

**Determining perceptions regarding the  
functioning of equality courts: the case of court  
clerks in the Gauteng region**

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requirements for the degree *Masters of Public Administration*  
at the North-West University

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## DECLARATION

I hereby declare that the dissertation entitled “**Determining perceptions regarding the functioning of equality courts: the case of court clerks in the Gauteng region**” and submitted in partial fulfillment of the requirements for the degree *Magister Public Administration*, at the Potchefstroom Campus of the North-West University, is my own original work, and has not previously been submitted for examination at any other institution of Higher learning. I further declare that all the sources that have been utilised, quoted or referred to have been duly acknowledged by means of complete references.

**D.M.S. FRANZMAN**

SIGNATURE:

A handwritten signature in black ink, appearing to read 'D.M.S. Franzman', written over a horizontal line.

DATE: MARCH 2019

## **ABSTRACT**

This study is located within the discipline of Public Administration, within the context of the South African Public Service, and focuses on the Department of Justice and Constitutional Development as the national government department mandated with the responsibility for the administration of justice and the promotion of constitutional development. Given South Africa's history of colonialism, apartheid and patriarchy, the establishment of the specialised equality courts seeks to facilitate the transition to a democratic society by, amongst others, ensuring access to justice and eradicating social and economic inequalities, particularly those that are systemic in nature. The study involves a determination of the perceptions of the equality court clerks regarding the functioning of the equality courts, focusing on the case of court clerks in the Gauteng region.

The rationale for the research is the apparent under-utilisation and ineffectiveness of the equality courts, which may be attributable to various factors such as: a lack of public awareness of the purpose, role and location of equality courts; a lack of information and awareness amongst the equality court staff regarding the purpose, role and functions of the equality courts; a lack of specialised expertise amongst equality court clerks linked to a lack of adequate and continuous training; and, the perceptions of the equality court clerks relating to the status, usage, accessibility, role and functioning of the equality courts.

The study involves benchmarking against international best practice of equality courts (or similar tribunals or fora) and furthermore adopts a mixed-method research approach. The research design of the study takes a phenomenological approach. The study uses semi-structured self-completion questionnaires and attitude scales, which integrate a combination of quantitative and qualitative aspects as primary data sources, in order to collect information with regard to the perceptions of equality court clerks of the role, function, usage and status of the equality courts. A thematic analysis is then undertaken in order to analyse the results so as to gain a comprehensive insight into the perceptions of the equality court clerks.

The findings indicate a low level of awareness of the legislative and regulatory framework governing the equality courts on the part of the equality court clerks. The responses furthermore indicate an inadequate and inconsistent understanding of their own role and functioning as equality court clerks, as well as of the regulatory environment which enables their functioning. The study also finds that the training of equality court clerks remains one of the key challenges hampering their effective functioning as equality court clerks, and that the lack of awareness of the equality courts on the part of the public is another major challenge hindering the usage and effectiveness of the equality courts.

The study proposes several practical recommendations which address the barriers and positively influence the perceptions of the equality clerks in promoting the status, usage, accessibility, role and functioning of equality courts, thus ensuring the improved delivery of justice services to the public and all users of the equality courts in South Africa.

The research is significant as it augments the body of Public Administration knowledge and enhances current understanding regarding the perceptions of equality court clerks of the role, function, usage and status of equality courts and how these perceptions impede or strengthen the effective functioning of the equality courts. The significance of the research thus lies in its contribution to gaining a better perspective of the barriers to the effective functioning of the equality courts as envisaged by their founding legislation, as well as in benchmarking against international best practice of equality courts (or similar tribunals or fora), in order to improve the functioning of the equality courts.

## KEY WORDS

**Key words: equality court, court clerks, public administration, democracy, human rights**

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## **DEDICATION**

**To my parents, John and Eileen**





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## **ABBREVIATIONS AND ACRONYMS**

DOJ&CD – Department of Justice and Constitutional Development

DPSA – Department of Public Service and Administration

FHR – Foundation for Human Rights

GRO – Gauteng Regional Office

HSRC – Human Sciences Research Council

ICCPR – International Covenant on Civil and Political Rights

ICERD – International Convention on the Elimination of all forms of Racial Discrimination

NDP – National Development Plan

NIS – National Information System

NOC – National Operations Centre

OHCHR – Office of the High Commissioner for Human Rights

PEPUDA – Promotion of Equality and Prevention of Unfair Discrimination Act

PERSAL – Personnel and Salary Information System

SAHRC – South African Human Rights Commission

UDHR – Universal Declaration of Human Rights

UNDP – United Nations Development Programme

UNESCO – United Nations Educational, Scientific and Cultural Organisation

UNICEF – United Nations Children's Fund

WPTPS – White Paper on Transforming Public Service Delivery





## CHAPTER 1

### INTRODUCTION AND OUTLINE OF THE STUDY

#### 1.1 INTRODUCTION

The focus of this study relates to determining the perceptions of the equality court clerks regarding the functioning of the equality courts.

This chapter provides an orientation into the national context and the current legislative and policy framework governing the creation, underlying rationale, intentions and objectives, as well as the administrative functioning of the equality courts in South Africa. The chapter then considers the apparent challenges and problems hindering the effective functioning of the equality courts, based on a review of available literature, reports and other related sources. The chapter furthermore sets out the research objectives, as well as the research questions of the study. Subsequently, the chapter presents the central conceptual and theoretical statements underpinning the study and provides a description of the research methodology. The significance and contribution of the study and the chapter layout of the study are then clarified, whereafter the chapter ends with a conclusion.

#### 1.2 ORIENTATION

South Africa became a constitutional democracy in 1994. The Constitution of the Republic of South Africa (1996) (hereinafter referred to as the Constitution) came into effect on 4 February 1997. The Preamble of the Constitution expresses the transformative nature of the Constitution and declares that one of the reasons for the adoption of the Constitution, amongst others, is to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights” (South Africa, 1996).

In terms of Section 1 of the Constitution, the Republic of South Africa is “one, sovereign, democratic state” founded on the values of amongst others “human dignity, the achievement of equality and the advancement of human rights and freedoms” (South Africa, 1996). The Bill of Rights in Chapter 2, Section 7(1), is furthermore proclaimed as “a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom” (South Africa, 1996). The right to equality is entrenched in Section 9, and Section 9 (4) requires national legislation to be enacted in order to prevent or prohibit unfair discrimination (South Africa, 1996).

The Promotion of Equality and Prevention of Unfair Discrimination Act (hereinafter referred to as the PEPUDA) (Act 4 of 2000) was passed to give effect to Section 9 of the Constitution. An excerpt from the preamble to the PEPUDA (South Africa, 2000) states that it “...endeavours to

facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom". The PEPUDA consists broadly of two parts, the first dealing with the prevention and prohibition of unfair discrimination and the second dealing with the promotion of equality. The first part focuses on aspects such as the establishment of equality courts and measures relating to their functioning. The provisions of the PEPUDA dealing with the equality courts have been in operation since 16 June 2003 (South Africa, 2000). However the second part of the Act, dealing with the promotion of equality, is not yet in effect.

The PEPUDA provides for the establishment of equality courts across South Africa, with wide-ranging powers in terms of the types of orders which they may make, and before which proceedings may be instituted in terms of or under the Act (South Africa, 2000). In terms of Section 16(1)(a) of the Act, all high courts are automatically designated as equality courts, while magistrates' courts can only be designated once they have specially trained personnel in place. The Guiding Principles in Section 4 of the PEPUDA *inter alia* emphasise "the development of special skills and capacity" for persons applying the Act, "to ensure effective implementation and administration thereof" (South Africa, 2000).

The PEPUDA seeks to raise awareness on the importance of promoting equality and overcoming unfair discrimination, hate speech and harassment, as well as to facilitate compliance with international law obligations (South Africa, 2000). Chapter 5 of the PEPUDA deals with the general responsibility to promote equality (South Africa, 2000). In terms of Section 24(1), the state "has a duty and responsibility to promote and achieve equality" (South Africa, 2000). Section 25 of the PEPUDA imposes a duty on the state to promote equality "where necessary with the assistance of the relevant constitutional institutions", amongst others, to (South Africa, 2000):

- develop fundamental rights awareness so as to promote a climate of understanding, mutual respect and equality;
- take measures to develop and implement programmes in order to promote equality;
- develop action plans to address any unfair discrimination;
- enact further relevant legislation to promote equality and to establish a legislative framework in line with the objectives of the PEPUDA;
- develop codes of practice and develop guidelines including codes regarding reasonable accommodation;
- provide assistance, advice and training on issues of equality;

- develop appropriate internal mechanisms to deal with complaints of unfair discrimination; and
- conduct information campaigns to popularise the PEPUDA.

However, government is still to submit and approve specific regulations relating to the sections in the PEPUDA governing the promotion of equality, as required by Chapter 5 of the PEPUDA, in order for these sections to come into operation (Department of Justice & Constitutional Development (DOJ&CD), 2015(a):2). Chapter 6 of the PEPUDA deals with general provisions and the implementation of the PEPUDA. Section 30 obliges the relevant Minister, where required in the circumstances, to draw up regulations specifically relating, amongst others, to: the procedures to be followed, the form of the related processes and procedures, the granting of legal aid, issues of representation, the appointment, powers, duties and functions of a clerk of an equality court in terms of Section 30(1)(e), and the attendance of witnesses and related matters (South Africa, 2000). The Minister of Justice and Constitutional Development has, in consultation with the Minister of Finance, and under Section 30 of the PEPUDA, established the Regulations in the schedule (South Africa, 2003). Chapter 2 of the Regulations, from Section 2 to Section 5, deals with the application for appointment of equality clerks, appointment requirements, conditions of appointment and additional functions of clerks (South Africa, 2003:4). In terms of these regulations, the appointment of equality court clerks must generally comply with the appointment requirements of the Public Service Act (103 of 1994), as amended by Act 30 of 2007, and the appointment policies for the post of an administrative clerk in the DOJ&CD. According to the Personnel and Salary Information System (PERSAL), equality court clerks are appointed on Level 5 (DOJ&CD, 2017a) which is an entry level post within the public service. The minimum qualification for a clerk of the court is a matric qualification (DOJ&CD, 2016a).

The completion of a course as approved by the Director-General of the DOJ&CD is a prerequisite for appointment as an equality court clerk (South Africa, 2003). Section 5 of the Regulations sets out the additional functions of a clerk, in addition to the standard administrative functions prescribed by the PEPUDA. Equality court clerks are also required, amongst others, to assist any illiterate person or person with a disability with the completion of any relevant document relating to the court proceedings, to the best of their ability (South Africa, 2003:5). They are also required to inform unrepresented or unassisted persons of their rights to representation or assistance, and of assistance available from constitutional institutions or other non-governmental organisations, as well as to inform and explain their rights and available remedies in terms of the Act to such persons to the best of their ability (South Africa, 2003).

Section 31(1) of the PEPUDA provides that no proceedings may be instituted in any court unless a presiding officer and one or more clerks are available (South Africa, 2000). Section 3(3) of the PEPUDA requires the Director-General of the DOJ&CD to take all reasonable steps within available resources to ensure that a clerk is available for each court in the Republic (South Africa, 2000). Furthermore, Section 31(6) obliges the Director-General to develop and implement a training course for clerks of equality courts with the objective of building a dedicated and experienced pool of trained and specialised clerks, capable of performing their functions and duties as contemplated by the PEPUDA (South Africa, 2000). This should be done by providing social context training and uniform norms, standards and procedures to be observed by the clerks in performing their functions and duties (South Africa, 2000).

The DOJ&CD is the national government department responsible, firstly, for the effective and efficient administration of justice and, secondly, for the promotion of constitutional development through the development and implementation of legislation and programmes which seek to advance and sustain constitutionalism and the rule of law (DOJ&CD, 2017:11). The DOJ&CD was tasked with the overall responsibility of ensuring the national roll-out of these specialised equality courts (Parliament, 2006a). The establishment of these courts seeks to achieve the speedy and informal processing of cases, which facilitate the involvement of all parties to the proceedings and also seeks to ensure access to justice for all persons in relevant judicial and other dispute resolution forums (DOJ&CD, 2016b).

There are currently 382 designated equality courts throughout the country, spread across the nine provinces (DOJ&CD, 2017b). The number of dedicated equality courts in the country by province is reflected in Table 1.1.

**Table 1.1: Number of dedicated equality courts by province**

<b>Province</b>	<b>Total number of dedicated equality courts</b>
Eastern Cape	79
Free State	53
Gauteng	27
KwaZulu-Natal	53
Limpopo	35
Mpumalanga	32
North West	27
Northern Cape	32
Western Cape	44
<b>Grand total</b>	<b>382</b>

(DOJ&CD, 2016c)

The intentions and objectives envisioned by the PEPUDA, through the establishment of equality courts are, *inter alia*, to provide simple, affordable and expeditious access to justice where violations of the right to equality have occurred. Equality courts “represent a mechanism which should ensure that all victims of human rights abuses, particularly the disadvantaged and poor, who would otherwise not be able to access the justice system in the more traditional ways, do get access to justice” (South African Human Rights Commission (SAHRC), 2012:18). The DOJ&CD has furthermore expressed the intention that equality court services should be available at all courts throughout the country, which is to be achieved, amongst others, through the training of equality court clerks as well as their appointment in terms of the PEPUDA, and will thus solve the problem of particularly the most vulnerable groups having to travel long distances to access equality courts in order to lodge complaints (DOJ&CD, 2017c).

According to Lane (2005:9), the PEPUDA is a key tool for enabling South Africa’s transition from a history of legislated discrimination to a future where equality is actively promoted through legislative measures. The PEPUDA establishes the equality courts as key mechanisms to achieve the eradication of the legacy of inequality within South Africa (Lane, 2005:9). This view is supported by Bohler-Muller (2006:382), who notes that the creation of equality courts in South Africa provides numerous possibilities and offers optimism for the future.

Whilst the introduction of equality courts is a measure welcomed by several segments of society, their potential has not been realised due to a lack of awareness about these courts, both on the part of the public as well as on the part of and within the state (Kaersvang, 2008:1). The context within which this study is conducted is embedded in the constitutional, statutory, legislative and policy frameworks and related mandates of the state with regard to public administration, in particular in relation to the effective implementation and administration of the PEPUDA, which gives effect to the equality section in the Bill of Rights.

In spite of these intentions, the various efforts undertaken to increase public awareness of these courts and to strengthen their effectiveness through training initiatives targeted at court officials and members of the judiciary and magistracy alike, they still remain relatively unknown and under-utilised, according to the SAHRC (2014:13). The underutilisation of and the lack of public awareness of the equality courts has however been a subject of considerable debate for over a decade (Parliament, 2006a; Open Society Foundation, 2010:5). The poor awareness of the equality courts, and the under-usage and ineffectiveness of the equality courts in South Africa therefore seems to be apparent (SAHRC, 2014:21). Based on a review of various published SAHRC reports, DOJ&CD reports, Parliamentary Portfolio Committee on Justice and Constitutional Development reports, academic studies, articles and statistical information

perused, there appear to be a number of underlying reasons and factors contributing to this state of affairs, as discussed below.

### **1.3 PROBLEM STATEMENT**

The challenges in relation to the ineffectiveness of the equality courts appear to be multi-dimensional. According to Kaersvang (2008:2), “the greatest challenge faced by the equality courts is that they remain relatively unknown”. Kaersvang (2008:2) attributes some of the underlying reasons for this state of affairs in part to government’s failure to promulgate regulations governing the promotion of the equality courts as required by the PEPUDA, but also to problems with the flow of information, both in the public sector and amongst court staff; a lack of information possessed by equality court staff; a lack of developed expertise amongst equality clerks as envisioned by the PEPUDA, and inaccurate information about the location of these courts (Kaersvang, 2008:2).

In terms of its constitutional and statutory mandate, the SAHRC undertakes research in order to monitor and examine the effectiveness and accessibility of the equality courts. The SAHRC’s Equality Report (2012:19) narrates some of the SAHRC’s findings pertaining to a number of issues, emanating from a project which sought to monitor the functioning of equality courts across the country. These include a lack of adequate and continuous training of judicial officers, as well as administrative personnel on the PEPUDA, discriminatory attitudes, beliefs and stereotypes held by judicial officers and court personnel alike, insufficient social context awareness, and finally sensitivities regarding the purpose of the PEPUDA and the role of equality courts, which, amongst others, all contribute to the under-utilisation and ineffectiveness of the equality courts.

The DOJ&CD has, however, conducted various training and public awareness initiatives relating to the PEPUDA and the equality courts, including training programmes offered by Justice College. Justice College is the DOJ&CD’s official training institution targeting *inter alia* the following categories of employees: prosecutors, court interpreters, court managers, registrars of the High Court, court clerks, other court officials and administrative personnel who deal with equality matters (DOJ&CD, 2017d). The courses offered to these officials include practical courses offered through a five-day programme on the PEPUDA, and utilisation of equality courts for clerks and registrars, as required by the PEPUDA. Training also includes issues of social context by familiarising staff with the court environment, constitutional values, perceptions and attitudes (DOJ&CD, 2017e:36). The expected impact of the training is that trainees become more socially contextualised, gain insight into the processing of equality court cases and are better capacitated to assist, advise and facilitate matters lodged by members of the public and to complete paperwork, thus ensuring the effective utilisation of these courts, (DOJ&CD,

2017e:36).

Between 2008 and 2014, a significant total number of 588 equality court clerks and registrars were trained, given the 382 dedicated equality courts which had been established nationally, (DOJ&CD, 2015a). The DOJ&CD was also involved and participated in collaborations between various Chapter 9 institutions and civil society organisations, such as the Foundation for Human Rights (FHR), in conducting public awareness campaigns and workshops focusing on the equality courts, and in particular, engaging in consultations with communities regarding the effectiveness and accessibility of the courts (FHR, 2014:35).

The DOJ&CD has, through its National Operations Centre (NOC), as the key source of business intelligence about the operational activities throughout the DOJ&CD (DOJ&CD, 2016c), developed a tool which assists to compile statistics on the number of cases reported to the equality courts countrywide (DOJ&CD, 2015b). However, an analysis of the DOJ&CD's NOC equality courts reports over the last five years for the financial periods 2013-2014 to 2017-2018 reveals that most provinces registered a very low number, or in certain instances no cases, during this period. One DOJ&CD report indicates "an increase in the number of cases dismissed and withdrawn compared to the previous financial year" (DOJ&CD, 2015b:34). However, the latest NOC annual report (DOJ&CD, 2018:4) illustrates that compared with the previous 2016-2017 financial year, the number of cases registered nationally declined by 32% during the 2017-2018 financial year. A comparison over a number of years of the total number of cases registered in the equality courts per province, which illustrates a worrying consistent decrease in the number of cases registered annually, is reflected in Table 1.2 below.

**Table 1.2: Total number of cases registered per province per year**

<b>Province</b>	<b>2013-2014</b>	<b>2014-2015</b>	<b>2015-2016</b>	<b>2016-2017</b>	<b>2017-2018</b>
Eastern Cape	17	20	21	23	20
Free State	28	38	35	5	7
Gauteng	208	253	57	141	52
KwaZulu-Natal	143	232	178	92	75
Limpopo	8	8	18	11	4
Mpumalanga	94	119	116	56	36
North West	29	42	10	0	4
Northern Cape	10	37	16	4	7
Western Cape	75	95	107	39	46
<b>Grand total</b>	<b>612</b>	<b>844</b>	<b>558</b>	<b>371</b>	<b>251</b>

(Adapted from DOJ&CD, 2017; DOJ&CD, 2018)

Kok (2010:39) considers the notion of state incapacity in the context of a training project undertaken by the DOJ&CD in terms of the PEPUDA, in which he describes the inability of the state to have conceived and implemented an effective training programme for equality court personnel, including equality court clerks, as required by the PEPUDA. Furthermore, he finds that the state has failed to capacitate and establish a skilled team of equality court personnel (Kok, 2010:43-44). Kok (2010:45) proceeds to point out the shortcomings of the training programme and the resultant gap between the suggested ideal in the Act and the actual outcome achieved.

The SAHRC (2014:21) has found that the equality court structures need further bolstering and that the DOJ&CD needs to step in urgently, using various strategies to increase the usage and the effectiveness of these equality courts, if access to justice is to be ensured for victims whose rights to equality have been breached. The SAHRC furthermore expressed the view that the PEPUDA is not working as it should and that a major paradigm shift is needed (Parliament, 2006b). What this means for this study is that a need exists to identify the existing challenges and perceptual barriers that continue to persist amongst equality court clerks, despite previous interventions by the DOJ&CD, and to determine what interventions and strategies will assist to ensure the effective functioning and usage of the equality courts.

The problem thus seems to be that despite training interventions and other initiatives, the perceptions as well as potentially uninformed and discriminatory attitudes, beliefs and stereotypes of the equality court clerks, as well as those of the presiding officers and other court officials, may potentially undermine their role and obligation of ensuring the effective implementation and administration of the PEPUDA. This study therefore seeks to determine from appropriate theory (such as Equity Theory) and best practice, what the purpose and role of equality courts should be, and then determine what the perceptions of the equality court clerks are of the purpose, role, accessibility, usage and status of the equality courts, in order to understand where and on what training and other interventions should be focused.

#### **1.4 RESEARCH OBJECTIVES**

According to Leedy and Ormrod (2009:45), the objective of a research study should be to address a particular question or problem with the intention of making a difference or suggesting possible applications or solutions to the said question or problem. The research objectives present the way in which the research problem is researched. The objectives of this research study are:

- to describe theoretical approaches in analysing and understanding equality;



- to describe and analyse the statutory, policy and regulatory framework supporting the position, role and function of equality courts in South Africa as a democratic state;
- to analyse international best practice examples of equality courts (or similar tribunals or fora) in order to determine the reasons for their use, their role and function within democratic states;
- to analyse the perceptions of court clerks in relation to the promotion of the status, usage, accessibility, role and functioning of equality courts; and
- to propose recommendations to address the perceptions of equality court clerks regarding the status, usage, accessibility, role and functioning of equality courts within South Africa as a democratic state.

## **1.5 RESEARCH QUESTIONS**

The research questions assist to identify and narrow down the research objectives, while the research objectives present the way in which the research problem is researched, thus the two are aligned. In undertaking a research study, it is important to be focused precisely and rigorously on what the project aims to achieve (Bryman, 2012:10). The research questions that guide this research include:

- What are the theoretical approaches to understanding and analysing equality?
- What is the statutory, policy and regulatory framework supporting the position, role and function of equality courts in South Africa as a democratic state?
- What do international best practice examples of equality courts (or similar tribunals or fora) convey about the reasons for their use, role and function in democratic states?
- What does available information/data that can be collected through conducting an empirical investigation state about the perceptions of equality courts in relation to the status, usage, accessibility, role and functioning of the equality courts?
- What recommendations can be proposed in order to address the perceptions of equality court clerks in relation to the status, usage, accessibility, role and functioning of equality courts within South Africa as a democratic state?

## **1.6 CENTRAL THEORETICAL STATEMENTS**

A perception can be defined as “a belief or opinion, often held by many people and based on how things seem” (Cambridge Dictionary, 2017). Furthermore, a belief can be described as “something that is accepted, considered to be true, or held as an opinion” (Merriam-Webster’s Dictionary, 2017) or as “an idea that is believed to be true or valid without positive knowledge” (Merriam-Webster’s Dictionary, 2017). An opinion is “a view, judgment, or appraisal formed in the mind about a particular matter”, a “belief stronger than impression and less strong than positive knowledge” or “a generally held view” (Merriam-Webster’s Dictionary, 2017). An attitude

is “a feeling or opinion about someone or something, or a way of behaving that is caused by this” (Cambridge Dictionary, 2017).

Based on the aforementioned, it can be deduced that perceptions are subjectively held beliefs or opinions that are held by individuals or groups, which may be formed through, as well as informed by, individual or group experiences, observations and knowledge, and which can result in certain types of behaviour linked to attitudes. One of the underlying assumptions about the link between attitudes and behaviour is that of consistency (McLeod, 2014), thus meaning that behaviour or conduct will usually correlate with and correspond to the perceptions of an individual or group, and conversely, that perceptions influence or impact on behaviour.

The exploratory perception study is conducted within the context of the South African Public Service and is informed by a pragmatist paradigm or worldview (Tashakkori & Teddlie, 1998:23; Creswell & Plano Clark, 2011:39), guided by a social science conceptual and theoretical framework. For the purpose of this study, the theoretical framework selected for understanding and analysing equality, and which underpins the philosophy for the creation of the equality courts, is Equity Theory. Thus, while the underlying theoretical and conceptual approach of the study is based on equality, the study’s theoretical framework is Equity Theory. These aspects are however discussed in more detail in Chapter 2.

A mixed methods research strategy is used, in order to explore the equality court clerks’ perceptions of the role, functioning, usage and status of the equality courts. It is important to understand and examine these perceptions, since perceptions influence attitudes and behaviour, and therefore potentially impact the ultimate success or failure of the equality courts. This study examines the equality court clerks’ perceptions of the equality courts in relation to their role, function, usage and status and in terms of the equality court clerks’ different demographic characteristics including age, sex, race, highest qualification attained, number of years worked as an equality court clerk, as well as levels of training and further ongoing training received. The results are analysed both qualitatively and quantitatively, in order to gain a comprehensive insight into the perceptions.

## **1.7 RESEARCH METHODOLOGY**

The purpose of this section is to provide a description of the research methodology used in the research study. Bailey (1982:32) states that research methodology is the philosophy of the research process. According to Silverman (2013:123), most research methods can be used in research, based on either qualitative or quantitative methodologies.

### **1.7.1 Approach and design**

The empirical investigation covers the research design, sampling, instrumentation for data collection and data analysis, and deals with the limitations and delimitations, as they relate to primary data collection. The research approach adopted is a mixed-method approach, in other words a combination of elements of both the qualitative (inductive) and quantitative (deductive) approaches to the research methods of a study (Tashakkori & Teddlie, 1998:5). This method is used as it enhances the efficiency of the research by collecting, presenting and analysing both qualitative and quantitative data. One of the main reasons for using a mixed-method approach is to combine the strengths of qualitative and quantitative approaches, while at the same time addressing some of the inherent weaknesses of either mono-method approach (Creswell & Plano Clark, 2011:12).

One of the benefits of a mixed method approach is that it allows researchers to use all the tools available to them, in order to collect more detailed data, thus providing results with a broader viewpoint of the research problem (Center for Innovation in Research and Teaching (CIRT), 2017). As the results may include both observations as well as statistical analyses, they are validated within the study. Furthermore, as this method uses both inductive and deductive reasoning and thinking in combining the methodologies, it aids in reducing any partialities (CIRT, 2017). The disadvantages of employing this approach are that it may require more time and resources to collect both data types, it requires more skills on the part of the researcher, as the procedures may be complicated, and the methodology requires very clear explanation so that there is a correct understanding of the procedures and outcomes (CIRT, 2017).

According to Babbie and Mouton (2005:104), a research design is different from research methodology in the sense that “research methodology refers to methods, techniques and procedures that are employed in the process of implementing the research design or research plan”. A research design accordingly consists of a clear statement of the research problem, as well as plans for collecting, processing and interpreting the observations intended to provide answers to the research question. A choice of research design establishes a framework for collecting and analysing data and indicates the importance or primacy attached to a number of aspects of the research process, including the link between variables and generalising the findings to larger groups (Bryman, 2012:46).

For the purposes of this research study, the research design focuses primarily on determining the perceptions of equality court clerks in promoting the role, functioning, usage and status of the equality courts. Thus, the design of the study is a phenomenological design. Phenomenology can be described as a philosophy which looks at how individuals make sense

of their lived reality and how the observer/researcher should take note of their own biases relating to their understanding of that reality (Bryman, 2012:714). Phenomenology is the reflective study of prereflective or lived experience (Given, 2008). The phenomenological approach in social science is focused on refraining from considering the causal explanations of the phenomena observed and limiting the observation to mere description (Neisser, 1959). Van Manen (2017) describes phenomenology as a philosophy based form of inquiry. The benefits of phenomenology as design include an enhanced and in-depth appreciation of people's meanings and their role in the further development of theories, whereas its disadvantages include amongst others, challenges with complex analysis and interpretation, and that it demands more time and other resources for data collection (research-methodology.net., 2017).

### **1.7.2 Population and sampling**

The context within which this study is conducted is within the public service, specifically the DOJ&CD, which is the national government department tasked *inter alia* with the administration of justice and the promotion of constitutional development (DOJ&CD, 2015b). The focus of the study, from a public administration perspective, is determining the perceptions that the equality court clerks have of the role, function, usage and status of the equality courts.

A study population is that aggregation of elements from which the sample is actually selected (Babbie & Mouton, 2011:174). The engagement of the entire population in a research study is not always possible for practical and economic reasons, and it therefore becomes necessary to reduce the number of respondents to a reasonable number or a subset of the entire population (Burger & Silima, 2006:656-667). For the purposes of this study, all the equality court clerks currently appointed in terms of the PEPUDA at the various lower equality courts nationally (DOJ&CD, 2017b) constitute the study population. Due to a lack of accurate and reliable information relating to the appointment of equality clerks nationally, this posed some challenges in determining the actual number of the study population.

The target population is the defined population from which the sample has been selected (Banerjee & Chaudhury, 2010). Defining a target population is an important step in the sampling process. A sample is the segment of the population which is selected for investigation; it is a subset of the population (Bryman, 2012:187). Decisions regarding sample size are invariably based on considerations of the cost and time involved (Bryman & Bell, 2011:187). The geographical spread of all equality courts nationally is vast. The area to be covered, travelling distances, time and sample of respondents would be too extensive if the research study was to include all the equality court clerks across all the designated equality courts nationally. For the purposes of the study, the selected target population comprises all the equality court clerks

currently appointed as such at the various designated lower courts within the Gauteng Region and trained within the last five years (proposed sampling frame). The rationale for this is for reasons of practicality, proximity and considerations of time and costs. However, a consistent lack of accurate, reliable information and certainty regarding the formal appointment, as well as availability of training records and dates of last training attended, in respect of the Gauteng Region clerks, was noted. This resulted in some challenges in forming a clear and accurate picture of the sampling frame from which the study population was to be selected. The approach consequently taken was to include all the Gauteng Region equality clerks whose details had been accessed, in the study, resulting in some deviation from the original sampling frame due to the factors mentioned above.

The Gauteng Region comprises of six court clusters *viz.*: Pretoria, Randburg, Germiston, Kempton Park, Johannesburg and Soweto. All of the magistrate's courts designated as equality courts fall under these clusters (DOJ&CD, 2017:1). For the purposes of the research study, the sampling frame from which the study population is selected is a list of all the equality court clerks currently appointed as such at the approximately 30 dedicated equality courts (one clerk per equality court) within the Gauteng Region, who have received training within the last five years.

Including the entire target population therefore takes into consideration the number of clerks as well as the problem of non-response, and of refusal to participate, which may affect the actual response rate, which is therefore the percentage of a sample that does respond (Bryman, 2012:199). A number of methods of sampling may be used in the same study (Kothari, 2004:67). The sampling in this study comprises two levels. The first sampling level uses purposive sampling of the Gauteng Region and the second sampling level also involves purposive sampling of the trained equality court clerks from each of the equality courts in the Gauteng Region, *viz.* from within the purposive sample. Purposive sampling is a form of non-probability sampling which involves the intentional selection of certain items by the researcher (Kothari, 2004:59). The benefits of this type of sampling include relative savings in terms of time and costs, however a disadvantage is the possibility of personal bias on the part of the researcher (Kothari, 2004:59).

### **1.7.3 Instruments in data collection**

According to Kumar (2011:133), there are two main approaches to collecting data about a situation, person, problem or phenomenon. These relate to firstly, as is the case in most instances when embarking on a research study, when it is necessary to collect the requisite information; and secondly, in some instances the requisite information may already be

accessible and thus merely requires selection. Accordingly, data can be characterised as either primary or secondary data.

### **1.7.3.1 Semi-structured self-completion questionnaire**

For the purposes of the study, a semi-structured self-completion questionnaire/attitude scales was used as primary data source, which integrated a combination of quantitative and qualitative aspects, and was administered online using electronic mail (email), in order to reduce costs, while ensuring as high a response rate as possible.

The semi-structure self-completion questionnaire comprised four (4) different sections, with each section having a specific focus and aim, and that included both open-ended and closed questions . Open-ended questions allow respondents to respond in whichever way they wish, whereas closed questions present respondents with fixed options from which they have to select only one (Bryman, 2012:246).

The first section comprised open-ended questions that focused on respondents' demographic information, with the aim of forming a picture of the respondents' demographic profile. The next section comprised closed questions that focused on the respondents' knowledge of the legislation governing the equality courts, of the Regulations (South Africa, 2003) prescribing the administrative functions and duties of equality court clerks, as well as the training and capacity building of the respondents, with the aim of determining the respondents' level of awareness and knowledge of the legislation supporting the equality courts; of the administrative functioning of the equality courts and the roles and functions of equality court clerks; and lastly, the respondents' views relating to the capacity and training of the equality court clerks. The next section focused on attitude questions in the form of a Likert-type scale, which aimed to determine the respondent's perceptions and beliefs with regard to the equality courts and their roles and functions as equality court clerks. The last section dealt with a number of open-ended questions that focused on any challenges experienced by the respondents as equality court clerks, with the aim of determining the respondents' perceived challenges that hamper their effective functioning and performance of their required roles and functions as equality court clerks, as well as the challenges relating to the public and communities' knowledge, awareness, access and usage of the equality courts which contribute to the low number of cases dealt with by the equality courts.

An informational and introductory cover letter accompanied the questionnaire, so that respondents were aware of and understood the purpose and the parameters and requirements of the research. Respondents were requested to complete the questionnaire and to return the completed questionnaire via email within a certain timeframe. Follow-ups were done where

required, so as to ensure that the questionnaire was completed and returned as far as possible. This research study used semi-structured attitude scales which are questionnaires commonly used in survey research (Tashakkori & Teddlie, 1998:104). These scales typically include measures of attitudes, beliefs, self-perceptions, intentions, aspirations and a variety of related constructs (Tashakkori & Teddlie, 1998:104), and are used to collect information with regard to the perceptions of equality court clerks of the role, function, usage and status of equality courts. Likert-type scales are examples of such questionnaires. It is important to provide clear instructions on the completion of the questionnaire and introductory comments to respondents (Rubin & Babbie, 2011:225).

Permission was obtained from the Gauteng Regional Head, relevant cluster and unit managers, as well as the court managers for the relevant equality courts, to administer the questionnaire online using electronic mail (email) to the target population.

Some of the advantages of the self-completion questionnaire over face-to-face interviews in the circumstances include considerations of cost, resources, time, elimination of personal bias, as well as convenience for respondents (Bryman, 2012:234). Further advantages of using a semi-structured questionnaire is that it is fairly easy to analyse, taking the number of respondents into consideration, as data entry and tabulation are relatively straightforward (Bryman, 2012:234). Disadvantages of using a written questionnaire include the possibility of low response rates; the inability to probe responses as the questionnaire allows little flexibility; the risk that intended recipients/respondents may not in fact be the ones who complete the questionnaire; as well as the risk of an incomplete questionnaire or the questionnaire not being returned within the required time (Bryman, 2012:235). The opportunity to probe into specific perceptions was made possible through the inclusion of qualitative open-ended questions in the questionnaire.

Once the research instrument has been constructed, in this case a semi-structured self-completion questionnaire, it is important to test it out before using it for actual data collection. Pre-testing a research instrument entails a critical examination of the understanding of each question and its meaning, as understood by a respondent. A pre-test should be carried out under actual field conditions on a group of people similar to the study population. The purpose is not to collect data, but to identify problems that the potential respondents might have in either understanding or interpreting a question (Kumar, 2011:150).

Insofar as this was feasible, the instrument was piloted with relevant officials from the DOJ&CD in order to test and ensure relevance and context to the intended outcomes of the research study. The process of conducting pilot interviews is supported by Neuman (2011:191) and Bryman (2012:474). This process is augmented by a literature review of existing theoretical studies, information and data related to the research topic.

### **1.7.3.2 Literature review**

Primary and secondary literature sources were used as the foundation of the research. The focus and purpose of the literature review was to undertake a critical assessment of relevant existing research and theories relating to the study topic, viz. determining the perceptions of the equality court clerks regarding the functioning of the equality courts. Furthermore, the aim and benefits of the literature review to the study include the following: to determine and solicit information regarding what is already known about the topic; what concepts and theories, as well as research methods, have been applied; to determine any existing controversies relating to the topic; to establish the dominant theories and theoretical approaches to the topic, and to determine who the key contributors to research on the topic are (Bryman, 2012:8). Books, government and international reports, journals and articles, research and other reports, studies and statistical reports, as well as media articles were consulted, in order to ascertain the most current developments on the topic.

A preliminary assessment indicated that there was sufficient material and literature available to conduct research on the topic. The following data bases were consulted to ascertain that adequate sources were available for the purposes of this research:

- Catalogue of theses and dissertations of South African Universities (NEXUS)
- Catalogue of books: Ferdinand Postma Biblioteek (North-West University)
- Index to South African Periodicals (ISAP)
- EBSCO Academic Search Elite

### **1.7.4 Data analysis strategy**

Data analysis is a stage that comprises several elements and is fundamentally about data reduction (Bryman, 2012:13). It can refer to the analysis of either primary or secondary data. Primary data analysis involves the analysis of data collected by the researcher. Secondary data analysis refers to the analysis of data which was collected by someone else for another primary purpose. The utilisation of this existing data provides a viable option for conducting research when limited time and resources are an issue.

The study used thematic data analysis with the combination of both qualitative and quantitative data empirically gathered to derive findings. Thematic analysis involves the examination of data to extract core themes that may be ascertained between, as well as within, transcripts (Bryman, 2012:13). Thematic analysis is a well-known qualitative data analysis method which focuses on



identifying patterned meaning across a data set (University of Auckland, 2017). Braun and Clarke (2006) suggest a six step process for conducting thematic analysis, which involves: becoming familiar with the data, identifying initial codes, searching for themes, reviewing themes, defining and naming themes and finally producing the report.

### **1.7.5 Ethical considerations**

A very important aspect of social research ethics is that participation should be voluntary - no one should be forced to participate (Babbie & Mouton, 2005:546). Participants, or respondents, as they are referred to hereafter for the purpose of this study, furthermore have the right to informed consent, in other words, their participation is premised on some basic understanding of the research purpose and methods. Respondents must additionally be informed that they have the right to withdraw at any time. Researchers should take special care not to cause any harm, whether physical, psychological or otherwise, to respondents.

Privacy considerations are essential in social sciences research and researchers should be sensitive to the way in which their actions may violate the respondents' rights in this regard. Ethical researchers must therefore protect the rights to privacy of the respondents by guaranteeing anonymity (cannot identify a given response with a given respondent), or confidentiality (able to identify a given respondent's response but undertakes not to do so publicly) (Rudestam & Newton, 2001; Babbie, 2001).

These ethical considerations were discussed with respondents prior to the research administration process, and all reasonable efforts were made to ensure that any specific language requirements were considered so as to ensure understanding. Since the respondents in this study are employees of the DOJ&CD, a formal letter of introduction was sent to the Director-General (DG) as the Accounting Officer and Head of the Department, and at the latter's direction, also to the Deputy Director-General: Court Services Branch. These letters informed them of the purpose of the study, the possible advantages of the study for the DOJ&CD, and requested endorsement and permission, after consultation with the Gauteng DOJ&CD Regional Head, the relevant line managers and court managers, in order to involve the selected officials within the DOJ&CD for the purpose of the study.

Every effort was made to ensure that participation in the study was voluntary and that informed consent was obtained from respondents. Respondents were provided with basic information regarding the purpose of the study and how the findings of the study would be used. A customised introduction letter using available templates was developed, which provided some background information about the study to respondents. An informed consent form was

customised and an informed consent leaflet developed, in which these aspects were set out so that respondents were made fully aware of their rights to participate voluntarily in the study, their rights to confidentiality and privacy and the right to withdraw at any time during the study.

#### **1.7.6 Limitations and delimitations**

Limitations and delimitations are inherent in research studies (Tlhoalele, Nethonzhe & Lutabingwa, 2007:559). Some anticipated limitations in relation to the study included:

- resource limitations;
- time constraints;
- a potential lack of cooperation from or non-availability of respondents;
- reluctance or scepticism by some respondents to get involved;
- sample sizes selected for the purpose of the research study;
- a low level of participation or response rates from respondents;
- challenges with accessing statistical records and information;
- the non-availability of relevant data and information;
- information gaps and possible weaknesses of available data; and
- the scope of contribution to the body of existing knowledge may be limited.

These limitations were addressed and managed through written informational letters notifying respondents of their selection to participate in the research study, as well as the purpose, objectives and methodologies of the study.

The delimitations involve how the scope of the study is limited. In this case, the focus of the research study was on the perceptions of a selected sample of equality court clerks of the role, function, usage and status of the equality courts, and excluded other categories of public service officials working within the equality courts, as well as members of the judiciary and magistracy.

#### **1.8 SIGNIFICANCE AND CONTRIBUTION OF THE STUDY**

The contribution of this study is to augment the body of Public Administration knowledge and to enhance the understanding regarding the perceptions of equality court clerks of the role, function, usage and status of equality courts and how these perceptions may impede or strengthen the effective functioning of the equality courts. The research further contributes to gaining a better perspective on the barriers to the equality courts, as well as emerging best practice that contributes to the effective functioning of the courts. The study contributes to practical recommendations which address the barriers and positively influence the perceptions of the equality clerks in promoting the status, usage, accessibility, role and functioning of

equality courts, thus ensuring the improved delivery of justice services to the public and all users of the equality courts in South Africa.

## **1.9 CHAPTER LAYOUT**

The structure of the study flows from the research objectives as outlined above. The structure is as follows:

Chapter 1: Introduction to the research, its locus and focus, context, background and purpose in relation to determining the perceptions of equality court clerks of the role, function, usage and status of the equality courts. The research methodology, significance of the study and layout of chapters are also discussed.

Chapter 2: Includes the theoretical orientation, statutory and regulatory framework of the study, and outlines a literature review pertaining to specific theoretical approaches in understanding equality (such as Equity Theory), as well as the statutory, policy and regulatory framework supporting the position, role and function of equality courts in South Africa, and specifically equality court clerks within the DOJ&CD. Relevant literature accessed, consulted, studied and examined is discussed, and this furthermore includes academic books, journals, articles and writings.

Chapter 3: International best practice examples of equality courts (or similar tribunals or fora) within democratic states such as New Zealand, Australia, Brazil and Rwanda are reviewed, in order to determine the reasons for their use, their role and their function.

Chapter 4: This encompasses the analysis of the perceptions of the equality court clerks, and focuses on the empirical investigation and findings relating to the study. This chapter provides details of the data collected and observations made during the research study pertaining to the perceptions of equality court clerks in the DOJ&CD of the role, function, usage and status of equality courts. The challenges that were identified, what was confirmed and the outcomes are also detailed.

Chapter 5: Conclusions and Recommendations – this chapter contains the conclusions that arise from the findings, as well as the implications thereof. Recommendations are made which may provide a framework for a way forward and/or for developing a strategy in order to address the identified gaps and shortcomings, so as to change and/or improve the perceptions of equality court clerks of the role, function, usage and status of equality courts.

## **1.10 CONCLUSION**

This chapter set out the focus of this study which relates to determining the perceptions of the equality court clerks regarding the functioning, usage, role and status of the equality courts.

The chapter provided an orientation to the national context and the current legislative and policy framework governing the creation, underlying rationale, intentions and objectives, as well as the administrative functioning of the equality courts in South Africa. The apparent challenges and problems hindering the effective functioning of the equality courts, based on a review of available literature, reports and other related sources, were discussed. The research objectives as well as the research questions of the study were described, and the central conceptual and theoretical statements underpinning the study, as well as a description of the research methodology, were provided. The chapter then clarified the significance and contribution of the study and provided details relating to the chapter layout.

## CHAPTER 2

### THEORETICAL APPROACHES IN ANALYSING AND UNDERSTANDING EQUALITY

#### 2.1 INTRODUCTION

This exploratory perception study is conducted within the context of the South African Public Service. In particular, the study is conducted within the context of the DOJ&CD, which is the national government department mandated, as mentioned in the previous chapter, with *inter alia* the responsibility for the administration of justice and the promotion of constitutional development in South Africa (DOJ&CD, 2018:11). The focus of the study, from a public administration perspective, will be to determine the perceptions of equality court clerks regarding the position, role and function of the equality courts.

This chapter considers the theoretical orientation as well as the statutory and regulatory framework of the study. It firstly outlines a literature review of various theoretical approaches in understanding equality, and thereafter discusses the statutory, policy and regulatory framework supporting the position, role and function of equality courts in South Africa, and in particular, the equality court clerks.

#### 2.2 THEORETICAL ORIENTATION, STATUTORY AND REGULATORY FRAMEWORK OF THE STUDY

The following section in this chapter discusses the theoretical orientation of and various theoretical approaches to understanding equality, such as Equity Theory. Public Administration as a discipline is important, given its potentially significant contribution to the development of knowledge of those involved in public service, and more significantly, to be able to provide better and improved services to the public as the outcomes of Public Administration are aimed at service delivery and the improvement of the welfare of the people (Crous, 2004:575). The principles of justice, fairness, equity and equality are well-established within Public Administration as a discipline in the South African context, through Section 195 of the Constitution (1996), which sets out the basic values and principles governing public administration. In this regard, the practice of these values and principles in the work of public officials including the equality court clerks, and their effective and efficient functioning, are clearly established constitutional imperatives. The focus of this study is therefore to determine the perceptions of the equality court clerks within the DOJ&CD regarding the functioning of equality courts. The next section will consider the conceptual approaches in understanding equality.

### **2.2.1 Conceptualising equality and unpacking Equity Theory**

As highlighted in Chapter 1, for the purpose of this study, the theoretical framework selected for understanding and analysing equality, and which underpins the philosophy for the creation of the equality courts, is Equity Theory. Thus, while the underlying theoretical and conceptual approach of the study is based on equality, the study's theoretical framework is Equity Theory. In particular, the literature review will consider the Equity Theory framework from a social justice perspective, as this perspective is deemed most relevant in relation to the rationale for the creation of equality courts. In this regard, the preamble to the PEPUDA states that the PEPUDA "endeavours to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom" (South Africa, 2000).

A dictionary definition of equality refers to the right of different groups of people to have a similar social position and receive the same treatment (Cambridge Dictionary, 2018). Equality is premised on the notion of treating everyone the same - it aims to promote fairness, but this can only be achieved if everyone is in exactly the same situation or position (Sun, 2014). Fairness is the quality of treating people equally or in a way that is right or reasonable (Cambridge Dictionary, 2018). This understanding of fairness is consistent with the approach to equality as espoused by the PEPUDA (South Africa, 2000), in that it takes cognisance of the relevant context to determine what is reasonable in the circumstances. According to Dugard and Bohler-Muller (2014:245), the formal equality approach seeks to treat all individuals, notwithstanding their differences, the same. Dugard and Bohler-Muller (2014:245-246) state that substantive equality, on the other hand, recognises the historical patterns of discrimination that have resulted in some parts of the community being disempowered and unable to compete and interact on an equal footing with others. Thus, in order to achieve equality within this context, it may involve treating those groups of the community differently to other groups. Albertyn and Goldblatt (1998:249) view substantive equality as involving the eradication of systemic forms of domination and material disadvantage, so that individuals may realise their full human potential within positive social relationships. De Vos (2000:620) and Cockrell (1996:1) both contend that the jurisprudence of the South African Constitutional Court adheres to a substantive, contextual conception of equality which takes into consideration historical context and disadvantage due to unfair discrimination.

Based on the definitions outlined above, there are a number of theoretical approaches to equality. This study supports the substantive equality approach, which is consistent with the definition provided by the PEPUDA (South Africa, 2000), which gives effect to the equality clause in the Constitution (1996) and defines equality as "the full and equal enjoyment of rights

and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality in terms of outcomes” (South Africa, 1996).

There is a close link or relationship between the concepts of equality and equity, since both are strategies employed to achieve fairness (Sun, 2014). Equity as a concept is defined as justice according to natural law or right, specifically freedom from bias or favouritism (Merriam-Webster’s Dictionary, 2018). The principle of equity also implies that every person has access to fair and equal treatment under the law, irrespective of race, social class or gender (Shoreline Community College, 2018). Equity involves actively “levelling the playing fields” by taking difference, disadvantage and privilege into account, and in this way ensuring an equitable outcome for all (Sun, 2014). The PEPUDA (South Africa, 2000) 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”. The concepts of equality and equity reflect the underlying ethos of the PEPUDA in terms of achieving the eradication of social and economic inequalities, especially those that are systemic in nature, produced by our past history of colonialism and apartheid (Judge & Emdon, 2018:7).

Within this conceptual equality approach, the notion of egalitarianism refers to the belief that all people are equally important and should have the same rights and opportunities in life (Cambridge Dictionary, 2018). Egalitarianism can also be defined as a belief in human equality, especially with respect to social, political and economic affairs (Merriam-Webster’s Dictionary, 2018) or a social philosophy advocating the removal of inequalities amongst people (Merriam-Webster’s Dictionary, 2018). Thus, egalitarianism, which takes into consideration the lived realities of, and inequality amongst people, is in line with the purpose and objectives of the PEPUDA (South Africa, 2000).

Also within the context of the study’s proposed equality approach, the notion of human rights refers to the basic rights that it is generally considered all people should have, such as justice and the freedom to say what you think (Cambridge Dictionary, 2018). The PEPUDA (South Africa, 2000) expressly recognises that South Africa has international obligations under various binding human rights treaties which promote equality and prohibit unfair discrimination. The concept of justice refers to fairness in the way in which people are dealt with (Cambridge Dictionary, 2018). Pogge (2011) notes that the concept of justice is closely related to equality, and that in order to be morally acceptable, a society’s institutional order should treat its citizens justly, further highlighting the relevance of these concepts to the study. According to the Human Sciences Research Council (HSRC) (2004:1), the definition of social justice denotes the extension of principles as enshrined in the Constitution, of human dignity, equity and freedom to partake in all of the political, socio-economic and cultural spheres of society. Miller (2005:5)

notes that social justice rests on four principles, viz. (i) equal citizenship, (ii) the social minimum, (iii) equality of opportunity and (iv) fair distribution. The preamble of the Constitution (1996) declares that the Constitution is adopted amongst others to establish a society based on democratic values, social justice and fundamental human rights, and the concepts above reflect the principles and values underpinning both the Constitution (1996) and the PEPUDA (South Africa, 2000). The next section considers Equity Theory which underpins this study's conceptual approach which is based on equality.

### **2.2.2 History and origins of Equity Theory**

The choice of theory that underpins this study in understanding and analysing equality is the principle or Theory of Equity, which is considered to be one of the theories of justice. According to a World Bank Report (2006:78), Aristotle first made the distinction between justice and equity in Western philosophy. Beever (2004:33) notes that Aristotle originally assigned the meaning of equity as the recognition of an exception to a general rule and posited that the "nature of the equitable fundamentally involves or refers to a correction of law where it is defective owing to its universality". Since the early 1970's, numerous prominent intellectuals, including John Rawls (1972), Amartya Sen (2009), Ronald Dworkin (2000) and John Roemer (2000) have contributed significantly in different ways to the understanding of equity. Notwithstanding the fact that each posits a particular approach and choice, the World Bank Report (2006:77) finds that there are significant commonalities and each of these theorists have played a major role in furthermore shifting the focus of social justice from outcomes to opportunities.

Equity derives from the notion of moral equality, meaning that all people ought to be treated as equals (Jones, 2009: 3). Jones (2009) states that thinking about equity can assist in determining how to distribute goods and services across society, holding the state responsible for its power over how goods and services are distributed in a society, and using this power to ensure fair treatment for all citizens. Thus, applying these ideas in any particular national context involves complex choices, and entrenching considerations of distributive justice into national political and policy debates is central to national development (Jones, 2009).

The source of equality and equity as a concept of social justice developed from a history of emerging standpoints of social organisation and distribution of wealth and services (Equity for Children, 2013:2). The term social justice has a long history and in modern times the concept of a "social contract" enshrining the rights of citizens within a wider social framework has emerged (Social Justice News, 2018).



### **2.2.3 Major proponents of Equity Theory - classical liberal egalitarianism**

There are numerous different conceptions of equality, equity and egalitarian theories of social justice. Dealing with each one of these would go beyond the scope and purpose of this study. Thus this study will consider only the key central theories and contemporary frameworks underlying Equity Theory, which provide the theoretical background for the concept of equity and its relevance in today's highly unequal world.

#### **2.2.3.1 Rawls - justice as fairness/liberal egalitarianism**

Rawls (1972) is the leading proponent of the idea of justice and his interpretation of the idea of justice finds expression in the concept of "justice as fairness". Rawls' approach focuses on the notion of distribution to the greater society instead of individual members, and provides the foundation for the approach of lessening inequity by targeting the most disadvantaged (Equity for Children, 2013:3). Rawls (1972) posited that social justice is founded on two basic principles. Firstly, the "equal liberties" principle which is premised on "the most extensive liberty for each, consistent with similar liberty for others" and further that opportunities in the sense of "primary goods" ought to be available to all individuals, thus the "fair equality of opportunities principle" (World Bank, 2006:77). The second principle of Rawls' social justice theory, also referred to as the "difference principle" and which supports Rawls' "maximin principle", offers that the chosen distributions ought to maximise the opportunities of the least privileged group (World Bank, 2006:77).

Rawls provided the most significant and methodical account of social justice in the 20<sup>th</sup> Century and is concerned with organising societal relations amongst members in a society (Miklos, 2013:60). Das (2017:54) notes that Rawls was influenced by Kantian deontological ethics, a form of ethics which was largely founded on general rigid moral maxims and principles, thus termed "moral equality". Das (2017:56) further notes that Rawls employs the notion of a hypothetical social agreement to contend for principles of justice. In this sense, Das (2017:56) views the basic configuration of society as the "primary subject of justice".

Rawls' approach (1972:302) to the treatment of inequalities shares fundamental similarities with the concept of equity, since both intend to redress inherent disadvantages based on opportunity as well as social mobility (Equity for Children, 2013:4). These theoretical approaches are consistent with the aims and objectives of the PEPUDA (South Africa, 2000), which seeks to achieve the transition from an unequal to a democratic society by addressing past social and economic inequalities.

Rawls' second principle, which is posited on the notion of a fair equality of opportunity, is what gives rise to the equity paradigm (1972:302). This principle thus permits inequalities in

outcomes insofar as equality of opportunity exists (Equity for Children, 2013:4). Rawls (1972:100) argues that “undeserved inequalities call for redress; and since inequalities of birth and natural endowment are undeserved, these inequalities are somehow to be compensated for”. According to Corlett (1991:1), the major contribution and significance of Rawls’s theory is that it is projected within the Social Contract Theory of political philosophy and, thus, it also fits within the custom of constitutional democracy.

Based on the above, it can be argued that these theories support the conceptual approach in the PEPUDA (South Africa, 2000), in terms of its focus on the advancement of historically disadvantaged individuals, communities and social groups.

### **2.2.3.2 Dworkin - luck egalitarianism**

Dworkin is the founding father of luck egalitarianism, a part of distributive justice doctrines which holds that the inequalities in individuals’ conditions that are brought about by sheer luck, falling in ways that are beyond their power or control, should be reduced or eliminated. Inequalities that come about through an individual’s own doing or choice need not be reduced or eliminated (Arneson, 2018). His theory of luck egalitarianism proposes a distribution of resources that compensates individuals for innate differences which are not of their own will, including differences in individual persons’ talent (World Bank, 2006:77).

According to Segall (2010), luck egalitarianism can be regarded as the foremost opponent to Rawls’ dominant theory of justice. Luck egalitarianism is founded on the notion that it is unfair for individuals to be worse off than others as a result of factors beyond their control (Segall, 2010:2-3). In terms of luck egalitarianism, distributive justice demands rectifying the disadvantages that are beyond individuals’ control (Segall, 2010:10). The theory thus aims to compensate persons for the effects of bad luck on their lives. Luck egalitarianism advances the notion that every individual ought to be assured an equal start in terms of their overall level of opportunity for resources, or for welfare or for wellbeing, considering their original inner and outer endowments (Carter, 2011:567). Therefore, luck egalitarianism may be considered “natural” or “cosmic” in contra-distinction to Rawlsian justice, which is otherwise considered as “political” (Segall, 2010:11).

The study argues that the tenet of luck egalitarianism, insofar as it is premised on the redistribution of resources to assure equal opportunities to the most disadvantaged, who find themselves in this position not by their own choice, supports the approach of the PEPUDA (South Africa, 2000).

### **2.2.3.3 Sen - capabilities approach**

Sen's theory, premised on the capabilities approach, and drawing on Rawls' conception of social justice, views poverty as a multi-faceted phenomenon which encompasses far more than simply income levels (Equity for Children, 2013:4). Sen (2009:75-76) posits that every person is born with distinctive capabilities based on various factors and has to deal with multi-faceted challenges. Sen argues that inborn capabilities, or a person's propensity for attaining their full potential, are not inevitably met with opportunity conducive to enabling a person to realise that capability. As Sen regards development as freedom, he supports development as a means of addressing or providing for the particular needs of the poor through uniquely specific opportunities (Equity for Children, 2013:4). Sen's philosophy therefore supports the notion of the welfare economy (Das, 2017:63) and his preoccupation with outcomes is also held by thinkers such as Nussbaum (2011), whose writings on capabilities seek to link equality theories to the real lived phenomena of unequal starting points and varied needs (McColgan, 2014:16).

Sen's theory calls into focus the matter of the currency of egalitarian justice (Kaufman, 2014). Sen (2009:189) postulates that different individuals own different "conversion factors" from resources to actions and welfare. According to Sen (2009:191), the notion to be equalised amongst different individuals is their "capability set" and impediments to development can be defeated through the recognition of a person's capability. According to the United Nations Development Programme (UNDP) Human Development Report (UNDP, 2005:54), formal equalities, in order to have any meaning, have to be supported by Sen's so-called "substantive freedoms" – the capabilities – to opt for a certain lifestyle and to pursue activities that the individual holds with regard. Sen's capability approach supports the emphasis of poverty alleviation on the particular requirements of the disadvantaged (Equity for Children, 2013:3).

In this regard, these theories consider the lived realities, conditions and capabilities of individuals in determining the need for addressing or providing for their particular needs through uniquely specific opportunities.

### **2.2.3.4 Roemer - equal opportunity**

Roemer (2000:7) contends that equality of opportunity entails recompensing persons with differing amounts of resources commensurate with their differential abilities - not, however according to their differential exertions - whilst ability remains constant. Roemer therefore argues that equity requires equal opportunity and recognises that a person is primarily accountable for their own wellbeing, but acknowledges that various factors that are not of a person's own making impact the amount of effort which they put into and the level of welfare that they then attain (World Bank 2006:77). Roemer thus argues that the objective of public

action should be to equalise advantages amongst persons from groups with different circumstances throughout the continuum of the distribution of efforts within that group (World Bank, 2006:77).

This theory is consistent with the approach in the PEPUDA (South Africa, 2000) which recognises the continuing suffering by the majority of people in South Africa as a consequence of its discriminatory history and the need, therefore, to provide equality of opportunity as well as redress for past injustices.

#### **2.2.4 Critiques of liberal egalitarian Equity Theory and alternative theories**

Nozick (1974:150) as a libertarian liberal posits the notion of the moral equality of persons and advances quite a different theory from Rawls' theory regarding the meaning of equality. Nozick (1974:151) challenges Rawls's proposition of providing for the least disadvantaged groups and is of the view that the role of the state should be minimal and that the state should not impose obligations on individuals in order to assist the least advantaged (Corlett, 1991:2). Nozick is widely considered an anti-egalitarian, since he posits that theories of justice usually attach undue weight to outcomes such as welfare, utility, or even capabilities (World Bank, 2006:77). In terms of Nozick's theory, economic distributions are only just if they emanate from justice in obtaining and passing on of the goods by just means (Corlett, 1991:2-3). Thus, he stresses that the proper concern for a theory of justice ought to be on the fairness of processes (World Bank 2006:77). Based on this approach, Nozick refutes that Rawls's "difference principle" is a principle of justice at all (Corlett, 1991:3). This theory reflects a divergent approach from the earlier theories discussed, and one that differs from the underlying principles and ethos as espoused in the PEPUDA (South Africa, 2000).

According to the UNDP Report (2005:54), the free market theorist Hayek was from the libertarian tradition and a proponent of a liberal political order, who completely rejected the notion of social justice. Hayek rubbishes the notion of the distribution of resources, whether fairly or unfairly, and suggests that free markets and not human agency should ultimately determine the proper allocation of resources (UNDP, 2005:54). This approach, however, negates the aspect of human agency and the real phenomenon of unequal power relationships in structuring markets (UNDP, 2005:54). It is therefore not an approach that this study subscribes to, as it leans towards a formal equality approach, which is in conflict with the values and principles espoused in the Constitution (1996).

Das (2017:56) states that in a narrow interpretation, Rawls' deontological form of justice is traditional, since it maintains conventional social structures, and upon Das's hypothesis would not allow for the preferential treatment approach as envisaged, for instance, in India (Das,

2017:56). Das notes Rawls's cynicism regarding the notion of distributive justice (2017:63). Das (2017:57) observes that Sen's theory differs from Rawls' on various counts, even though Sen was influenced by Rawls. In the first instance, Sen focuses on "just societies" in contrast to Rawls, who considers "just institutions". In addition, Das (2017:57) observes that Sen advances a "prudent consequential approach" to justice, while Rawls as a deontologist, emphasises moral principles. Das (2017:59) maintains that Sen's prudent consequentialist approach justifies the concept of preferential treatment being applied in, for instance, the Indian context, as a method to achieving social justice. In this regard, Das's position regarding preferential treatment as a means for achieving social justice resonates with the South African context, in which the Constitution (1996) recognises the need for legislative and other measures designed to protect or advance persons who have been disadvantaged by unfair discrimination, in order to achieve equality which includes the full and equal enjoyment of all rights and freedoms.

Moss (2014:5) supports the notion of equality of condition which relates to people's general lived realities, and to this extent, contends that it is quite unlike a commitment to formal equality. Moss (2014:2) holds the view that egalitarianism can make a significant contribution as a theory of justice and argues, in the context of contemporary concerns relating to poverty and climate change, that it is imperative to aim for the achievement of substantive equality. Moss (2014:5) lists three different possibilities with regard to the preferred metric to be employed as a principle of equality, viz. welfarism, resourcism and the capability approach. Moss's theory accordingly resonates with the approach and ethos of the Constitution (1996), in that it relates to the achievement of substantive equality in which people's lived realities are considered.

Tilly (2005) advances the notion of durable inequalities, according to which clear-cut inequalities persist due to "exploitation and opportunity hoarding". In Tilly's view, privileged groups rely on relational mechanisms to maintain and perpetuate unequal advantage and opportunity hoarding. His writings offer a central theoretical framework for explicating why inequality and inequity exist and persist (Equity for Children, 2013:5). This theory therefore highlights why a transformational and contextual approach to the achievement of equality, as envisioned by the Constitution (1996), is appropriate and critical.

From the above discussion, it is evident that there are numerous theoretical approaches to understanding equality, and those theories which underscore the substantive equality approach in relation to the rationale for the creation of the equality courts have been highlighted. The following section reflects on the international conventions which support the promotion of equality from both a theoretical and policy perspective.

### **2.2.5 International policy supporting equality**

The Universal Declaration of Human Rights (UDHR) (1948) was adopted by the United Nations predominantly as a response to the horrors perpetrated by the Nazis to further an ideology that consigned persons to a lesser status (Buchanan, 2010:689). Article 7 of the UDHR pronounces that “All are equal before the law and are entitled without discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination” (UN, 1948). Although the UDHR is not a treaty, several current international legal experts consider it to be relevant and supportive of customary international law (Gutto, 2001:272).

According to the report by the Office of the High Commission for Human Rights (OHCHR, 2004), there is a considerable body of United Nations (UN) international legal instruments, treaties and conventions which specifically promote and protect universal rights (OHCHR, 2004:1). The International Convention on the Elimination of all forms of Racial Discrimination (ICERD) in Articles 1 and 1(4) refer to “special measures”. This is elaborated upon in General Comment No.18 of the UN Human Rights Committee, issued during its 37<sup>th</sup> session in 1989, which states that “the principle of equality sometimes requires states to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant” (referring to the International Covenant on Civil and Political Rights) (UN, 1989). This approach underscores the approach of the Constitution (1996), as well as the objectives of the PEPUA (South Africa, 2000) in creating the equality courts.

The report by the OHCHR (2004) unpacks the human rights approach to poverty and relies on Sen’s capability approach to empower the disadvantaged. This rights based approach to poverty assumes a multi-dimensional stance, and does not consider only income deprivations but also horizontal inequalities that cause the marginalisation of certain individuals (Equity for Children, 2013:5). The above approaches reflect current human rights approaches to understanding equality and are consistent with the foundational values and principles and the approach to equality as embodied in the Constitution (1996) and the PEPUA (South Africa, 2000).

From a human development perspective, a number of considerations justify why equality matters (UNDP, 2005:52). In the sphere of international development, the Social Equity Theory entails that an emphasis is placed on the most disadvantaged, in order to satisfy their particular requirements (Equity for Children, 2013:4). Current literature reflects acceptance of the notion that an equity approach connotes development, and that in the modern-day fast-changing demographic, social, environmental and economic context, the need for equitable economic development programmes is particularly urgent (Zone, 2018).

Important international institutions such as the United Nations Children’s Fund (UNICEF) use the concept of equity prominently and expressly in their work, planning and official documents. The equity-based approach in UNICEF’s programmes and policies set out to understand and address the root causes of inequity, in order that all children, particularly those who suffer the worst deprivations in society, have access to basic rights and other services essential for their survival, growth and development (UNICEF, 2011). The UNDP’s Human Rights Development Report (UNDP, 2005), the Report on the World Social Situation by the United Nations Research Institute for Social Development (UNRSID, 2005) and the World Bank’s Development Report (2006), first reflected the equity concept in international organisational spheres. Equity-focused evaluation has developed increasingly within the sphere of international development evaluation, due to the increased prominence of equity in the achievement of international development goals, such as the attainment of equality for all (Robertson, 2015). The key aspects which differentiate equity from related concepts include the fact that equity is regarded both in terms of the *process* of eliminating barriers by compensating for historical disadvantage and treating individuals in accordance with their level of need, and as a *result* of that process (Robertson, 2015). Regardless of whether increasing equality of opportunity, or equal access to services is sufficient, rather than measuring equity according to equality of outcomes, or assessing different people’s lived realities, an equity approach involves dealing with the particular deficits of the most marginalised in societies (Equity for Children, 2013:2).

The approaches discussed reflect a conception of equity which is concerned with the objective of providing redress for past disadvantage to the most vulnerable and marginalised individuals. The literature therefore provides a basis for understanding the theoretical orientation to understanding equality and the role of equality courts in South Africa.

The next section discusses policy frameworks related to the understanding of equality and the creation of the equality courts in the South African context.

#### **2.2.6 South African policy frameworks supporting the concept of substantive equality, social justice and the creation of the equality courts**

According to Kentridge (1996:14-3), Section 8(1) of the Interim Constitution of the Republic of South Africa (1993) embraces a substantive conception of equality, and thus Section 8(1) ought to be understood to allow redistributive measures. Following this logic, Kentridge (1996:14-14) argues that affirmative action, rather than detracting from equality, instead seeks to safeguard that equality may be achieved. Kentridge (1996:14-55) further advances that Section 9(2) of the Constitution (1996), which corresponds with Section 8(3) in the Interim Constitution, settles the issue that special measures to counter systemic historical inequalities are critical to the

conception of equality encompassed by the Constitution, and should not be regarded as an anomaly to the principle of equality before the law and equal protection of the law.

Albertyn and Goldblatt (1998:248) propose an equality jurisprudence that places difference and disadvantage at the centre of the concept of equality and addresses systemic disadvantage so as to create the opportunity for every member of society to fulfill his or her human potential within positive social relationships. Albertyn and Goldblatt (1998:249) define substantive equality as the eradication of systemic forms of dominations and material disadvantage that ultimately contribute to the development of opportunities that allow people to realise their full potential within constructive social relationships. Pieterse (2001:93) focuses on the notion of shared oppression and proposes a context-based accommodation of difference. Pieterse's (2001:93) view therefore accords with the approach advanced by Albertyn and Goldblatt (1998), which places difference and disadvantage at the heart of equality analysis. For the purpose of this study, it is argued that these approaches support the conceptualisation of equality and the creation of the equality courts as tools for social transformation.

Klare (1998:150) maintains that the notion of transformative constitutionalism is a long-term project of constitutional enactment, interpretation and enforcement, which seeks to transform a country's institutions and power relations in a democratic, participatory and egalitarian direction. This proposition has subsequently established significant support in various academic debates, court decisions as well as in civil society drives for social justice, and strengthens the conceptual understanding of the philosophy supporting the creation of the equality courts.

Van Marle (2000) proposes an ethical interpretation of equality as a way of interpretation that radically acknowledges difference and otherness, and argues for such an ethical interpretation of equality as an alternative to both substantive and formal equality. Van Marle (2000:293) regards the current approach to equality in South Africa as a substantive approach, and her critique of this substantive approach is that it might become a new formalism. Van Marle (2000) posits that the meaning of "ethical", in an ethical interpretation of equality, is precisely the openness for difference and for radical otherness that cannot be reduced. Thus according to Van Marle, the practical consequence is that it is impossible to achieve equality fully or to recognise, accommodate and accept difference fully (Van Marle, 2000:293). What this theory means for the study is that there should be some recognition of the limitations of substantive equality in terms of acknowledging difference and otherness, and that these concepts need to be constantly reviewed over time, in order to ensure that they are consistent with current and evolving circumstances.



Currie and De Waal (2005:231) opine that the constitutional guarantee of equality in South Africa should be interpreted contextually, in light of its past apartheid political and legal system which was based on institutionalised inequality and discrimination. According to Lane (2005:9), the PEPUDA establishes the equality courts as key mechanisms to achieve the eradication of the legacy of inequality within South Africa. This view is supported by Bohler-Muller (2006:382), who notes that the creation of equality courts in South Africa provides numerous possibilities and offers optimism for the future. Bohler-Muller (2006:384) notes that the PEPUDA (South Africa, 2000) is widely regarded as a key law for advancing the transformation of all spheres of South African society, and for redressing the legacy of apartheid in such a manner as to acknowledge that all human beings are equally deserving of respect and as such, opportunities should be provided for all people to realise their full potential within positive social relationships.

Kaersvang (2008:4) notes that equal access to courts is well-established as a fundamental human right, as this right facilitates access to and safeguarding of various other rights. Due to its apartheid history, access to courts in South Africa presented a serious challenge, leading to the creation of special equality courts to address this problem (Kaersvang, 2008:4). Kok (2008:42) assessed the potential effectiveness of the PEPUDA in achieving its intended goals of effecting far-reaching societal transformation by identifying specific criteria of effective legislation. He notes that anti-discrimination legislation could generally have a number of goals, but argues that the PEPUDA is primarily aimed at transforming South African society (Kok, 2008:43). Kok (2008:46) posits that amongst others, law enforcement agents “must be committed to the behaviour required by the law, even if not to the values implicit in it”. He however concludes that equality court personnel have not received adequate and sustained training and are therefore not necessarily committed to implementing the Act (Kok, 2008:63), as was described in the previous chapter.

Keehn (2010:3) posits that the “Constitution requires substantive equality, rather than mere formal equality, demanding equality of outcomes and not just the same treatment of individuals. This requires that the state go beyond merely sanctioning acts of discrimination and instead take proactive measures to transform society and thereby achieve actual equality” (Keehn, 2010:3). Keehn (2010:4) furthermore notes that the equality courts offer other important procedural advantages to complainants and are intended to be more flexible and informal in their proceedings, based on the numerous features of their design which intend to allow cases to be processed without legal representation, with minimal cost and expeditiously (Keehn, 2010:5). These theoretical approaches align with this study's understanding of equality and the objectives of the PEPUDA (South Africa, 2000), to enable cost-effective and speedy processing of cases, thereby ensuring access to justice, in particular to vulnerable communities.

Given the legacy of inequality and the struggle against oppression in South African society, De Jager (2011:107) holds that the right to equality has been hailed by the highest courts in the land post-apartheid as a core fundamental value against which all law and state practice should be tested. De Jager (2011:107) notes that South Africa's equality courts have been heralded as a transformative mechanism for the redress of systemic inequality and the promotion of the right to equality. This conception of equality and of the purpose for the establishment of the equality courts further underpins the approach of this study. According to Kruger (2011:32), the substantive provisions contained in, and the procedural mechanisms provided by, the PEPUA (South Africa, 2000) for enforcing these provisions, create the means and the framework for asserting the right to equality. This approach further supports the underlying rationale for the creation of equality courts as tools to facilitate transformation and social change in South Africa.

Holness and Rule (2014:1908), in considering the barriers to advocacy and litigation in the equality courts for persons with disabilities, put forth the view that the rights to equality and access to justice are often not realisable without accessibility being provided to persons with disabilities. Furthermore, they state that "the way that the law treats those subject to it is also an indicator not just of the status of the affected persons, but also of the country's commitment to democracy and social justice" (Holness & Rule, 2014:1910). Holness and Rule (2014:1911) furthermore argue that the accessibility of the equality courts to achieve their intended objectives requires the dismantling of both physical and social barriers to the right to equality. The attainment of substantive equality and the restoration of respect for the dignity of all persons in light of South Africa's apartheid past is foundational to the new democratic order (Dugard & Bohler-Muller, 2014:246).

Based on the literature reviewed, it is evident that there is overwhelming and broad consensus regarding the conceptual understanding of equality and the theoretical underpinning for the establishment of equality courts in South Africa. The debate about equity and social justice is very much an ongoing one. Available literature on equity reflects the overlapping and reinforcing nature of the deprivations which sustain, reinforce and exacerbate poverty (Equity for Children, 2013:6).

In particular, in the South African context, a review of the available literature suggests that the South African constitutional interpretation of the right to equality and the approach to equity supports a substantive equality approach, premised on the constitutional goal of achieving social justice. Based on the aforementioned literature review, the Equity Theory framework from a social justice perspective, which focuses on the achievement of substantive equality, is deemed relevant in relation to this study, as it resonates and is consistent with the underpinning philosophy and rationale relating to the establishment of equality courts. The following section elaborates on the statutory and regulatory framework of the study.

### **2.2.6.1 The Constitution**

Prior to 1994, South Africa's political and legal order was marked by a history of apartheid and institutionalised racism. South Africa's transition to a constitutional democracy began with the coming into effect of the Constitution on 4 February 1997, as mentioned in the previous chapter.

As described in the previous chapter, the Preamble to the Constitution expressly recognises the injustices of the past and adopts the Constitution as the supreme law of the Republic, so as to "...heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights..."(South Africa, 1996). This signifies a constitutional commitment to social justice which takes into account the history of oppression and injustices caused by the system of apartheid. Chapter 1 of the Constitution (1996) contains the founding provisions. According to Section 1 of the Constitution, South Africa is founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms; non-racialism and non-sexism and the supremacy of the Constitution and the rule of law (South Africa, 1996).

Chapter 2 of the Constitution contains the Bill of Rights, which in accordance with Section 7(1), "is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom" (South Africa, 1996). Section 7(2) sets out the obligations of the state with regard to the Bill of Rights, in that the state should respect, protect, promote and fulfil the rights therein (South Africa, 1996). The application of the Bill of Rights is dealt with in Section 8 and it applies to all law and is binding on the legislature, the executive, the judiciary and all organs of state (South Africa, 1996). Importantly, Section 9 of the Constitution entrenches the right to equality and in accordance with Section 9(1), all persons are guaranteed the right to equality before the law and to equal protection and benefit of the law (South Africa, 1996). Section 9(2) elaborates further upon the right to equality, which includes the full and equal enjoyment of all rights and freedoms and furthermore provides that legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination, may be taken, in order to promote the achievement of equality (South Africa, 1996).

Section 9(3) provides a non-exhaustive list of grounds upon which the state may not unfairly discriminate either directly or indirectly against anyone (South Africa, 1996). Section 9(4) prohibits any person from unfairly discriminating, directly or indirectly, against anyone on one or more grounds listed in accordance with Section 9(3) (South Africa, 1996) and in addition, prescribes that national legislation be enacted to prevent or prohibit unfair discrimination (South Africa, 1996). Section 9(5) creates a presumption of unfairness in relation to discrimination on any of the listed grounds, unless it can be established that the discrimination is fair (South

Africa, 1996). Section 39(1) of the Constitution obliges any court, tribunal or forum seized with interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality and freedom and requires that such fora “must” consider international law and “may” consider foreign law” (South Africa, 1996).

In light of the above, it is evident that the vision and overall goal of the Constitution is a transformative one which is committed to the notion of substantive equality and which, as set out in the Preamble, seeks to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights (South Africa, 1996).

#### **2.2.6.2 White Paper on Transforming Public Service Delivery**

The Department of Public Service and Administration (DPSA) published the White Paper on Transforming Public Service Delivery (WPTPS) (South Africa, 1997) which sets out eight transformation priorities, with the key objective being to transform service delivery in the public service (South Africa, 1997). According to the introduction section of the WPTPS, the purpose is to provide South Africa with a policy framework and a practical implementation strategy for the transformation of public service delivery (South Africa, 1997). The WPTPS is primarily about how public services are provided, and specifically about improving the efficiency and effectiveness of the way in which services are delivered (South Africa, 1997). It makes specific reference to the Constitution which sets out the basic values and principles governing public administration in Chapter 10 (South Africa, 1996). One of the aims of the WPTPS is to bring a fresh approach to service delivery, which amongst others also focuses on attitudes and behaviour within the public service (South Africa, 1997). The relevance of the WPTPS to this study, since the study is located within the discipline of Public Administration within the context of the DOJ&CD as the department responsible for the administration of the equality courts, is that it would be applicable to the administrative functioning of the equality courts.

#### **2.2.6.3 The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000**

Already discussed in broad detail in the previous chapter and sections, the PEPUDA was passed in compliance with the obligation arising out of Section 9 of the Constitution (South Africa, 1996), which requires that national legislation be enacted to prevent or prohibit unfair discrimination. The preamble to the PEPUDA (South Africa, 2000) acknowledges the necessity for eradicating social and economic inequalities, in particular those inequalities that are systemic in nature due to South Africa’s unique history of colonialism, apartheid and patriarchy. The PEPUDA (South Africa, 2000) thus explicitly acknowledges South Africa’s apartheid past and its oppressive history based on racial discrimination. The preamble to the PEPUDA (South Africa, 2000) further provides that the PEPUDA aims to enable a shift from the past to a

democratic society, guided by the principles of “equality, fairness, equity, social progress, justice, human dignity and freedom”. Kruger (2011:38-39) posits that the PEPUDA (South Africa, 2000) complements the Constitution (1996) and its vision of change in an egalitarian direction.

In Chapter 1 of this study an overview of the broad aims and objectives of the PEPUDA is provided. In addition, Section 1 of the PEPUDA (South Africa, 2000) sets out the definitions including the concept of equality, which in terms of Section 1 is defined to include “the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality in terms of outcomes”. Section 2 of the PEPUDA (South Africa, 2000) sets out the objects of the PEPUDA, which include giving effect to the aspirations of the Constitution, as well as the “equal enjoyment of all rights and freedoms” by all persons. Section 3 deals with the interpretation of the PEPUDA and provides that anyone who applies the PEPUDA must construe its provisions so as to give meaning to the provisions of the Constitution, amongst which are the promotion of equality through special measures designed to protect or advance those disadvantaged by past and present unfair discrimination. Section 4 of the PEPUDA (South Africa, 2000) contains the Guiding Principles which *inter alia* re-iterate a number of principles to be applied in dealing with matters brought to the court, amongst these being developing special skills and capacity for those applying the PEPUDA in order “to ensure effective implementation and administration thereof”. Section 4(2) requires that systemic discrimination and inequalities specifically relating to race, gender and disability across all aspects of life as a result of past and present unfair discrimination, as well as the necessity of taking measures across all levels to eliminate such discrimination and inequalities, must be considered (South Africa, 2000). In terms of Section 5, the PEPUDA (South Africa, 2000) is binding on the state as well as on all individuals. The underpinning approach of the PEPUDA therefore clearly supports the notion of substantive equality. In this regard, the PEPUDA requires adequately trained and capacitated equality court clerks, in order to ensure effective functioning.

Chapter 4 of the PEPUDA (South Africa, 2000) provides for the establishment of equality courts across South Africa. Section 16 states that every high court is an equality court for the area of its jurisdiction, while lower (magistrates) courts can only be designated as equality courts for the relevant administrative region concerned, once certain requirements as set out by the PEPUDA (South Africa, 2000) have been met. Section 17 of PEPUDA (South Africa, 2000) relates to clerks of the equality courts and provides for the appointment or designation of such officers by the Director-General of the DOJ&CD for every equality court, subject to Subsection (2) and legislation applicable to the public service. The same section, furthermore, provides that clerks of the equality courts must in general assist the relevant court in carrying out its functions and

perform the prescribed functions (South Africa, 2000). This legislative requirement relating to the training and designation or appointment of equality court clerks supports the administrative functioning of the equality courts.

The provisions of the PEPUDA dealing with the equality courts have been in operation since 16 June 2003 (South Africa, 2000). According to Section 19 of the PEPUDA, the procedural rules in terms of the PEPUDA follow the normal court rules, with the necessary changes required by the context to equality courts (South Africa, 2000). Section 20 of the PEPUDA relates to the institution of proceedings in terms of or under the PEPUDA, and various relevant subsections deal with some of the obligatory duties and functions of the equality court clerks (South Africa, 2000). For example, in terms of Section 20(2), a person who wishes to institute proceedings must notify the clerk of such intention in the prescribed manner (South Africa, 2000). In terms of Section 20 (3)(a), an equality court clerk must within the prescribed period, refer such matter to the presiding officer (South Africa, 2000). According to Section 20 (3)(b), once the presiding officer has decided that a matter is to be heard and has referred the matter to the clerk, an equality court clerk bears responsibility for assigning the date for the hearing of the matter within the prescribed period (South Africa, 2000). Section 20(5)(a) provides that an equality court clerk must transfer a matter to an alternative forum as per court order and as directed by the presiding officer (South Africa, 2000). Furthermore, Section 20(6) requires an equality court clerk to transfer a matter as directed, as well as to notify both parties of the transfer in the prescribed manner (South Africa, 2000). In addition, Section 22(6)(b) requires the equality court clerk in specific circumstances to submit reasons as well as the record to the appeal court in question for review in the prescribed manner, as soon as is practicable (South Africa, 2000). The aforementioned thus demonstrates that there is a strong legal and regulatory framework in place which supports the roles and functions of the clerks, as well as the administrative functioning of the equality courts.

In terms of Section 31(1) of the PEPUDA, no proceedings may be instituted in any court unless a presiding officer and one or more clerks are available (South Africa, 2000). The availability of both a presiding officer and an equality clerk are thus prerequisites for proceedings to be instituted in the equality courts. The Director-General of the DOJ&CD is mandated by Section 31(3) of the PEPUDA to take all reasonable steps within the available resources of the DOJ&CD in order to ensure that there is a clerk available for each court in the country (South Africa, 2000). As was indicated in the previous chapter, the Director-General of the DOJ&CD is furthermore obliged in accordance with Section 31(6) of the PEPUDA (South Africa, 2000) to develop and implement a training course for equality court clerks with the aim of “building a dedicated and experienced pool of trained and specialised clerks” able to perform their functions and duties as contemplated by the PEPUDA (South Africa, 2000).

Kaersvang (2008:4) notes that advice needed by litigants would be provided by an equality court clerk, whose function also entails guiding complainants through the process of filing a complaint. As the equality court clerks are thus required to assist complainants, Kruger (2011:30) argues that it is obvious why training of clerks is critical – if the clerks are not aware of the meaning and application of the PEPUDA (South Africa, 2000), deserving cases brought by persons who wish to seek redress through the equality courts may never actually reach these courts. The argument can thus be made that, based on the aforementioned discussions, the adequate training and capacitation of the equality courts is critical in ensuring that the equality courts are utilised and function effectively.

The following section considers, in more detail than provided in the previous chapter, the mandate, role and function of the DOJ&CD in relation to the implementation of the PEPUDA. As required by Section 30 of the PEPUDA (South Africa, 2000), the Minister of Justice and Constitutional Development has, in consultation with the Minister of Finance, established Regulations (South Africa, 2003). These regulations set out the additional administrative duties and functions required of the equality court clerks, and as such, constitute the regulatory framework supporting the equality courts.

As indicated in Chapter 1 of this study, since the DOJ&CD is responsible for the effective and efficient administration of justice and, furthermore, for the promotion of constitutional development through the development and implementation of legislation and programmes that seek to advance and sustain constitutionalism and the rule of law, it is, thus, responsible for the administration of the equality courts and to ensure the effective implementation of the PEPUDA (DOJ&CD, 2018:15). The equality courts have been set up to assist persons who believe that they have suffered unfair discrimination, hate speech or harassment (DOJ&CD, 2018a). These equality courts ensure that it is easy for someone with such a case to bring their case to the court and that the issue is finalised speedily (DOJ&CD, 2018a). The PEPUDA provides for the designation of equality courts and the DOJ&CD has so far designated a large number of courts as equality courts (DOJ&CD, 2018b). The rationale for the establishment of these equality courts, amongst others, is to ensure the speedy and informal processing of cases where rights violations are involved (DOJ&CD, 2018b). The DOJ&CD has indicated that this will be achieved through the training of presiding officers and the clerks of the equality court, as well as their appointment in terms of the PEPUDA, which will solve the problem of particularly the most vulnerable groups having to travel long distances to lodge complaints in the equality courts (DOJ&CD, 2018b).

As indicated previously and illustrated in tabular format in Chapter 1 of this study, there are currently 382 designated equality courts nationally, located within the nine provinces of South Africa (DOJ&CD, 2018c). The DOJ&CD has made available a step-by-step guide for lodging an equality case with the equality courts. This sets out each individual step in the process of

lodging a complaint, as well as what assistance is to be provided by the clerk of the court (DOJ&CD, 2018d). The DOJ&CD has also promoted awareness on the right to equality and the PEPUDA by amongst others, producing an A-5 booklet accessible online to explain the PEPUDA, as well as to explain the requirements and procedure to be followed to lodge a complaint at the equality courts (DOJ&CD, 2018e). Thus, the study argues that the underpinning philosophy and rationale relating to the establishment of equality courts in South Africa subscribe to a substantive equality approach, premised on the vision of the Constitution of achieving a society based on democratic values, social justice and fundamental human rights (South Africa, 1996).

The next section discusses South Africa's national strategy and long-term plan, which sets out the vision for the elimination of poverty and the reduction of inequality.

#### **2.2.6.4 National Development Plan: Vision 2030**

The National Development Plan (NDP) is a national plan for South Africa to eliminate poverty and reduce inequality by 2030 (South Africa, 2011). The NDP's vision and trajectory is to achieve these goals, amongst others, through building a capable and developmental state as well as through transforming society and uniting the country as enjoined by the Constitution (South Africa, 2011). Chapter 13 of the NDP deals with building a capable and developmental state and provides that staff at all levels must have the authority, experience and support required to do their jobs (South Africa, 2011). Chapter 15 of the NDP focuses on creating unity in diversity and building "a more equitable society where opportunity is not defined by race, gender, class or religion" (South Africa, 2011). In particular, Chapter 15 of the NDP acknowledges that despite achievements and progress made since the advent of constitutional democracy in 1994, South Africa still remains a deeply divided society (South Africa, 2011). In recognising the injustices of the past, and as enjoined by the Constitution and the Preamble, Chapter 15 of the NDP therefore provides that redress measures which seek to address past imbalances should be reinforced (South Africa, 2011). In this regard, there is an alignment between the NDP and the PEPUDA (South Africa, 2000), as the creation of equality courts provide mechanisms through which redress for past imbalances may be sought.

The legislative and regulatory context thus provides a solid framework and strong support for the important position, role and function of the equality courts, as well as of the functions and roles of equality court clerks within the DOJ&CD. In this regard and in order to ensure the effective functioning of the equality courts, it is thus critical that the DOJ&CD, as the responsible department, ensures that the equality courts are established, designated and are accessible throughout the country, and furthermore, that the required administrative capacity is adequately



trained, capacitated and appointed so as to execute their roles in supporting the administration of the equality courts efficiently and effectively.

### **2.3 CONCLUSION**

This chapter answered the research question relating to what the theoretical approaches to understanding and analysing equality are, by describing the theoretical approaches in analysing and understanding equality. The chapter furthermore answered the research question relating to what the statutory, policy and regulatory framework supporting the position, role and function of equality courts in South Africa as a democratic state are, by describing and analysing the statutory, policy and regulatory framework supporting the position, role and function of equality courts in South Africa as a democratic state.

The chapter outlined a literature review of various theoretical approaches in conceptualising and understanding equality and Equity Theory. It furthermore discussed the history and origins of Equity Theory, as well as major proponents as well as critiques of liberal egalitarian Equity Theory. It then considered contemporary egalitarian frameworks and perspectives on Equity Theory, from both an international human rights and a development stance. Thereafter the chapter discussed the national statutory, policy and regulatory framework supporting the position, role and function of equality courts in South Africa, and in particular, the equality court clerks.

The next chapter will discuss and review international best practice examples and policy frameworks of equality courts (or similar tribunals or fora) within democratic states, in order to determine the reasons for their use, their role and their function.

## **CHAPTER 3**

### **A REVIEW OF INTERNATIONAL FRAMEWORKS OF EQUALITY COURTS (OR SIMILAR TRIBUNALS OR FORA)**

#### **3.1 INTRODUCTION**

This chapter discusses and reviews international examples of equality courts (or similar tribunals or fora) within a number of selected democratic states, in order to analyse the reasons for their use, their role and their function. The statutory, policy and regulatory framework supporting the establishment of the specialised equality court system in South Africa was examined in the previous chapters. In order to determine and assess the equality court clerks' perceptions regarding the functioning of equality courts in South Africa, this chapter considers and reviews a few international examples of similar tribunals or fora in democratic states, for the purpose of an enhanced understanding for the reasons and conditions under which these institutions function.

In discussing and reviewing the international examples of New Zealand, Australia, Brazil and Rwanda, the chapter will demonstrate how each country's national policy and legal and institutional framework is shaped and influenced by its particular history and social context. Best practice identified in reviewing these selected international tribunals or fora, relevant to the functioning of the equality courts in South Africa, will then be highlighted, in order to inform possible recommendations and strategies for the South African context.

#### **3.2 A REVIEW OF INTERNATIONAL EXAMPLES OF NATIONAL FRAMEWORKS OF EQUALITY COURTS (OR SIMILAR TRIBUNALS OR FORA)**

A best practice is a procedure that has been shown by research and experience to produce optimal results, and that is established or proposed as a standard suitable for widespread adoption (Merriam-Webster's Dictionary, 2018). A best practice can also be defined as a way of running an organisation or providing a service that is recognised as correct or most effective (Collins Dictionary, 2018). In the context of, and for the purpose of this study, the concept is to be understood as those comparable international examples of equality courts (or similar tribunals or fora), within the selected democratic states, which may best and most appropriately inform the South African context with regard to the best use, role and function of equality courts.

Benchmarking is a process by which an organisation compares its products and methods with those of the most successful organisations in its field, in order to try to improve its own performance (Collins Dictionary, 2018). In the context of this study, benchmarking with regard to the functioning of the equality courts in South Africa is done by analysing and reviewing the

approaches and frameworks of similar tribunals or fora in the selected democratic states for the purpose of incorporating or adapting the best practice into the recommendations put forward for the South African context, so as to improve the functioning of the equality courts.

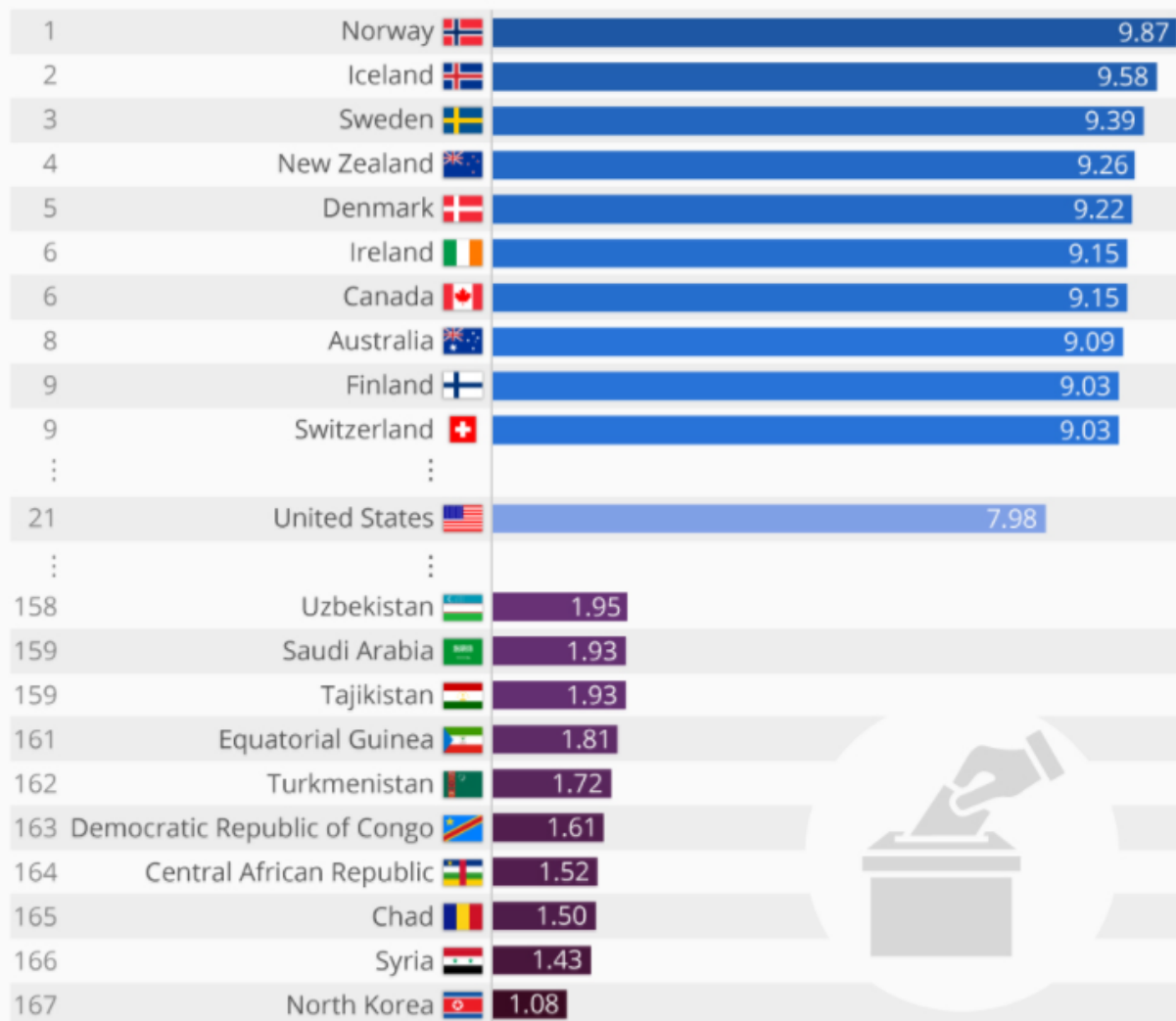
In selecting specific international best practice, particular criteria were used (comparable to South Africa), including that the country must be a democracy, that it must have had a historical context which necessitated redress and that the current social context of the country is important. Democracy is defined as a system of government in which people choose their rulers by voting for them in elections (Collins Dictionary, 2018). Thus, a democratic state refers to a state or country with such a system of government.

The United Kingdom based Economic Intelligence Unit (EIU) compiles a *Democracy Index* each year, in order to measure and to provide a snapshot of the state of democracy in a number of countries worldwide, even though the definition and measurement of democracy is a highly contested topic (EIU, 2017:1). Recent research indicates that Nordic countries have the strongest democracies in the world, occupying four out of the top five ranking spots, which include New Zealand as the only non-Nordic country (Harris, 2018). Figure 3.1 below illustrates the state of democracy, inclusive of a total of 167 countries, during 2017 (Harris, 2018).

The selection of the case of New Zealand for this study is informed by the fact that it ranks fourth amongst the world's top five strongest democracies from diverse continents and regions within established democratic states in developed first world countries (Harris, 2018), as well as due to its history relating to the indigenous *Māoris* (*Māori Source*, 2018). Australia, which ranks ninth amongst the world's top ten strongest democracies, is included as a mature democratic state and due to its history, diversity of cultures and significant indigenous heritage (Australia, 2018). Brazil is selected as an example of a younger but vibrant democratic state in a developing country, with a history marked by high levels of inequality and discrimination, specifically against Blacks and Indigenous Peoples (Minority Rights Group International, 2018) that is, thus, comparable to South Africa. Lastly, the case of Rwanda as an example of an African country is selected due to its history of colonial control and the 1994 genocide, which necessitated the creation of unique and innovative structures, in order to achieve justice and reconciliation in the context of a post-conflict society (Wolters, 2005:1). These democratic states are selected to highlight lessons learnt and relevant best practice, which are applicable to aspects relating to how the equality courts in South Africa work. Accordingly, for the purposes of this chapter, New Zealand, Australia, Brazil and Rwanda will be discussed.

## The Best And Worst Countries For Democracy

2017 democracy index score (10=full democracy, 0=authoritarian regime)\*



\* Scoring categories based on electoral process and pluralism, civil liberties, functioning of government, political participation, political culture



@StatistaCharts

Source: The Economist



Image: EIU via Statista

(Source: Harris, 2018)

**Figure 3.1: Illustration of 2017 state of democracy index score per country**

The national constitutional and legal framework and equality machinery of each state is shaped and influenced by a particular historical and social context. Thus, a brief overview of the historical and national context, the constitutional and legal framework, as well as the relevant equality tribunal or fora in each of the selected cases, insofar as it addresses the need for redress and achievement of equality and social justice is discussed and reviewed. In

conclusion, consideration is given to how certain identified best practice may be relevant to aspects of the equality courts in South Africa.

### 3.2.1 New Zealand

New Zealand became a colony within the British Empire in 1841 and a Dominion in 1907. It gained full independence in 1947, however the British monarch remains the Head of State to the present day, with the Governor-General, appointed by the British monarch upon the advice of the New Zealand Prime Minister, as the representative Head of State, (New Zealand, 2018a). The indigenous *Māoris* were surpassed in numbers by European settlers as early as the 19<sup>th</sup> Century. New Zealand's current population in 2018 is estimated at just over 4.75 million. The last national census in 2013 revealed that of the total population of over 4 million, 74% of citizens declared themselves to be of European descent. *Māoris* made up 14.9%, with those of Asian ethnicity contributing another 11.8% (World Population Review, 2018).

New Zealand is a treaty based, Pacific nation. The Treaty of Waitangi is New Zealand's founding document, named after the place in the Bay of Islands where it was first signed in 1840 (New Zealand History, 2018). The Treaty is an agreement, in *Māori* and English texts, which was made between the British Crown and about 540 *Māori rangatira* (chiefs) (New Zealand Tourism, 2018). An increasing number of British migrants arrived in New Zealand in the late 1830s, with the intention to settle permanently. At the same time, there were extensive land transactions with the *Māori*, increasing lawlessness by some of the settlers and an indication that the French were interested in taking possession of New Zealand (New Zealand History, 2018). During this time, there were approximately 125 000 *Māoris* and about 2000 settlers in New Zealand comprising sealers, whalers, missionaries and merchants (New Zealand Tourism, 2018). Although initially unwilling to act, the British Government ultimately realised that occupying the country could protect the *Māori* people, regulate British subjects and secure commercial interests. The Treaty was prepared in just a few days (University of Auckland, 2018a). The English draft was translated into *Māori* overnight on 4 February 1840, and about 500 *Māoris* debated the document for a day and a night before it was signed on 6 February 1840 (New Zealand History, 2018).

Assured that their status would be strengthened, a number of *Māori* chiefs supported the agreement. About 40 chiefs signed the *Māori* version (*Te Tiriti o Waitangi*) on 6 February 1840. By September, about 500 more chiefs had signed the copies of the document that were sent around the country. Some signed while remaining uncertain; others refused or had no chance to sign. Almost all signed the *Māori* text. The Colonial Office in England later declared that the Treaty applied to *Māori* tribes whose chiefs had not signed. British sovereignty over the country

was proclaimed on 21 May 1840 (New Zealand History, 2018). The Treaty represents a broad statement of principles on which the British and *Māori* made a political compact to found a nation state and build a government in New Zealand. The document has three articles. In the English version, the *Māori* cede the sovereignty of New Zealand to Britain; the *Māori* give the Crown an exclusive right to buy lands which they wish to sell, and, in return, are guaranteed full rights of ownership of their lands, forests, fisheries and other possessions; and the *Māori* are given the rights and privileges of British subjects (New Zealand History, 2018).

The Treaty in the *Māori* version was believed to express the meaning of the English version, however there are important differences. Most significantly, the word 'sovereignty' was translated as '*Kawānatanga*' (governance) – thus some *Māori* believed they were giving up government over their lands but retaining the right to manage their own affairs. The English version guaranteed 'undisturbed possession' of all their 'properties', but the *Māori* version guaranteed '*Tino rangatiratanga*' (full authority) over '*Taonga*' (treasures, which may be intangible). The *Māori* understanding was at odds with the understanding of those negotiating the Treaty for the Crown, and as *Māori* society valued the spoken word, justifications provided at the time were quite likely as important as the wording of the document (New Zealand History, 2018). Different understandings of the Treaty have been under deliberation for some time, and since the 1970s in particular, many *Māori* have urged that the terms of the Treaty be respected. Some *Māori* embarked on protest marches on Parliament and occupied land. In addition, there have been various studies of the Treaty and an increased awareness of its meaning and importance in contemporary New Zealand in terms of its influence on government (New Zealand Now, 2018). In more recent times, it has become the norm to refer to the intention, spirit or principles of the Treaty, however the Treaty of Waitangi is not considered part of New Zealand domestic law, except where its principles are referred to in various Acts of Parliament (New Zealand Now, 2018).

Ever since the 1840 signing of the Treaty, several government initiatives had led to the *Māori* losing resources and power, and becoming culturally and economically deprived within their own lands. To address the grievances arising from these actions, reconciliation efforts were initiated in the country which can generally be categorised according to three interventions: the Treaty of Waitangi settlement process; the Office of the Race Relations Conciliator; and public education platforms (Mulholland, 2016). The exclusive right to determine the meaning of the Treaty rests with the Waitangi Tribunal, which was established by the Treaty of Waitangi Act 114 of 1975 (New Zealand, 1975). By establishing the Waitangi Tribunal, Parliament provided a legal process to investigate alleged breaches of the Treaty by the Crown and through which

*Māori* Treaty claims could be investigated. Tribunal inquiries contribute to the resolution of Treaty claims and to the reconciliation of outstanding historical issues between *Māori* and the Crown (New Zealand, 2018).

The jurisdiction of the Waitangi Tribunal is unique within New Zealand, and no other similar tribunal exists elsewhere world-wide. The Tribunal does not operate as a typical court, but rather as a body which handles inquiries and makes recommendations pertaining to the practical application of the Treaty (Waitangi Tribunal, 2012:1). More than 2000 claims have been lodged with the Tribunal, and a number of major settlements have been reached (New Zealand, 2018a). The Tribunal has dealt with and reported on various issues, ranging from *te reo Māori* (the *Māori* language) to fresh water, underground resources and fisheries. Many of the recommendations contained in its reports have been implemented by governments and have contributed to many initiatives and the establishment of new institutions, such as *Reo irirangi*, (*Māori* radio); *Te Taura Whiri i te Reo Māori* (the *Māori* Language Commission); and *Te Māngai Pāho* (the *Māori* Broadcasting Funding Agency) (New Zealand, 2018). Initially, up until 1985, when Parliament permitted the Tribunal to investigate events dating back to 1840, the Tribunal was restricted to hearing claims relating to current government actions only. Since then, many hundreds of historical claims were made and reports released which have provided redress (Waitangi Tribunal, 2012).

The Tribunal has categorised these claims into districts, and thus researching and hearing claims in a specific area is referred to as a district inquiry. The district inquiry process has almost been completed, and in 2008 Parliament revoked the Tribunal's power to register new historical claims (New Zealand, 2018). During 2015, the Waitangi Tribunal commemorated its 40th anniversary (Timutimu, 2015). The Tribunal had by then registered 2501 claims, fully or partly reported on 1028 claims, issued 123 final reports and issued district reports covering 79% of New Zealand's land area (New Zealand, 2018). In terms of the Waitangi Tribunal's strategic direction for the period up to 2025, published during 2014, the Tribunal undertook to: respond to claims that require urgent attention, complete the final four district inquiries in progress at that stage; hear the remaining historical claims concerning pre-1992 issues; hear most of the remaining contemporary (post-1992) claims and substantially complete *kaupapa* (generic) inquiries (New Zealand, 2018). The Tribunal is currently attending to grouping the claims that raise *kaupapa* (generic) issues into broad thematic inquiries; the first of these inquiries relating to addressing issues faced by war veterans is currently under way (New Zealand, 2018).

The Waitangi Tribunal Unit of the Ministry of Justice, based in Wellington, provides administrative and support services to the Waitangi Tribunal (New Zealand, 2018b). The administrative position of Court Registry Officer (CRO) executes an important role in the

effective running of courts and works as part of a registry team that is responsible *inter alia* for: quality customer service; efficient and timely case progression and management, effective judicial case support and maintaining the requisite knowledge capital (New Zealand, 2018c). A CRO holds the statutory authority of a Deputy Registrar in New Zealand, which in terms of Section 14 of the District Courts Act 1947 (New Zealand, 1947), Section 27 and/or Section 72 of the Judicature Act 1908 (New Zealand, 1908) means exercising a cross-cutting range of powers and functions in accordance with that authority, thus, executing his or her functions in a quasi-judicial capacity (New Zealand, 2018c). A CRO may operate within one or more jurisdictions such as in civil, family or criminal matters, and may work within one or across a variety of following process streams such as: receiving and processing claims; taking claims to court; case management and scheduling (New Zealand, 2018c).

The District Courts Operating Unit undertakes a wide range of complex responsibilities. Notably, District Courts also provide judicial support as well as certain operational and administrative services to various other specialised Tribunals on behalf of the Special Jurisdictions Unit (New Zealand, 2018c). A CRO must possess the appropriate expertise, knowledge and experience so as to ensure an effective and timely service to members of the Judiciary and all court users (New Zealand, 2018c). In terms of educational, professional qualifications and technical skills, a CRO is required to have a National Certificate of Educational Achievement (NCEA) Level 2 (Sixth Form Certificate), which is the national qualification system for New Zealand's senior secondary school students; a tertiary qualification and/or relevant work experience is regarded as an advantage, with a good standard of English regarded as essential and a relevant second language in certain courts seen as an advantage. A current national driver's license is regarded as an advantage, but may be an essential requirement in some courts. In order to become fully competent, a CRO incumbent is furthermore required to undergo training and to be well-versed with a number of pieces of legislation relevant to the jurisdiction(s) within which they work (New Zealand, 2018c).

The Waitangi Tribunal's claims process is well documented and defines claims as allegations that the Crown has breached the Treaty of Waitangi through particular actions, inactions, laws, or policies and that *Māori* have suffered prejudice (harmful effects) as a result (New Zealand, 2018d). An online sample claim form is available and this template claim form is offered to be used as a guide, as there is no standard form for lodging a claim with the Tribunal. The template claim form provides a helpful tool which lists all the Tribunal's requirements for registration (New Zealand, 2018e). All documents submitted to the Waitangi Tribunal must be filed with the Registrar. Claims can be sent to the Tribunal by post, email, facsimile or submitted in person at the Tribunal's address provided online (New Zealand, 2018f).



Once a claim is submitted, and if it satisfies the criteria for registration, it is then considered by the Waitangi Tribunal (New Zealand, 2018d). Any *Māori* may submit a claim to the Waitangi Tribunal, as long as certain information is provided to enable the Tribunal to process the claim. If a claim meets the Tribunal's requirements, it will be registered and the Tribunal will allocate a 'Wai' (short for Waitangi Tribunal claim) number for the claim. Furthermore, the Tribunal will contact the claimant/s as well as the Crown and other interested parties, in order to notify them accordingly (New Zealand, 2018d). A claim which has been lodged with the Tribunal may be amended or withdrawn at any stage, upon written advice by the claimant to the Registrar. The Tribunal will then issue a memorandum/direction stating that the claim has been withdrawn. Once a claim is withdrawn by the claimant, this removes the Tribunal's jurisdiction to inquire into the claim (New Zealand, 2018g). Claimants do not require legal representation at Tribunal hearings. Notwithstanding this, due to the technical legal issues, evidentiary requirements and volumes of documents involved, the Tribunal generally favours both that claimants are legally represented and, where relevant, that claimants arrange joint representation with other claimants (New Zealand, 2018g). Once a claim has been registered, a claimant can apply for legal aid funding to assist them in meeting the legal costs of processing their claim. Applications are prepared by their legal representative and submitted to the Tribunals' Legal Aid Services Treaty team for consideration (New Zealand, 2018h).

The Tribunal groups various claims together, based on the issues involved, for example, claims which relate to a particular inquiry district or claims that are defined as generic/*kaupapa* and thus involve broad national or systemic issues. During 2001 and 2002, the Tribunal developed a new method for conducting a district inquiry, called the New Approach, which established the quickest likely process for inquiries, considering the principles of natural justice (New Zealand, 2018d). Tribunal inquiries are premised on a thorough analysis of evidence, which, particularly in historical inquiries, may span a wide range of issues dating back to the signing of the Treaty. Research relating to the relevant claim can be commissioned as well as carried out by the Tribunal, claimants, third parties and the Crown (New Zealand, 2018d). Technical specialist research is regularly undertaken by Tribunal staff and contractors commissioned by the Tribunal, Crown Forestry Rental Trust researchers commissioned on behalf of claimants, and other researchers commissioned by the Crown. Claimants are also encouraged to produce 'claimant evidence' of their own, their community's or their *tūpunas* (grandparents' or ancestors') experience or traditions (New Zealand, 2018e).

Tribunal staff and technical researchers usually engage directly with claimants and other parties in the course of conducting their research. This may be done in person (*kanohi ki te kanohi*) through research meetings (*hui*), in order to build understanding of the claim issues and to collect advice and information on resources of relevance to their work. Tribunal staff keep inquiry parties informed of progress through newsletters (*pānui*) and draft reports are usually

provided to all parties for comment before they are finalised (New Zealand, 2018i). Other than reports, relevant research can consist of mapping or indexed collections of documents pertaining to the claim. The final reports of technical evidence collected are collated into a collection of reports, together with other evidence collectively referred to as a 'casebook' before the commencement of hearings. Such evidence is noted on the record of inquiry and disseminated to the Crown and other claimants involved in the inquiry (New Zealand, 2018i). The Tribunal holds hearings in order to hear evidence from the claimants in support of their claims, as well as from the Crown. The parties can ask questions relating to the evidence put forth and make submissions on the issues raised in the inquiry (New Zealand, 2018j).

After an inquiry hearing is completed, the Tribunal publishes its report with findings. The Tribunal has released numerous and varied reports over the years. Once the Tribunal has issued its report, claimants and Crown consider their response (New Zealand, 2018k). Settlement negotiations are facilitated by the Office of Treaty Settlements, which negotiates settlements of historical claims directly with claimant groups, under the guidance and direction of Cabinet. Each settlement involves financial and commercial redress, cultural redress and an apology for the offending acts (Mulholland, 2016). The Office of Treaty Settlements also provides policy advice to the government on broad Treaty settlement issues, as well as on individual claims, oversees the implementation of settlements, and administers the protection mechanism of Crown owned land for Treaty settlement purposes (New Zealand, 2018k).

In addition to the redress dealt with through the Tribunal, New Zealand's first piece of human rights legislation, the Race Relations Act 1971 (150 of 1971), came into force on 1 April 1972 (New Zealand Human Rights Commission, 2018). The 1971 act was promoted by the then National Government, in order to strengthen New Zealand's role internationally as an ardent and independent human rights champion. The 1971 act created the Office of Race Relations Conciliator, which was established in New Zealand in the same year, 1971. In its first few months of existence, the Office of Race Relations Conciliator handled 79 complaints, most of which were brought by *Māori* and Pacific people (New Zealand Human Rights Commission, 2018).

New Zealand was the first country to have a Conciliator, a model which other countries have since followed. It was merged in 2002 with the Human Rights Commission and the position of Conciliator changed to that of Commissioner (Harris, 2012). The Office of Race Relations Conciliator released reports on its findings, which served as educational resources for the public, since its purpose was to work towards the promotion of positive race relations (Mulholland, 2016). The two key laws in New Zealand which specifically promote and protect human rights are the Bill of Rights Act 1990 (109 of 1990) and the Human Rights Act 1993 (82 of 1993). New Zealand's Bill of Rights Act (New Zealand, 1990) sets out a range of civil and

political rights, which arise from the United Nations International Covenant on Civil and Political Rights (ICCPR). These include the rights to freedom of expression, religious belief, freedom of movement, and the right to be free from discrimination (New Zealand, 1990). The Bill of Rights Act (New Zealand, 1990) requires the government and anyone carrying out a public function to observe these rights, and to justify any limits placed on them. Any new legislation is examined to test consistency with the rights and freedoms in the Bill of Rights Act (New Zealand, 1990). In the event of any inconsistencies, the government is required to provide a justification for the limitation of such rights (New Zealand, 1990). Any violation of rights under the Bill of Rights Act in the exercise of a public function by a person or an organisation can be taken to the High Court, in order to seek a remedy (New Zealand, 1990). However, this process is not free of charge and can be very expensive (New Zealand, 1990). A claimant may be able to seek initial legal advice from a community law centre, and anyone who cannot afford to take a claim to the High Court, may apply to the Ministry of Justice for legal aid to cover legal costs (New Zealand, 1990). Civil legal aid grants may be required to be paid back to the Ministry (New Zealand, 1990). The New Zealand Justice Department developed guidelines which are accessible online, in order to make the Bill of Rights Act (New Zealand, 1990) more accessible to the public (New Zealand, 2018m).

The relevance of the Waitangi Tribunal, similar to the South African context, is that its establishment was necessitated by a particular history and the need to provide various forms of redress to the indigenous *Māori* people, in order for New Zealand to move forward and grow as a nation, as well as to ensure the protection of the rights to equality of all persons and the achievement of social justice.

The next section will consider the example of Australia, based on its historical context, which involved the colonisation of its indigenous Aboriginal people, which thus necessitated redress to address the injustices of the past and the impact thereof on the current social context of the country.

### **3.2.2 Australia**

In 1770, during his maiden Pacific expedition, Lieutenant James Cook claimed control of the east coast of Australia for the British Crown, encouraging the British authorities to establish a penal colony to deal with the problem of Britain's overcrowded prisons (Aboriginal Heritage Office, 2018). The island continent of Australia was colonised by the British in 1788, when Captain Arthur Phillip and 1500 convicts, crew, marines and nationals arrived at Sydney Cove. At the time, it is estimated that more than 750 000 Aboriginal people inhabited the continent, comprising of more than 400 different nations (Aboriginal Heritage Office, 2018). Their cultures had developed

over 60 000 years, rendering Indigenous Australians the custodians of the world's most ancient living culture (Australians Together, 2018).

The arrival of the British marked the end of the ancient Aboriginal way of life, and the beginning of the Aboriginal people's oppression and destruction of their livelihood and their lifestyle, based on total kinship with the natural environment, culture and history (Aboriginal Heritage Office, 2018). The arrival of the British furthermore brought about armed conflict, displacement and dispossession of land, as well as disease, which struck a fatal and epidemic blow to the Aboriginal people who had no resistance to the deadly viruses, resulting in more than half of the population being wiped out (Aboriginal Heritage Office, 2018). The sexual mistreatment and abuse of Indigenous girls and women resulted in venereal disease being passed to Indigenous people in rampant proportions. The annihilation of Indigenous people was reportedly achieved through mass shootings, forcing crowds of people off cliffs, in addition to numerous accounts of Indigenous people being offered foodstuff spiked with various toxic substances (Aboriginal Heritage Office, 2018).

The colonisation of Australia therefore had a devastating impact on the Indigenous Aboriginal people, who had inhabited the land for many thousands of years (Australians Together, 2018). Indigenous people persistently resisted the violation of their right to land, and its influence on Indigenous cultures and communities. Around 20 000 Aboriginal people were killed due to colonial violence during this period, and it is estimated that about 2500 settlers died due to the conflict during this time (Aboriginal Heritage Office, 2018).

Australia gained independence as a nation on 1 January 1901 after the British Parliament passed legislation allowing the six Australian colonies, which were then still subject to British rule, to govern in their own right as part of the Commonwealth of Australia. The Commonwealth of Australia was thus established as a constitutional monarchy in 1901, with a written constitution, and with Australia's Head of State being the British monarch (Australia, 2018a). The Australian Constitution (1900) established the Commonwealth of Australia Government, defining its structure, powers and procedures, as well as the rights and obligations of the states in relation to the Commonwealth. These were based on a federal system of government, according to which powers are divided between the central government and regional "states" (Australia, 2018a). However, the omission of the Aboriginal and Torres Strait Islander people in the nation's constitution has led to over a century of debate over how best to recognise Australia's Indigenous people (Henderson, 2015).

Modern day Australia is a diverse, multi-cultural, multi-racial country with a significant indigenous heritage permeating all aspects of life (Australia, 2018b). The estimated resident population of Australia during 2017 was 24.7 million people (Australian Bureau of Statistics,

2017). The Aboriginal people were Australia's first inhabitants and are believed to have migrated from Asia to Australia about 60 000 years ago (Villarica, 2011). According to Paradies (2005:1), indigenous Australians are those peoples who have maintained a relationship through descent, self-identification and community acceptance with the pre-colonial populations in Australia, and furthermore suffer from disadvantage across a range of social, economic and health indicators, compared to other Australians. In terms of the overall health and wellbeing of Indigenous Australians, despite significant improvements recorded as continuing or emerging, significant gaps between Indigenous and non-Indigenous Australians remain, and this “disadvantage” or “gap” starts from birth and continues throughout life (Australian Institute of Health and Welfare, 2018).

Australia's Constitution (1900) provided the basic rules for government and established a federal system which distributed powers between a new central government and states (Australian National Commission of Audit, 2018). Australia follows a Westminster system of government and law which it inherited from its British colonisers. The Commonwealth Parliament consists of two main political parties and a number of minor parties. Each state and territory also has its own government (Australia, 2018b).

The Australian Human Rights Commission Act 1986 (125 of 1986) (formerly called the Human Rights and Equal Opportunity Commission Act 1986) established the Human Rights and Equal Opportunity Commission (now known as the Australian Human Rights Commission) and gives it functions in relation to a number of international human rights instruments (Australian Human Rights Commission, 2018a). The Australian Human Rights Commission was established on 10 December 1986 (International Human Rights Day) as Australia's national human rights watchdog (Australian Human Rights Commission, 2018b). The Australian Human Rights Commission is an independent body which investigates complaints about discrimination and human rights breaches - it does not act as an advocate or legal representative for a party to a complaint. The complaint process is simple, free and flexible (Australian Human Rights Commission, 2018c).

The Australian Federal Parliament has passed a number of anti-discrimination laws, which aim to protect people from certain types of discrimination in public life and from breaches of their human rights by Commonwealth departments and agencies (Australian Human Rights Commission, 2018a). The Australian Human Rights Commission has statutory responsibilities under these laws, which include the authority to investigate and conciliate complaints of alleged discrimination and human rights breaches lodged in accordance with these laws (Australian Human Rights Commission, 2018a).

The Age Discrimination Act 2004 (68 of 2004) helps to ensure that people are not treated less favourably on the ground of age in various areas of public life, and also provides for positive discrimination (Australian Human Rights Commission, 2018a). The Disability Discrimination Act 1992 (135 of 1992) has as one of its major objectives to eliminate discrimination against people with disabilities. The Racial Discrimination Act 1975 (52 of 1975) gives effect to Australia's obligations under the relevant International Convention on the Elimination of All Forms of Racial Discrimination (Australian Human Rights Commission, 2018d). The key objective of the Sex Discrimination Act 1984 (4 of 1984) is to promote equality between men and women.

The Australian Human Rights Commission has a dedicated Aboriginal and Torres Strait Islander Social Justice Commissioner, who, as a member of the Commission, works both in Australia as well as internationally. This dedicated Commissioner works in the interests of Aboriginal and Torres Strait Islander peoples, in order to advocate for the rights of Indigenous peoples; promote an Indigenous perspective on different issues; build support and understanding for an Indigenous perspective, and empower Indigenous peoples (Australian Human Rights Commission, 2018e). This also involves the Commissioner collaborating with other organisations, so as to initiate educational efforts and the development of customised promotional materials (Australian Human Rights Commission, 2018e).

The Australian Human Rights Commission has produced a publication, in the form of a brochure, which is also available online, entitled "*Know your rights: Aboriginal Torres Strait Islanders*" which explains what racial discrimination is and what anyone who experiences racial discrimination can do to protect their rights. It also details the work of the Australian Human Rights Commission and the Aboriginal and Torres Strait Islander Social Justice Commissioner, in relation to Aboriginal and Torres Strait Islander people (Australian Human Rights Commission, 2018e).

The Aboriginal and Torres Strait Islander Social Justice Commissioner is furthermore mandated to report to the Attorney-General each year on the human rights situation of Aboriginal and Torres Strait Islander peoples, and to make recommendations on the action required to ensure the protection of these rights (Australian Human Rights Commission, 2018f). This obligation is achieved by the submission of an annual Social Justice Report to the Australian Parliament (Australian Human Rights Commission, 2018f). Through the Aboriginal and Torres Strait Islander Social Justice Commissioner, the Australian Human Rights Commission also reports annually on the operation of the Native Title Act 1993 (110 of 1993) (Australian Human Rights Commission, 2018g:9) and the effect of the Act on the exercise and enjoyment of human rights of Aboriginal and Torres Strait Islander peoples (Australian Human Rights Commission, 2018f). This specific obligation is satisfied through the submission of the Native Title Report. Since

2013, these reporting requirements have been met through the development and submission of a combined Social Justice and Native Title Report.

The Australian Human Rights Commission receives a wide variety of complaints, including from Aboriginal and Torres Strait Islander peoples, concerning individual and systemic discrimination. The nature of these complaints informs the policy and advocacy work of the Commission. During the reporting period 2015-2016, as was the case in the previous periods, most of the complaints of discrimination received specifically from Aboriginal and Torres Strait Islander peoples relating to relevant legislation were about racial discrimination, and the majority of cases were finalised through conciliation (Australian Human Rights Commission, 2018g:174). Some examples of complaints filed by Aboriginal and Torres Strait Islander peoples include discrimination by a retail outlet whilst shopping, and various complaints relating to discrimination in employment contexts (Australian Human Rights Commission, 2018g).

General information regarding how to make a complaint is easily accessible online from the Commission's website, via an online video, and a complaints fact sheet has been translated into 24 different languages. Information is also available in alternative formats where complainants may have a hearing or visual impairment. In addition, there is a free telephone interpretation service through which members of the public can obtain information (Australian Human Rights Commission, 2018h). A complainant can make a complaint no matter where they live in Australia and it does not cost anything to make a complaint (Australian Human Rights Commission, 2018f).

Complaints must be in writing and Commission staff provide assistance to complainants with the complaints process. No legal representation is required to make a complaint. Anyone lodging a complaint on behalf of another person is required to provide authorisation, in order to act on their behalf. This can be done by completing an Authority to Act form, which should be submitted together with the complaint form (Australian Human Rights Commission, 2018i). Once a complaint is made, the Commission assesses the complaint and engages with the complainant as well as the other side. The Commission may resolve a complaint by conciliation (Australian Human Rights Commission, 2018j). However, as the Commission is not a court, it does not have the power to decide whether unlawful discrimination has occurred. Its role is to obtain the version of both sides and where appropriate, help those involved to resolve the complaint (Australian Human Rights Commission, 2018k). In instances where a complaint is not resolved or is discontinued for some other reason, a complainant may refer the matter to court, in order to decide whether unlawful discrimination has occurred. A complainant wishing to approach a court should do so within a prescribed timeframe, to the relevant court, which would be the Federal Circuit Court of Australia or the Federal Court of Australia. The Commission cannot take a matter to court on behalf of the complainant, nor assist the complainant to present

their case in court. Complainants are entitled to seek legal representation in taking the matter to court (Australian Human Rights Commission, 2018i).

The Commission publishes summaries of a range of complaints which have been resolved through its conciliation process on a Conciliation Register. This information is provided as an aid to assist people involved in complaints to prepare for conciliation and should not be considered or used as legal advice. The complaints summarised in the Conciliation Register are de-identified and the Commission does not provide further information about these complaints. Parties to complaints requiring advice about the outcomes appropriate to their particular circumstances should seek independent legal advice. Complaints are resolved in conciliation on a 'without admission of liability' basis (Australian Human Rights Commission, 2018j).

The Commission's National Information Service (NIS) provides information and referrals for individuals, organisations and employers about a range of human rights and discrimination issues. This service is free and confidential. The NIS can provide information about people's rights and responsibilities under federal human rights and anti-discrimination law; discuss whether a person may be able to make a complaint to the Commission or how the law might apply to their situation; give information about how to make a complaint; respond to a complaint or deal with specific discrimination issues and refer persons to another organisation which may be able to help them, if the Commission cannot assist. The NIS is however unable to provide legal advice (Australian Human Rights Commission, 2018l).

The Commission's Charter of Service sets out the Commission's aim of providing a service that is professional, accessible, fair and timely. The Charter stipulates that people can expect to be treated with respect and courtesy; expect to be provided with clear and accurate information; to collect, store, use and disclose their personal information in accordance with Australian law; to be kept informed about the progress of the complaint; to be treated impartially and fairly; progress enquiries and complaints to be dealt with in a timely manner; and to be provided with reasons for the Commission's decisions (Australian Human Rights Commission, 2018m). The Charter also explains what the Commission cannot assist with or provide. This includes legal advice; to advocate for a particular person or organisation; to review or investigate the decisions of courts and tribunals; to deal with matters that are not covered by federal human rights and discrimination law; or to keep communicating with complainants whose concerns are not covered by federal human rights and discrimination law, or whose complaints to the Commission have been finalised (Australian Human Rights Commission, 2018m). In order to assist the Commission to provide the best possible service, the Charter furthermore sets out what is expected from people using the NIS and the Investigation and Conciliation Service. This includes treating Commission staff with respect and courtesy; informing the Commission if they have any special requirements to access the service such as a need for an interpreter or for



information to be provided in an alternative format; keeping the Commission informed about any changes to complainants' circumstances or contact details; reading the information provided by the Commission; responding to requests for information in a timely manner and as accurately as possible; attending scheduled meetings or conciliation conferences; and complying with reasonable requests during the process (Australian Human Rights Commission, 2018m).

The Commission's Charter of Service sets out a process for receiving compliments and general feedback for improvement, in line with its commitment to continual service improvement. Anyone can participate in the Commission's Service Satisfaction Survey or send feedback directly to the officer who dealt with their enquiry or complaint. Complaints about bad service can be escalated to the Executive Director of the Australian Human Rights Commission if not resolved with the relevant official or their supervisor directly (Australian Human Rights Commission, 2018m).

The Commission publishes statistics about complaints received and resolved on its website (Australian Human Rights Commission, 2018n). The Commission's 2016/2017 Annual Report reflects that during that period, it received 1,939 complaints about discrimination and breaches of human rights and conducted 1,128 conciliation processes, of which 75% were successfully resolved. During the same period, the Commission assisted over 14,911 people and organisations by providing information about the law and the complaint process, assisting with problem solving and providing referrals to other services (Australian Human Rights Commission, 2018o:18, 33). Notably, the Commission reported that it had recorded generally high levels of public satisfaction rates regarding its services (Australian Human Rights Commission, 2018o:18, 34). The Commission reported that its Investigation and Conciliation Service and the NIS continued to provide exceptional service to complainants and respondents, corroborated through rigorous evaluation processes. Satisfaction rates with its conciliation service remained at a record high from the perspective of both complainants and respondents (Australian Human Rights Commission, 2018o:13).

The Commission has a high level of organisational and performance excellence (Australian Human Rights Commission, 2018o:37). The Commission invests significantly in staff well-being and professional development resulting in staff feeling engaged and valued, with a work-life balance. In the May 2017 Australian Public Service Survey, an analysis of responses by Commission staff (65% response rate) reportedly showed *inter alia* that 90% of staff have a strong understanding of how their workgroup's role contributes to the Commission's strategic direction (Australian Human Rights Commission, 2018o:38). For the purpose of this study, the important aspects of the Australian example to be noted include the fact that the national context and specific situation of the Aboriginal and Torres Strait Islander peoples have been taken into account by the Australian Human Rights Commission, in designating a specific

dedicated Commissioner to work in their interests. Furthermore, the Australian Human Rights Commission has institutionalised an annual reporting mechanism on the exercise and enjoyment of their human rights of the Aboriginal and Torres Strait Islander peoples. The Australian Human Rights Commission's investment in the well-being and professional development of staff has resulted in staff being actively engaged and having a strong understanding of their roles and functions supporting the work of the organisation and its goals.

The next section will discuss the case of Brazil where there are still high levels of inequality and discrimination, specifically against Blacks and Indigenous Peoples. This is as a result of its history of colonisation and the killing of its indigenous people, which thus necessitated redress to address the injustices of the past and the impact thereof on the current social context of the country.

### **3.2.3 Brazil**

Pedro Álvares Cabral, with his convoy, which was headed to India, set foot at *Porto Seguro*, which is presently the state of Bahia, in 1500. The area which makes up modern Brazil had native inhabitants numbering in the millions, made up of several clans and linguistic groups, the exact numbers and locations of which are uncertain. Their descendants had subsisted on this land for many centuries, up to 30,000 years (Mother Earth Travel, 2018). Several parts of these areas were subsequently left abandoned due to the fatal epidemics and slave hunters of the colonial times that wiped out the populace. According to historical evidence, it is likely that the number of indigenous people surpassed the populace of Portugal itself. The indigenous people, initially curious and welcoming, and willing to trade goods, with a unique propensity for violent defense, were unable to thwart the destruction resulting from the diseases passed on by the Europeans and Africans. Many thousands surrendered to smallpox, measles, tuberculosis, typhoid, dysentery and influenza, and entire tribes were wiped out by the diseases passed on via the indigenous trade routes (Mother Earth Travel, 2018).

The Europeans exploited the cultural differences amongst the native Indian inhabitants, in order to forge groupings that supplied back up support during the colonial conflicts. The Portuguese considered the Indians slave labour. At the time that Portugal started its expansionist project, it had a population of only about 1 million people. African and native Brazilian slaves were common in Portugal, and Portugal's colonial economy in Brazil was thus premised upon slavery. Initially the Portuguese negotiated with the natives, however they subsequently resorted to violent enslavement of the indigenous peoples, which underscored much of the history thereafter. The conquest of Brazil involved a protracted and complex course which spanned vast distances, various tribes and periods. As a result of the large-scale import of enslaved Africans, Brazilian culture and heritage is closely linked to those in Africa (Meyer, 2010).

Brazil is the only nation in South America whose language and culture derive from Portugal (Education Encyclopedia, 2018). Brazil has historically faced many challenges such as the lack of political and economic stability, long periods of high inflation, and an unplanned population growth, leading to major educational problems (Education Encyclopedia, 2018). Brazil is the largest and most populous country in South America, with a population of approximately 207 million people (One World Nations Online, 2018). According to a recent World Bank report which listed South Africa in first place as the most unequal country in the world, out of 149 countries, Brazil was in eighth place, followed by Colombia and Panama in ninth and tenth places respectively. This completed the top ten list of the most unequal countries in the world (Gous, 2018).

Modern day Brazilian society is composed of different ethnic and racial groups and is characterised, in cultural terms, as one of the richest in the world. However, according to a United Nations Educational, Scientific and Cultural Organisation (UNESCO) report, its history is marked by inequality and discrimination, specifically against Blacks – based primarily on skin colour and physical appearance, and Indigenous Peoples, impeding their full economic, political and social development (UNESCO, 2018a). Following the annihilation of the local indigenous inhabitants during the 17th Century, approximately 3.65 million enslaved Africans were brought to Brazil (Minority Rights Group International, 2018). Afro-Brazilians who self-identify as a political minority despite being a demographic majority continue to face multiple impediments to the full enjoyment of their human rights (United Nations General Assembly Human Rights Council Session, 2016:1).

Brazil is a Presidential Federated Republic in which the exercise of power is attributed to distinct and independent organs which are subject to a system of balances in order to guarantee compliance with the laws of the Constitution (Presidency of the Republic of Brazil, 2018a). Brazil is a federal republic consisting of 26 states, a federal district and 5,507 municipalities. The states have powers to adopt their own constitutions and laws. Their autonomy, however, is limited by the federal constitution, which specifically protects human rights. Brazil's Federative Constitution (*Constituição Federal*) (The Federal Senate, 2018) came into being on 5 October 1988, thus its democratic regime is quite recent (Utsumi, 2014). Brazil's Constitution (The Federal Senate, 2018) is the fundamental law in Brazil, and is the seventh Constitution in Brazil's history, with the most amendments effected to date. The 1988 Constitution enshrines strong protections for racial equality and the promotion of the rights of all the citizens. The 1988 Constitution (The Federal Senate, 2018) is considered a milestone in Brazil's history, since it is the first one to grant several rights that were once privileges to few people. It is composed of 250 articles, which are divided under 9 titles, and the objectives of Brazil's Constitution are listed as the construction of a free, fair and egalitarian society for all persons (Utsumi, 2014). The

Brazilian fundamental principles, listed in the first four articles of the Constitution (The Federal Senate, 2018) define the political, social and juridical bases of Brazil as a democratic state, divided into three powers: the Executive, the Legislative, and the Judiciary (Presidency of the Republic of Brazil, 2018a).

Article 3 of Title I (Fundamental Rights) of the Brazilian Federative Constitution (The Federal Senate, 2018) sets out its fundamental objectives, *inter alia*, to: build a free, unified and just society; to reduce social and regional inequalities; and to promote the well-being of all without prejudice as to origin, race, sex, colour, age and any other forms of discrimination (The Federal Senate, 2018). Article 5 of the Brazilian Constitution (The Federal Senate, 2018) guarantees the right of all persons to equality before the law, without distinction, of Brazilians as well as foreigners residing in the country, the inviolability of the rights to life, liberty, equality, security and property on the terms set out in the Constitution (The Federal Senate, 2018). According to Article 5 of the Constitution, the practice of racism constitutes a crime that is not eligible to bail and does not have a statute of limitations (The Federal Senate, 2018).

The Commission on Human Rights and Minorities (CDHM) was created in 1995 after Brazil's participation in the UN Conference on Human Rights in Vienna (1993) (Sierra & Mesquita, 2015). Since its inception, the CDHM has been a useful resource for legislators addressing issues of human rights. It has also created a system of funding, in order to ensure its ability to continue executing programmes on human rights. The CDHM has published books, booklets, pamphlets and reports, and has participated in other educational activities. The CDHM is one of the 21 standing committees of the House of Representatives. It is a technical body composed of 18 representative members and an equal number of alternates, supported by a group of aides and administrative staff. Members are charged with receiving, reviewing and investigating allegations of human rights violations; discussing and voting on legislative proposals related to their subject area; supervising and monitoring the implementation of related government programmes; collaborating with non-governmental entities; conducting research and studies on the state of human rights in Brazil and abroad, including for the purpose of public disclosure and the provision of grants to other Committees of the House; and addressing concerns related to ethnic and social minorities, especially Indians and Indigenous communities, including the preservation and protection of popular and ethnic cultures in the country.

The Brazilian state's key mechanism for reporting human rights violations is the National Human Rights Ombudsman Office (United Nations Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2012:34). The Human Rights Ombudsman Office has competence to receive, analyse and process reports of human rights violations; for disseminating information and orientation about actions, programmes, campaigns, rights and care services, protection and defense, and for establishing accountability

with regard to human rights services at the federal, state and municipal levels (United Nations Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2012:34).

The channel for dialogue and engagement with civil society for receiving complaints and for disseminating information is the *Disque Direitos Humanos* (Dial Human Rights) Call Center: *Disque 100*. The service operates 24 hours a day, seven days a week. Calls are free of charge and may be made from anywhere in the country (United Nations Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2012:34). The *Disque 100* serves as a public call centre operated by the Ministry of Human Rights (MDH), and provides a direct channel for the receipt of complaints of racism (Presidency of the Republic of Brazil, 2018b). The confidential hotline can forward or refer cases on to the relevant authorities. On request, reports can be made anonymously and the hotline also offers advice and information regarding human rights (Presidency of the Republic of Brazil, 2018b).

The Ombudsman Office uses a system, namely the Care and Management Computerised System, developed on a free platform, *SIMEC – Disque 100: Direitos Humanos*. This tool organises information and data regarding the different vulnerable groups attended to systematically, including regarding the different modes of receiving reports, the violations reported, and the final recipients of the reports. Through the use and implementation of *SIMEC – Disque 100: Disque Direitos Humanos*, the Ombudsman's Office is able to monitor progress and generate reports throughout the entire investigation process. This technological apparatus allows speedy access to information on claims and more effective monitoring of actions, as they channel interventions and inspections directly to continuous violations (United Nations, 2012:34). The ongoing liaison and dialogue between the states, the Judiciary, and civil society organisations reinforces the importance of multi-stakeholder networks devoted to guaranteeing human rights, developing methods of protection, prompt attention and establishing accountability for reports of human rights violations (Brazilian Agricultural Research Corporation - *Embrapa*, 2017). In this regard, the Ombudsman Office continues to act directly in representative, collective cases, as well as in the resolution of social tensions and conflicts that involve human rights violations (United Nations Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2012:34). According to an article relating to a report released by the country's National Ombudsman of Human Rights, Brazil recorded a staggering 133,061 complaints of human rights violations in 2016, which included alleged violations of the rights of children, older persons, homeless persons, persons with disabilities, on the grounds of sexual orientation and gender identity, physical and psychological abuse, slave labour and inhumane prison conditions (Telesur, 2017).

The National Secretariat of Human Rights was founded by the Brazilian Government in 1997, in order to speed up a federal programme of human rights in Brazil. The thrust of this unique, first of its kind programme was to eliminate racial, ethnic and religious prejudice in Brazil (Brazilian Government, 2014). Brazil's Minister of the Secretariat for Policies to Promote Racial Equality (SEPPPIR) was created in 2003, in order to formulate and coordinate affirmative action policies, promote racial equality and ensure the rights of the Black population (Brazilian Government, 2014). After passing the Racial Equality Statute in 2010 (as described hereunder), the Brazilian National Congress has also passed laws which create quotas for Black people in federal universities, federal technical secondary education institutions and the public service. Brazil has thus adopted a series of dedicated laws on racial inequality. Law 7716 of 1989, as modified by Law 9459 of 1997, prohibits racism and discrimination based on ethnicity, religion or nationality, and criminalises racial discrimination and discrimination based on ethnicity, skin colour, religion and nationality.

The Law on Racial Equality 2010 (*Estatuto da Igualdade Racial*) (12.288 of 2010) was passed in 2010, with the purpose of guaranteeing to the Afro-Brazilian population, the achievement of equal opportunities, the support of ethnic rights and the struggle against discrimination and other forms of ethnic intolerance, in accordance with the equality provisions of the Constitution (Presidency of the Republic of Brazil, 2010). The statute issues a federal government mandate to administer programmes and specific measures for reducing racial inequality (Brazil, 2010). The adoption of affirmative action programmes by the Brazilian government is specifically mandated in terms of Article 15 of the Law on Racial Equality (Brazil, 2010).

Significantly, Article 51 of the Law on Racial Equality (Brazil, 2010) obliges the Federal Government to establish a Permanent Ombudsman for the Defense of Racial Equality, for the purpose of handling complaints of prejudice and discrimination based on ethnicity or colour and to monitor the implementation of measures to promote equality (Brazil, 2010). Article 52 of the Law on Racial Equality (Brazil, 2010) further endorses and guarantees the right of access of victims of ethnic discrimination to the Permanent Ombudsman for the Defense of Racial Equality and other relevant organs of state, for the fulfillment of their rights in all instances.

The statute is significant as it is the first racial equality legislation in the region to articulate government goals for promoting racial inclusion. In contrast, throughout the rest of Latin America, victims can draw upon only broad constitutional principles of equality (Hernandez, 2013:129). However, the statute has been criticised by Afro-Brazilians as being merely aspirational and failing in practice to provide concrete rights in order to enforce equality (Alves, 2010). An average of 364 complaints per day were reportedly made to Brazil's "Dial Human Rights Hotline" during 2016, and while extremely high, that year reportedly experienced a

decrease by 3.3 percent from 137,517 reports to the hotline during 2015. The toll free hotline, *Disque Igualdade Racial* (Racial Equality Hotline), was created by the Brazilian Government in order to receive and refer race-crime reports to the appropriate and competent authorities. The creation of the hotline is a forward-looking initiative by the Brazilian Government, which was the first in the world to create a secretariat at the highest level of federal administration (with ministry status) so as to address racism. Brazil was also the first country in the world to institutionalise the discussion of racial equality policies and is considered an international model in the area (Brazilian Government, 2014).

There are some positive institutional initiatives at the federal and state levels which advance the rights of minority communities. Of particular note is the establishment of federal secretariats with the same status as ministries on issues relevant to minority rights, including the Secretariat for Policies for the Promotion of Racial Equality, the Special Secretariat for Human Rights and the Secretariat for Policies Involving Women's Rights. In October 2015, these secretariats were merged into one larger Ministry of Women, Racial Equality and Human Rights (United Nations General Assembly, 2016:7). According to a UNESCO report (UNESCO, 2018b), despite considerable and innovative work in promoting human rights, Brazil still has some challenges as there is no expressive understanding of the universality and indivisibility of civil, political, social, economic and cultural rights – thus there is still a large number of people who continue to encounter major difficulties in exercising their citizenship and their basic rights.

The Brazilian example provides a number of useful insights and lessons pertaining to South Africa. Specific legislation has been created to guarantee the achievement of equal opportunities by the Afro-Brazilian population, to support ethnic rights and the fight against discrimination and other forms of ethnic intolerance. The legislation further issues a federal government mandate to administer programmes and specific measures for reducing racial inequality, and for the adoption of affirmative action programmes by the Brazilian Government. Through this legislation, the Federal Government is furthermore obliged to establish a Permanent Ombudsman for the Defense of Racial Equality, in order to deal with related complaints and to monitor the implementation of measures meant to achieve equality. A free of charge 24/7 confidential public hotline for purposes of reporting discrimination cases, managed at Ministerial level, has been set up, and may also involve the referral of complaints to relevant authorities. Free information and advice on human rights issues are available, and where requested, complaints of racism may be lodged anonymously. The Brazilian example further demonstrates the innovative use of technology through the development and use of an electronic tool which allows quick access to information on claims and more effective monitoring of actions, as well as directly informing interventions and inspections with regard to continuous violations. The Brazilian example illustrates the effective use of an empirical informational

database relating to the nature and patterns of complaints. This information is then used to inform future strategies. The creation of a secretariat at the highest level of federal administration (at Ministerial level) in order to address racism is another feature of the Brazilian example, coupled with strong multi-stakeholder networks devoted to guaranteeing human rights, developing methods of protection, prompt attention and establishing accountability for reports of human rights violations.

The following section will reflect on the case of Rwanda, based on its history of colonisation as well as mass ethnic violence and killings during the 1994 genocide, which therefore necessitated post-conflict redress and reconciliation, so as to address the issue of impunity of the past and the impact thereof on the current social context of the country.

### **3.2.4 Rwanda**

Rwanda is a relatively small interior state situated in east-central Africa, with a population size of approximately 11.5 million people (One World Nations Online, 2018). As a country, Rwanda is still occupied with the national project of recovering from the ethnic violence which gave rise to state-sponsored genocide during the mid-1990s. During the Rwandan mass genocide, approximately 800,000 to one million ethnic Tutsis and moderate Hutus were slain and an estimated 150,000 to 250,000 women raped by the dominant Hutu groups within a period of a hundred (100) days starting from 7 April to 16 July 1994 (United Nations, 2018).

The Hutu extremists planned a mission of ethnic cleansing, in order to erase the whole Tutsi population. The mass violence was sparked by the shooting down of a plane carrying the then Rwandan President Habyarimana, a Hutu, as well as President of the neighbouring Burundi, on 6 April 1994, by a missile fired from Rwanda's capital city Kigali. Even though it was never established who was responsible for firing the missile which brought the plane down, the Hutu blamed the Tutsi and were thus prompted to execute their pre-designed systemic plans to start the genocide – due to an existing culture of institutionalised crime based on ethnic discrimination (National Commission for the Fight Against Genocide (CNLG), 2012). Preceding this event, there had been continuous tensions between the Hutu Government and the Rwandan Patriotic Front (RPF), referred to as the Rwandan Civil War, which started in 1990. The RPF was composed mostly of Tutsi refugees who had left Uganda due to Hutu violence against them (SoftSchools, 2018).

The Rwandan genocide was a systematic campaign by the Hutu ethnic majority targeted at eliminating the entire minority Tutsi group (Beauchamp, 2014). Hutu militias used one radio station *Radio Television Libres Des Mille Collines* (RTLM) to air a broadcast on 7 April 1994 inciting the Hutu to start slaying the Tutsi through a code slogan "cut down the tall trees",



referring to the Tutsi as “cockroaches” and inciting the Hutu to “crush the cockroaches” (United Nations, 2018). The strife between the Hutus and the Tutsis originated mainly due to economic factors. The Hutus, who formed the dominant populace of Rwanda, were traditionally crop farmers, whereas the Tutsis tended livestock. Related class differences eventually gave rise to perceived ethnic distinctions, associated with the notion that since cattle were more valued than crops, the Tutsi minorities were viewed as the more powerful group. An ethnic Tutsi elite minority had been the ruling monarchy for some time already when the Belgians took control of the land from Germany in 1917, after Germany had colonised it in 1884 (Beauchamp, 2014). The German and Belgian colonial control had further exacerbated these differences between the two groups, as the preferential support to the Tutsi monarchy further fueled the Tutsis being perceived as signifying colonial oppression for the Hutu majority (Beauchamp, 2014). This strife between the Tutsi and the Hutu groups continued beyond Rwanda’s achievement of independence which saw the Hutus, due to their size, easily winning the first national elections in 1961 (Beauchamp, 2014).

Almost immediately following the start of the genocide, the Tutsi rebel group RPF, led by Paul Kagame, began a military onslaught to overthrow the Rwandan Government, which was achieved in 100 days. Kagame, a Tutsi, then took over military and *de facto* leadership of the country, although a Hutu was made president with Kagame appointed as the vice president (Beauchamp, 2014). After the devastating genocide, Rwanda as a country was completely decimated and all its institutions of governance and infrastructure completely destroyed (Manyok, 2013:2). The genocide caused tremendous shock and horror both nationally as well as internationally, given the scale and brutality of the human rights violations and killings. Some of the most critical questions faced by the Government of National Unity which was put in place on 19 July 1994 (CNLG, 2012:15) following the Rwandan genocide, included how to ensure that those responsible for these gross human rights violations would be brought to book and how to end the impunity (Manyok, 2013:2). Since the Rwandan justice system had been destroyed and most judges and prosecutors were killed during the violence, alternative and innovative ways had to be found to ensure justice for the victims, to ensure that perpetrators of the genocide were brought to justice and to bring a measure of security and stability to the country (Manyok, 2013:3). Consequently, the International Criminal Tribunal for Rwanda (ICTR) was set up in Arusha, Tanzania, and adopted by the United Nations (UN) Security Council on 8 November 1994 (Powers, 2011), in order to deal with criminal aspects relating to the genocide, given the destruction of the Rwandan justice system (Tiemessen, 2004:58).

The jurisdiction of the ICTR was to prosecute the criminal suspects of genocide and other crimes against humanity which had been committed in Rwanda from 1 January to 31 December 1994, despite strong views expressed by the Government of Rwanda, supported by various

human rights bodies, that the period ought to extend to much earlier, as the genocide was pre-meditated prior to 1994. The ICTR started its work on prosecuting genocide-related crimes in 1996, however it soon became clear that the national justice system could not manage the high volume of cases involved (Wolters, 2005).

There were several shortcomings and challenges relating to the ICTR, which included amongst others that it did not address the societal requirements of reducing ethnic tension, encouraging peaceful reintegration, nation building and healing processes (Manyok, 2013:4). The ICTR system was also very slow and thus ineffective in dealing with the extremely high number of cases awaiting trial across the country. Between 1994 and 2012, a total of 95 genocide organisers were tried at the ICTR, meaning that at that pace, it would take several centuries for all alleged perpetrators to be brought to justice (Fried, 2017). Therefore, the Rwandan Government decided to step in by proposing an old indigenous mode of dispute resolution known as *Gacaca*, as a way in which to bring hundreds of thousands of alleged perpetrators to justice (Manyok, 2013:3). At the time, there were over 130,000 arrested and detained persons in prison in Rwanda after the mass violence, upon suspicion of committing acts of genocide (Tiemessen, 2004:1)

In *Kinyarwanda*, one of the official languages of Rwanda alongside English and French (Powers, 2011), the word *Gacaca* refers to “a bed of soft green grass” on which in ancient traditions, a community and mainly leaders, elders or individuals known for their integrity and wisdom gathered to discuss and resolve conflicts traditionally relating to domestic family matters or within or between community members (*Gacaca Community Justice*, 2018). If parties were not satisfied with the outcome, they could take their matter to the chief or even the king (*Gacaca Community Justice*, 2018). *Gacaca* courts therefore represent the concept of “judgment on the grass” originating from an indigenous community based system of restorative justice (Tiemessen, 2004:60). *Gacaca* is premised on truth telling and confessions, as well as meting out punishment to violators, while focusing on building harmony and contributing to social order. *Gacaca* also provides members of the community with an opportunity to participate in the proceedings, including on how to punish the human rights violators, as well as having a role to play in the reintegration of the perpetrators back into the community (Tiemessen, 2004:60).

During the period of colonial rule, a Western-style justice system was introduced in Rwanda, in effect weakening the tradition and trust in the traditional system. As a result, the *Gacaca* courts had diminished in stature and were only used in small villages for less serious crimes or conflicts (*Gacaca Community Justice*, 2018). Through the establishment of these courts in a modified format, in order to deal with the crimes of genocide, the Rwandan Government essentially endeavoured to address the shortcomings of the ICTR and thus sought to ensure

restorative justice in respect of over one hundred thousand genocide suspects. Given the ethnic strife, pursuing cases under the normal judicial system would have been problematic, given the difficulty in finding impartial judges and trustworthy witnesses (Manyok, 2013:5). Furthermore, the judicial system had almost entirely collapsed and there was a shortage of legal expertise and administrative staff (CNLG, 2012:5), given the devastation and loss of life caused by the mass killings. For these reasons, the Rwandan Government opted to go the route of the *Gacaca* courts system, given its commitment to restore and rebuild the national legal system following the genocide (Manyok, 2013:2).

Rwandan Organic Law was first conceptualised and enacted during 1996, following a period of extensive national discussion and consultation, for the specific purpose of prosecuting those suspected of committing acts of genocide (Tiemessen, 2004:61). The term “Organic Law” refers to the concept of application of both national and traditional/indigenous methods of justice, in order to enable the prosecution of crimes committed during the relevant period between 1990 and 1994 (Tiemessen, 2004:61). The Government of Rwanda promulgated Draft Organic Law of 1996 (8 of 1996) on 30 August 1996, which governed the prosecution of genocide and other crimes against humanity committed since 1 October 1990, so as to address the gap of a lack of domestic law to prosecute the genocide perpetrators at national level. This law contained two important innovations as compared with standard international human rights protection mechanisms. Firstly, it categorised alleged perpetrators into four various groups, and secondly, it allowed for the option of reducing punishments relating to the commission of the crime of genocide to all those who pleaded guilty, other than those falling within the first group (CNLG, 2012:17).

In Article 2 of the Draft Organic Law (8 of 1996), the first category included: the planners, organisers, instigators, supervisors and ringleaders of the genocide; leaders at the national, prefectural, communal, sector or cell levels that participated in genocide; well-known criminals and those who committed sexual torture. The second category included those who either committed or who were accomplices to acts of murder. The third category comprised of those alleged to have committed crimes involving other serious violence to individuals, while the fourth category involved those who were involved in inflicting damage to property (CNLG, 2012:18).

However the Rwandan Government encountered several challenges in implementing this legislation due to various factors, including that there was generally a denial of the genocide, a conspiracy of silence amongst detainees and a reliance on the hope by detainees that they may be acquitted due to a lack of evidence. As a result, the Rwandan Government, in particular the Ministry of Justice, conducted a mass awareness campaign in order to sensitise people about

the law and the benefits of the guilty plea in all detention facilities (CNLG, 2012:32). Following the creation of a legal framework in order to deal with the aftermath of the genocide, the re-establishment and strengthening of the Rwandan judicial system started with the employment and capacity building for the required judicial personnel (Butera, 2005:35). The genocide trials to achieve post-conflict justice commenced during December 1996, and the Rwandan judicial system was subsequently re-established, with trials proceeding smoothly and various role-players contributing actively in this regard. There was notable and continuous improvement in the administration of justice as a result of the richer experience and appreciation of the Organic Law of 1996 (8 of 1996). Much time and dedication was invested in ensuring justice, for example through the use of innovative judicial methods and increasing capacity through ongoing training and sensitisation efforts (Wolters, 2005:1). The Rwandan National Unity and Reconciliation Commission was established in 1999, with its core responsibility relating to coordinating reconciliation efforts in Rwanda (United Nations, 2018). The drawback of the legal system at the time, however, was the pace of the trials which was slow.

The *Gacaca* courts were thus established through the enactment of the so-called Organic Law of 2000 (40 of 2000) on 26 January 2001, which legislative framework took into cognisance the particular social, legal and political realities of the country in repurposing the traditional *Gacaca* to deal with the remaining genocide cases. The Rwandan Organic Law of 2000 (40 of 2000), adopted and enacted following several amendments, governed the establishment of *Gacaca* courts and set out the legal framework relating to the prosecution of genocide crimes as well as other crimes against humanity perpetrated between the period 1 October 1990 to 31 December (CNLG, 2012:33). The stated purpose and objective of the *Gacaca* courts included unveiling the truth about the genocide; speeding up the cases of genocide and other crimes against humanity; eliminating the culture of impunity; strengthening national unity and reconciliation amongst Rwandans and re-affirming the Rwandan peoples' ability to find solutions to their own problems (CNLG, 2012:33). The new Organic Law clarified the organisation, functioning and jurisdiction of *Gacaca* courts, matters related to the crimes and individuals prosecuted, as well as applicable sentences (CNLG, 2012:34).

A *Gacaca* court was set up starting from the most grassroots level in every cell, to every sector, district or town and province, including Kigali City in Rwanda. Each *Gacaca* court consisted of a general assembly, a bench and a coordination committee. The *Gacaca* court general assembly was tasked with a number of duties in relation to the *Gacaca* court, including presenting means of prosecution and defence evidence during the hearing; electing members of the *Gacaca* court bench and their substitutes; constituting necessary additional benches within the *Gacaca* court of the cell; electing members of the superior *Gacaca* courts and examining and adopting the

report of activities done by the coordination committee (CNLG, 2012:35). The members of the bench of the *Gacaca* courts, referred to as the *Inyangamugayo* judges, were Rwandans of good standing who were elected by the general assembly of the cell in which they resided. The elections of the *Inyangamugayo* judges were preceded by much campaigning and information sessions including radio broadcasting, in order to ensure the mass-scale support and participation of the Rwandan people. Prior to the *Gacaca* courts process starting, the Rwandan population was sensitised by leaders regarding the functioning of *Gacaca* courts, in order for the people to fully grasp that acting as an *Inyangamugayo* judge in a *Gacaca* court was unpaid voluntary work (CNLG, 2012:193). In order to ensure that the judges carried out their responsibilities optimally, much emphasis and focus was placed on capacitating them through training. Prior to the training of judges, trainers were trained with an emphasis on the Organic Law and the subject matter of genocide in general and against the Tutsi in particular, given the national context. The subsequent training of judges followed, with a focus on the objectives of the *Gacaca* courts and the analysis of these objectives; on the code of ethics of the judges; the functioning of *Gacaca* courts; the collaboration between *Gacaca* courts and judicial or administrative organs (Department of *Gacaca* Courts, Prisons, Police, Prosecution Office) and filling in of forms. As a result, the *Inyangamugayo* judges were well equipped to execute their roles. Notwithstanding, the Department of *Gacaca* Courts ensured that further and ongoing training sessions to build their capacity were conducted (CNLG, 2012:47-48). The *Gacaca* court hearings were generally open to the public, except in certain pre-determined circumstances including relating to maintaining public order. Motivated judgments were handed down in public by the bench, signed or otherwise endorsed by all members of the court who were part of the deliberations.

The *Gacaca* coordination committee of each *Gacaca* court comprised of a president, a first vice-president, a second vice-president and two secretaries, who were all required to be able to read and write *Kinyarwanda*. Members of the *Gacaca* court elected the coordination committee amongst themselves, based on a simple majority. The roles and functions of the *Gacaca* coordination committee were multi-fold, including: to convene and preside over meetings and coordinate the activities of the bench for the *Gacaca* court, as well its general assembly; to register complaints, testimonies and evidences given by the population; to receive and record files for suspects answerable to the *Gacaca* court; to register appeals filed against judgments passed by *Gacaca* courts; to forward files of judgments appealed against to the *Gacaca* courts of appeal; to register decisions made by organs of the *Gacaca* court; to prepare reports of activities of *Gacaca* courts; to implement decisions of the general assembly and those of the *Gacaca* court bench and to immediately transfer the report of activities approved by the general assembly of the *Gacaca* court to superior *Gacaca* courts (CNLG, 2012:38).

Each level of the *Gacaca* courts had specific roles and functions as provided for by law. The Department of *Gacaca* Courts within the Supreme Court came about as a result of the amendment of the Fundamental Law of the Republic of Rwanda (O.G 9 of 2000), which comprises a collection of texts with numerous components, on 18 April 2000. The functions assigned to the Department of *Gacaca* Courts included the coordination and control of the activities of *Gacaca* courts in Rwanda; ensuring continuous oversight of the overall functioning of the *Gacaca* courts and lastly, conducting periodic inspections of *Gacaca* courts in order to assess progress of activities. The *Gacaca* process started with a pilot phase, in order to test its functioning, check efficiencies and identify any loopholes, so as to inform strategies and mechanisms and to address gaps that may hamper the effective functioning of the *Gacaca* courts (*Gacaca* Community Justice, 2018). Lessons learnt during the pilot phase formed the basis for further and ongoing re-designing and reorganisation of the *Gacaca* court organs and for improving their functioning (*Gacaca* Community Justice, 2018a).

The Organic Law of 2004 (16 of 2004) of 19 June 2004, which established the organisation, jurisdiction and functioning of *Gacaca* courts, subsequently replaced the Organic Law of 2000 (40 of 2000), relating to the creation of *Gacaca* courts and governing the prosecution of genocide crimes and other crimes against humanity committed in Rwanda during the period 1 October 1990 and 31 December 1994 (Wolters, 2005:9). The repeal of the earlier Organic Law was mainly influenced by the lessons which had been learnt during the pilot phase, in order to improve the functioning of *Gacaca* courts. Regarding the Organic Law of 2004 (16 of 2004), the legislative framework was also revised and adapted whenever required for the purpose of strengthening the functioning of the *Gacaca* court system, or to address any challenges experienced relating to the daily functioning of *Gacaca* courts (*Gacaca* Community Courts, 2018b). Each legislative amendment was immediately followed by the provision of training to all the *Inyangamugayo* judges of the *Gacaca* courts, in order to empower them regarding the core aspects of the legislative amendment. Organic Law of 2004 (16 of 2004) was amended thrice: in 2006, 2007 and again in 2008 (CNLG, 2012:210). Some of the changes made related to the coordination of the activities of *Gacaca* courts and their functioning.

The National Service of *Gacaca* Courts (NSGC) was established as an independent structure, separate from the Supreme Court, as the body responsible for coordinating the activities of *Gacaca* courts and is provided for by the Constitution of the Republic of Rwanda (2003) of 4 June 2003, as amended to date (Official Gazette of the Republic of Rwanda, Special No of 04/06/2003) in Article 152. The organisation, attributions and functioning of the NSGC are defined by the Organic law of 2004 (8 of 2004) of 28 April 2004. According to Article 1 of the Organic Law (8 of 2004) of 28 April 2004, the NSGC is tasked with the follow-up, control and

coordination of activities of *Gacaca* courts, and is autonomous in administrative and financial management. The NSGC employed several qualified lawyers who were responsible for the coordination of the *Gacaca* courts' activities and provided legal support to the *Inyangamugayo* judges when required (CNLG, 2012:206). Some of the other responsibilities of the NSGC included ensuring the functioning of *Gacaca* courts and providing technical advice; resourcing the *Gacaca* courts with relevant materials; ensuring the proper functioning of *Gacaca* courts and the application of laws and regulations that govern them; supervision and ensuring that required measures are in place for the smooth running of *Gacaca* courts' activities and ensuring the coordination of all activities relating to the functioning of *Gacaca* courts (CNLG, 2012:61).

Thus, while Rwanda followed a retributive justice model at the national and international level, it applied the restorative justice model of *Gacaca* courts at the local level (Tiemessen, 2004:70). Organic Law applied to both the *Gacaca* and national courts. *Gacaca* had a much longer application in terms of time span than the ICTR, covering crimes committed between 1990 and 1994 (Tiemessen, 2004:60). The *Gacaca* courts had jurisdiction over the second to fourth categories of the Organic Law in respect of which punishments varied, but excluded the death penalty, ranging from life imprisonment to community service and reintegration. Plea bargaining was a further contentious but vital part of the process which provided for the option of immediate release once a suspect confessed. Prosecution of cases in *Gacaca* was a participatory community process, since a broad gathering took on the role of prosecutor to identify perpetrators and victims and put forth evidence (Tiemessen, 2004:60).

The *Gacaca* courts tried an overall number of 1,958,634 cases within a period of ten years, and thus demonstrated what the Rwandan Government had accomplished through the creation of the *Gacaca* courts, compared to what it might have achieved through the standard national judicial system (Dusabeyezu, 2013:26). The *Gacaca* courts closed on the 18 June 2012 after officially completing their work (*Gacaca* Community Justice, 2018b).

The NSGC set up a Documentation Centre on the *Gacaca* courts process, in order to memorialise the 1994 Genocide process, which contains all related written documentation such as the registers, notes of data collected, recordings, copies of judgments, names of *Inyangamugayo* judges and the like (CNLG, 2012:163). The sheer determination of the Rwandan people to reconstruct their country, the close cooperation between various national structures, together with the assistance and support of a number of other national and international role-players, made it possible to innovate the modified *Gacaca* court system to deal with genocide crimes, based on Rwandan traditions and culture. The funding assistance and resources offered were targeted particularly at capacity building, training of *Inyangamugayo* judges and other role-players operating in the *Gacaca* courts, supplying resources to the courts,

raising public awareness to encourage participation and support for the *Gacaca* courts process and capacity building for the staff of the NSGC, amongst others (CNLG, 2012:183-184).

According to the United States Institute of Peace (2018), Rwanda exemplifies an ambitious attempt, through a “top-down approach”, at reconciliation in a post-conflict society. Rwanda’s attempt at achieving mass community-based justice has been described as a “mixed success” (Human Rights Watch, 2011) and the model has been surrounded by much debate (Haberstock, 2014:9). Thus, although not without challenges, the *Gacaca* model provides useful lessons for post-conflict countries that may be seeking to ensure accountability and inspire public engagement (Longman, 2009:311). Amongst the major strengths of the *Gacaca* courts were their accessibility, highly participatory, community-based and restorative justice nature. Proceedings were carried out in the local language, within walking distances, using simplified procedures that did not require legal representation, and were more expeditious than formal court proceedings (Butera, 2005). The legislative framework was continually assessed, and where changing circumstances required this, the law was amended or adapted as required. Training was provided to judicial officials following each legal amendment, in order to ensure that they were kept abreast of any related legislative developments. A study conducted by the Centre for Conflict Management (CNLG) and the National University of Rwanda to assess Rwandans’ perceptions and views regarding whether the *Gacaca* system had attained its objectives, reflected an overwhelmingly positive response (*Gacaca* Community Justice, 2018).

The next section will draw some general observations which South Africa could consider in increasing the use of its equality courts in order to promote equality, based on the international case studies reviewed.

### **3.3 GENERAL OBSERVATIONS**

In light of the criteria used to select the specific international best practice examples of countries which are comparable to South Africa, a number of general observations can be made.

Political will at the highest levels and broad public support for the conceptualisation and establishment of these fora were important. It is vital to have a strong constitutional, legal and policy framework in place which responds to the specific national context. Specific legislation was in place to support these structures, underpinned by an appropriate regulatory framework. In one of the examples discussed, the establishment of the relevant structure began with a well-designed pilot phase in order to investigate and assess its functioning, evaluate efficiencies and find any loopholes, with the view to shaping future strategies so as to increase the effective functioning of the structure. The findings of the pilot phase informed the further and continuous re-design and adaptation of the structure to improve functioning.



Relevant legislation should be continually assessed, and where changing circumstances or the prevailing context so requires, the law should be amended or adapted as required. Any legislative changes introduced were immediately followed by the provision of training to relevant officials. Adequately capacitated, skilled and well-informed professional and administrative personnel are critical to ensuring the successful functioning of these structures. Well-defined roles and functions of the personnel supporting these structures are important in ensuring the effectiveness of the structures. In some of the examples discussed, the court administrative personnel performed quasi-judicial functions commensurate with the qualifications and training. Well-trained, impartial and socially aware judicial officers are important cornerstones of these structures. State investment in the continuous education, training and well-being of relevant personnel in these examples is evident.

The accessibility of the structures, simplified procedures, lack of requirement for legal representation, user-friendliness and lack of or minimal cost procedures were also key features underpinning the use of the structures and mechanisms. Public education and awareness campaigns aimed at increasing the public's knowledge, support for and understanding regarding the purpose and operation of these structures are key factors in ensuring the success of the structure. User-friendly guidelines, accessible information and advisory services in various languages, including free translation services and the availability of alternative methods for communicating with hearing and visually impaired persons, increased the usage of these structures.

Some of the examples had toll free hotline numbers for reporting cases and permitted anonymous reporting of violations, also providing free information and advice regarding human rights. The ability of these structures to submit periodic reports also increased the stature and awareness of the work of these tribunals or fora. Strong multi-sectoral stakeholder networks and strong coordination between relevant bodies helped to strengthen the effectiveness and usage of these structures.

Innovative methods of technology to support empirical-based interventions and the effective handling of claims, for example through the categorisation of similar or systemic claims, have assisted in increasing the effectiveness of these structures. Specialist skills and capacity to assist and support the work of the structures where this is required, for example with technical research work, are effectively used in some of the examples studied. The innovative use of periodic reporting has also assisted to further increase awareness and the effectiveness of these structures.

The following section deals with the conclusion of the chapter, after having discussed and reviewed the international examples of equality courts or structures.

### **3.4 CONCLUSION**

This chapter assisted in addressing the research question relating to what international best practice examples of equality courts (or similar tribunals or fora) convey about the reasons for their use, role and function in democratic states, by analysing international best practice examples of equality courts (or similar tribunals or fora), in order to determine the reasons for their use, their role and function within democratic states.

The chapter discussed and reviewed international examples of equality courts (or similar tribunals or fora) within New Zealand, Australia, Brazil and Rwanda, in order to determine the reasons for their use, their role and their function. The chapter investigated how each country's national policy, as well as the legal and institutional framework are shaped and influenced by its particular history and social context. In reviewing these selected international tribunals or fora, best practice was identified which was deemed to be relevant to the functioning of the equality courts in South Africa, and which may inform possible recommendations and strategies for the South African context.

The next chapter analyses the perceptions of the equality court clerks by focusing on the empirical investigation and findings relating to the study. It provides details of the data collected and observations made during the research study pertaining to the perceptions of equality court clerks in the DOJ&CD of the role, function, usage and status of equality courts. The challenges which were identified, what was confirmed and the outcomes are also detailed.

## **CHAPTER 4**

### **ANALYSING THE EQUALITY COURT CLERKS' PERCEPTIONS REGARDING THE FUNCTIONING OF EQUALITY COURTS**

#### **4.1 INTRODUCTION**

This chapter focuses on the empirical investigation and findings relating to the research study conducted. The chapter provides details of the data collected and observations made during the research study pertaining to the research objective to analyse the perceptions of equality court clerks in the DOJ&CD in relation to the role, functioning, usage, accessibility and status of equality courts. The challenges which were identified, what was confirmed and the outcomes are also detailed.

Throughout the chapter, reference is made to the literature review and the theoretical framework discussed in previous chapters, in order to support and confirm the findings that are presented, interpreted and analysed in this research study.

The chapter firstly considers the research methodology, describing how the methodology as described in Chapter 1 has been operationalised, including a discussion of the number of responses received and the coding of respondents. Thereafter a breakdown of the demographic information of the respondents is presented, according to age, sex, race, highest qualification attained and the number of years worked as equality court clerks. A thematic analysis is then undertaken, according to the emergent themes identified, followed by general observations and a conclusion.

#### **4.2 RESEARCH METHODOLOGY**

As discussed in Chapter 1, a mixed methods research strategy was used in order to explore the equality court clerks' perceptions of the role, functioning, usage and status of the equality courts, as well as presenting different demographic characteristics including race, gender, age, as well as years of service, employee development and mentorship, training, awareness of constitutional values, attitudes and culture. The results are analysed both qualitatively and quantitatively, in order to gain a comprehensive insight into the perceptions.

For the purposes of the study, as discussed in Chapter 1, the selected target population was all the equality court clerks currently appointed as such at the various designated lower courts within the Gauteng Province, and who had been trained within the last five years (proposed sampling frame). The rationale for this approach was based on considerations of practicality, proximity and considerations of time and costs.

Through a letter of introduction submitted, information regarding the purpose of the study, the possible advantages of the study for the DOJ&CD, and the request for endorsement and permission to involve the selected officials within the DOJ&CD for the purpose of the study were provided. Written permission was duly granted by the Director-General (DG) as the Accounting Officer of the DOJ&CD to conduct the research study in principle, subject to further discussion with the Deputy Director-General: Court Services Branch (DDG:CS), since the equality court clerks are located within this division of the DOJ&CD. By direction of the DG, the DDG:CS Branch was further consulted, and written permission and access to conduct the research study was subsequently also granted. In addition, the Office of the DDG:CS Branch facilitated further contact with the Acting Head:Gauteng Regional Office (GRO), as well as relevant line managers, informing them of the research study, providing them with a copy of the introduction letter and signed consent, and requesting their support and assistance with furnishing any information, documents or assistance requested with regard to the research study.

The Acting Head:GRO was contacted directly, in order to assist with furnishing information *inter alia* relating to the total number of equality courts in Gauteng; the total number of equality court clerks in Gauteng; the latest list of all appointed equality court clerks in Gauteng trained within the last five years, and any other relevant information which would be of assistance. The Acting Head:GRO indicated that this information would best be sourced from the Gauteng Provincial Area Court Managers for the Pretoria, Randburg, Germiston, Kempton Park, Johannesburg and Soweto court clusters. Thus the GRO's assistance was requested with facilitating an introduction and access to the relevant Gauteng Region Area Court Managers. The GRO assisted accordingly, whereupon the Area Court Managers were contacted directly via telephone as well as via electronic email, in order to follow up on the information requested, as well as to request a list with the names and contact details of the equality court clerks per cluster.

In some instances the requested information was provided immediately by the Area Court Managers, and in other cases several follow-ups had to be made in order to obtain this information. A noteworthy observation to be made is in relation to the levels of completeness and gaps or variation of the information provided in relation to what was requested. In a number of instances, specific details regarding the training of clerks were either not available or omitted, and in other instances, additional information was provided such as that pertaining to the availability of certificates of appointment of the clerks. A consistent lack of accurate, reliable information or certainty regarding the formal appointment, as well as availability of training records and dates of last training attended, in respect of clerks, was noted. As a result, this posed some challenges in forming a clear picture of the sampling frame from which the study

population was to be selected, due to the lack of information regarding the appointment and training of clerks. This was exacerbated by the fact that in some court clusters, particularly in the Johannesburg Central Court, a further inconsistency was evident in relation to the number of clerks who had been appointed and trained as equality court clerks and the number of clerks who are in fact actively utilised in the equality courts. Consequently, the approach taken was to include all the equality clerks in the Gauteng Region whose details had been provided by the Areas Court Managers in the study, thus deviating somewhat from the original sampling frame due to the factors mentioned above.

The table below illustrates the information solicited from each of the court clusters in Gauteng, based on the information requested and provided:

**Table 4.1: Breakdown of Gauteng court clusters, equality courts and equality court clerks**

<b>Court cluster</b>	<b>Name and number of equality courts</b>	<b>Number of equality court clerks</b>	<b>Other comments / observations</b>
<b>Randburg</b>	Randburg (1)	1	
	Roodepoort (1)	1	
	Randfontein (1)	1	
	Fochville (1)	0	Official appointed is on pension.
	Oberholzer (1)	1	
	Westonaria (1)	1	
	Alexandra (1)	1	
	Krugersdorp (1)	1	
	Kagiso (0)	-	It was indicated that this court has not been proclaimed yet, meaning that it is not in operation yet.
<i>Subtotal</i>	<i>8</i>	<i>7</i>	
<b>Johannesburg</b>	Johannesburg central (1)	14	It was indicated that 14 officials had been trained and appointed as equality court clerks during 2011. It was further highlighted that of these officials, only one is currently utilised actively as a clerk of the equality court,

			<p>while another official was utilised a few times during 2018. Thus, none of the other 12 officials, despite having been trained, have been utilised practically as equality court clerks, due to challenges that were reportedly already communicated to the GRO.</p> <p>It was further indicated that only 2 officials' certificates of appointment were available, whereas the other 12 officials' certificates were indicated as lost.</p> <p>It was noted that the certificate of appointment of the 1 clerk who was utilised a few times during the current year was amongst those whose certificates of appointment were recorded as lost.</p>
<b>Subtotal</b>	<b>1</b>	<b>14</b>	
<b>Pretoria</b>	Cullinan (0)	-	
	Mamelodi (0)	-	
	Ekangala (0)	-	
	Pretoria North (1)	2	
	Bronkhorstpruit (1)	2	
	Atteridgeville (1)	2	
	Soshanguve (1)	1	
	Pretoria central (1)	1	
<b>Subtotal</b>	<b>5</b>	<b>8</b>	
<b>Kempton Park</b>	Boksburg (1)	1	Court indicated as "active" but no matter currently on roll. One clerk went for training.
	Benoni (1)	1	Court indicated as "active".
	Brakpan (1)	1	Court indicated as "active".
	Daveyton (1)	0	Position vacant. Court indicated as "inactive" – no cases received to date.
	Kempton Park (1)	0	Court indicated as "active" however no cases / applications received during month of June 2018. No clerk is appointed but another official is assisting at the

			moment.
	Nigel (1)	1	Court indicated as "inactive" – no cases reported in spite of the sensitization of the public through educational programmes and road shows. It was indicated that there is an appointed clerk and clerk has received training.
	Springs (1)	1	Court indicated as "active" - currently has one matter that is being heard. There is no dedicated court room.
	Tembisa (0)	-	
	Tsakane (0)	-	
<b>Subtotal</b>	<b>7</b>	<b>5</b>	
<b>Germiston</b>	Germiston (1)	1	
	Heidelberg (1)	1	Indicated that a refresher course is needed.
	Meyerton (0)	0	
	Palmridge (1)	2	
	Sebokeng (1)	1	The challenge was noted that there were no cases for equality court for the past two years.  Imbizo is required, and the appointment of more than one clerk to do equality court cases.
	Vanderbijlpark (1)	1	
	Vereeniging (1)	1	It was indicated that training is needed for the clerk and to appoint another one
<b>Subtotal</b>	<b>6</b>	<b>7</b>	
<b>Soweto</b>	Protea (1)	1	The Soweto cluster comprises of 5 courts: 4 branch courts and 1 main court which is situated in Protea, where the equality court is situated. The equality court is currently used as a civil court. Cases for the equality court are hardly received. In 2017, only 1 matter was before the court but was struck off the roll, and one case was brought however the attorneys never continued with it. In 2018, no cases had been received as yet. The current equality court clerk was trained and appointed while still in JHB court and is retiring by the end of 2018. Another official was identified, however the court is still waiting for

			training after application for a course was submitted early during 2018.
<i>Subtotal</i>	1	1	
<b>TOTAL</b>	<b>28</b>	<b>42</b>	

Written requests with enclosed research questionnaires were distributed via email to the forty-two (42) equality court clerks, as per the lists provided by the Area Court Managers, requesting their participation in the research study within a specific timeframe. After several reminders and follow-ups were done via email, as well as telephonically over a period of approximately ten (10) weeks, seventeen (17) clerks out of the total of the forty-two (42) respondents responded to the request by completing and returning the questionnaires. Based on the above, the response rate achieved was thus 40.5%.

However this response rate must be considered against the background provided above, particularly in relation to the Johannesburg cluster, where only two (2) out of the list of fourteen (14) equality court clerks provided actually deal with equality court cases. Bearing this in mind, had only two (2) of the clerks in the Johannesburg court been included in the total of the target population, the response rate would be calculated based on the responses of seventeen (17) out of a total of thirty (30) clerks, thus 56.7%.

Only one of the two “active” equality clerks in the Johannesburg court responded by returning a completed form. Three other clerks from the Johannesburg court participated in the study – all three are currently “inactive” and one of these three is one of only two Johannesburg court clerks whose certificates of appointment are available. Thus, if one excludes the three inactive Johannesburg court clerks from the total of seventeen (17) who responded, this would reduce the actual number of respondents to fourteen (14) out of a total of thirty (30) targeted, thus indicating a 46.6% response rate.

Despite the low response rate, for which possible explanations are provided above, most of the respondents submitted relatively similar and re-enforcing answers, and thus it is argued that an additional number of respondents would have been unlikely to provide any different answers. Theoretical saturation can be employed as a principle for determining at what point to cease collecting new data on a specific theoretical notion, and to proceed to an analysis of the developing findings (Bryman, 2012:419). Thus it is posited that theoretical saturation has been achieved, since there is sufficient data to reproduce the study (Fusch & Ness, 2015).



Out of the seventeen (17) respondents, sixteen (16) respondents agreed and one (1) respondent did not agree to participate in the study. One other (1) respondent indicated via email, however without completing the questionnaire, that due to workload and constraints, he/she was not able to participate. Of interest is that quite a number of the equality court clerks with whom telephonic follow-ups were made, expressed reservation, reluctance and/or difficulty in participating in the study. The reasons mainly indicated included that they had either never dealt with any equality court cases before; that long periods of time had elapsed since they were trained as equality court clerks without any opportunity to apply their knowledge in any practical way, or due to a lack of any or a very low number of equality court cases presenting at the courts. In addition, a number of the equality court clerks indicated that although they had been appointed as equality court clerks, they were mainly being utilised in other areas or sections of the courts, for example, assisting in the civil sections, criminal sections, small claims court, cash halls or with taxations. A few of the equality court clerks also indicated that their high workload prohibited them from participating in the research study. In a few other instances, a lack of access to basic office equipment, such as a working computer or email, posed challenges with regard to participating in the study. There were also instances in which contact with a number of the respondents was not achieved at all, despite several emails and attempts to contact them telephonically, including on their cellular phone numbers provided as well as via text messages.

The research questionnaire comprised a combination of qualitative and quantitative questions. The questionnaire was divided into four (4) different sections, commencing with a section relating to respondents' demographic information, followed by a section relating to the respondents' knowledge of the legislation governing the equality courts, of the Regulations (South Africa, 2003) prescribing the administrative functions and duties of equality court clerks, as well as the training and capacity building of the respondents. The next section dealt with attitude questions in the form of a Likert-type scale, which was linked to the respondent's perceptions and beliefs with regard to the equality courts and their roles and functions as equality court clerks. The last section dealt with the challenges that the respondents experience which hamper their effective functioning and performance of their required roles and functions as equality court clerks, as well as the challenges relating to the public and communities' knowledge, awareness, access and usage of the equality courts which contribute to the low number of cases dealt with by the equality courts.

Thematic analysis involves the examination of data collected so as to extract core themes that could be distinguished between and within transcripts or respondent questionnaires (Bryman, 2012:13). A key feature of the process of identification of themes is through coding of each transcript or questionnaire (Bryman, 2012:13). The sixteen (16) respondents who agreed to

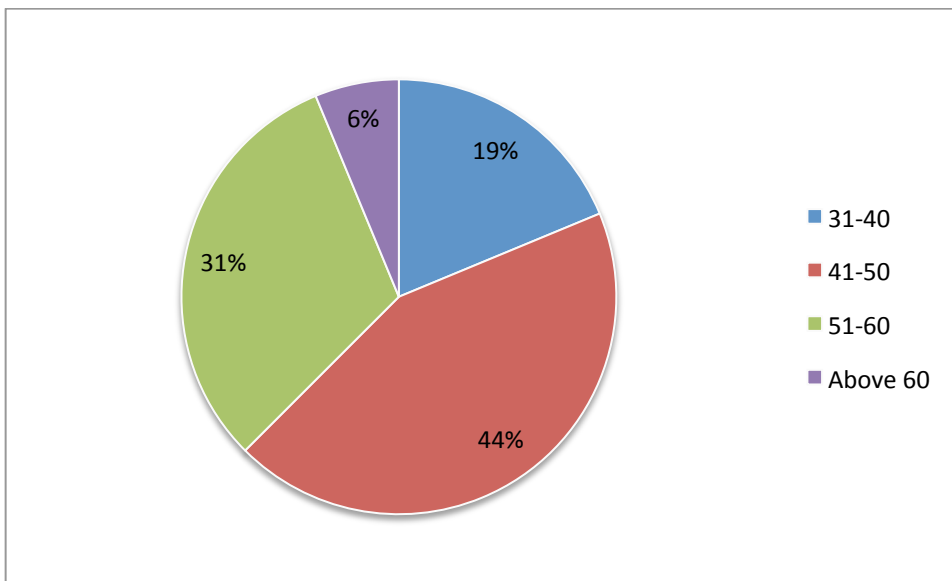
participate in the study are coded in the following manner as QR1, QR2, QR3 and so forth, according to the order of receipt of the completed questionnaire and will be referred to accordingly in this manner in this chapter.

#### 4.2.1 Breakdown of respondents' demographical information

Based on the sixteen (16) completed respondent questionnaires analysed, the following provides a breakdown of the respondents' demographic details.

##### 4.2.1.1 Age of respondents

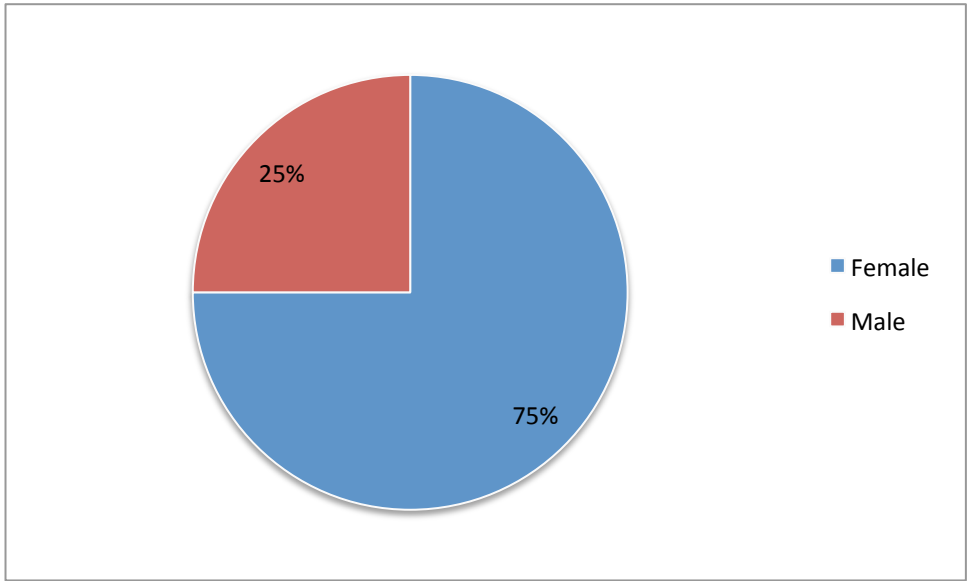
The figure below shows the age breakdown of the questionnaire respondents, indicating that most respondents fall within the 41-50 age category (44%), followed by five (5) in the 51-60 aged category (31%), thereafter three (3) in the 31-40 age category (19%) and lastly one (1) in the above 60 age group (6%). No respondents fell within the below 21 or the 21-30 age category. This analysis indicates that the majority of the respondents in the Gauteng region are middle-aged and above, with some soon reaching pensionable age. In comparison, only a small minority of the respondents fall within the younger age category.



**Figure 4.1: Age of respondents**

##### 4.2.1.2 Sex of respondents

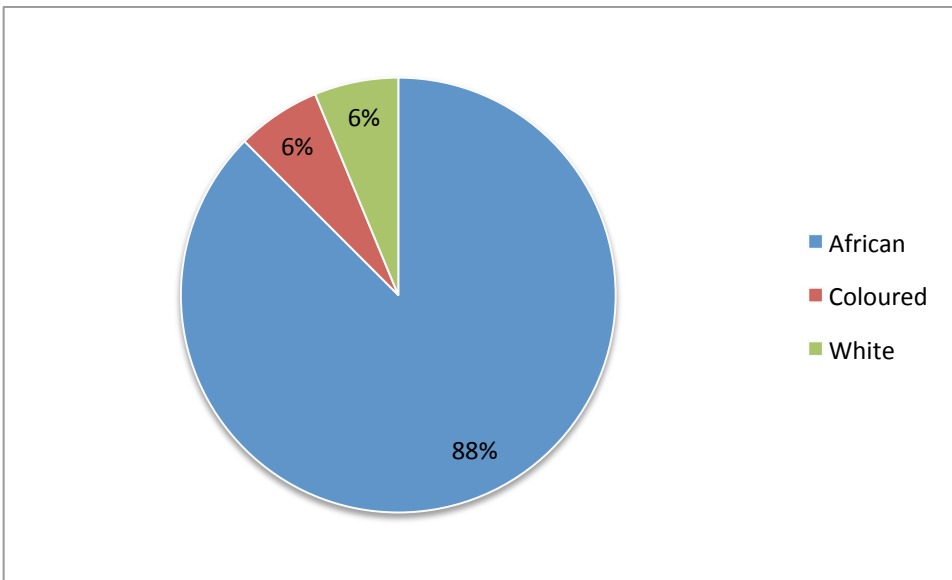
The figure below shows the breakdown based on the sex of the questionnaire respondents, indicating that twelve (12) of the respondents (75%) were female, compared with only four (4) males (25%).



**Figure 4.2: Sex of respondents**

**4.2.1.3 Race of respondents**

The figure below shows the breakdown by race of the questionnaire respondents, indicating that most respondents, a total of fourteen (14), fall within the Black African category (88%), followed by an equal number of one (1) from the Coloured (6%) race group and one (1) from the White (6%) race group.

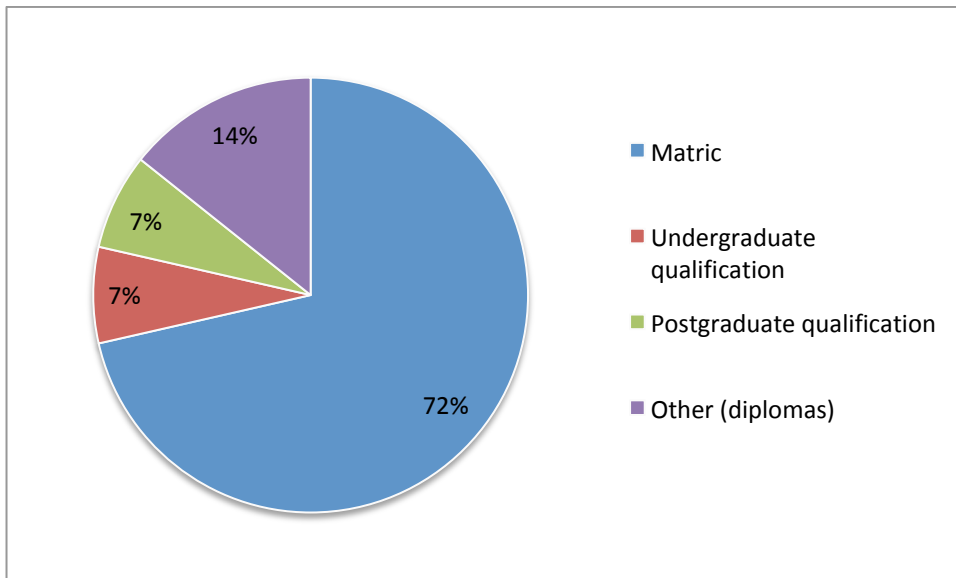


**Figure 4.3: Race of respondents**

**4.2.1.4 Highest qualification attained by respondents:**

The figure below shows the highest qualification attained by the questionnaire respondents, indicating that a total of ten (10) respondents have a matric qualification (72%), followed by two (2) who have other qualifications (diplomas) (14%), one (1) respondent with an undergraduate qualification (7%) and one (1) respondent with a postgraduate qualification (7%).

Most respondents therefore possess the minimum matric qualification which is the appropriate academic requirement to be appointed as a clerk of the court (DOJ&CD, 2017), with only a small number having further or higher academic qualifications.

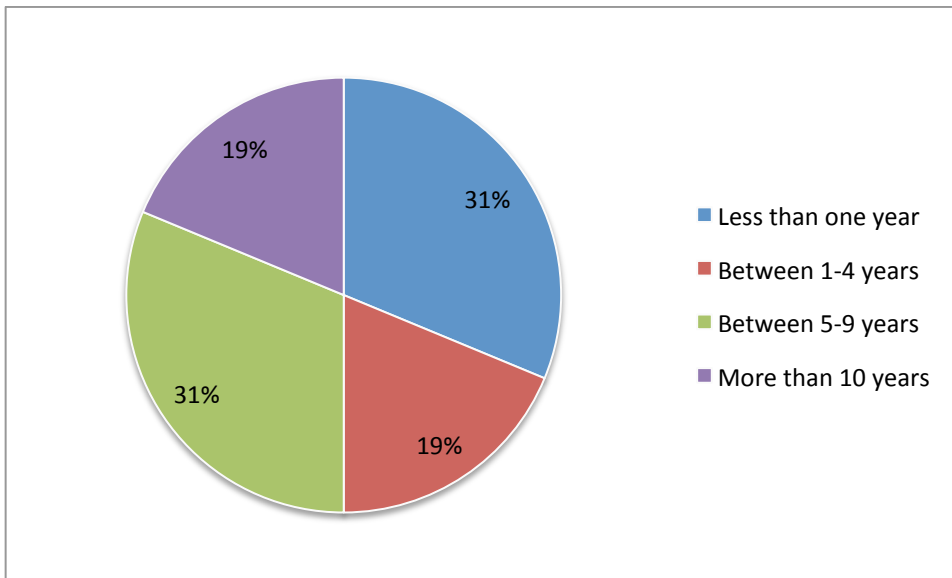


**Figure 4.4: Highest qualification attained by respondents**

#### **4.2.1.5 Number of years that respondents have worked as an equality court clerk**

The figure below shows the number of years that questionnaire respondents have worked as equality court clerks. An analysis of the data indicates that an equal number of the equality court clerks, a total of five (5), have worked as an equality court clerk for less than one (1) year (31%), a further five (5) worked as equality court clerks for between 5-9 years (31%), followed by three (3) who have worked in this capacity for between 1-4 years (19%) and three (3) who have worked in this capacity for more than 10 years (19%).

This also indicates that of the total respondents currently working as equality court clerks, only half of the respondents actually fall within the proposed sampling frame of the study i.e. those clerks that have received training within the last five (5) years.



**Figure 4.5: Number of years worked as an equality court clerk**

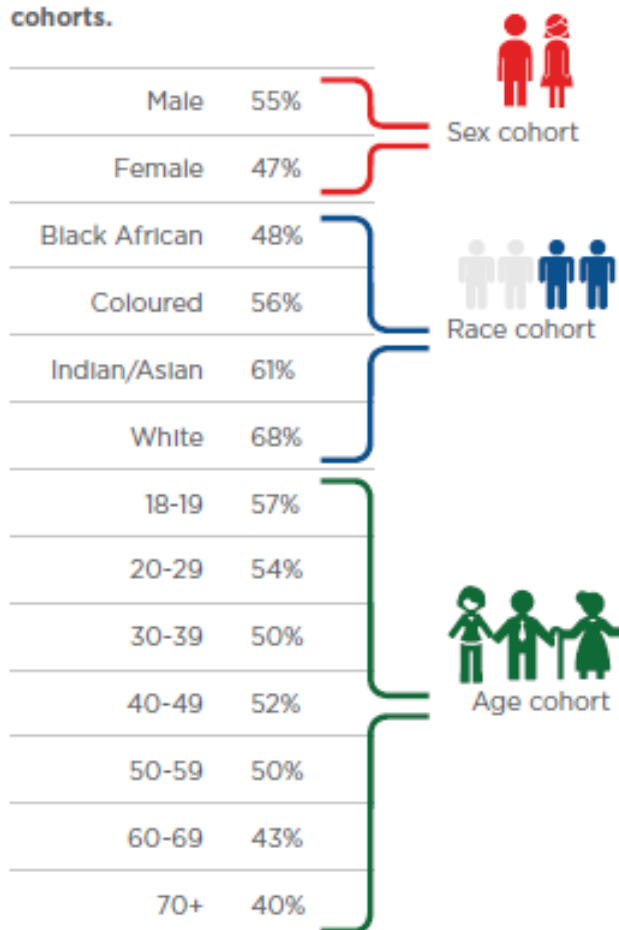
An analysis of the demographic information relating to the respondents, considered within the context of the background provided, indicates that the predominant profile of the Gauteng Region respondents constitute middle aged or older, female, African clerks with a matric qualification and who have worked as equality court clerks, either for only less than a year or for between 5-9 years. This analysis accords with the finding of recent studies indicating that women still mostly occupy lower level positions according to Statistics South Africa (Stats SA, 2018). The Stats SA report found that although South Africa has made significant progress regarding gender representivity, it is still below the 50% target for women occupying high level positions, with the majority of women employed as domestic workers (97%) or as lower level clerks (72%) (Stats SA, 2018).

According to a recent national baseline survey, overall levels of awareness of the Constitution have increased from 47% in 2011 to 51% today (Foundation for Human Rights (FHR), 2018:38). Knowledge of the Constitution is lowest in marginalised and vulnerable communities, the people who most need its protection. However, more concerning is the finding that less than half of the women (47%) in South Africa have heard of the Constitution or the Bill of Rights, in comparison with men (55%) (FHR, 2018:38).

As illustrated in the figure below, the survey also found that levels of awareness of rights differed across sex, race and age cohorts. In relation to the race of respondents, Whites were the most likely (68%) to have heard of either the Constitution or the Bill of Rights, followed by Indian/Asian respondents (61%). The majority (56%) of Coloureds had heard of either the Constitution or the Bill of Rights, however less than half (48%) of Black African respondents had

heard of either. Female Black African respondents were least likely (44%) to have heard of the Constitution or the Bill of Rights (FHR, 2018:38). According to the survey, the likelihood of having heard of the Constitution or the Bill of Rights decreased with age (FHR, 2018:39). Furthermore, the survey found different levels of awareness across provinces and that the largest proportions of low levels of knowledge included KwaZulu-Natal (46%) and Gauteng (41%) (FHR, 2018:52).

Levels of awareness differed across **sex, race and age cohorts.**



There were also very different levels of awareness **across the provinces.**

**Figure 4.6: Levels of awareness of rights differed across sex, race and age cohorts**

(Source: FHR, 2018)

In light of the above findings and the analysis of the predominant profile of the Gauteng Region respondents, this would indicate the need to ensure specific and ongoing training for the equality court clerks. Thus, in order to ensure that the requisite administrative support as required by the PEPUDA is available, the DOJ&CD, as the mandated government department

responsible for the administration of equality courts (DOJ&CD, 2018:11), would have to ensure that the equality court clerks are properly trained and capacitated on a continuous basis.

### **4.3 THEMATIC ANALYSIS OF EQUALITY COURT CLERKS' PERCEPTIONS**

A perception is “a belief or opinion, often held by many people and based on how things seem” (Cambridge Dictionary, 2018). Perceptions may be affected by beliefs, values, prejudices, expectations, and life experiences (Lumen Learning, 2018). Accordingly, perceptions may be described as subjective beliefs or opinions held by individuals or groups, and may be formed through, as well as influenced by, the individual's or group's own experiences, observations and knowledge, potentially resulting in certain types of behaviour linked to these perceptions.

This research study uses thematic data analysis to examine the combination of qualitative and quantitative data which was collected empirically, in order to develop the research findings. Thematic analysis involves the scrutiny of data gathered in order to extract core themes which may be ascertained between, as well as within, transcripts (Bryman, 2012:13). Thematic analysis is a recognised qualitative data analysis method which focuses on identifying patterned meaning across a data set (University of Auckland, 2018).

According to Braun and Clarke (2006), a six step process is employed to conduct thematic analysis, involving the following distinct steps: becoming familiar with the data, identifying initial codes, searching for themes, reviewing themes, defining and naming themes and finally producing the report. Various themes were identified arising out of the data collected. These themes were then reviewed, defined and titled accordingly. Thereafter an analysis of each theme was done as set out in the thematic analysis section below.

#### **4.3.1 Theme 1 - Legislation supporting the equality courts**

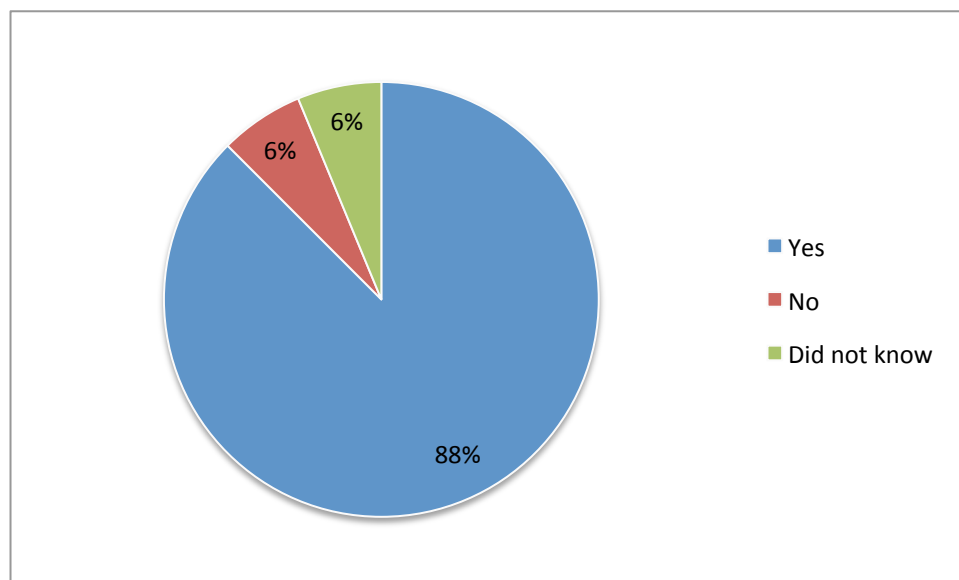
The first theme relates to the legislation supporting the equality courts. In Chapters 1 and 2, it was determined that the Constitution (1996), and in particular the PEPUDA (4 of 2000), are the most important pieces of legislation which govern the equality courts. The Constitution sets out the right to equality in Section 9 (1996) and the PEPUDA (South Africa, 2000) sets out the roles, functions and details regarding the appointment and training of clerks. The Regulations (South Africa, 2003) established in terms of Section 30 of the PEPUDA (South Africa, 2000) sets out the administrative roles and functions of the equality court clerks. Section 5 of the Regulations provides information relating to the additional functions of the equality court clerks, over and above what is already contained in the PEPUDA with regard to their standard administrative functions (South Africa, 2003).



With regard to the relationship between the Constitution (South Africa, 1996) and the equality courts, most respondents with the exception of a few appeared to have a basic level of knowledge in this regard. Verbatim responses indicating respondents' understanding of the relationship are presented below:

- *“Equality courts have been established to give effect to the rights and ethics entrenched in the Constitution”* (QR1, 2018).
- *“The Equality Courts exist because it is required in terms of the Constitution”* (QR3, 2018).
- *“The Constitution provides all people of South Africa equal rights and the protection of the law. The equality courts are there to enforce those rights and seek to build and protect our country in a way that people are living in a society that is based on principles of equality that are fair and just allowing people to live free and protected. A community that is equal and where their human rights and dignity are protected”* (QR4, 2018).
- *“The Constitution is guiding the equality court that all people are equal”* (QR9, 2018).
- *“The Constitution not only guarantees equality, but also requires the government to adopt other legislation to protect against unfair discrimination and equality to ensure that all people are treated the same”* (QR16, 2018).

An analysis of the data gathered reflects that most respondents possess a basic level of understanding of the relationship between the Constitution and the equality courts, and of the legislation supporting the equality courts, as illustrated in the figure below.



**Figure 4.7: Are the equality courts governed by specific legislation?**

In terms of what the respondents considered to be the most important legislation governing equality courts and the functioning of the equality court clerks, only eight (8), which comprises 50% of the respondents, appeared to be aware of or specifically named the PEPUDA (South Africa, 2000). After the PEPUDA (South Africa, 2000), the Constitution (South Africa, 1996) was mentioned most often as the most important legislation governing equality courts and the functioning of the equality court clerks in three (3) instances, followed by the Employment Equity Act (55 of 1998), which was mentioned in two (2) instances. In addition, respondents also referred to the Promotion of Administrative Justice Act (3 of 2000), the Promotion of Access to Information Act (2 of 2000), the Children’s Act (38 of 2005) and “...other items in the South African Law” (QR5, 2018). Half (50%) of the respondents either failed to answer the question at all or provided an indirect response, which possibly indicated that they are not aware that the PEPUDA is the most important legislation governing equality courts and the functioning of the equality court clerks.

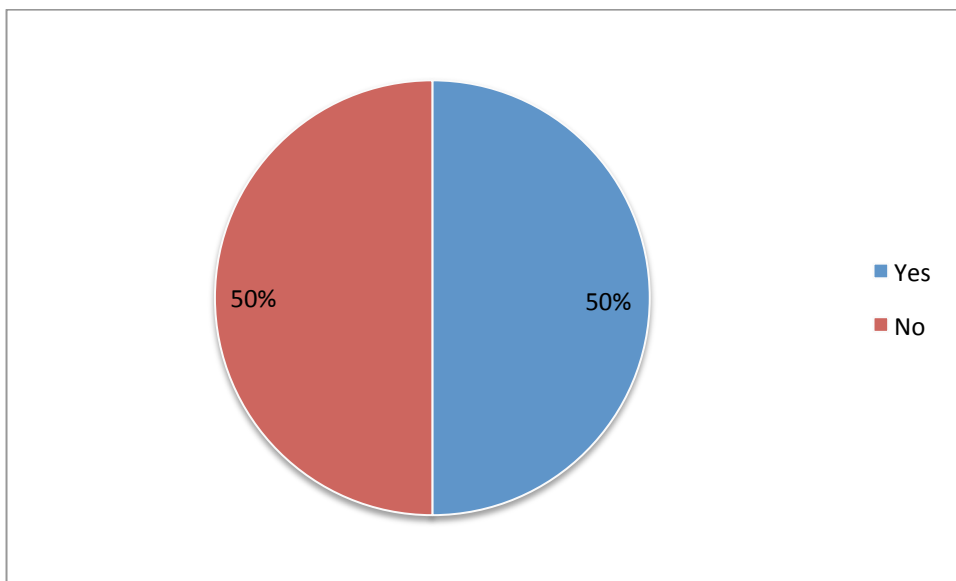
Respondents were also requested to indicate what they considered to be the most important parts in the legislation dealing with the functioning of the equality courts. The responses indicated a varied and low to basic level of understanding in this regard, as presented below:

- “Access to Justice, Promotion of Equality, Access to Information” (QR1, 2018).
- “It is important as its helps people without knowledge of how to be helped” (QR2, 2018).
- “1. Act. 2. Rules” (QR3, 2018) and “PEPUDA” (QR11, 2018).
- “The main purpose of the Equality Act is to: Prohibit and prevent unfair discrimination, prohibit and prevent hate speech, prevent harassment, promote equality and provide remedies for victims of unfair discrimination, hate speech and harassment” (QR4, 2018).
- “It is the eradication and elimination of unfair discrimination such as harassment, hate speech and to balance the imbalances of the past” (QR6, 2018).
- “Promote gender equality” (QR7, 2018).
- “Treating people fairly, unfair discrimination because of your religion, sex orientation, the colour of your skin. Things that were happening in the past but there were no courts” (QR9, 2018).
- “Most of people were discriminated against and there was no legislation before which assisted victims” (QR10, 2018).
- “Employment Equity Act” (QR13, 2018).
- “Prevention and general prohibition of unfair discrimination. Prohibition of unfair discrimination on ground of race. Prohibition of unfair discrimination on ground of gender. Prohibition of unfair discrimination on ground of disability. Prohibition of hate speech. Prohibition of harassment. Prohibition of dissemination and publication of unfair discriminatory information that unfairly discriminates” (QR15, 2018).

One respondent was unable to provide a response and explained: “I cannot remember as my current job description has no scope of Equality Courts” (QR5, 2018). From this response it is evident that not all of the trained and appointed equality court clerks actually work in the equality courts. In addition, three respondents (QR8, QR12, QR14) did not provide any response and one respondent was unsure in this regard (QR16).

These findings indicate that there is a worryingly low level of knowledge amongst respondents with regard to the most important parts in the legislation dealing with the functioning of the equality courts. This implies, practically speaking, that the equality court clerks that are entrusted with the responsibility and duty to ensure and assist with the effective function of the equality courts, do not know the provisions or the legislation governing their functions in this regard.

In terms of the respondents’ awareness of the standard administrative functions prescribed by the legislation dealing with equality courts, the table below reflects that only 50% of the respondents indicated awareness in this regard.



**Figure 4.8: Awareness of the standard administrative procedures prescribed by the legislation for equality courts**

Based on the analysis of the responses provided, it is concerning that only 50% of the respondents indicated that they were aware of the standard administrative functions assigned to them under the PEPUDA as the key legislation relating to equality courts. The practical implication of this is that only 50% of the respondents as public service officials would possess the requisite awareness and knowledge to be able to provide the necessary administrative

assistance to members of the public seeking assistance with bringing equality cases to these courts.

What this means in terms of the requirement of having a supporting legislative environment in place, as provided for in an earlier chapter on the legislative and regulatory environment, is that when those responsible for the implementation of the PEPUDA are unaware of their roles and duties, this undermines the effective functioning, usage and status of the equality courts.

The next section will consider a further theme which was identified relating to the administrative functioning of the equality courts, with specific focus on the administrative functions of the equality court clerks.

#### **4.3.2 Theme 2 - Administrative functioning of the equality courts and the roles and functions of the equality court clerks**

The second theme identified relates to the administrative functioning of the equality courts and the roles and functions of the equality court clerks. As mentioned above, the PEPUDA (South Africa, 2000) sets out the administrative functions, roles and duties of the equality court clerks. In addition to the PEPUDA provisions, the Regulations established under the PEPUDA (South Africa, 2003) set out the additional administrative functions of the equality court clerks.

Respondents were asked about their knowledge of the additional duties and functions of equality court clerks as prescribed by the Regulations. Their responses revealed a low to very basic level of knowledge and awareness in this regard. The responses also reflected a wide range of very well informed respondents to respondents with almost no understanding of their functions and duties.

QR4 (2018) indicated a very well-informed understanding of the administrative functioning and roles and functions of equality court clerks by stating that *“As an equality court clerk, I have the necessary knowledge, skills and experience to effectively carry out my roles and functions. As an equality court clerk, I receive ongoing, adequate and appropriate training to enable me to carry out my roles and functions effectively. Upon receipt of a written intention by a party to institute proceedings in terms of the legislation dealing with equality courts, as an equality court clerk, I must open a file and number the matter with a consecutive number of the year. As an equality court clerk, I am required to keep a detailed register of all matters, mark all documents as assigned to the matter and file on the appropriate file. As an equality court clerk, I am required to assist any illiterate person or person with a disability with the completion of any relevant document relating to the court proceedings to the best of their ability. As an equality court clerk, I am required to inform unrepresented or unassisted persons of their rights to representation or assistance. As an equality court clerk, I am required to inform unrepresented*

*or unassisted persons of legal assistance available from constitutional institutions or other non-governmental organisations. As an equality court clerk, I am required to inform and explain unrepresented or unassisted persons of their rights and available remedies in terms of the legislation dealing with equality courts. As an equality court clerk, I am required to assist unrepresented or unassisted persons by reading and explaining documentation to them. As an equality court clerk, I am required to assist unrepresented or unassisted persons by explaining the process or procedures relating to the attendance of witnesses to them. As an equality court clerk, I am required to subpoena witnesses to attend enquiries at the request of a party, or by the direction of the court I am required to inform witnesses that they are entitled to witness fees and ensure that a witness is assisted in this regard”.*

Towards the middle of the spectrum relating to the knowledge and level of understanding in this regard, QR1 (2018) stated *“To assist the court in performing its functions”* whilst QR16 (2018) mentioned *“When the clerk receives Form 2 they must open a file and number the matter and we must kept registers with the particulars of the parties involved; number the file; relief requested; date and the outcome of the enquiry and the outcome of an appeal or review”*. Then, on the complete other end of the spectrum, reflecting a very low level or no understanding at all of the administrative functioning of the equality courts, QR7 (2018) indicated that the role and functions of the equality court clerks are to *“Refer cases to alternative forums”*. QR10 (2018) mentioned that *“The additional duty of equality clerks is to look and find where discrimination come from. If it is a matter of equality, file must be open and send to the Magistrate”*, whilst QR5 (2018) contended that *“I cannot remember as my current job description has no scope of Equality Courts”*.

In a few instances no responses were provided, implying a possible lack of knowledge, and in other instances responses were submitted that comprised of information that appeared to be simply copied directly from the relevant legislation or guidelines. In one instance, a respondent indicated that they do not work in the equality court environment and in another instance, reliance was placed on referring to a manual for clarity. *“Always refer to the manual if you need clarity”* (QR13, 2018).

An examination of the responses provided reveals a similarly concerning level of awareness amongst respondents of the additional administrative duties and functions assigned to them in terms of the Regulations (South Africa, 2003). Practically this implies that only a small section of the respondents possess the requisite awareness and knowledge of the practical additional administrative assistance which they are required to provide to members of the public seeking assistance or redress for violations of the right to equality brought to the equality courts.

Respondents were asked to indicate what they considered to be the most important functions of an equality court clerk, and their responses are presented below:

- *“Give guidance to the public and assist the court”* (QR1, 2018).
- *“All functions are important”* (QR3, 2018).
- *“Impartiality is key”* (QR5, 2018).
- *“To facilitate the process of the Equality Act to the satisfaction of the equality court processes, without being biased or judgmental”* (QR6, 2018).
- *“To help people to fill in forms & explain forms to them”* (QR7, 2018).
- *“To interview the complainant thoroughly because this is where the case is being built. Then when the clerk is satisfied that it is an equality court case, open a file”* (QR9, 2018).
- *“Is to get the story and if it is really the matter of equality then open a file”* (QR10, 2018).
- *“Refer to a Guide to the Equality Court Manual”* (QR11, 2018).
- *“To provide information. To prepare a file for consideration. Finalise the matter and court proceedings”* (QR12, 2018).
- *“Making sure that all people who need help get it without any problem”* (QR13, 2018).
- *“Upon receipt of a written intention by a party to institute proceedings in terms of the legislation dealing with equality courts, as an equality court clerk, one must open a file and number the matter with a consecutive number of the year”* (QR15, 2018).
- *“Institution of proceeding; notification to the respondent; referral to presiding officer and the clerk must not be biased”* (QR16, 2018).

The Guiding Principles in Section 4 (1)(e) of the PEPUDA emphasises “the development of special skills and capacity for persons applying this Act in order to ensure effective implementation and administration thereof” (South Africa, 2000). By implication, there is an obligation and expectation on the equality court clerks to play a unique and significant role in order to ensure that the PEPUDA indeed achieves the facilitation of a transition to a democratic society (South Africa, 2000).

The responses reflected that although respondents generally regarded their roles as important, they viewed their functions as predominantly clerical, thus alluding to a rather simplistic and detached view of their functions and roles as equality court clerks. The findings of the study show that there is a considerable disconnect between the equality court clerks’ view of the importance and essence of their functions *vis-à-vis* what the PEPUDA envisages their role and functions to be. The responses of most of the respondents indicate that they have a low to basic level of understanding of what the administrative functions of the equality courts entail, and generally perceive their functions as predominantly perfunctory and repetitive in nature. Examples of this are QR9 (2018) stating that *“Opening the file and giving it a reference*

*number*”, QR12 (2018) mentioning *“Bringing matter to the magistrate for consideration”*, which was corroborated by QR11 (2018) who noted that *“Completion of forms and opening of court file. Numbering and registering the case to the necessary register, therefore submit the file to the magistrate to decide”*.

A number of respondents’ perceptions displayed a basic level of understanding of the administrative functioning of the equality courts. *“Make determinations on prohibited conduct and make appropriate orders”* (QR1, 2018); *“Set out in Regulations”* (QR3, 2018); *“It entails screening of the complainants and to make sure to correct processes and the use of the prescribed forms is adhered to correctly and precisely in consideration of the time frame in each piece of legislation”* (QR6, 2018) and *“To listen to the matter and open a file if necessary and give it a case number”* (QR10, 2018).

One respondent expressed a different view stating that *“Teaching people of their rights”* (QR7, 2018) is what they considered to be the most important aspect of the administrative functions of the equality courts. In contrast, QR15 (2018) reflected quite a different opinion, stating that *“The enjoyment of all spirit of the Constitution. To give effect to the letter and spirit of the Constitution in particular: the enjoyment of all rights and freedoms by every person; the promotion of equality; the values of equality; the values of non-racialism and non-sexism contained in Section 1 of the Constitution; the prevention of unfair discrimination and protection of human dignity as contemplated in Sections 9 and 10 of the Constitution; the prohibition of advocacy of hatred, based on race, ethnicity, gender or religion”*.

The findings indicate some variance amongst respondents’ perceptions of the administrative functions of the equality courts. The responses reflect an apparent inconsistent understanding of their own role and function, as well as the regulatory environment which enables their functioning, thus falling short of the requirements imposed by the PEPUDA and the obligations assigned in the Regulations (2003), which arguably demand and envisage that the equality court clerks play a more specialised and active role. What this indicates is that there is a significant gap between what the legislative and regulatory framework requires and the actual level of understanding and awareness of the equality court clerks of the administrative functioning of the equality courts, including their additional roles, duties and functions as equality court clerks.

In a subsequent section of the questionnaire, respondents were asked to indicate using a Likert-type scale, whether they “strongly agree”, “agree”, “disagree” or “strongly disagree” with a number of statements relating to their attitudes and beliefs about the equality courts, their administrative roles and functions, as well as their knowledge, skills and experience to carry out these roles and functions effectively.

The table below provides an analysis of the findings in this regard.

**Table 4.2: Breakdown of equality court clerks' perceptions regarding administrative functioning**

No.	Statement	Strongly Agree		Agree		Disagree		Strongly Disagree	
		N	%	N	%	N	%	N	%
<b>C1</b>	The equality courts play a very important role in protecting all people in South Africa's rights to equality and not to be unfairly discriminated against.	7	44	5	31	3	19	1	6
<b>C2</b>	The equality courts are fully functional, well capacitated and competent to perform all of their functions as required by law.	5	31	7	44	4	25	0	0
<b>C3</b> <b>C4</b>	<i>Dealt with in analysis under Theme 3 below</i>								
<b>C5</b>	Upon receipt of a written intention by a party to institute proceedings in terms of the legislation dealing with equality courts, as an equality court clerk, I must open a file and number the matter with a consecutive number of the year.	9	56	6	38	1	6	0	0
<b>C6</b>	As an equality court clerk, I am required to keep a detailed register of all matters, mark all documents as assigned to the matter and file on the appropriate file.	12	75	3	19	1	6	0	0
<b>C7</b>	As an equality court clerk, I am required to assist any illiterate person or person with a disability with the completion of any relevant document relating to the court proceedings to the best of their ability.	12	75	3	19	1	6	0	0
<b>C8</b>	As an equality court clerk, I am required to inform unrepresented or unassisted	11	69	4	25	1	6	0	0



	persons of their rights to representation or assistance.								
<b>C9</b>	As an equality court clerk, I am required to inform unrepresented or unassisted persons of legal assistance available from constitutional institutions or other non-governmental organisations.	10	62	4	25	2	13	0	0
<b>C10</b>	As an equality court clerk, I am required to inform and explain unrepresented or unassisted persons of their rights and available remedies in terms of the legislation dealing with equality courts.	8	50	7	44	1	6	0	0
<b>C11</b>	As an equality court clerk, I am required to assist unrepresented or unassisted persons by reading and explaining documentation to them.	8	50	7	44	1	6	0	0
<b>C12</b>	As an equality court clerk, I am required to assist unrepresented or unassisted persons by explaining the process or procedures relating to the attendance of witnesses to them.	7	44	6	37	3	19	0	0
<b>C13</b>	As an equality court clerk, I am required to subpoena witnesses to attend enquiries at the request of a party or by the direction of the court.	9	56	6	38	1	6	0	0
<b>C14</b>	I am required to inform witnesses that they are entitled to witness fees and ensure that a witness is assisted in this regard.	9	60	2	13	4	27	0	0

One respondent did not provide any response to C14 (QR8, 2018). Overall, the findings reflect that the majority of the respondents generally and consistently display very positive and progressive attitudes and “strongly agree” with statements regarding the importance of the equality courts and their expected roles and functions as equality court clerks, thus positively re-enforcing the duties and functions as assigned by relevant legislation and guidelines.

Notwithstanding the aforementioned, there appears to be a contradiction between respondents' responses to these questions and their responses in previous questions when they were asked to elaborate on what they thought the standard as well as the additional administrative roles and functions of equality courts entail. The difference in the responses to the attitude questions could be ascribed to respondents responding to questions in a manner in which they consider or think that they are expected to respond, rather than what they truly believe.

Further analysis of the findings show that with regard to the respondents' views about whether the equality courts are fully functional, well capacitated and competent to perform all of their functions as required by law, 41% agreed while 31% strongly agreed that the equality courts are fully functional, well capacitated and competent to execute their legislated functions. Only 25% of the respondents indicated that they "disagree" with this statement. The argument can be made that even though the equality court clerks do not have a clear and full understanding of what their own functions and duties entail, they do perceive equality courts to be functioning well. This apparent disconnect will be further explored in the following section.

#### **4.3.3 Theme 3 - Capacity and training of the equality court clerks**

The third theme identified is in relation to the aspect of training and capacity of equality court clerks. As indicated in Chapter 1, the equality court clerks are required to complete a course approved by the Director-General of the DOJ&CD prior to appointment as an equality court clerk (South Africa, 2003). Furthermore, Section 31(6) of PEPUDA obliges the Director-General to develop and implement a training course for equality court clerks, so as to build a dedicated and experienced pool of trained and specialised clerks, capable of performing their functions and duties (South Africa, 2000). This should amongst other things be done by providing social context training and ensuring that the uniform norms, standards and procedures are observed by the clerks in performing their functions and duties (South Africa, 2000).

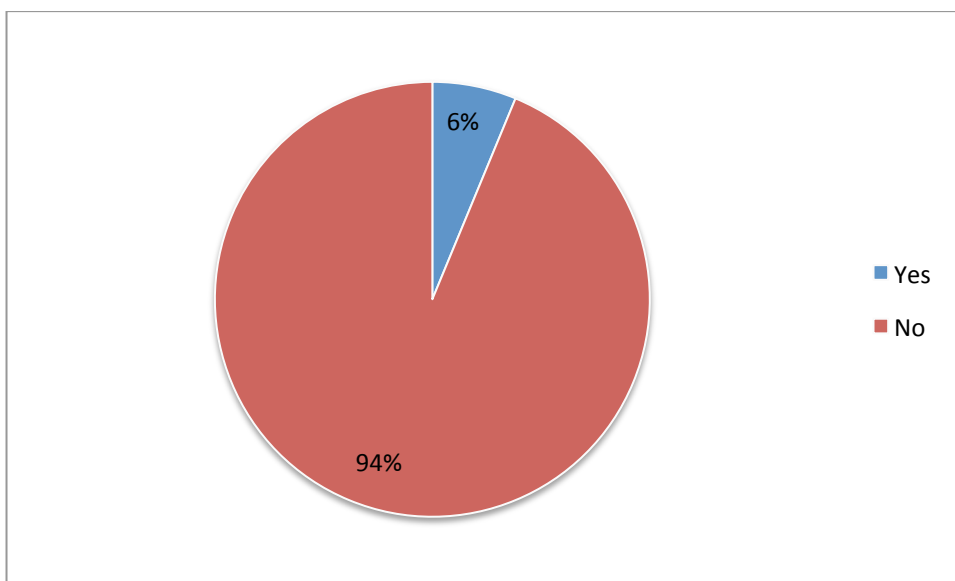
Respondents were asked to indicate whether they had completed any training course before being appointed as equality court clerks. The table below indicates the findings.

**Table 4.3: Completion of training courses prior to appointment as equality court clerks**

<b>Answer</b>	<b>Number of respondents</b>	<b>Percentage</b>
Yes	14	87%
No	2	13%

The findings reflect that most of the respondents, namely fourteen (14), comprising 87% of the respondents had undergone and received the basic required training prior to appointment as an equality court clerk. However, two (2) respondents (13%) did not receive any training prior to appointment. QR15 (2018) indicated that he/she attended the training, even though he/she is not actively working on equality cases.

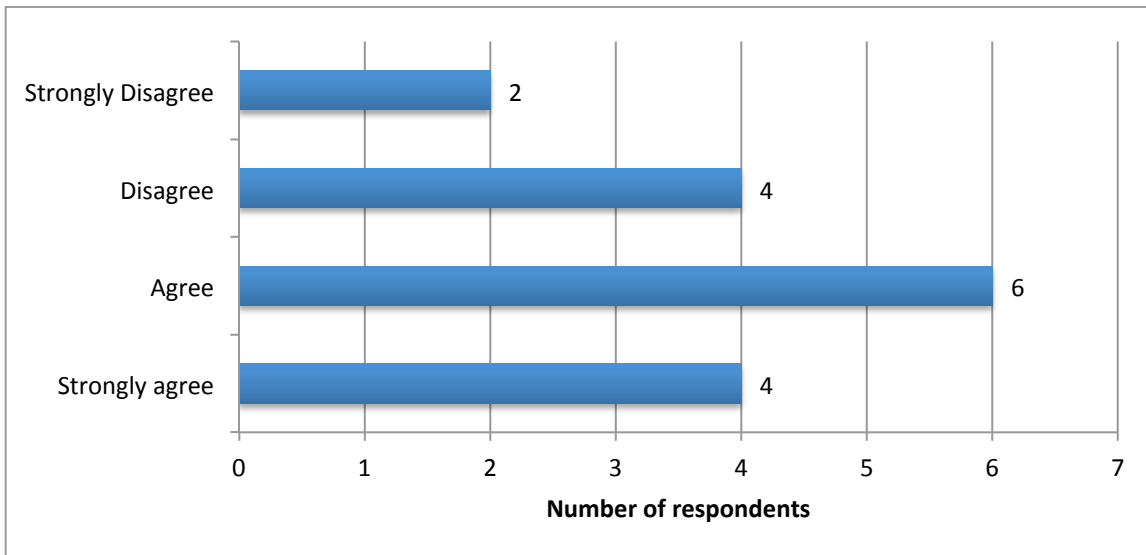
Respondents were also asked to indicate whether, since their appointment as an equality court clerk, they have attended any further training course(s) relating to the performance of their functions and duties as equality court clerks. All of the respondents except for one (1) indicated that they had not received any further training since being appointed as equality court clerks, as can be seen in the following figure.



**Figure 4.9: Received further training after appointment as equality court clerk**

Literature confirms that the state has failed to capacitate and establish a skilled cadre of equality court personnel (Kok, 2010:43-44). The findings reflect that an overwhelming majority of fifteen (15) respondents had not received any further related training following their appointment as an equality court clerk. Only one (1) respondent (QR10, 2018) indicated that he/she did receive further training, although the nature of this training was not ascertained.

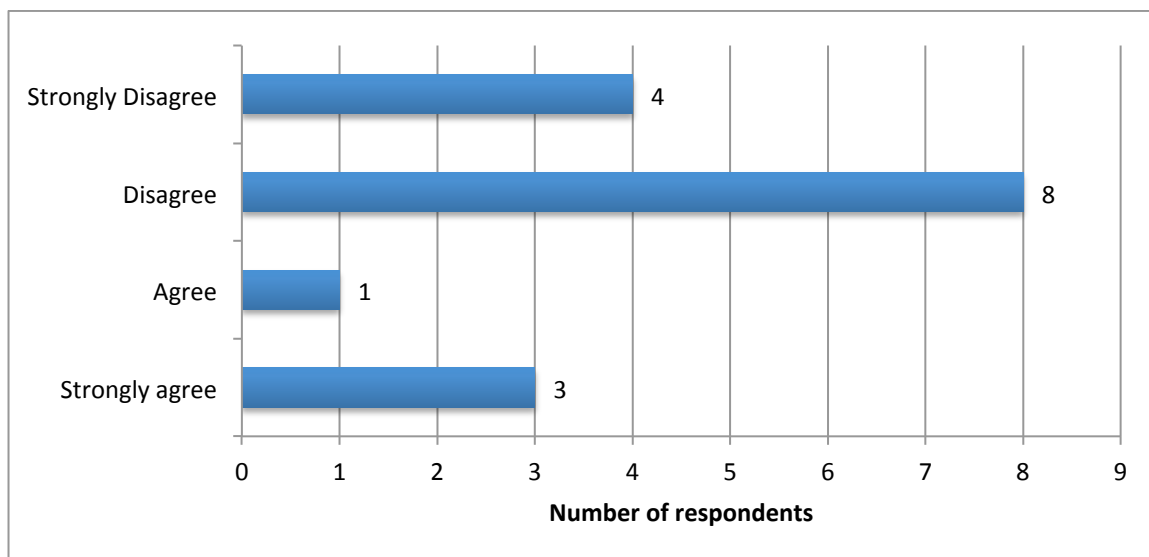
Respondents were requested to indicate using a Likert-type scale whether they “strongly agree”, “agree”, “disagree” or “strongly disagree” with statements relating to whether they believed that they have the necessary knowledge, skills and experience to carry out these roles and functions effectively. The findings are indicated in the figure below.



**Figure 4.10: As an equality court clerk, I have the necessary knowledge, skills and experience to effectively carry out my roles and functions**

An analysis of the data shows that the majority of the respondents (37%) “agreed” while 25% either “strongly agreed” or “disagreed”, and a smaller proportion (13%) “strongly disagreed” with the statement that they have the necessary knowledge, skills and experience to carry out these roles and functions effectively. What this shows is that the majority perceived themselves as capacitated, while 38% indicated their perceived incapacity in carrying out their responsibilities. Again, a contradiction can be observed between those who have been trained, their perceptions and actual statements regarding their roles and functions and the above indication that they have adequate knowledge, skills and experience to carry out their roles and functions.

Respondents were furthermore also requested to indicate using a Likert-type scale whether they “strongly agree”, “agree”, “disagree” or “strongly disagree” with statements relating to whether they believed that they receive ongoing, adequate and appropriate training in order to enable them to carry out their roles and functions effectively. The findings are indicated in the figure below.



**Figure 4.11: As an equality court clerk, I receive ongoing, adequate and appropriate training to enable me to carry out my roles and functions effectively**

An analysis of the data shows that an overwhelming majority of the respondents “disagreed” (50%), followed by 25% who “strongly disagreed” that they receive ongoing, adequate and appropriate training to enable them to carry out their roles and functions effectively. This should be seen in relation to the previous question where they indicated that they were appropriately capacitated to carry out their equality court responsibilities.

Only a small percentage of respondents (19%) “strongly agreed” and the smallest proportion of respondents (6%) “agreed” that they receive ongoing, adequate and appropriate training to enable them to carry out their roles and functions effectively. Again, a strong relationship exists with the previous findings where 38% perceived themselves as not fully capacitated, which would indicate a need for continuous and appropriate training of equality court clerks.

Based on the findings, while the respondents perceived themselves as capacitated and trained for their work as equality court clerks, the argument is made that considering their apparent lack of understanding of their roles and functions as set out in PEPUDA and the Regulations (2013), the need for continuous training is important although lacking in the DOJ&CD. These results, combined with the analysis and conclusions drawn earlier relating to the predominant profile of the respondents and recent survey findings relating to the level of awareness of the Constitution and Bill of Rights of these respondents, indicate that adequate and continuous training of equality court clerks would be conducive to the effective functioning of the equality courts.

The next section deals with the perceived challenges which hamper the usage, public knowledge and awareness, accessibility and effecting functioning of the equality courts.

#### **4.3.4 Theme 4 - Perceived challenges hampering the usage, public knowledge and awareness, accessibility and effective functioning of the equality courts**

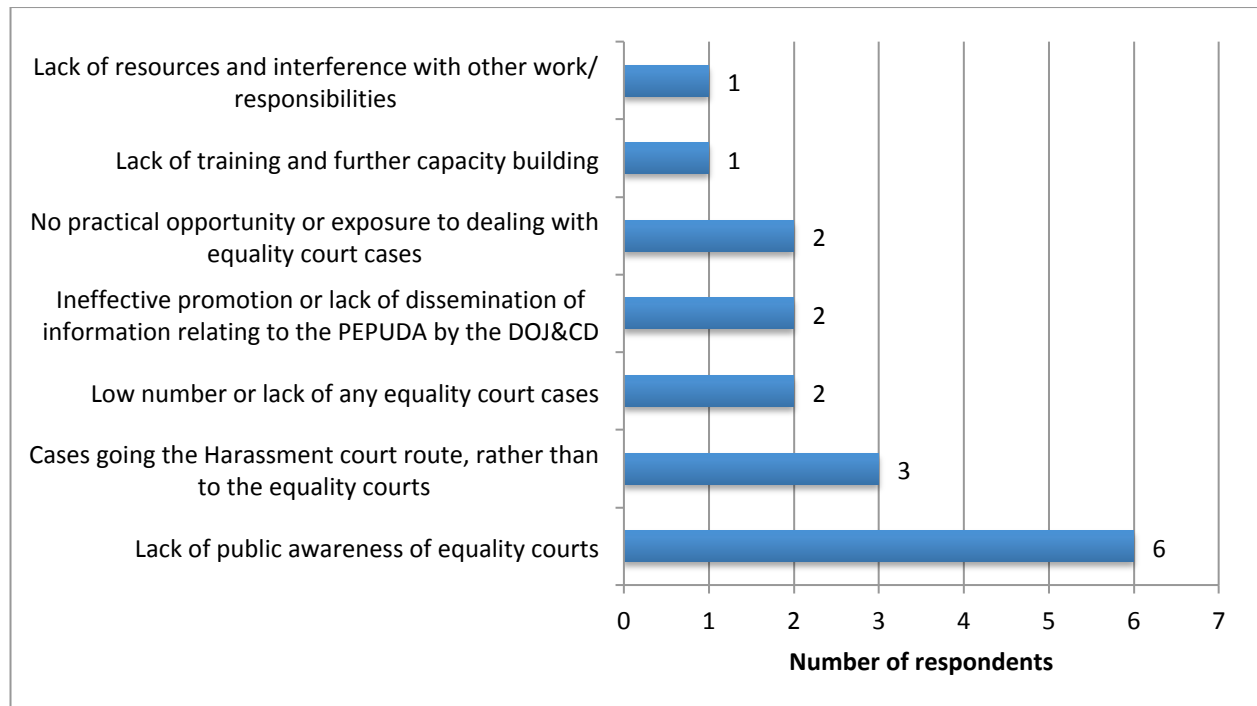
The fourth theme identified relates to the equality court clerks' opinions and views with regard to the challenges which they experience overall as hampering the usage, awareness, accessibility and effective functioning of the equality courts. The respondents' opinions were requested in open-ended questions relating to the perceived challenges hampering the use of equality courts and which contribute to the low number of cases dealt with by the equality courts. Respondents indicated that:

- *"Most people are not aware about equality courts and how it functions"* (QR1, 2018).
- *"I can't say as we don't have cases in court"* (QR2, 2018).
- *"We do not have an active court, therefore I cannot answer the question"* (QR4, 2018).
- *"People are not aware of Equality Courts, the court has low volumes"* (QR5, 2018).
- *"The challenges hampering the use of equality courts are lack of resources with interference of other responsibilities; lack of transparency and dissemination of information to the people the Act is objectively designed to service"* (QR6, 2018).
- *"Most cases are for harassment"* (QR7, 2018).
- *"I can't answer Section D because I was never given a chance to work as an equality clerk and I was the first person trained as an equality clerk. I went for training in the year 2002"* (QR8, 2018).
- *"Most of the people are not aware of the Equality Court"* (QR9, 2018).
- *"The challenges are that most people are not aware of the equality court"* (QR10, 2018).
- *"Since there is Harassment court in operation, most cases fall to Harassment court"* (QR11, 2018).
- *"Lack of knowledge by the society. They are not aware of what an Equality Court is"* (QR12, 2018).
- *"Since they introduced Harassment Court most cases fall to them"* (QR13, 2018).
- *"For now and for me it is to get training, its been years now since I was trained and did not do even a single case"* (QR14, 2018).

While the above quotes confirm a lack of awareness amongst the broader society regarding the existence and use of equality courts, one respondent indicated that *"The Equality Court should be promoted more effectively by the Department"* (QR3, 2018). QR15 (2018) argued that *"Equal access to courts is recognised as a fundamental human right in a plethora of human rights treaties. This right is critical because it facilitates access to and protection of other rights. However, for those living in poverty, particularly those with little formal education, the right of access to the courts is often illusory"*. Combined with the above findings that equality court

clerks themselves do not have a full understanding of their role, functions and duties, the lack of community awareness exacerbates the non-use of these courts.

Most of the challenges mentioned by the respondents relate to a lack of awareness by the public of the equality courts and the PEPUDA (South Africa, 2000). Thus challenges cited can be grouped as presented in the following figure.



**Figure 4.12: Perceived challenges hampering the use of equality courts and which contribute to the low number of cases dealt with by the equality courts**

The equality court clerks were asked about their views regarding the challenges relating to the public and communities' knowledge, awareness, access and use of the equality courts. Respondents indicated that:

- *“The concept has not been widely advertised to sensitise people about equality courts”* (QR1, 2018).
- *“It’s very difficult as they don’t have any knowledge with Equality”* (QR2, 2018).
- *“I think most people who do not know their rights are not aware that they are able to get help at court in this particular knowledge”* (QR4, 2018).
- *“People are not aware of Equality Courts, the court has low volumes and poor information”* (QR5, 2018).

- *“Lack of proper Equality Act marketing strategy. Lack of consistency in constantly spreading the information about the Equality Court Act, limited resources and drive to advertise and publicise the purpose of the Equality Court Act” (QR6, 2018).*
- *“Some people are not aware of equality courts. They stay in rural areas where they are still being abused by their employers and being discriminated against by their colleagues, employers and their next of kin” (QR7, 2018).*
- *“There is no awareness about the services of the equality court” (QR9, 2018).*
- *“There must be imbizos or the outreach to inform people about equality” (QR10, 2018).*
- *“Some public members are not familiar with equality court, or do not have knowledge of the Equality Court. Maybe if the campaigns can be conducted to make our community aware of the Equality court. The Equality cases are not as busy as other cases in our Court. We can only open one case per year or never open a case in a year” (QR11, 2018).*
- *“In most courts, equality court is replaced with the Harassment Act which is the most reason we have a low number of equality court cases registered” (QR12, 2018).*
- *“High legal costs and confusing, rigid procedures serve to keep poor litigants out of court and often result in loss when they attempt to represent themselves. In common law systems, in which judges’ precedential decisions define and shape the law, this lack of access affects more than individual litigants. It deprives society as a whole of the opportunity to benefit from judicial involvement in protecting the legal rights of the poor” (QR15, 2018).*

An analysis of the respondent’s views in this regard reflects that many of them identified the absence of a sustained and focused public or community awareness or education drive by the DOJ&CD in order to inform the public, especially in rural communities, about the equality courts and the PEPUDA (South Africa, 2000) as a key challenge. The corollary to this, which is also reflected to a large extent from an analysis of the data, is the respondents’ views that the lack of public awareness of the equality courts and legislation is the most serious challenge, which hampers access and use of the equality courts.

The responses also indicated various other challenges as factors hampering the accessibility and usage of the courts, as illustrated below:

- low volumes of cases;
- service of documents;
- cases being dealt with under the “Harassment Act” instead;
- limited resources;
- filling in of forms;
- legal representation (Legal Aid); and
- taking the forms to the police or sheriffs for service.



When asked whether equality court clerks perceived any additional challenges, QR 6 (2018) indicated that *“Equality courts clerks are not independently and solely focused on Equality Court Act processes. Their focus is divided into other responsibilities e.g. a civil clerk doing civil work can also be an equality court clerk”*. QR 16 (2018) mentioned that *“Yes I’m also the clerk of the civil court and the taxing master”*. QR12 (2018) argued that the *“Lack of Magistrate appointments in lower courts and the training of other clerks and of the police and the magistrates”* (QR12, 2018) contribute to the lack of awareness regarding the existence and use of equality courts, while QR 13 (2018) complained that *“The applicant will come and look for the forms to open an equality court case. After that he/she won’t bring them back to us”* (QR13, 2018).

Equality court clerks also identified physical resources as constraining their work. QR6 (2018) stated that the *“Lack of resources like an office, transport, proper functioning tools such as a computer, printer, scanner, access to internet, access to telephonic requirements and a free use of cellphones”* hamper their effective functioning. QR 7 (2018) highlighted that *“Some of cases are work related and being in equality court makes it very difficult, like the one of an asylum seeker who thinks they are being discriminated against if they don’t qualify for UIF”* (QR7, 2018). QR 13 (2018) corroborated this, contending that *“If you explain to the Applicant that that case does not fall under the Equality Court and they do not want to understand, insisting that is an equality case. To explain to them that they must take forms to the sheriff and there is a certain amount to pay they will tell you that but equality is free”*.

An assessment of the respondents’ views shows similarities and consistencies with earlier findings in respect of their perceived challenges, and an analysis of the results includes a number of common challenges such as: lack of public awareness of equality courts and understanding of the courts’ purpose; low number of cases brought to the equality courts; lack of access to basic resources and an insufficient number of trained and appointed equality court clerks. Recent literature confirms these practical challenges experienced by equality court personnel, indicating that the obligations placed on the equality court clerks may place unrealistic burdens on them and limit the actual and realistic achievement of such responsibilities (Judge & Emdon, 2018:25).

#### **4.4 GENERAL OBSERVATIONS**

An analysis of the responses indicates that there is an apparent low level of awareness of the legislative and regulatory framework governing the equality courts. The responses also indicate a lack of and an inconsistent understanding of their own role and functioning as equality court clerks, as well as of the regulatory environment which enables their functioning.

Based on the data collected and analysed, it is furthermore apparent that training of equality court clerks remains one of the key challenges hampering their effective functioning. The lack of awareness of the equality courts on the part of the public is another major challenge hindering the equality courts' promise, as espoused in the preamble of the PEPUDA (South Africa, 2000) of "facilitating the transition to a democratic society..."(South Africa, 2000).

Furthermore, the additional information and comments which accompanied the responses also provided extremely rich and useful insights into the practical challenges experienced. For example in some instances, information was furnished regarding cases where the equality court clerks would be retiring soon, the low number of equality court cases dealt with by some of the courts, a lack of dedicated equality court room space, or where the equality courts were, *inter alia*, used as civil courts instead. These insights proved useful in gaining a clearer, more nuanced understanding and appreciation of the working environment of the equality court clerks.

#### **4.5 CONCLUSION**

This chapter addressed the research question relating to what the available information/data which can be collected through conducting an empirical investigation states about the perceptions of equality courts. This is with regard to the status, usage, accessibility, role and functioning of the equality courts, by analysing the perceptions of court clerks in relation to the promotion of the status, usage, accessibility, role and functioning of equality courts.

The chapter focused on the empirical investigation and on presenting, interpreting and analysing the findings relating to the research study conducted. The chapter provided details of the data collected and observations made during the research study pertaining to the perceptions of the equality court clerks in the Gauteng region in relation to the role, functioning, usage, accessibility and status of equality courts. Demographic data was presented statistically, using numbers and illustrated by means of graphic elucidations. Thereafter, identified themes using thematic analysis were presented narratively using descriptive data and verbatim quotes.

The challenges that were identified, what was confirmed and the outcomes were discussed. Throughout the chapter, reference was made to the literature review and the theoretical framework discussed in previous chapters, in order to support and confirm the findings that were presented, interpreted and analysed in this research study.

## CHAPTER 5

### CONCLUSIONS AND RECOMMENDATIONS

#### 5.1 INTRODUCTION

The study commenced by identifying and articulating the research problem and subsequently alluded to possible answers through means of the research proposal, as discussed in Chapter 1. Chapter 2 of the study dealt with the theoretical orientation, statutory and regulatory framework and Chapter 3 discussed and reviewed international best practice examples of equality courts (or similar tribunals or fora), in order to determine the reasons for their use, role and function. Chapter 4 dealt with the collection and analysis of data, focusing on the empirical investigation, the findings and the challenges.

This chapter deals with the conclusions and recommendations and sets out the conclusions which arose from the findings, as well as the implications thereof. The chapter also proposes recommendations which may provide a framework for a way forward and/or for developing a strategy to address the identified gaps and shortcomings, so as to change and/or improve the perceptions of equality court clerks of the role, function, usage and status of equality courts.

The value and contribution of a research study should be reflected in the conclusions and recommendations and should be contextualised in terms of the research problems and/or research questions on which the study was based. The contribution of this study is to augment the body of Public Administration knowledge and to enhance the understanding regarding the perceptions of equality court clerks of the role, function, usage and status of equality courts and how these perceptions may impede or strengthen the effective functioning of the equality courts.

#### 5.2 CONCLUSIONS

This section provides a summary of the findings and conclusions reached, as well as the implications thereof, in each of the previous chapters. These are discussed in relation to the research objective and question that each chapter dealt with.

##### **5.2.1 Research objective: to describe theoretical approaches in analysing and understanding equality - Chapter 2**

The first research objective of the study was to describe theoretical approaches to analysing and understanding equality. Thus, the research question to be answered was: what are the theoretical approaches to understanding and analysing equality?

In answering this research question, the study considered the theoretical orientation by outlining a literature review of various theoretical approaches to understanding equality. For the purpose

of this study, the theoretical framework selected for understanding and analysing equality, and which underpins the philosophy for the creation of the equality courts, is Equity Theory, one of the theories of justice. The study discussed the history and origins of Equity Theory, its major proponents, as well as critiques of liberal egalitarian Equity Theory. It then considered contemporary egalitarian frameworks and perspectives on Equity Theory from an international human rights based approach, and a developmental as well as a South African stance.

From the literature review undertaken, it is evident that there are numerous theoretical approaches to understanding equality. The findings of the literature review further indicated overwhelming and broad consensus regarding the conceptual understanding of a substantive equality approach, based on the conceptions of redistributive justice and equity which acknowledge difference and disadvantage and which are concerned with the objective of providing redress for historical injustices to the most vulnerable and marginalised individuals, as the theoretical underpinning for the establishment of the equality courts in South Africa.

### **5.2.2 Research objective: to describe and analyse the statutory, policy and regulatory framework supporting the position, role and function of equality courts in South Africa as a democratic state - Chapter 2.**

The second research objective was to describe and analyse the statutory, policy and regulatory framework supporting the position, role and function of equality courts in South Africa as a democratic state. In this respect, the research question which had to be answered was: what is the statutory, policy and regulatory framework supporting the position, role and function of equality courts in South Africa as a democratic state?

In answering this research question, the study considered the statutory, policy and regulatory framework supporting the position, role and function of equality courts in South Africa, and specifically, equality court clerks within the DOJ&CD. The study found that the vision and overall goal of the Constitution (1996) is a transformative one, which is committed to the notion of substantive equality and which, as set out in the Preamble, seeks to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights. A further finding was that the WPTPS, which seeks to provide a policy framework and a practical implementation strategy for the transformation of public service delivery, is applicable to and therefore provides support for the administrative functioning of the equality courts. The review of the PEPUDA (South Africa, 2000) further demonstrates that there is a strong legislative and regulatory framework in place which supports the roles and functions of the clerks, as well as the administrative functioning of the equality courts. The study also found that there is alignment between the NDP (South Africa, 2011) and the PEPUDA (South Africa,

2000), as the creation of equality courts provides mechanisms through which redress for past imbalances, as envisaged by the NDP, may be sought.

The study concluded that the legislative and regulatory context provides a solid framework and strong support for the important position, role and function of the equality courts, as well as of the functions and roles of equality court clerks within the DOJ&CD. However, it established that it would be critical for the DOJ&CD, as the responsible department, to ensure that the equality courts are established, designated and are accessible throughout the country, and furthermore, that the required administrative support staff are adequately trained, capacitated and appointed to execute their roles in supporting the administration of the equality courts efficiently and effectively.

### **5.2.3 Research objective: to analyse international best practice examples of equality courts (or similar tribunals or fora) in order to determine the reasons for their use, their role and function within democratic states - Chapter 3.**

The third research objective was to analyse international best practice examples of equality courts (or similar tribunals or fora), in order to determine the reasons for their use, their role and function within democratic states. The following research question thus had to be answered: what do international best practice examples of equality courts (or similar tribunals or fora) convey about the reasons for their use, role and function in democratic states?

The study discussed and reviewed the international examples of New Zealand, Australia, Brazil and Rwanda, in order to investigate and demonstrate how each country's national policy and legal and institutional framework are shaped and influenced by its particular history and social context. Best practice identified in reviewing these selected international tribunals or fora, relevant to the functioning of the equality courts in South Africa, were highlighted, so as to inform possible recommendations and strategies for the South African context. In selecting the specific international best practice, specific criteria were used (comparable to South Africa), including that the country must be a democracy, that it must have had a historical context which necessitated redress and that the current social context of the country is important.

The findings of the study demonstrated that the policy and legal and institutional framework relating to each tribunal or forum (similar to the equality courts) were born out of a specific historical, social and national context. A number of observations were made regarding what was in place to make these structures work. These observations are reflected below in accordance with each of the themes identified:

#### **5.2.3.1 Legislation supporting the tribunals or fora**

- political will and commitment at the highest levels to support these structures;

- a constitutional, legal and policy framework responsive to the specific national context;
- specific legislation in place underpinned by an appropriate regulatory framework;
- regular review and assessment of relevant legislation in order to ensure responsiveness and adaptation to changing contexts;
- strong multi-sectoral stakeholder networks and strong coordination between relevant bodies helped to strengthen the effectiveness and usage of these structures.

#### **5.2.3.2 Administrative functioning of the tribunal or fora and roles and functions of the tribunal or fora's administrative staff**

- well-defined roles and functions of the personnel supporting these structures to ensure their effectiveness;
- in some of the examples discussed, the court administrative personnel performed quasi-judicial functions commensurate with qualifications and training;
- conducting well-designed pilots in order to investigate and assess the tribunal's functioning, evaluate efficiencies and find any loopholes, with the view to shaping future strategies so as to increase the effective functioning of the structure;
- continuous re-design and adaptation of the structure in order to improve functioning;
- innovative methods of handling claims, for example through the categorisation of similar or systemic claims, have increased the effective functioning of these structures.

#### **5.2.3.3 Capacity and training of the tribunal's or fora's administrative staff**

- legislative changes introduced were immediately followed by the provision of training to relevant officials;
- adequately capacitated, skilled and well-informed professional and administrative personnel in order to ensure the successful functioning of these structures;
- well-trained, impartial and socially aware judicial officers;
- state investment in the continuous education, training and well-being of relevant personnel in these examples is evident;
- specialist skills and capacity in order to assist and support the work of the structures where this is required, for example with technical research work, were effectively used in some of the examples studied.

#### **5.2.3.4 Perceived challenges hampering the usage, public knowledge and awareness, accessibility and effective functioning of the equality courts**

- broad public support for the conceptualisation and establishment of these fora;

- accessibility of the structures, simplified procedures, no requirement of legal representation, user-friendly and no or minimal cost procedures were key features underpinning the use of the structures and mechanisms;
- public education and awareness campaigns aimed at increasing the public's knowledge, support for and understanding regarding the purpose and operation of these structures;
- user-friendly guidelines, accessible information and advisory services in various languages including free translation services;
- the availability of alternative methods for communicating with hearing and visually impaired persons increased the usage of these structures;
- some of the examples had toll free hotline numbers available 24/7 for reporting cases and permitted anonymous reporting of violations where requested;
- strong customer service orientation and focus on regular feedback and interaction with relevant parties to proceedings.

In addition, the following observations were made relating to reporting and accountability frameworks:

- these structures submit periodic reports which increase the stature and awareness of the work of the structures;
- the innovative and strategic use of periodic reporting has assisted to further increase awareness and the effectiveness of these structures.

#### **5.2.4 Research objective: to analyse the perceptions of court clerks in relation to the promotion of the status, usage, accessibility, role and functioning of equality courts - Chapter 4.**

The fourth research objective was to analyse the perceptions of court clerks in relation to the promotion of the status, usage, accessibility, role and functioning of equality courts. In this respect, the following research question had to be satisfied: what does available information/data which can be collected through conducting an empirical investigation state about the perceptions of equality courts in relation to the status, usage, accessibility, role and functioning of the equality courts?

The chapter firstly considered the research methodology, describing how the methodology as defined in Chapter 1 had been operationalised, including a discussion of the number of responses received and coding of respondents. Thereafter a breakdown of the demographic information of the respondents was presented, according to age, sex, race, highest qualification attained, and the number of years worked as equality court clerks. A thematic analysis was then undertaken, according to the emergent themes identified, followed by general observations and a conclusion.

A mixed methods research strategy was used and the results were analysed both qualitatively and quantitatively, in order to gain a comprehensive insight into the perceptions of the equality court clerks. Thematic analysis was used to extract the core themes identified from the data collected, so as to develop the research findings. An analysis of the demographic information of the respondents indicated that the predominant profile of the Gauteng Region respondents constitutes middle aged or older, female, African clerks with a matric qualification and who have worked as equality court clerks either for only less than a year or for between 5-9 years.

The thematic analysis, firstly relating to the legislation supporting the equality courts, found that most respondents possess only a basic level of understanding of the relationship between the Constitution and the equality courts, and of the legislation supporting the equality courts. The findings further indicated that there is a worryingly low level of knowledge amongst respondents with regard to the most important parts in the legislation dealing with the functioning of the equality courts. This implies, practically speaking, that the equality court clerks who are entrusted with the responsibility and duty to ensure and assist with the effective functioning of the equality courts, do not know or are not aware of the provisions or the legislation governing their functions in this regard.

Furthermore, only 50% of the respondents were aware of the standard administrative functions assigned to them under the PEPUDA (South Africa, 2000), as the key legislation relating to equality courts. The practical implication of this is that only half of the respondents as public service officials possess the requisite awareness and knowledge to provide the necessary administrative assistance to members of the public seeking assistance with bringing equality cases to these courts. What this means is that since half of the respondents responsible for the implementation of the PEPUDA (South Africa, 2000) are unaware of their roles and duties, this undermines the effective functioning, usage and status of the equality courts.

The second theme identified related to the administrative functioning of the equality courts and the roles and functions of the equality court clerks. Respondents were asked about their knowledge of the additional duties and functions of equality court clerks as prescribed by the Regulations. Their responses reveal a low to very basic level of knowledge and awareness in this regard. The responses also reflected a wide range of very well informed respondents to respondents with almost no understanding of their functions and duties. An examination of the responses provided reveals a similarly concerning level of awareness amongst respondents of the additional administrative duties and functions assigned to them in terms of the Regulations (South Africa, 2003). Practically this implies that only a small section of the respondents possess the requisite awareness and knowledge of the practical additional administrative assistance which they are required to provide to members of the public seeking assistance or redress for violations of the right to equality brought to the equality courts. The responses



reflected that although respondents generally regarded their roles as important, they viewed their functions as predominantly clerical, thus alluding to a rather simplistic and detached view of their functions and roles as equality court clerks. The findings of the study show that there is a considerable disconnect between the equality court clerks' view of the importance and essence of their functions *vis-à-vis* what the PEPUDA envisages their role and functions to be. The findings indicate some variance amongst respondents' perceptions of the administrative functions of the equality courts. A further conclusion which was drawn was that even though the equality court clerks do not have a clear and full understanding of what their own functions and duties entail, they do perceive equality courts to be functioning well.

The third theme identified was in relation to the aspect of training and capacity of equality court clerks. Based on the findings, while the respondents perceived themselves as capacitated and trained for their work as equality court clerks, the conclusion drawn is that considering their apparent lack of understanding of their roles and functions as set out in PEPUDA and the Regulations (2013), the need for continuous training is important although lacking in the DOJ&CD.

The fourth theme identified related to the equality court clerks' opinions and views with regard to the challenges which they experience overall as hampering the usage, awareness, accessibility and effective functioning of the equality courts. Most of the challenges mentioned by the respondents related to a lack of awareness by the public of the equality courts and the PEPUDA (South Africa, 2000). Many of the respondents identified the absence of a sustained and focused public or community awareness or education drive by the DOJ&CD, so as to inform the public, especially in rural communities, about the equality courts and the PEPUDA (South Africa, 2000) as a key challenge. An analysis of respondents' views in respect of their perceived challenges include a number of common challenges such as: lack of public awareness of equality courts and understanding of courts' purpose; low number of cases brought to the equality courts; lack of access to basic resources and an insufficient number of trained and appointed equality court clerks.

### **5.3 RECOMMENDATIONS**

This section contains and discusses recommendations, based on the findings emanating from this study, with reference to the themes identified as discussed in Chapter 4.

#### **5.3.1 Theme 1: Legislation supporting the equality courts**

The study found that most respondents possess only a basic level of understanding of the relationship between the Constitution and the equality courts, and of the legislation supporting the equality courts. Furthermore, the findings indicated a low level of knowledge amongst

respondents with regard to the most important parts in the legislation dealing with the functioning of the equality courts.

The following recommendations are proposed so as to improve the equality court clerks' levels of awareness and understanding in this regard, so that they are better able to support and promote the effective functioning of the equality courts.

- The current training courses offered by Justice College and other institutions to be reviewed, in order to ascertain appropriateness in terms of content, level, duration of training etc.
- Ensure that all equality court clerks, as public service officials, undergo Compulsory Induction Programme (CIP) training courses offered by the National School of Government as the institution mandated with the provision of training to public officials, so as to ensure that the clerks have a basic understanding of the public service environment and their roles as public officials within the public service.

Furthermore, the findings reveal that only half of the respondents are aware of their administrative roles and duties, so as to be able to provide the necessary administrative assistance to members of the public seeking assistance with bringing equality cases to these courts.

As a lack of awareness of their administrative functions undermines the effective functioning, usage and status of the equality courts, it is recommended that training and capacity building interventions be implemented and intensified in order to empower and capacitate the equality court clerks to execute their functions:

- Ongoing and regular refresher training courses to be provided, as research has shown that the culture and attitude of any organisation to complaints, the attitude as well as the recruitment and training of staff play a vital role in the effectiveness and efficiency of that complaints handling body or structure.
- On-the-job training and skills transfer through targeted exposure to practical equality court environments to be considered, for example through piloting the implementation of periodic cross-transfers within clusters or within regions, according to usage/volumes of cases.
- Strengthen inter-sectoral coordination including relating to the training offered by various institutions, other than Justice College, such as the SAHRC, Legal Aid South Africa, private law firms who also provide legal training and support on the PEPUDA, to include the equality court clerks where relevant.

### **5.3.2 Theme 2: Administrative functioning of the equality courts and the roles and functions of the equality court clerks**

The second theme identified related to the administrative functioning of the equality courts and the roles and functions of the equality court clerks. Respondents were asked about their knowledge of the additional duties and functions of equality court clerks, as prescribed by the Regulations. Their responses revealed a low to very basic level of knowledge and awareness in this regard. The responses also reflected a wide range of very well informed respondents to respondents with almost no understanding of their functions and duties. An examination of the responses provided reveals a similarly concerning low level of awareness amongst respondents of the additional administrative duties and functions assigned to them in terms of the Regulations.

The practical implication is that only a small number of the respondents possess the requisite awareness and knowledge of the practical additional administrative assistance which they are required to provide to members of the public seeking assistance or redress for violations of the right to equality brought to the equality courts. The responses reflected that, although respondents generally regarded their roles as important, they viewed their functions as predominantly clerical, thus alluding to a rather simplistic and detached view of their functions and roles as equality court clerks. The findings of the study show that there is a considerable disconnect between the equality court clerks' view of the importance and essence of their functions *vis-à-vis* what the PEPUDA envisages their role and functions to be. The findings indicate some variance amongst respondents' perceptions of the administrative functions of the equality courts. A further conclusion drawn was that even though the equality court clerks do not have a clear and full understanding of what their own functions and duties entail, they do perceive equality courts to be functioning well.

As the generally low and inconsistent levels of awareness of their additional administrative functions significantly undermine the effective functioning, usage and status of the equality courts, it is recommended that the training and capacity building interventions as recommended above, be implemented and intensified so as to empower and capacitate the equality court clerks to execute their functions. In addition the following recommendations are proposed:

- Review the current minimum qualification criteria as well as the current training syllabus and consider the development of a certified training qualification for equality court clerks.
- DOJ&CD to conduct an empirical investigation into the actual current numbers of appointed and trained clerks nationally, so that there is an accurate database to work from, for purposes of further interventions.

- DOJ&CD to investigate and address the human resources and related challenges arising out of findings from various studies indicating that the equality court clerks who, as also evidenced in this study, generally have low levels of awareness of their administrative roles and functions, are often allocated work other than equality court work in practice, which results in their removal from the equality court environment. This in turn leads to the further “unlearning” of their knowledge of and related roles and functions in terms of the PEPUDA.

### **5.3.3 Theme 3: Capacity and training of the equality court clerks**

The third theme identified was in relation to the aspect of training and capacity of equality court clerks. Based on the findings, while the respondents perceived themselves as capacitated and trained for their work as equality court clerks, the argument is made that considering their apparent lack of understanding of their roles and functions as set out in the PEPUDA and the Regulations, the need for continuous training is important although lacking in the DOJ&CD.

In this regard, the following recommendations are proposed:

- The DOJ&CD to address the human resources challenges identified by prioritising the provision of training and ongoing capacity development, so as to enhance the specialisation of the equality court clerks.
- The DOJ&CD to explore the viability and benefits of establishing a regional support/contact desk, linked to a centralised national focal point, dedicated to providing support and guidance to equality court clerks.
- The DOJ&CD to consider the creation of a repository of relevant resources including regularly updated practical manuals and guidelines as well as equality court precedents and rulings in a format that is accessible to the equality court clerks.
- The DOJ&CD in collaboration with relevant stakeholders to convene a national workshop/summit focusing on identifying challenges experienced in relation to the equality courts and proposing practical solutions to address these.
- The DOJ&CD through its training arm, Justice College, to consider including a strong customer service orientation/focus in the training course/syllabus for the equality court clerks. A United Kingdom study (Johnston & Mehra, 2002), which set out to explore what constitutes complaint management best practice, identified a number of insights in this regard. These include *inter alia*: the need not only for speedy resolutions, but also a human touch; the need for actual closure and not just follow-ups; top-level involvement in complaints; the strategic use of complaints; a combination of decentralised and centralised tasks, and parallel systems for staff suggestions or complaints.

#### **5.3.4 Theme 4: Perceived challenges hampering the usage, public knowledge and awareness, accessibility and effective functioning of the equality courts**

The fourth theme identified related to the equality court clerks' opinions and views with regard to the challenges which they experience overall as hampering the usage, awareness, accessibility and effective functioning of the equality courts. Most of the challenges mentioned by the respondents relate to a lack of awareness by the public of the equality courts and the PEPUDA. Many of the respondents identified the absence of a sustained and focused public or community awareness or education drive by the DOJ&CD as a key challenge. The DOJ&CD needs to inform the public, especially in rural communities, about the equality courts and the PEPUDA.

An analysis of respondents' views in respect of their perceived challenges includes a number of common challenges such as: lack of public awareness of equality courts and understanding of these courts' purpose; a low number of cases brought to the equality courts; a lack of access to basic resources and not enough trained and appointed equality court clerks.

The implication of these challenges is that they hamper and undermine the overall functioning and effectiveness of the equality courts as envisaged by the PEPUDA. As the Foundation for Human Rights' Socio-Economic Rights for All (SEJA) Programme Baseline Survey (FHR, 2018) found, as long as people do not know their rights, they are not able to assert their rights, and therefore continuous constitutional rights awareness campaigns are critical.

In relation to the above, the following recommendations are proposed:

- Chapter 5 of the PEPUDA (Sections 24-29), which deals with the general responsibility to promote equality, is not yet in operation. This should be promulgated and put into operation as soon as possible.
- The PEPUDA advisory body (Equality Review Committee) to sustain the implementation of public and community awareness programmes regarding the equality courts, in order to educate the community, especially rural communities, about the equality courts, working in collaboration with relevant government departments and civil society organisations.
- The DOJ&CD to direct more resources towards the development of promotional campaigns and programmes relating to the equality courts, for example, for conducting sustained public education and awareness campaigns, utilising social media platforms, through the development, distribution and dissemination of appropriate informational pamphlets, the use of local/community radio and other sources of information, so as to ensure that community members are aware of their rights in terms of the PEPUDA.

- The DOJ&CD to consider aligning the aforementioned interventions within existing programmes currently being implemented by the DOJ&CD in relation to Outcome 14: Nation Building and Social Cohesion, which is aligned to Chapter 15 of the NDP.
- The DOJ&CD to ensure that the equality court clerks have access to, and the use of basic operational resources and equipment necessary to perform their functions.
- The DOJ&CD to investigate the viability of setting up a toll free 24/7 number or application for the provision of advice and information on lodging discrimination related complaints, possibly in collaboration with or linked to one of the currently existing hotlines or applications such as the “Reporting Racism” app, “*Zimela*” (Saal, 2018), currently being piloted by one local anti-racism network of civil society organisations, or the “Xenowatch” tool recently launched by another grouping of academic and civil society organisations, in the form of an open source platform for the purposes of reporting xenophobic threats and attacks (via free sms, email, mobile app, the website and whatsapp/call) and monitoring xenophobic threats and violence in South Africa (Xenowatch, 2018).
- The DOJ&CD to ensure the designation of all lower courts as equality courts and to ensure the appointment and training of adequate numbers of equality court staff as required by the PEPUDA.
- Current collaborations and existing initiatives between the DOJ&CD, the SAHRC and other relevant departments and civil society organisations focusing on constitutional rights awareness campaigns, such as the current multi-sectoral Constitutional Rights Education Working Group, an inter-sectoral structure created to coordinate programmes for increasing constitutional education and human rights awareness in South Africa, should be bolstered to include the promotion of PEPUDA and awareness of the equality courts in their work, and collaborative efforts should be intensified in this regard.
- The institutional strengthening and bolstering of the equality courts as an existing mechanism for redress should form an integral pillar of the implementation of the current draft National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (NAP), once finalised.

The next section provides a number of recommendations for future research, based on the findings of the study.

#### **5.4 FUTURE RESEARCH**

Based on the findings of this research, the following recommendations are made for future research:

- To research the possibilities and develop specific, targeted strategies for the equality courts to be utilised more, in order to address systemic and institutionalised discrimination.
- Further research and investigation into the current structure and functioning of the ERC as the advisory body on PEPUDA, in order to review its current functioning and assess the potential benefits of a legislative amendment which will enhance optimal operation and functioning of the body. This is in light of the critical role of the ERC in relation to reporting to, and advising the Minister of Justice on, the operation of PEPUDA and addressing the question of whether the objectives of PEPUDA have been achieved, particularly in light of the current challenges pertaining to the effective functioning of the equality courts.

## **5.5 CONCLUSION**

The contribution of this study was to augment the body of Public Administration knowledge and to enhance the understanding regarding the perceptions of equality court clerks of the role, function, usage and status of equality courts and how these perceptions impede or strengthen the effective functioning of the equality courts. The research further contributed to gaining a better perspective of the barriers to, as well as emerging best practice, that could potentially contribute to the effective functioning of the equality courts.

The study contributes towards practical recommendations which, it is hoped, will address the barriers and positively influence the perceptions of the equality clerks in promoting the status, usage, accessibility, role and functioning of equality courts, thus ensuring the improved delivery of justice services to the public and all users of the equality courts in South Africa.

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## ANNEXURES

### Annexure A - Letter from DOJ&CD granting provisional access and consent to conduct study

The Director-General  
Department of Justice and Constitutional Development  
Attention: Mr V. Madonsela  
25<sup>th</sup> floor, SALU Building  
Pretoria

Dear Sir

**Re: Permission and access to conduct research study**

I am writing to request permission and access to conduct a research study at the Department of Justice and Constitutional Development (DOJ&CD).

Following successful completion of the Executive Development Programme (EDP) course (six modules, as well as four electives subsequently) as part of a group of women senior managers supported by the DOJ&CD in collaboration with the National School of Government (NSG), I am currently registered to continue studying at the North-West University (NWU) towards the degree *Magister Public Administration*.

At this stage, I am about to commence with the process of writing my dissertation. The research study is entitled "*Determining perceptions regarding the functioning of equality courts: the case of court clerks in the Gauteng region*". This research will be conducted under the supervision of Prof. G. Van Dijk, Director: School of Social and Government Studies, Potchefstroom Campus, North-West University, who may be contacted for confirmation in this regard on tel: (018) 299 1627 or email: [Gerda.VanDijk@nwu.ac.za](mailto:Gerda.VanDijk@nwu.ac.za)

It is envisaged that the study will further contribute towards gaining a better perspective of the barriers to the equality courts, as well as emerging best practices that contribute towards the effective functioning of the courts.

For the purposes of the research study, the target population will be the equality court clerks appointed at the various designated lower courts within the Gauteng Province who have been trained within the last five years. The rationale for this is for reasons of practicality, proximity and considerations of the resources i.e. time and related costs involved.

The research study will use semi-structured questionnaires, and it is envisaged that these questionnaires will be administered online using email in combination with postal and/or

personal delivery and/or collection, subject to approval being granted for the research study to be conducted in the DOJ&CD.

Where relevant, subject experts and other specialists within the DOJ&CD may be consulted or interviewed regarding the research study.

Participation in the research study will be completely voluntary and participants' rights to informed consent will be upheld, and confidentiality and anonymity will be guaranteed. The responses will be used for academic purposes only.

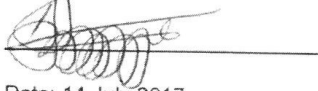
Your approval to conduct this study will be greatly appreciated. I am available to clarify any questions or concerns that you may have in this regard.

Should you approve, kindly furnish a signed letter of permission on the DOJ&CD's letterhead acknowledging your consent and permission for me to conduct this survey/study as stated above.

Regards

Ms Danaline Franzman

(Chief Director: Social Justice and Participatory Democracy, Branch: Constitutional Development)



Date: 14 July 2017

Tel: 012 – 315 1487 (work)

Cell: 082 872 2508

Email: [DFranzman@justice.gov.za](mailto:DFranzman@justice.gov.za) (work) and: [danaline@hotmail.com](mailto:danaline@hotmail.com) (private)



Request approved in principle, subject to Ms Franzman discussing the matter further with Adv. JB Skosana, DDG: Court Services

## Annexure B - Letter from DOJ&CD confirming access and consent to conduct study

J 464



**the doj & cd**

Department:  
Justice and Constitutional Development  
**REPUBLIC OF SOUTH AFRICA**

Private Bag X81, PRETORIA, 0001 • MOMENTUM Building, 329 Pretorius Street,  
PRETORIA • Tel: (012) 315 1016 • www.justice.gov.za

### **BRANCH COURT SERVICES AND POLICY DEVELOPMENT**

Enq: Adv. JB Skosana  
Email: [JSkosana@justice.gov.za](mailto:JSkosana@justice.gov.za)

**Ms Danaline Franzman**

### **PERMISSION AND ACCESS TO CONDUCT RESEARCH STUDY**

On behalf of the Department of Justice and Constitutional Development, as head of the branch Court Services I am pleased to approve your request to conduct a research study at the equality courts.

I support this effort and will provide any assistance necessary for the successful implementation of this study. The study will indeed contribute towards gaining a better perspective of the barriers to the equality courts and trust that the Department will draw positive lessons therefrom.

I will liaise with the Regional Head Gauteng to also provide any assistance necessary in this regard.

Kind Regards

A handwritten signature in black ink, appearing to read 'JB Skosana', written over a horizontal line.

**Adv. JB Skosana**  
**Deputy Director General: Court Services**  
Date: 17/01/2018

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**Access to Justice for All**

## Annexure C - Letter of consent with questionnaire



NORTH-WEST UNIVERSITY  
YUNIBESITHI YA BOKONE-BOPHIRIMA  
NOORDWES-UNIVERSITEIT  
POTCHEFSTROOMKAMPUS

Private Bag X6001, Potchefstroom  
South Africa, 2520  
Tel: 018 299-1111/2222  
Web: <http://www.nwu.ac.za>  
**School of Social and Government Studies**

14 June 2018

### **Informed consent for participation in an academic research study**

#### **Title of the study**

**Determining perceptions regarding the functioning of equality courts: the case of court  
clerks in the Gauteng region**

Research supervised by:  
Prof HG van Dijk  
0124203403  
[Gerda.vandijk@up.ac.za](mailto:Gerda.vandijk@up.ac.za)

Dear Respondent

You are invited to participate in an academic research study conducted by Ms D Franzman ([DFranzman@justice.gov.za](mailto:DFranzman@justice.gov.za)) in partial fulfilment for the Masters in Public Administration degree at the North West University. The purpose of the study is to determine equality court clerks' perceptions regarding the functioning of equality courts within the Gauteng region. The study aims to provide recommendations addressing the perceptions of equality court clerks of the role, function, usage and status of equality courts.

**Approval was granted by the Director General of the DOJ&CD to conduct the study.**

Should you consent to participate in this study, please note the following:

- Your participation is voluntary and you may withdraw from the study at any time.
- Your anonymity is guaranteed and no person will be individually identified.
- Your participation is invaluable, as it will provide insight into the effective functioning of equality courts to strengthen the South African democracy.
- All data collected will be used for academic purposes only.
- You will be required to indicate your acceptance by ticking the appropriate box provided below.
- If you consent to participate, you will be required to complete the research questionnaire (see below) and to return the completed questionnaire via email to: [DFranzman@justice.gov.za](mailto:DFranzman@justice.gov.za) within a timeframe of five (5) working days.

**I agree to participate in this research (tick the appropriate box):**

Yes	<input type="checkbox"/>
No	<input type="checkbox"/>

**If you agree to participate (yes is ticked), please proceed to complete the questionnaire below.**

**RESEARCH QUESTIONNAIRE:**

<b>SECTION A:</b>	<b>RESPONDENT DEMOGRAPHIC QUESTIONS</b>
-------------------	-----------------------------------------

Below are a series of questions regarding your demographics. Please go through each question and mark with an “X” in the relevant block.

a) Indicate your age group by marking with an “X” in the relevant block.

Below 21	
21 - 30	
31 - 40	
41 - 50	
51 - 60	
Above 60	

b) Indicate your sex by marking with an “X” in the appropriate block.

Male	
Female	

c) Indicate your race group by marking with an “X” in the appropriate block.

African	
Coloured	
Indian	
White	
Other (please specify)	

d) Indicate your highest qualification by marking with an “X” in the appropriate block.

Below Matric	
Matric	
Undergraduate qualification	
Postgraduate qualification	
Other (please specify)	

e) Indicate the number of years that you have worked as an equality court clerk by marking with an “X” in the appropriate block.

Less than 1 year	
Between 1-4 years	
Between 5-9 years	
10 years or more	

SECTION B:	KNOWLEDGE QUESTIONS
------------	---------------------

**B1. Explain, using your own words, what the relationship is between the Constitution and equality courts.**

.....  
 .....  
 .....

**B2. To your knowledge, are the equality courts governed by specific legislation? Provide your answer with an "X" in the appropriate block.**

Yes	
No	

**B3. Please list what you consider to be the most important legislation governing equality courts and the functioning as equality court clerks.**

.....  
 .....  
 .....

**B4. What do you consider to be the most important parts in the legislation dealing with the functioning of the equality courts?**

.....  
 .....  
 .....

**B5. What do the Regulations prescribe as the additional duties and functions of equality court clerks?**

.....  
 .....  
 .....

**B6. What do you consider to be the most important functions of an equality court clerk?**

.....  
 .....  
 .....

**B7. Are you aware of the standard administrative functions prescribed by the legislation dealing with equality courts? Provide your answer with an "X" in the appropriate block.**

Yes	
No	

**B8. What do the administrative functions of the equality courts entail?**

.....  
 .....  
 .....  
 .....

**B9. Did you complete any training course before you were appointed as an equality court clerk? Provide your answer with an “X” in the appropriate block.**

Yes	
No	

**B10. Since your appointment as an equality court clerk, have you attended any further training course(s) relating to the performance of your functions and duties as an equality court clerk? Provide your answer with an “X” in the appropriate block.**

Yes	
No	

<b>SECTION C:</b>	<b>ATTITUDE QUESTIONS</b>
-------------------	---------------------------

**Please read the following statements and indicate your response by marking with “X” to confirm whether you “strongly agree” = 1, “agree” = 2, “disagree” = 3 or “strongly disagree” = 4.**

No.	Statement	Strongly Agree	Agree	Disagree	Strongly Disagree
<b>C1</b>	The equality courts play a very important role in protecting all people in South Africa's rights to equality and not to be unfairly discriminated against.	1	2	3	4
<b>C2</b>	The equality courts are fully functional, well capacitated and competent to perform all of their functions as required by law.	1	2	3	4
<b>C3</b>	As an equality court clerk, I have the necessary knowledge, skills and experience to effectively carry out my roles and functions.	1	2	3	4
<b>C4</b>	As an equality court clerk, I receive ongoing, adequate and appropriate training to enable me to carry out my roles and functions effectively.	1	2	3	4

<b>C5</b>	Upon receipt of a written intention by a party to institute proceedings in terms of the legislation dealing with equality courts, as an equality court clerk, I must open a file and number the matter with a consecutive number of the year.	1	2	3	4
<b>C6</b>	As an equality court clerk, I am required to keep a detailed register of all matters, mark all documents as assigned to the matter and file on the appropriate file.	1	2	3	4
<b>C7</b>	As an equality court clerk, I am required to assist any illiterate person or person with a disability with the completion of any relevant document relating to the court proceedings to the best of their ability.	1	2	3	4
<b>C8</b>	As an equality court clerk, I am required to inform unrepresented or unassisted persons of their rights to representation or assistance.	1	2	3	4
<b>C9</b>	As an equality court clerk, I am required to inform unrepresented or unassisted persons of legal assistance available from constitutional institutions or other non-governmental organisations.	1	2	3	4
<b>C10</b>	As an equality court clerk, I am required to inform and explain unrepresented or unassisted persons of their rights and available remedies in terms of the legislation dealing with equality courts.	1	2	3	4
<b>C11</b>	As an equality court clerk, I am required to assist unrepresented or unassisted persons by reading and explaining documentation to them.	1	2	3	4
<b>C12</b>	As an equality court clerk, I am required to assist unrepresented or unassisted persons by explaining the process or procedures relating to the attendance of witnesses to them.	1	2	3	4
<b>C13</b>	As an equality court clerk, I am required to subpoena witnesses to attend enquiries at the request of a party or by the direction of the court.	1	2	3	4



<b>C14</b>	I am required to inform witnesses that they are entitled to witness fees and ensure that a witness is assisted in this regard.	1	2	3	4
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<b>SECTION D:</b>	<b>CHALLENGES QUESTIONS</b>
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**Below are a few questions about the challenges you experience as equality court clerks which you are requested to answer. Please go through each question and respond in your own words, explaining the reasons for your answers as far as possible.**

**D1. In your opinion, what are the challenges hampering the use of equality courts and that contribute towards the low number of cases dealt with by the equality courts?**

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**D2. In your view, what are the challenges relating to the public and communities' knowledge, awareness, access and use of the equality courts?**

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**D3. Do you have any specific challenges that hamper your effective functioning as equality court clerk?**

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**D4. Please elaborate on any other challenges that you as an equality court clerk experience in relation to performing your required role and functions?**

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**End of questionnaire - thank you for your participation**