1998. The operation of anti-discrimination laws in Australia. In *Human rights in Australian law: Principles, practice and potential*, ed. D. Kinley, 292–318. Leichardt: The Federation Press.
- Bohler, N. 2000. Equality courts: Introducing the possibility of listening to different voices in South Africa. *Journal of Contemporary Roman-Dutch Law* 63(2): 288–294.
- Bohler-Muller, N. 2000. What the equality courts can learn from Gilligan's Ethic of Care: A novel approach. *South African Journal on Human Rights* 16(4): 623–641.
- Bohler-Muller, N. and M. Tait. 2000. The equality courts as a vehicle for legal transformation – A few practical suggestions. *Obiter* 21: 406.
- Brand, D. 2000. Die Wet op die Bevordering van Gelykheid en die Voorkoming van Onbillike Diskriminasie. *Word and Action* 40(371): 13–18.
- Carpenter, G. 2001(a). Equality and non-discrimination in the new South African constitutional order (1): The early cases. *Journal of Contemporary Roman-Dutch Law* 64: 619–642.
- Carpenter, G. 2001(b). Equality and non-discrimination in the New South African constitutional order (2): An important trilogy of decisions. *Journal of Contemporary Roman-Dutch Law* 64: 409–422.
- Carpenter, G. 2002(a). Equality and non-discrimination in the new South African constitutional order (3): The saga continues. *Journal of Contemporary Roman-Dutch Law* 65(1): 37–58.
- Carpenter, G. 2002(b). Equality and non-discrimination in the New South African constitutional order (4): Update. *Journal of Contemporary Roman-Dutch Law* 65(2): 177–185.
- Chemerinsky, E. 1998. Can courts make a difference? In *Redefining equality*, ed. D. N and D. M. Douglas, 191–204. Oxford: Oxford University Press.
- Currie, I. and J. de Waal. 2005. *The Bill of Rights Handbook*. Cape Town: Juta.
- Davis, D. 1999. *Democracy & deliberation*. Kenwyn: Juta.
- De Vos, P. 2000. Sexual orientation and the right to equality in the South African Constitution: National coalition for gay and lesbian equality & Another v Minister of Justice & Others. *South African Law Journal* 17(1): 17–25
- De Waal, J. 2002. Equality and the constitutional court. *SA Mercantile Law Journal* 14(2): 141–156.
- Dror, Y. 1958. Law and social change. *Tulane Law Review* 33(4): 787–802.
- Gutto, S. B. O. 2001. *Equality and non-discrimination in South Africa: The political economy of law and law making*. Claremont: New Africa Books.
- Jagwanth, S. 2003. Affirmative action in a transformative context: The South African experience. *Connecticut Law Review* 36(3): 725–745.
- Kende, M. S. 2000. Gender stereotypes in South African and American constitutional law: The advantages of a pragmatic approach to equality and transformation. *South African Law Journal* 117(4): 475–770.
- Kentridge, S. 1996. Bills of Rights – The South African experiment. *Law Quarterly Review* 112: 237–262.
- Klare, K. E. 1998. Legal culture and transformative constitutionalism. *South African Journal on Human Rights* 14(1): 146–188.
- Kok, J. A. 2008. A socio-legal analysis of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. LLD thesis University of Pretoria.

- Lacey, N. 1987. Legislation against sex discrimination: Questions from a feminist perspective. *Journal of Law and Society* 14(4): 411–421.
- Lane, P. 2006. South Africa's equality courts: An early assessment. <http://www.csvr.org.za/papers/paprctp5.htm> (accessed 24 February 2006).
- Liebenberg, S. and M. O'Sullivan. 2001. 'Equality: Theory and practice in South Africa and elsewhere'. Paper presented at a conference: South Africa's New Equality Legislation: A tool for advancing women's socio-economic equality. University of Cape Town. January, 18–20.
- Loenen, T. 1997. The equality clause in the South African Constitution: Some remarks from a comparative perspective. *South African Journal on Human Rights* 13(3): 401–429.
- Lustgarten, L. 1986. Racial inequality and the limits of the law. *The Modern Law Review* 49(1): 68–85.
- Lustgarten, L. 1992. Racial inequality, public policy and the law: Where are we going? In *Discrimination: The limits of law*, eds. B. Hepple and E. M. Szyszczak, 455–471. London: Mansell.
- Moseneke, D. 2002. The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication. *South African Journal on Human Rights* 18(3): 309–319.
- Nair, K. V. 2001. Search for equality through constitutional process: The Indian experience. Paper presented at a conference entitled 'Equality: Theory and Practice in South Africa and elsewhere' held at the University of Cape Town from 18–20 January 2001 (on file with author).
- Pieterse, M. 2005. What do we mean when we talk about transformative constitutionalism? *SA Public Law* 20(1): 155–166.
- Rautenbach, I. M. 1997. Die verband tussen die gelykheidsbepaling en die algemene beperkingsbepaling in die Handves van Regte. *Journal of South African Law* 114(3): 571–583.
- Rautenbach, I. M. 2001. Die konstitusionele hof se riglyne vir die toepassing van die reg op gelykheid II. *Journal of South African Law?* 9(2): 329–340.
- Van der Vyver, J. D. 1998. Gelykberegting. *Journal of Contemporary Roman-Dutch Law* 61: 367–376.
- Van der Walt, A. J. and H. Botha. 1998. Coming to grips with the New Constitutional Order: Critical comments on Harksen v Lane NO. *SA Public Law* 13(1): 17–41.
- Vogt, G. S. 2001. Non-discrimination on the grounds of race in South Africa – with special reference to the promotion of equality and prevention of unfair discrimination Act. *Journal of African Law* 45(2): 196–209.
- Woolman, S. 1997. Out of order? Out of balance? The limitation clause of the Final Constitution. *South African Journal on Human Rights* 13(1): 102–134.