CHAPTER 4

EQUALITY AND UNFAIR DISCRIMINATION IN EDUCATION

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INTRODUCTION

Unfair discrimination has shaped the South African education system, producing inequality in our schools and society.

Under apartheid, schools were strictly segregated by race. White learners received most of the funding and resources, resulting in an inferior education for the majority of black learners. In Head of Department, Mpumalanga Department of Education v Hoerskool Ermelo, the Constitutional Court described this system and its consequences (para 46):

[...] every black child received 1/8 of the funding and were supported by relatively affluent white communities. On the other hand, formerly black public schools have been, and try and large remain, scantily resourced. They were deliberately funded singly by the apartheid government. Also, they served the races and were supported by relatively deprived black communities. That is why perhaps the most striking and debilitating feature of apartheid is an unequal distribution of skills and competencies acquired through education.

Race remains the most visible marker of inequality in our education system, but other inequalities also persist. Unfair discrimination on the basis of gender, religion, language, sexual orientation and disability, among many other grounds, has been a constant feature of education in South Africa. Often these forms of unfair discrimination have combined, resulting in deeper inequalities.

In this section of the handbook, we address different forms of inequality and unfair discrimination in our schools, and the efforts needed to address these problems. This chapter lays a foundation by introducing the legal principles and concepts that will feature in the chapters to follow.

The chapters in this section all underline an important point. Addressing inequality and unfair discrimination should not only be seen as a duty; this task should also be seen as an opportunity to make schools more welcoming, inclusive places that make all children feel valued.

THE CONSTITUTION AND THE EQUALITY ACT

Section 9 of the Constitution guarantees the right to equality. This right has three important parts:

- First, a right to equality before the law, and equal protection and benefit of the law (Section 9(1)).
- Second, permission for the state to take positive measures to protect and advance groups that have been disadvantaged by unfair discrimination (Section 9(2)).
- Third, a prohibition on unfair discrimination by the state (Section 9(3)) and by private individuals (Section 9(4)).

Parliament has passed legislation to give effect to this right. The most important statute for our purposes is the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act). The Equality Act prohibits unfair discrimination by the state and all individuals. It also prohibits related wrongs, such as hate speech, harassment and the publication of unfairly discriminatory material. The Equality Act has created a network of Equality Courts around the country. These courts are meant to provide a quick, informal and effective way of resolving unfair discrimination disputes. As a result, the Equality Act is one of the primary sources of rights and remedies when a learner experiences unfair discrimination in school. The process of bringing a claim in the Equality Court is discussed in more detail below.

International law

There are many international instruments that expressly prohibit discrimination in education and require positive measures to promote equality. These include:
- The International Covenant on Civil and Political Rights (ICCPR)
- The International Covenant on Economic, Social and Cultural Rights (ICESCR)
- The Convention for the Elimination of all Forms of Discrimination Against Women (CEDAW)
- The Convention on the Rights of the Child (CRC)
- The Convention on the Rights of People with Disabilities (CRPD)
We have in mind: 

• First, equality requires the equal enjoyment and protection of constitutional rights. This idea is endorsed by Section 9(2) of the Constitution. This means that equality requires all learners to receive a basic education.

• Second, equality is about accommodating and valuing difference, rather than treating everyone identically or promoting uniformity. Schools that attract learners from diverse backgrounds can promote understanding and tolerance. Learners in diverse schools are also better equipped for life in a diverse country.

• Finally, equality requires us to break down patterns of group disadvantage, and to prevent new patterns of disadvantage from forming. Many learners are not only denied the right to a basic education; they continue to suffer stigma, stereotyping, socioeconomic disadvantage, violence, and powerlessness as a result of their race, gender, disability, sexual orientation or other group membership. Equality in education requires that we end these patterns of disadvantage.

These valuable forms of equality are often referred to as ‘substantive’ equality. When someone talks about substantive equality, they are referring to some or all of these forms.

The prohibition of unfair discrimination is an important tool in promoting these valuable forms of equality. In particular, this prohibition helps to prevent patterns of group disadvantage being perpetuated or created in schools. It is important to remember that this prohibition on unfair discrimination is just one of the many tools available to promote equality in schools. For example, school feeding schemes, free education, improvements in teacher quality, and many other actions all help to promote equality by breaking down patterns of group disadvantage.

WHAT IS UNFAIR DISCRIMINATION?

In everyday language, we use the word ‘discrimination’ to mean a very serious type of wrong. In South African law, we use this word in a slightly different way. Discrimination is not wrongful in itself; it is only wrong if it is unfair.

In the next two sections, we explain the concepts of discrimination and unfairness in greater detail.

DISCRIMINATION DEFINED

Section 1 of the Equality Act defines discrimination as:

(a) any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly—

(a) imposes burdens, obligations or disadvantages on; or

(b) withheld benefits, opportunities or advantages from, any person on one or more of the prohibited grounds.

In Harksen v Lane 1998 (1) SA 300 (CC), the Constitutional Court defined discrimination under Section 9(3) of the Constitution in slightly different terms, as ‘differentiation’ that is directly or indirectly based on prohibited grounds (paragraph 47).
Discrimination involves actions or omissions that impose burdens or withhold benefits, directly or indirectly, on the basis of prohibited grounds.

DIRECT AND INDIRECT DISCRIMINATION

Discrimination can occur directly or indirectly on the basis of prohibited grounds.

MULTIPLE AND INTERSECTIONAL DISCRIMINATION

Discrimination may occur on one or more grounds. This can involve ‘multiple discrimination’ and ‘intersectional discrimination’.

Intersectional discrimination occurs when a learner is discriminated against because of a combination of protected grounds. For instance, a school that prohibits learners from wearing the hijab in schools would discriminate on the basis of race and religion. This is because this rule does not discriminate against all Muslim learners, or all female learners, or even all female Muslim learners. Instead, it discriminates against Muslim female learners whose particular cultural and religious practices require the hijab.

Intersectionality is an important idea in discrimination law. We are not defined by single identities. Instead our identities are shaped by our membership of overlapping social groups. Experiences of discrimination and inequality are complex, and generally cannot be reduced to a single protected ground.

UNFAIRNESS

We have already seen that discrimination is only wrongful if it is found to be unfair.

In this approach, discrimination is unfair if it has a severe impact on the learner or group of learners that is not justified. The factors listed in the Equality Act are merely a guide to answering these questions. No factor is decisive.

THE BURDEN OF PROOF

Under the Equality Act, the person alleging unfair discrimination must set out the facts that indicate that discrimination has occurred. The person who is accused of unfair discrimination must then prove that no discrimination has occurred, or that the discrimination is fair.

This burden of proof is placed on the discriminator no matter whether the ground is listed in the Equality Act or is an analogous ground. For example, HIV status is not listed in the Act, but it is an analogous ground of discrimination. As a result, if a school discriminates against learners on the basis of HIV status, then the school will have to prove that this discrimination is fair.

This burden of proof is slightly different under the Constitution, although it is not necessary to go into the details here. The Equality Act applies to all cases of discrimination except a few narrow exceptions, such as if you want to reduce the number of learners by age for sports teams and other extra-mural activities. That is age discrimination, and it is fair, in most cases. For example, you would not want to see 16-year-olds playing competitive soccer against nine-year-olds.

While some forms of discrimination may be fair, we should still consider each case of discrimination very carefully.

Many of the forms of discrimination that we have taken for granted in the past are now unlawful. Discrimination against black people, women, gay people, transgender people and many other groups was all thought natural and normal at one time. The test for unfair discrimination makes us think long and hard about whether different forms of discrimination are justified.

UNFAIRNESS FACTORS

Section 14(3) of the Equality Act sets out the following factors to consider in deciding whether discrimination is unfair.

(a) Whether the discrimination is improper or is likely to impair human dignity,
(b) the impact of the discrimination on the complainant,
(c) the position of the complainant in society compared to the sufferer from patterns of disadvantage, or belongs to a group that suffers from such pattern 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.
Let us now put these concepts to use by considering how the unfairness test would be applied to a real-life situation.

A school has a policy that all pregnant learners must leave school when they fall pregnant, and that they may only return in the year after they have given birth. A learner falls pregnant in January of her Grade 11 year and gives birth in October. She is forced to miss a whole year of school as a result. She brings a claim of unfair discrimination against the school in the Equality Court.

The school’s policy clearly discriminates on the basis of pregnancy, a listed ground in the Equality Act and the Constitution. This is also a form of sex and gender discrimination. The school will bear the burden of proving that this discrimination is fair. In the Equality Court, the school argues that this discrimination is necessary to deter learners from falling pregnant. To assess whether this discrimination is unfair, the Equality Court will consider the two parts of the unfairness analysis: impact and justification.

The impact of this discrimination is severe, and takes different forms. It has had a serious impact on the learner as she was forced to miss a full year of education. It will have a similar impact on all other learners who fall pregnant. This discrimination also has a wider impact on society. The school’s policy suggests that young women are to blame for falling pregnant, reinforcing stigma and harmful double standards. It also enunciates the socio-economic disadvantage that women experience in society. The failure to accommodate pregnant women and the burden of childcare responsibilities stand in the way of many women accessing education and meaningful work opportunities. This policy continues this pattern of disadvantage and exclusion.

Having assessed the impact of the discrimination, the Equality Court would then consider whether the school can justify this impact. There are obvious problems with the school’s attempt at justification. If the aim is to stop learners from falling pregnant, it is not clear why pregnant learners are singled out for this harsh treatment, while the fathers of their children are allowed to continue their schooling. There is also no basis to believe that this policy will in fact prevent learners from falling pregnant. Better education and greater availability of contraceptives are far more effective strategies to limit the harm of depriving learners of a full year of education that welcomes learners from diverse backgrounds, caters to their diverse needs, and makes all learners feel safe and valued.

In MEC for Education, KwaZulu-Natal v Pillay, the Constitutional Court explained this concept of reasonable accommodation (para 73):

As explained above, equality in education requires the accommodation of difference, not strict uniformity. The failure to reasonably accommodate those whose needs are different will often result in unfair discrimination. Reasonable accommodation is required to achieve inclusive education. An inclusive education is an education that welcomes learners from diverse backgrounds, caters to their diverse needs, and makes all learners feel safe and valued.

What the Court is saying is that schools and the government must be prepared to make some effort to accommodate learners from diverse backgrounds. This may cost time and money. But this is a price worth that we do not relegate people to the margins of society because they do not or cannot conform to certain norms.
paying to allow people to participate in schools and in their communities. The same test for unfair discrimination applies where a school or the state has failed to accommodate the needs of a learner or group of learners.

First, the failure to make accommodation will generally be a form of indirect discrimination, as neutral rules or practices may disproportionately exclude or have an impact on certain learners. For instance, if a school is only accessible by stairs, this has a significant impact on wheelchair-bound learners. Second, the unfairness analysis will focus on the consequences of the failure to accommodate learners and the justification for this failure. This will often involve a balancing enquiry, weighing the impact of the discrimination against the cost of making the accommodation. As the Court indicated in Pillay, ‘the essence of reasonable is an exercise in proportionality’ (para 86).

In the example of the school which is only accessible by stairs, this has a significant impact on wheelchair-bound learners. They may be denied entry to the school entirely, or they may have to go through the humiliation of being carried up and down the stairs each day. This impact must be weighed against the cost of installing a ramp for wheelchairs. This cost of that action will probably be limited in comparison with the benefits it will bring for the learners. As a result, it would be unfair discrimination to refuse to install a wheelchair ramp, unless there are strong reasons not to do so.

The prohibition of unfair discrimination is an important tool in promoting equality, but it has its limits. This prohibition does not directly address existing patterns of disadvantage caused by historical unfair discrimination. For example, a black learner at a poorly resourced township school may not face any immediate acts of unfair discrimination. The prohibition on unfair discrimination can offer her no immediate solutions. Other positive steps must be taken to undo the disadvantage that she experiences as a result of apartheid.

The prohibition on unfair discrimination is also backward-looking, as it responds to unfair discrimination that has or is about to occur, rather than putting in place measures to prevent unfair discrimination from occurring in the future. It also generally relies on the courage and resources of individuals who have to bring unfair discrimination claims to court.

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Unfair discrimination and inequality are complex social problems that can take many different forms. This is reflected in the detailed laws that have developed in response.

While these laws are intricate, they exist to serve clear aims: to ensure that all learners receive a basic education, to accommodate difference, to promote diversity, and to break down patterns of group disadvantage.

The next chapters will assess how these aims are being realised in law and in practice in different areas of the education system.