

Infusing equality for sexually diverse learners at school

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The paper is based on one on a Masters' study by Elmien van Wyk, supervised by Annamagriet de Wet and Elda de Waal. The study is titled "Exploring education-related sexual equality experiences of LGBTQ+ students: an education law perspective", 2019. North-West University. <https://repository.nwu.ac.za/handle/10394/33187>

Introduction

<https://silc.ku.edu/SafeZone>

<https://astt.org>

SAFE
ZONE



???

<http://www.newnownext.com/things-lgbt-people-cant-do/03/2015/>

National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others (2000:par.109)

[w]hen everything associated with homosexuality is treated as bent, queer, repugnant or comical; the equality interest is directly engaged. People are subject to extensive prejudice because of what they are or what they are perceived to be, not because of what they do. The result is that a significant group of the population, because of its sexual non-conformity, is persecuted, marginalised and turned in on itself.

Gay Lesbian A-sexual Bi- Trans- Hetero- Queer

Values?

Appreciation of diversity

- Difference and diversity is a basic reality of human life and schools
- Inclusion and respect in society requires 'multicultural policies that recognizes differences, champion diversity and promote cultural freedom' (UN Development Programme)
- Post 1994 education system purpose of developing 'all people's talents and capabilities', advancing 'democratic transformation or society', combatting racism, sexism, unfair discrimination and poverty, and advancing 'diverse cultures and languages' (Head of Department: Mphumalanga Dept of Education and another v Hoërskool Ermelo and Another)



<http://www.slapupsidethehead.com/2008/06/alberta-school-bans-anti-homophobia-shirt/>

Values? Sexual equality and human dignity

- Sexual minorities must not be portrayed as less equal than others or dehumanised/objectified
- National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others;
- Geldenhuys v National Director of Public Prosecutions and Others;
- Du Toit and Another v Minister of Welfare and Population Development and Others;
- Minister of Home Affairs and Another v Fourie and Another;
- Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others



Objectives

- What role could human rights values, and in particular the value of equality, play in bringing about improved educational experiences for sexual minorities (LGBTQ+ learners/students)

<http://www.pragmatismopolitico.com>



<http://www.newnownext.com/things-lgbt-people-cant-do/03/2015/>

Equality – a value



Political and moral equality, equal opportunities, equal respect as a human being, equality before the law, equal treatment by public administration, and equal consideration of different needs
Smit, 2011

Constitutional values

- Section 1

The Republic of South Africa is one, sovereign, democratic state founded on the following values-

(a) Human dignity, the **achievement of equality** and the advancement of human rights and freedom

- Section 7

The Bill of Rights is a cornerstone of democracy in south Africa. It enshrines the rights of all people in our country and affirms the democratic values of dignity, **equality** and freedom.

- MEC for Education: Kwazulu-Natal and Others v Pillay (2007:par.63):
Freedom is one of the underlying values of our Bill of Rights and courts must interpret all rights to promote the underlying values of 'human dignity, equality and freedom'. These values are not mutually exclusive but enhance and reinforce each other.



Values and rights relationship

- Values and rights have a reciprocal quality – protecting a right constitutes realising a value and *vice versa*
- The relationship between values and rights could create an environment of awareness and respect and could install an equality value to support improved education experiences for learners who identify as one of the sexual minorities



The right to equality

- *[t]he status or condition of being treated fairly according to regularly established norms of justice... (Garner, 2009:616)*
- **Section 9**

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.

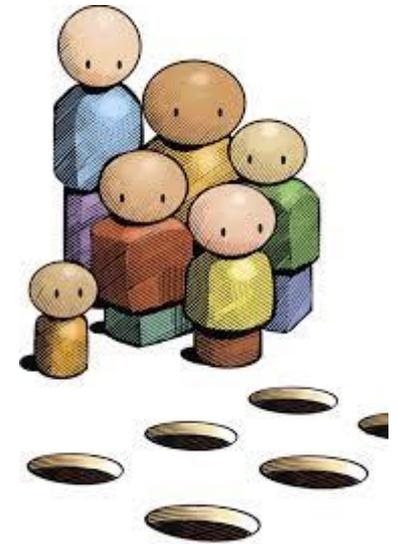
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(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.

Formal and substantive equality

- The formal approach to equality seeks only equal application or treatment of persons without looking at the situations, cultures and environments of specific individuals that might affect the equality of outcomes or the effects of equal rules or treatment (Smith, 2014:612).
- Formal equality does not always challenge or address the structures, cultures and environments which already exist while seeking to achieve equality by focusing on “consistency in treatment” (Smith, 2014:612).
- Instances where a formal approach to equality is implemented, mostly focus on direct discrimination (*cf.* 3.4.3.1) by solely noticing the “abstract person” (Fredman, 2005:163; Smith, 2014:612).
- As such, rules and practices do not discriminate between people on the basis of situational contextual factors that may prohibit them from enjoying equal effects of such rules or practices.



Formal and substantive equality



- Smit (2013:82) is of the opinion that the Constitution implies a need for South Africans to make the shift from formal equality to substantive equality.
- President of the Republic of South Africa and Another v Hugo (1997)
Although the long term goal of our constitution [the South African Constitution] is equal treatment, insisting upon equal treatment in established inequality may well result in the entrenchment of that inequality.

Formal and substantive equality

- Radley (2015:278) defines substantive equality as an approach which recognises that instead of treating all individuals as one and the same and applying laws consistently without distinction or discrimination, individuals must be accounted for in terms of their substantive worth and duly recognised on account of their differences which are required to be tolerated and accommodated in a pluralistic democratic order.
- Due to inequalities, oppression, marginalisation and disadvantage for LGBTQ+ people brought about through heteronormativity and previous unequal legislation, heterosexual individuals and individuals belonging to sexual minorities should not be seen as the same and should not always be treated alike.

Formal and substantive equality

- The Constitutional Court emphasised the need for a substantive approach to equality in the *President of South Africa v Hugo* (1997:par.60-61) in this statement:
We need ... to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.

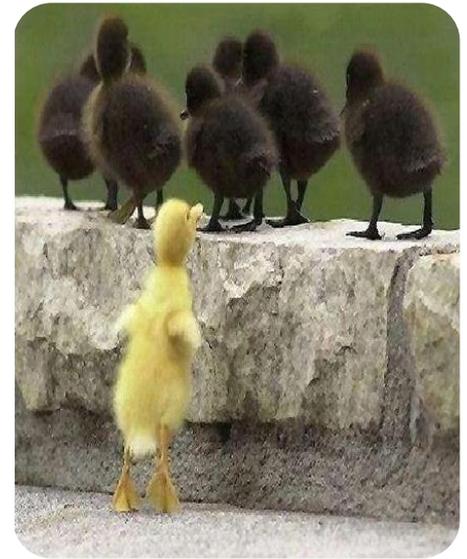
Fair and unfair discrimination

- The Constitution prohibits unfair discrimination but not mere differentiation. Differentiation is tested against rationality or irrationality whereas discrimination is tested against fairness or unfairness.
- PEPUDA (2000) define *discrimination* by stating as follows:
[Differentiation] [m]eans any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly imposes burdens, obligations or disadvantage on; or withholds benefits, opportunities or advantages from any person on one or more of the prohibited grounds.



Prohibited discrimination (unfair discrimination)

- Section 9(3) of Constitution
- PEPUDA (2000):
race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or any other grounds 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.)



Practical implications



- Equal enjoyment of rights and freedoms
- Consider policy and practice as well as elements of culture, ethos etc. Ask
 - Is there differentiation in how different groups are treated?
 - If there is, is it on prohibited grounds?
 - Does it infringe dignity of one party/group?
 - Does it unfairly advantage one group over another?
 - Does it unfairly disadvantage one group?
 - Could it be justified as promoting substantive equality?

Practical implication



- Language
- Assumptions or 'normal'
- Who are preferred (privileged)
- Understanding differing needs
- Norms / Scripts
- Gender-sexuality binaries
- Representation

Questions or comments? 😊

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